STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0931

State of Minnesota,
Respondent,

vs.

Augustine Corona,
Appellant.

Filed August 20, 2018
Affirmed
Connolly, Judge

Brown County District Court
File No. 08-CR-16-225

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

Charles Hanson, Brown County Attorney, Paul J. Gunderson, Assistant County Attorney, New Ulm, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Johnson, Judge; and Rodenberg, Judge.

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

CONNOLLY, Judge

Appellant argues that the district court abused its discretion by denying his petition for postconviction relief because he received ineffective assistance of counsel and his plea to felony driving while impaired (DWI) was not intelligently made. We affirm.

FACTS

After a traffic stop on March 1, 2016, appellant Augustine Corona was charged with nine counts, including felony DWI and felony refusal to submit to testing. On October 13, 2016, appellant pleaded guilty to felony refusal to submit to testing in exchange for dismissal of the other eight counts. The plea allowed for a downward dispositional departure sentence if, before his sentencing hearing, appellant obtained a Rule 25 chemical-dependency assessment, abided by that assessment's recommendations, and abided by mental health therapy recommendations.

Before appellant pleaded guilty, appellant's public defender told him that his criminal-history score was four and the presumptive sentence that appellant faced was 45 months in prison. Before the district court accepted appellant's guilty plea, it verbally informed appellant that felony refusal to submit to a chemical test is "punishable by up to seven years incarceration and not more than a $14,000 fine." During the plea hearing, appellant agreed that other than what was contained in the plea agreement, no one had

made any "promises . . . to get [him] to plead guilty." In actuality, appellant's criminal-history score was five, which garners a presumptive sentence of 66 months in prison.[1]

Appellant failed to submit to the Rule 25 chemical-dependency evaluation before his January 9, 2017, sentencing hearing. He also failed to appear for that sentencing hearing. On February 3, 2017, appellant was arrested in Iowa for a separate incident. On February 9, 2017, appellant appeared for sentencing for his DWI guilty plea, but sentencing was rescheduled for a later date, pending the completion of a presentence investigation (PSI).

After he entered his plea agreement but before he was sentenced, appellant wrote multiple letters to the district court. In a letter dated March 12, 2017, appellant wrote the following. In response to the question, "What are you requesting?" appellant wrote, "I will not plea guilty to 66 month in prison." In response to the question, "What are the reasons for your request?" appellant wrote, "I want to avoid a prison sentence. I like a chance on *probation please!*" (emphasis in original). Appellant also wrote:

> Judge, my attorney states that I'm looking at being sent to prison for 66 month, (which he first had said 45 months) and I don't understand cause I haven't be[en] able to talk to him . . . . Your Honor all I am saying is I refuse to plea guilty to any charge on sentencing date because I feel I'm not getting a chance on explaining my reasons and to be sent to prison for not being [responsible] its really a stiff penalty. I know you have nothing to do w[ith] my agreement, Your Honor I just feel I'm not giving a chance to fulfill probation.

[1] In his affidavit, the public defender explained that he miscalculated the criminal-history score because he missed a 2013 worksheet because of an error in the spelling of appellant's name.

In a letter dated March 14, 2017, appellant wrote, "Please give me a chance I beg of thee. I will follow your current plea agreement. I will go do all my 66 months if I mess up, and I will sign to prove that I'm serious."[2]

The PSI noted that the sentencing guidelines recommended a commitment of 66 months in prison and that appellant had "not done anything to prove . . . he is willing to be amenable to supervision if the [district c]ourt granted a departure from the guidelines." On March 20, 2017, the district court sentenced appellant to 66 months in prison.

On June 16, 2017, appellant filed a notice of appeal with this court and subsequently moved to stay his appeal to initiate postconviction proceedings. This court granted appellant's motion, and appellant filed a postconviction petition, arguing that his plea should be withdrawn because he received ineffective assistance of counsel and that he did not intelligently enter his guilty plea. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

"We review the denial of a petition for postconviction relief for an abuse of discretion." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). The district court abuses its discretion if it has "exercised its discretion in an arbitrary or capricious manner,

[2] At the sentencing hearing, the district court explained that appellant was not amenable to probation: "I think [appellant] certainly does have good intentions, and I think he does want to change, but it's the follow-through that is the problem. You were released. You were at the House of Hope. You left there. It took a month before you were brought to court. I gave you another chance. You went to Iowa . . . and I am not inclined to give [appellant] a third chance at this point."

based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* (quoting *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015).

I.

Appellant first argues that the district court abused its discretion by rejecting his claim that he had received ineffective assistance of counsel because his attorney misinformed him of his correct criminal-history score and the presumptive sentence that he faced and he relied upon that misinformation when entering his guilty plea. To prevail on an ineffective-assistance-of-counsel claim, a petitioner must "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). If petitioner fails to meet one of those prongs, the other need not be analyzed. *Id.*

The question on the first prong is whether appellant's attorney's advice was within the range of competence demanded of attorneys in criminal cases. *Hill v. Lockhart*, 474 U.S. 52, 58-59, 106 S. Ct. 366, 370 (1985). An unqualified promise of a particular sentence may rise to ineffective assistance of counsel. *See State v. Andren*, 358 N.W.2d 428, 431 (Minn. App. 1984) ("If appellant's trial counsel made an unqualified promise of probation, appellant would be allowed to withdraw his plea."). However, an attorney's incorrect calculation of a criminal-history score—even when an attorney should have requested a pre-plea sentencing guidelines worksheet—does not necessarily amount to professional incompetence. *See State v. Ferraro*, 403 N.W.2d 845 (Minn. App. 1987).

In *Ferraro*, Ferraro argued that he had received ineffective assistance of counsel when his attorney informed him that his criminal-history score was three rather than four, which was the difference between a presumed probationary sentence and a presumed sentence of commitment. 403 N.W.2d at 846-47. However, Ferraro was told that his criminal-history score was uncertain until the Department of Corrections calculated it. *Id.* at 846. After the plea hearing, but prior to the sentencing hearing, Ferraro learned that his actual criminal-history score was four rather than three. *Id.* at 847. Ferraro argued on appeal that the misunderstanding constituted ineffective assistance of counsel. *Id.* at 848. This court rejected Ferraro's argument, stating, "Although this would have been a good case to request a pre-plea sentencing guidelines worksheet, the failure to do so was not incompetence." *Id.* This court reasoned that appellant was "fully informed his criminal history score was uncertain." *Id.* Appellant argues that *Ferraro* is distinct because in that case, there was extensive discussion about the possibility of a different criminal-history score. The state counters that *Ferraro*'s holding did not depend on the "extensive" discussion; it simply concluded that Ferraro was fully informed of the possibility that his criminal-history score was uncertain and that his attorney's failure to request a pre-plea sentencing guidelines worksheet does not equate to incompetence.[3]

Here, the district court concluded that appellant's attorney's conduct was not unreasonable. We agree. The record does not show that appellant's attorney promised him that his criminal-history score was four such that appellant *only* could face a sentence of

[3] We note that it is best practice for an attorney to order a pre-plea sentencing guidelines worksheet.

45 months in prison. At the plea hearing, appellant's attorney told appellant, "Once a person is convicted of a felony DWI, all future DWI's in the state of Minnesota are felonies; it doesn't matter how much time passes. And a second conviction for a felony DWI is a presumptive commit to prison of 36 months. It might even be more for you because of your criminal history score." Additionally, the district court ensured that appellant acknowledged, on the record, that he was promised nothing other than what was contained in the plea agreement. The inaccurate criminal-history score and presumptive sentence were not part of the plea agreement; no specific length of a prison sentence was a part of the plea agreement. Thus, the district court did not abuse its discretion by rejecting appellant's ineffective-assistance-of-counsel claim.

Further, appellant's ineffective-assistance-of-counsel argument fails on the second prong. The district court found that appellant had not shown that he was prejudiced by being misinformed about his criminal-history score and presumptive sentence because there was "no reasonable likelihood that he would have insisted on going to trial rather than accept a plea agreement that offered him probation." Again, we agree.

In an affidavit filed with the district court, appellant claimed that if he had known that he faced a presumptive sentence of 66 months in prison, he would have tried his case rather than enter a guilty plea. The district court found that appellant's claim was not credible. This finding is supported by the evidence. No specific prison sentence was a part of the plea agreement. The district court asked appellant whether he had been made any promises—other than what was contained in the plea agreement—in exchange for his guilty plea, and appellant replied, "No, Your Honor." Appellant had an opportunity to

address the district court at the sentencing hearing, after the district court and attorneys discussed the 66-month presumptive sentence, but he did not claim that his attorney had promised him a lesser sentence. In appellant's letters to the district court between his sentencing and his motion for postconviction relief, appellant did not claim that his acceptance of the plea agreement relied upon his attorney promising him a lesser sentence. Instead, in his letters to the district court, appellant requested probation. Pursuant to the plea agreement, appellant had the opportunity for a downward departure if he would have completed a Rule 25 chemical-dependency evaluation before sentencing. He received the opportunity that he bargained for, but he failed to meet the conditions necessary to realize the opportunity. Therefore, the district court did not abuse its discretion by concluding that there was no credible evidence that, but for the alleged error, appellant would have insisted on going to trial rather than entering a guilty plea.

II.

Appellant also argues that the district court erred by rejecting his claim that his plea agreement was made unintelligently where he was misinformed about the maximum and presumptive sentence that he faced. The district court has the duty of ensuring a plea is being intelligently made. *See* Minn. R. Crim. P. 15.01 ("Before the judge accepts a guilty plea, the defendant must be sworn and questioned by the judge with the assistance of counsel."). This court reviews the validity of a guilty plea de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

The district court did not explicitly address this argument; it simply denied appellant's postconviction petition. However, before it accepted appellant's guilty plea,

the district court correctly informed appellant multiple times that the maximum sentence for felony DWI (refusal) was seven years. *See* Minn. Stat. § 169A.24, subd. 2 (2014) (stating that the maximum statutory length of imprisonment for felony DWI (refusal) is seven years).

Further, caselaw supports the state's argument that a guilty plea is not unintelligent when a defendant was incorrectly informed of the presumptive sentence under the sentencing guidelines. A constitutionally valid guilty plea must be accurate, voluntary, and intelligent. *Raleigh*, 778 N.W.2d at 94. The intelligence component requires that the defendant "understands the charges against him, the rights he is waiving, and the consequences of his plea." *Id.* at 96. A defendant need not know of *every* consequence of his plea for the plea to be intelligent, *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016), but he must know of the *direct* consequences of a plea, which are "definite, immediate, and automatic and are punitive and part of a defendant's sentence." *State v. Brown*, 896 N.W.2d 557, 561 (Minn. App. 2017) (quotation omitted), *review denied* (Minn. July 18, 2017). A guilty plea's direct consequences primarily include the maximum sentence and fine. *Raleigh*, 778 N.W.2d at 96.

The Minnesota Supreme Court has held that the advisement of the presumptive sentence is not required before the trial court accepts a guilty plea. *See State v. Trott*, 338 N.W.2d 248, 252-53 (Minn. 1983) (stating the supreme court is "unwilling to hold that a defendant must be questioned by the [district] court at the time he enters his guilty plea to insure that he understands what the presumptive sentence is under the Minnesota Sentencing Guidelines"). Similarly, here, we are not willing to hold that the district court

erred by failing to ensure that, before entering his guilty plea, appellant knew what the presumptive sentence was under the Minnesota Sentencing Guidelines.

Affirmed.