STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0387

Jesse Scott Bertoli, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 20, 2015
Affirmed
Halbrooks, Judge

Ramsey County District Court
File No. 62-CR-11-6333

Cathryn Middlebrook, Chief Appellate Public Defender, Drake D. Metzger, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Tom Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

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

HALBROOKS, Judge

Appellant challenges the denial of his postconviction request to withdraw his guilty plea, arguing that his counsel's assistance throughout the plea was ineffective,

rendering his plea involuntary, and that his plea was unintelligent because he did not understand the consequences of pleading guilty. Because we conclude that appellant received effective assistance of counsel and the record unequivocally demonstrates that appellant was aware of the consequences of his plea, we affirm.

FACTS

In November 2011, appellant Jesse Bertoli pleaded guilty to one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2010). At the beginning of the plea hearing, Bertoli acknowledged that he understood the nature of the plea hearing and that he had had enough time to talk with his counsel about his decision to plead guilty. Bertoli repeatedly confirmed that nothing impacted his ability to understand the proceedings. Bertoli's counsel then proceeded to ask him a series of questions, including the following:

> COUNSEL: Mr. Bertoli, first of all, you and I have known each other for a number of years now. Is that correct?
> BERTOLI: Yes.
> COUNSEL: And you contacted me on this incident on the day you were arrested and we met in custody, and from that moment we've basically discussing—been discussing what was going to be happening today. Is that correct?
> BERTOLI: Yes.
> COUNSEL: Now, you understand what we're doing, correct?
> BERTOLI: Yes.
> COUNSEL: You understand what the guideline sentence calls for, 144 months. You understand that.
> BERTOLI: Yes.
> COUNSEL: So if the judge does not agree with our departure, your guideline sentence is 144 months. There's nothing that we're going to do today that's going to be able to change that. Once you say "guilty," as you did, that's what it's going to be unless we can convince the judge to do otherwise. You understand that?

BERTOLI: Yes.
COUNSEL: Now, in order to avail yourself to this straight plea there are certain constitutional rights you have to give up, and we went over a document today, correct?
BERTOLI: Yes.
COUNSEL: And there was nothing in this document that was a surprise to you, in fact, we've discussed everything in this document prior to today's date. Is that—
BERTOLI: Yes.
COUNSEL: —correct? You understand that by resolving this case in this fashion you have to give up your right to a jury trial or court trial. Do you understand that?
BERTOLI: Yes.
COUNSEL: You give up your right to have the government prove this case beyond a reasonable doubt either to the Court or to a jury of your peers. You understand that?
BERTOLI: Yes.
COUNSEL: You understand that if it was to a jury or the Court that the proof—well, to a jury it would have to be a unanimous verdict, which means they'd all have to agree. Do you understand that?
BERTOLI: Yes.
COUNSEL: You give up your right to remain silent, which means you have to tell the judge what it is that makes you guilty. You understand that?
BERTOLI: Yes.
COUNSEL: You give up your right to confront and cross-examine your accusers. Do you understand that?
BERTOLI: Yes.
COUNSEL: And you give up your right to contest the admissibility of any unconstitutionally seized evidence. For example, if we wanted to say that your statement that you gave where you essentially confessed to this was done illegally or—or some technicality where we could ask the judge to have that thrown out, we're going to give all those things up. Do you understand that?
BERTOLI: Yes.
COUNSEL: And this is the way you in fact wish to proceed. Is that correct?
BERTOLI: Yes.
COUNSEL: Now, are you happy with my representation?
BERTOLI: Yes.

> COUNSEL: Do you think there's anything you could have told me or—or have not told me that would make things any different?
> BERTOLI: No.
> COUNSEL: And you're not under the influence of any drugs or alcohol. Is that correct?
> BERTOLI: No. That is correct.
> COUNSEL: Okay. Is this your signature at the bottom of this page signed in—on today's date?
> BERTOLI: Yes.
> COUNSEL: And you had an opportunity to review with me and on your own the contents of this document, correct?
> BERTOLI: Yes, I did.
> COUNSEL: I'd offer the petition, Your Honor.

After the district court accepted Bertoli's plea petition as a voluntary waiver of his rights, the state questioned Bertoli to provide a factual basis for his plea. Bertoli admitted to facts establishing each element of the charged offense. The district court sentenced Bertoli to the commissioner of corrections for 144 months.

Nearly two years after pleading guilty, Bertoli moved to withdraw his plea as invalid at a postconviction evidentiary hearing. Bertoli argued that he lacked an understanding of the legal system because he grew up within a community he described as a "cult." He stated that crimes committed within the community were never reported to the police but were instead handled at hearings conducted by community members. He testified that during these hearings the accused would stand before community members and admit to committing the crime. After admitting to and apologizing for the act, the accused would typically be forgiven. Bertoli suggested that these experiences led him to believe that the plea hearing was a prelude to trial.

Assisted by new counsel, Bertoli then testified about his interactions with his plea counsel, which included the following:

> COUNSEL: Over the entire period of your case, aside from meeting at the courthouse, how many times did you and [counsel] meet?
> BERTOLI: On the outside, we met with him three times or I met with him three times.
> COUNSEL: And during those discussions, did you ever discuss the court process?
> BERTOLI: No. It was—it was we basically discussed the court process at the courts. We never discussed him giving me a piece of paper and this and that, and I'm going to go over here and walk up there. We only discussed what happened in court on the day of court.
> . . . .
> COUNSEL: I'm handing you what's been marked Exhibit 2. Do you recognize this document?
> BERTOLI: Yes.
> COUNSEL: What is that document?
> BERTOLI: The thing that says the Petition to Enter Plea or something, Enter Plea of Guilty.
> COUNSEL: Do you recall signing this on the day of your plea hearing?
> BERTOLI: Yes.
> . . . .
> COUNSEL: Did you discuss what this document was with [counsel]?
> BERTOLI: Very vaguely. . . . [H]e said, basically, he was just going to go in there. "I'm going to say this. I'm going to say that. I'm going to say this, and you're going to say, 'yes' to it."
> . . . .
> COUNSEL: And looking at this document, if you go to the second page, you agree that that is your signature at the bottom, correct?
> BERTOLI: Yes.
> COUNSEL: And you did read through this document?
> BERTOLI: Yes, as much as I could.
> . . . .
> COUNSEL: And do you recall going on the record with [counsel] that day?

> BERTOLI: Yeah.
> COUNSEL: You recall that he asked you a number of questions such as, "You understand you're waiving your right to a trial?"
> BERTOLI: Yes.
> COUNSEL: And you answered, "Yes"?
> BERTOLI: Yeah.
> COUNSEL: And do you believe you understand what you were doing that day?
> BERTOLI: At the time, I did.

Bertoli's plea counsel then testified that Bertoli never expressed a desire to proceed with a trial. Because Bertoli felt terrible about his behavior and wanted to accept responsibility for his actions, the two mainly discussed a strategy to present Bertoli as amenable to probation. Plea counsel thought that the only way to achieve probation was for Bertoli to accept responsibility and plead guilty. Counsel testified that the two reviewed the plea petition line by line, and Bertoli indicated to him that he understood what the plea petition meant. Plea counsel further explained that he informed Bertoli that he would be answering a series of yes-or-no questions, but he never told Bertoli to just say "yes." Plea counsel further testified that Bertoli was not surprised at being sentenced, nor did he believe Bertoli was under the impression that he was still awaiting trial after sentencing.

The district court denied Bertoli's motion, concluding that Bertoli failed to demonstrate that his attorney's representation was deficient or ineffective at any point during his plea counsel's representation. The district court also determined that Bertoli's plea was accurate and intelligently made and that no manifest injustice compelled the withdrawal of the plea. Bertoli now appeals.

D E C I S I O N

Bertoli argues the postconviction court erred in concluding that his plea was valid because the plea was neither voluntarily nor intelligently made. To withdraw a guilty plea after sentencing, a defendant must show that "'withdrawal is necessary to correct a manifest injustice.'" *State v. Raleigh*, 778 N.W.2d 90, 93-94 (Minn. 2010) (quoting Minn. R. Crim. P. 15.05, subd. 1). A manifest injustice exists when a court accepts an invalid guilty plea. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be valid, a plea must be accurate, voluntary, and intelligent. *Id*.

Bertoli's plea was voluntary

Bertoli argues that he involuntarily pleaded guilty because he did not receive effective assistance of counsel. When a plea is counseled, the voluntariness of the plea turns on the competence of counsel's advice. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To prevail, Bertoli must show that (1) his counsel's performance was deficient, that is, "'below an objective standard of reasonableness'" and (2) the deficient performance prejudiced his defense. *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). Because ineffective-assistance-of-counsel claims involve a mix of law and fact, we review these claims de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

Bertoli contends his plea was involuntary because he was not asked on the record if he was aware of the maximum sentence for first-degree criminal sexual conduct. He cites *Leake v. State*, 737 N.W.2d 531 (Minn. 2007), and argues that failure to advise a client on the record of the potential maximum sentence is objectively unreasonable

assistance of counsel, which renders his plea involuntary. Bertoli mischaracterizes *Leake*'s holding. In that case, Leake argued that his trial counsel misled him about the maximum sentence he faced. 737 N.W.2d at 539. The state offered Leake a plea bargain where it would recommend a "sentence of life with the possibility of release after 30 years plus an additional consecutive sentence for an unrelated probation violation." *Id.* Leake argued that counsel informed him that this sentence was not what the state would recommend in return for a guilty plea but instead represented the maximum sentence for his crime. *Id.* Relying on this mistaken belief, Leake then rejected the plea agreement offered by the state, proceeded to trial, and was convicted. *Id.* at 534. The district court sentenced Leake to life without the possibility of release, a more severe sentence than Leake believed was possible. *Id.* Under these facts, the supreme court did not hold that either counsel's conduct was objectively unreasonable. *Id.* at 541. Instead, the supreme court determined that Leake was entitled to a postconviction evidentiary hearing to fully develop his ineffective-assistance-of-counsel arguments. *Id.* at 543.

Bertoli's reliance on *Leake* is misplaced for several reasons. First, Bertoli has already achieved the relief that Leake sought and the remedy the supreme court granted: a postconviction hearing providing him with the forum to develop facts supporting his claim. *Leake* did not create a new standard for ineffective-assistance-of-counsel claims that helps Bertoli; *Leake* merely reiterated previous supreme court decisions, holding that petitioners bringing ineffective-assistance-of-counsel claims should be granted postconviction hearings when those claims require the development of additional evidence. *See, e.g.*, *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997).

Second, the record demonstrates that, at the postconviction hearing, Bertoli failed to produce any evidence demonstrating that he held a mistaken belief about the maximum sentence that he faced. Bertoli admitted to discussing the plea petition and its contents with counsel. The petition correctly referred to the 30-year maximum sentence for first-degree criminal sexual conduct. The plea transcript confirms that Bertoli and his counsel repeatedly discussed the plea petition before Bertoli ultimately decided to plead guilty. Bertoli repeatedly acknowledged that he understood the contents of the petition, which included the 30-year maximum sentence, and Bertoli swore to tell the truth before testifying. These uncontested facts preclude Bertoli's argument here that attempts to attack his previous statements. *See Erickson v. State*, 702 N.W.2d 892, 898 (Minn. App. 2005) (summarily rejecting appellant's argument that his previous statements at the plea hearing were incomplete or false).

Finally, we cannot find support for Bertoli's claim that the lack of an explicit, on-the-record question asking Bertoli if he was aware of the maximum sentence he faced triggers an ineffective-assistance-of-counsel claim. Bertoli never alleged that his counsel misled him about the maximum sentence, nor does he provide any evidence demonstrating that had counsel asked him about the maximum sentence on the record he would have proceeded differently. Unlike *Leake*, Bertoli was not sentenced in excess of what he believed to be the maximum duration; he received the exact presumptive sentence that he was told to expect upon pleading guilty. *See* 737 N.W.2d at 539 (explaining that Leake was sentenced to life without the possibility of release, contrary to what he was told by trial counsel and the district court). Bertoli has failed to present any

evidence that, had he been asked on the record about the maximum sentence he faced, the plea hearing would have proceeded differently.

Because Bertoli makes no other arguments challenging the voluntariness of his plea, we conclude that his plea was voluntary. *See Ecker*, 524 N.W.2d at 718 (stating requirements for voluntariness of counseled plea).

Bertoli's plea was intelligent

Bertoli next argues that his plea was unintelligent because he did not understand the rights he was waiving or the consequences of pleading guilty. A plea is intelligent if the defendant understands (1) the charges against him, (2) the rights waived by pleading guilty, and (3) the consequences of the plea. *Williams v. State*, 760 N.W.2d 8, 15 (Minn. App. 2009), *review denied* (Minn. Apr. 21, 2009). The consequences of a plea refer to the direct consequences, primarily the maximum sentence and fine. *Raleigh*, 778 N.W.2d at 96.

Bertoli does not argue that he failed to understand the charges against him and we have already determined that he understood the consequences of his plea. Bertoli's challenge to the intelligence of his plea is confined to his assertion that he did not understand the rights he was waiving by pleading guilty. The record unequivocally confirms that Bertoli understood that pleading guilty would result in his waiver of several rights. The plea petition indicated that by signing the petition, Bertoli was acknowledging that he was waiving his right to trial. Bertoli signed the petition. During the plea hearing, Bertoli repeatedly acknowledged that he understood the contents of the plea petition, and he explicitly acknowledged waiving his right to trial. At the

postconviction hearing, Bertoli again admitted to acknowledging at the plea hearing that his plea would waive his right to trial. Bertoli's counsel also testified that the two repeatedly discussed Bertoli's decision to waive the right to trial for strategic sentencing reasons.

Bertoli's attempt to refute these repeated sworn statements rests on two statements at the postconviction hearing. He stated that when he testified at the plea hearing that he understood the nature of the plea hearing and the contents of the plea petition, he meant that he understood them "as much as [he] could understand at that time." He later implied that he did not understand the nature of questions because his counsel told him to answer "yes" to every question. But the record demonstrates that Bertoli did not simply answer "yes" to every question; he answered "no" to his counsel's questions when that answer was appropriate. This indicates that he understood the nature of his counsel's questions, including those questions about the rights that were waived by Bertoli's plea.

Ultimately, Bertoli's evidence is inadequate to rebut his repeated sworn statements and signed plea petition stating the opposite. In *Williams*, we summarily rejected the appellant's argument when she claimed that her plea was not intelligently entered because the plea transcript and the contents of her plea petition plainly contradicted her postconviction arguments. 760 N.W.2d at 15. Bertoli cannot rebut his repeated statements made under oath that he understood the rights he was waiving.

Because Bertoli understood (1) the charges against him, (2) the rights he waived by pleading guilty, and (3) the consequences of his plea, his plea was intelligently entered.

Affirmed.