STATE OF MINNESOTA
IN COURT OF APPEALS
A10-783

State of Minnesota,
Respondent,

vs.

Ibrahim Abdullahi Mohamed,
Appellant.

Filed November 7, 2011
Affirmed in part, reversed in part, and remanded
Harten, Judge[*]

Hennepin County District Court
File No. 27-CR-09-19950

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Lee W. Barry, III, Assistant County Attorneys, Minneapolis, Minnesota (for respondent)

Mark D. Nyvold, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Harten, Judge.

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

HARTEN, Judge

In this appeal from his conviction and from a postconviction order, appellant challenges the denials of his two motions to withdraw his guilty plea, claiming that the

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

district court abused its discretion in rejecting appellant's arguments that (1) his counsel pressured him to enter a guilty plea by telling him the possible consequences of a trial; (2) his plea was unintelligent; and (3) but for his counsel's ineffective assistance, he would not have pleaded guilty. We affirm those decisions. Because the district court erred in the order in which it imposed appellant's sentences, we reverse and remand for resentencing.

FACTS

On 19 April 2009, four officers saw appellant Ibrahim Mohamed shoot a semi-automatic handgun at a victim on the ground. The four officers drew their guns and began firing at appellant, who then returned fire in their direction.

Appellant was charged with ten counts: five counts of attempted murder in the second degree (intentional) (felony) (Minn. Stat. § 609.19, subd. 1(1) (2008)), against the victim and four other individuals, each of which had a penalty of 3-20 years; one count of assault in the first degree (felony) (Minn. Stat. § 60.221, subd. 1) (2008)) against the victim, which had a penalty of 3-20 years and/or a fine of $30,000; and four counts of assault in the first degree (felony) against four peace officers engaged in the performance of their duty (Minn. Stat. § 609.221, subd. 2(a) (2008)), which had a penalty of 10-20 years and/or a fine of $30,000. At that time, appellant had two other pending charges: one count of attempted second-degree murder for an incident on 1 November 2008 and one count of drive-by shooting for an incident on 18 April 2009.

Appellant pleaded guilty to one count of attempted second-degree murder and one count of assault of a peace officer. The plea bargain provided for dismissal of the

remaining eight counts and the charges from the two earlier incidents, and for consecutive sentences on the counts to which appellant pleaded guilty, within a range of 180-240 months.

At the plea hearing, appellant was questioned extensively as to (1) his understanding of the plea bargain, (2) his desire to enter into the bargain, (3) the adequacy of the assistance provided by his attorney, and (4) the factual background for the two counts to which he pled guilty.

Prior to sentencing, appellant moved to withdraw his guilty plea, claiming that it was involuntary because he had been pressured by his attorney. But the "pressure" appellant claimed was that his attorney had told him that the possible sentence if he went to trial could be as much as 750 months. As the district court observed, advising appellant of the possible results of going to trial was the attorney's responsibility, even if it caused appellant to feel pressured. Appellant also expressed the view that the sentence he had agreed to in the plea bargain was too great for a first-time offender and that he had not known the sentences would be consecutive. The district court denied appellant's motion to withdraw his guilty plea because the transcript revealed appellant understood he would receive consecutive sentences within a total range of 180-240 months.

Before the rescheduled sentencing hearing, appellant's attorney discovered that one of the counts to which appellant pleaded guilty, assault of a peace officer engaged in the performance of duties in violation of Minn. Stat. § 609.221, subd. 2(a), was subject to a statutory minimum penalty of 120 months, served, under Minn. Stat. § 609.221, subd. 2(b) (2008). Appellant's attorney related this to the state's attorney and to the court.

Appellant again moved to withdraw his plea, arguing that his counsel had been ineffective by not telling him about the statutory minimum sentence, which could have affected the negotiations. The state asserted that appellant gained an advantage because the 180-month minimum to which he had agreed would provide for the full term of 120 months, executed, required by subdivision 2(b); the state also agreed to lower appellant's maximum sentence from 240 months to 207.5 months, the maximum for attempted second-degree murder with a criminal history score of two, which score appellant would acquire if the assault was sentenced first. Appellant's attorney, after noting that the middle-of-the-box sentence for attempted second-degree murder with a criminal history score of two would be 173 months and the minimum sentence would be 147 months, argued for an aggregate sentence of 180 months, the lowest sentence consistent with the plea bargain.

The district court sentenced appellant to 207 months, concluding that it was "an appropriate sentence in this matter," was "within the sentencing range that was negotiated," and was "not a departure from the sentencing guidelines." The district court also noted that, in the alternative, he could sentence appellant to 207 months "as consecutive sentences with a sentencing departure that would also keep it within the sentencing range of the 207 months."

Appellant moved for postconviction relief, challenging his 207-month sentence on the grounds that (1) the assault, which occurred after the attempted murder, was sentenced first; (2) Minn. Sent. Guidelines II.F (2008) requires offenses to be sentenced in the order in which they occurred; and (3) no reasons were given for this departure from

the guidelines. Appellant sought concurrent sentences, the first-imposed being a 153-month sentence, half of the 306-month middle-of-the-box sentence for second-degree murder with no criminal history points, and the second-imposed being a sentence of between the mandatory minimum 120 months for the assault of a police officer and 132 months, the maximum sentence for first-degree assault with two criminal history points.

The district court denied the motion in the erroneous belief that the sentencing guidelines requirement that sentences be imposed in the order in which the offenses occurred applies only to consecutive sentences, not to concurrent sentences. *See* Minn. Sent. Guidelines II.B.1 (2008) ("Multiple offenses are sentenced in the order in which they occurred.").[1]

Appellant argues that the district court abused its discretion in denying each of his motions to withdraw his guilty plea.

D E C I S I O N

A district court may allow withdrawal of a guilty plea prior to sentencing "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. Whether it is fair and just requires consideration of the defendant's reasons for seeking withdrawal and any possible prejudice to the state from granting withdrawal. *Id.* A reviewing court will reverse the district court's determination of whether to permit withdrawal of a guilty plea only if the district court abused its discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

[1] The district court erroneously relied on Minn. Sent. Guidelines II.F (2008), which states that "[w]hen consecutive sentences are imposed, offenses are sentenced in the order in which they occurred."

1. First Motion to Withdraw

The transcripts of the hearings on appellant's guilty plea and on his first motion to withdraw support the district court's conclusion that appellant "changed his mind, but there is nothing beyond that" to support withdrawal. On 29 January, appellant answered "Guilty" when asked if he wanted to plead guilty or not guilty to each of the two counts. He answered "Yes" when asked if: (1) he had had enough time to discuss the matter with his attorney; (2) he had seen his attorney multiple times that week; (3) he was satisfied with his attorney's work; (4) he knew that, by pleading guilty, he would not have either a jury trial or a "judge-alone" trial; (5) he knew that his sentence could range from 450 to 750 months; (5) he had read the document, and (6) he had signed it. He answered, "No" when asked if anyone had made any promises or threats to get him to plead guilty and if he had any questions.

Four weeks later, on 25 February, appellant told the district court that his counsel had been ineffective. When the court asked how, appellant said: "Ineffective by, you know what I'm saying, you know, I wanted to go to trial. I was pressured to take this deal . . . . I was told that if I go to trial I was going to get 750 months." Because appellant had been charged with seven Level XI offenses, each having a presumptive sentence of 306 months with no criminal history score, and five Level IX offenses, four of which carried a minimum 120-months-served sentence, the range of 450 to 750 months that his attorney told him could result from a trial was not inaccurate. The district court agreed with what the attorney had said and told appellant, "I don't know what

would have happened at trial, but getting a sentence significantly larger than you are facing here is . . . a realistic possibility after a trial."

Appellant also argued that his plea was an "unintelligent decision." The district court responded:

> But we went through that plea agreement . . . on the record, and you indicated that you had read it and understand it, and you signed the bottom of each of the pages . . . . I asked you if you had questions. I asked you whether you wanted a trial. And you kept telling me you don't have questions, you don't want to have a trial. . . . [A]nd this was all under oath, and that's what you told me a few weeks ago, on the plea date. . . .

The district court did not abuse its discretion in concluding that appellant had presented no valid reasons for withdrawal and denying his motion. *See State v. Raleigh*, 778 N.W.2d 90, 97-98 (Minn. 2010) ("Because [the defendant] failed to provide any valid reason why withdrawal would be fair and just, the district court did not abuse its discretion in concluding that [the defendant] failed to advance a credible reason to support withdrawal of his plea."). The denial of appellant's first motion to withdraw his guilty plea is affirmed.

2. Second Motion to Withdraw

"If a person alleging ineffective assistance was convicted by a guilty plea, he must allege that, but for the allegedly ineffective assistance of counsel, he would not have pleaded guilty." *Carey v. State*, 765 N.W.2d 396, 402 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009). At the hearing on his second motion to withdraw the plea, appellant argued that his counsel was ineffective in not telling him of the 120 months, executed, mandatory minimum sentence for assault of a peace officer; he claimed that, if

he had known of the mandatory sentence, he would not have pleaded guilty. Two factors refute this claim. First, appellant agreed to a minimum sentence of 180 months when he pleaded guilty, and the discovery that one charge had a minimum of 120 months, executed, did not affect that minimum. Second, appellant agreed to a maximum of 240 months in his plea, and, after discovering the mandatory minimum sentence for assault of a peace officer, the state lowered the maximum to 207 months, which worked to appellant's advantage. Thus, appellant's claim that he would not have pleaded guilty if he had known of the mandatory sentence is contrary to the facts and to logic, and we reject it.

But we agree with both parties that appellant was erroneously sentenced because the sentence for the assault of a peace officer was imposed before the sentence for attempted second-degree murder, even though the assault occurred after the attempted murder. On the basis of the sentencing issue alone, we reverse the sentencing imposed by the district court and remand for resentencing.

Affirmed in part, reversed in part, and remanded.

Dated: _____ _____

James C. Harten, Judge