This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).

STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1504
A10-693

State of Minnesota,
Respondent,

vs.

Leon Quincell Adams,
Appellant.

Filed October 26, 2010
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-05-035759

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges the district court's denial of his postconviction petition without an evidentiary hearing. Because the district court did not abuse its discretion in summarily denying the petition, we affirm.

FACTS

On November 9, 2006, appellant Leon Quincell Adams pleaded guilty to charges of first- and second-degree criminal sexual conduct for sexually molesting his stepdaughters. The district court imposed concurrent sentences of 144 and 58 months but stayed execution on the condition that appellant comply with numerous probation conditions.

During the year following sentencing, appellant violated the terms of his probation on two separate occasions. The district court imposed intermediate sanctions and continued appellant on probation. On March 27, 2009, Minneapolis police encountered appellant and determined that he had an alcohol concentration of .25. On April 23, appellant was terminated from his sex-offender treatment program. These incidents prompted appellant's probation officer to file violations.

A probation-revocation hearing was held on April 24. The public defender assigned to appellant in connection with the underlying offenses appeared with appellant at the hearing. Assigned counsel asked the court to continue the matter for a formal evidentiary hearing on May 15. Assigned counsel and appellant also discussed the fact that the sentencing judge had a conflicting assignment and that the evidentiary hearing

would be before a different judge. Appellant agreed to this arrangement. The record of the May 15 hearing indicates that assigned counsel requested a continuance to address additional issues raised by the final report from appellant's sex-offender program. The district court granted appellant's request to continue the revocation hearing until May 22 before the sentencing judge.

Appellant disputes the record of events on May 15. He maintains that assigned counsel was not available and that another public defender represented him at the hearing. Appellant remembers only that the substitute attorney's first name is "John."[1] Appellant claims that "John" told appellant's wife prior to the May 15 hearing that the judge was "ready to rule on [the] case" and that he would drop one of the sentences and order appellant to serve only 58 months in prison. Appellant asserts that he did not learn of this conversation until after the hearing. Between the May 15 and May 22 hearings, appellant alleges that he left messages for "John" advising that he wished to "take the deal" for a 58-month sentence.

Appellant appeared at the May 22 hearing with assigned counsel. Appellant admitted that he violated his probation terms, but argued that his sentences should not be executed as a consequence of the violations. The district court considered testimony from appellant's probation officer and his counselor from the sex-offender treatment program. Appellant testified that he had made progress in his life and that he should not

[1] We note that the transcript from appellant's April 6, 2009 initial hearing indicates that attorney John Ryan from the public defender's office substituted for assigned counsel, but that hearing does not bear on the May 15 hearing at issue in this appeal. Appellant acknowledges that the May 15 transcript indicates that assigned counsel was present and represented appellant at that hearing.

go to prison. The record reflects no discussion of alternative consequences for the admitted probation violations.

The district court revoked appellant's probation and executed the concurrent sentences. Appellant initiated a timely appeal. He later moved to stay the appeal and remand for postconviction proceedings, which this court granted. After the district court summarily denied appellant's postconviction petition, the stay was dissolved and the appeals from the probation revocation and the denial of postconviction relief were consolidated into this appeal.

D E C I S I O N

Appellant challenges the district court's denial of his postconviction petition without an evidentiary hearing. We review a summary denial of a postconviction petition for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). When reviewing the denial of postconviction relief, we review issues of law de novo and issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (*Leake II*).[2]

A defendant may seek postconviction relief pursuant to Minn. Stat. § 590.01, subd. 1 (2008). A postconviction court must conduct an evidentiary hearing unless the petition, files, and the record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). In order to receive a hearing, a defendant must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief. *Roby v. State*, 531 N.W.2d 482, 483 (Minn. 1995). "Any doubts as to

[2] *State v. Leake*, 699 N.W.2d 312 (Minn. 2005) (*Leake I*), was Leake's direct appeal.

whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing." *State v. Rhodes*, 627 N.W.2d 74, 86 (Minn. 2001)).

Appellant's postconviction petition alleges ineffective assistance of counsel during the May 15 probation-revocation hearing. To receive an evidentiary hearing on this claim, appellant must allege facts that would "demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (*Leake III*) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2066-68 (1984)). Trial counsel's performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). Argumentative assertions for which a petitioner offers no factual support are insufficient to establish a claim of ineffective assistance of counsel. *Leake II*, 737 N.W.2d at 543.

Appellant's ineffective-assistance claim is premised on substitute counsel's failure to advise him during the May 15 hearing of the district court's willingness to execute only the shorter sentence if appellant admitted the two probation violations. To determine whether the district court abused its discretion in summarily rejecting this claim, we consider appellant's allegations as to each prong of the *Strickland* analysis in turn.

As to the first *Strickland* prong, appellant asserts that an evidentiary hearing is necessary because there are fact issues regarding (1) whether appellant was represented by substitute counsel at the May 15 hearing and (2) whether the district court made "an

offer" to execute only the 58-month sentence. We disagree. The sole support for appellant's factual assertions are the allegations contained in the affidavits of appellant and his wife. The record of the May 15 hearing clearly contradicts these allegations. The transcript indicates that assigned counsel was present and defended appellant's interests during the hearing. At the beginning of the hearing, the prosecutor identified himself and the other persons in the courtroom, including appellant, assigned counsel, and appellant's probation officer. Assigned counsel responded when the district court addressed him by name. No correction or addition to the names on the record was made.

Even if substitute counsel appeared on appellant's behalf on May 15, there is no competent evidence that counsel's performance fell below an objective standard of reasonableness. The hearing transcript does not reveal any discussion or indication that the district court proposed a particular disposition of the case. Rather, the transcript indicates that assigned counsel received the final report from appellant's sex-offender program prior to the hearing, and that appellant requested a continuance to more fully address issues raised by the report. Because appellant presented no facts beyond the two affidavits to demonstrate ineffective assistance of counsel, we conclude that the first *Strickland* prong is not met.

With respect to the second prong of the *Strickland* analysis, appellant argues that he would have received a shorter sentence but for substitute counsel's ineffective performance. In the analogous context of a rejected plea agreement, a defendant is prejudiced by ineffective assistance "if there is a reasonable likelihood the plea bargain would have been accepted had the defendant been properly advised." *Leake II*, 737

N.W.2d at 540. Here, appellant's assertion that he would have accepted a 58-month sentence is contradicted by his testimony at the May 22 hearing. During his testimony, appellant appealed to the "mercy of the [c]ourt" and asked the district court not to send him to prison "because [he] made a lot of progress." This testimony is inconsistent with appellant's affidavit in which appellant alleges that he "would have been more than willing to accept [58 months in prison] rather than risk execution" of the full sentence. Because appellant did not demonstrate a reasonable likelihood that he would have accepted the shorter sentence, he cannot show he was prejudiced by the alleged ineffective assistance of counsel.

On this record, we conclude that the district court did not abuse its discretion in summarily denying appellant's postconviction petition. Appellant's argumentative assertion that he received ineffective assistance from a substitute attorney that affected the outcome of his case lacks factual support and is contradicted by the record. As in *Leake II*, appellant's assertions are insufficient to establish a claim for ineffective assistance of counsel. *Id.* at 543.

Because we conclude that the district court did not abuse its discretion in summarily denying appellant's postconviction petition, we do not reach appellant's request for relief.

Affirmed.