STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2182

Joel Pourier, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 29, 2013
Affirmed
Connolly, Judge

Hennepin County District Court
File No. 27-CR-09-26871

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook, Kathryn J. Lockwood, Assistant Public Defenders, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

CONNOLLY, Judge

Appellant challenges his 120-month sentence, a double-durational departure, for eight counts of theft by swindle, arguing that his guilty plea was involuntary because of ineffective assistance of counsel and improper inducement from counsel and that the district court abused its discretion in imposing the upward departure because the conduct underlying appellant's last offense did not support it. Because there is no basis to allow appellant to withdraw his guilty plea and because the district court did not abuse its discretion by the upward departure, we affirm.

FACTS

Appellant Joel Pourier was the financial and executive director of Oh Day Aki Heart of the Earth Charter School (HECS), which closed in July 2008. Between August 2003 and July 2008, appellant was alleged to have embezzled $1,380,000 from HECS.

He pleaded guilty to eight counts of theft by swindle, stating at the plea hearing that he understood the state was seeking an aggravated sentence of up to 136 months. Appellant received the presumptive sentences of 21 months, 27 months, 45 months, 51 months, 60 months, 60 months, and 60 months on the first seven counts and, on count eight, a double departure of 120 months, all concurrent.

His petition for postconviction relief was denied. He challenges the denial, arguing that he is entitled to withdraw his guilty plea because he received ineffective assistance of counsel and because counsel improperly pressured him to plead guilty and that the double upward departure on count eight was an abuse of discretion.

D E C I S I O N

1. Ineffective Assistance of Counsel

In reviewing a postconviction court's decision to grant or deny relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

> The defendant must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quotation and citation omitted). When a defendant is represented by counsel during the plea process, "the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) (quotation omitted).

Appellant argues that his counsel should have known and advised appellant that the state requested an upward departure and that, if appellant pleaded guilty, the court could order a departure. The transcript shows that appellant's counsel did tell appellant about the state's motion and that the district court could order the departure.

Appellant answered "Yes" when asked by counsel if they had reviewed "the State's paperwork moving for an aggravated sentence?" and when asked by the district

court if he understood that "by entering a straight plea, you're leaving to my discretion any sentence in this matter . . . ." Thus, appellant knew that the state had sought an aggravated sentence and that sentencing would be at the court's discretion.

Appellant's counsel questioned him about the prospective sentence.

> Q. [Appellant], I'd like to direct your attention to what we call aggravating factors. We've had quite a bit of an opportunity to discuss what aggravating factors are, correct?
> A. Yes.
> Q. And you know that the State is moving to seek an upward sentence, sentencing departure based on aggravating factors in this specific case, correct?
> A. Yes.
> Q. And you know they're alleging and you're prepared to admit to aggravating factors as they relate to each individual count of the complaint that you just pled guilty to, correct?
> A. Yes.
> Q. Sir, would you agree with me that each of the eight counts that you just pled guilty to is a major economic offense, correct?
> A. Yes.
> Q. You'd also agree that there were – for each of the eight counts, there were multiple incidents of theft from the victim, where the victim would be the school, correct?
> A. Yes.
> Q. And that applies to each of the eight counts, correct?
> A. Yes.
> Q. And that for each of the eight counts there was a substantial monetary loss greater than the minimum loss specified by statute [i.e., $35,000], correct?
> A. Yes.
> Q. And for each of the eight counts, you would agree with me that there was a high degree of sophistication or planning involved, correct?
> A. Yes.
> Q. Similarly, you would agree with me, sir, that for each of the eight counts that you used a position of trust in a fiduciary relationship, with the victim being the school, to facilitate the commission of each of the eight counts, correct?
> A. Yes.

Q. You understand what we've just gone over here?
A. Yes.
Q. You've had an opportunity to talk to me about the State's attempt to get a sentence in excess of what the guidelines call for, correct?
A. Yes.
Q. And have I answered all of your questions?
A. Yes.
Q. Have I done that to your satisfaction?
A. Yes.
Q. Do you have any other questions regarding the State's attempt to move for an upward sentencing departure? Do you have any other questions regarding that for myself, the prosecutor or the judge?
A. No.

Appellant was also cross-examined on the aggravating factors.

Q. [W]hat I'm saying is it's an inside job. You were in a position where you could move the money, and you did?
A. Yes.
Q. And you understand that that's an abuse of a position of trust and authority in doing that?
A. I do understand that, yes.
Q. Then the other aggravating factor that the State has alleged in its motion essentially is that by taking this money for yourself, you're essentially depriving the students at the school of their educational dollars. Do you understand that?
A. Yes. . . .
Q. [T]he allegation here for sentencing purposes is that if you hadn't taken this money, it would have been used for permitted educational purposes. Do you understand that?
A. Yes.
Q. And you understand that the population of the school here are essentially by and large under-served, poor, urban Native American youth?
A. Ninety-eight percent of them, yes.
Q. So that would be a correct characterization?
A. Yes . . . .
Q. . . . And by taking this money, you understand that you were essentially depriving that group of essentially vulnerable students of basically a million dollars of the value of their education collectively?

A. Yes.

. . . .

Q. . . . [Y]ou are also by law entitled to have a trial on proving the aggravated factors that we've just described: That it was a lot of money over an extended period of time, an abuse of trust and authority, and the people that were hurt essentially are this group of vulnerable, under-served, underprivileged youth. Do you understand that you're entitled to a trial on that as well?

A. Yes.

Q. And that by making these waivers today, you're giving up that right to a trial on the aggravating factors in this case?

A. Yes.

. . . .

Q. . . . [Y]ou still want to admit the facts that we've talked about that support an aggravated sentence and basically go directly to a sentencing and have the judge decide what your sentence will be in this case; is that right?

A. Yes.

Q. Now, you understand that the presumptive sentence that attaches in this case is essentially 57 months; that is that eight counts at a level six offense, the presumptive sentence is 57 months for a range of 49 to 68 months?

A. Yes.

Q. And you've had a chance to see those numbers?

A. Yes.

Q. And you know essentially that the State wants to give you a longer penalty than that?

A. Yes.

Q. . . . [Y]ou know essentially that the State is asking for a double departure in this case?

A. Yes.

Q. And you know that by entering this plea today and this waiver, essentially all bets are off and it's going to be completely up to the judge where the sentence will lie in this case, whether it could be 57 months or less, or it could be a lot more than 57 . . .; is that correct?

A. Yes.

Q. And do you know that we're going to have a contested sentencing hearing . . . but in the end it's going to be completely up to the judge?

A. Yes.

> Q. There's no agreement between yourself and the State of Minnesota as to what your sentence is going to be; is that correct?
> A. That's correct.

Thus, appellant's testimony established at the plea hearing that he: (1) knew the state was seeking an aggravated sentence; (2) agreed that aggravating factors were present; and (3) waived his right to a trial on the aggravating factors. His testimony shows that he understood the state's position on sentencing, the district court's absolute discretion to sentence him as it saw fit, the presence of aggravating factors, his right to a trial on those factors, and his waiver of that trial. He also testified that he had discussed sentencing and aggravating factors with his attorney, but, even if he had not done so, he could not show that the result of the proceeding would have been different.

Appellant argues that his counsel should have told him that a trial might result in guilty findings on only some of the counts. But appellant does not provide any explanation as to which counts might have received a "not guilty" verdict, or why the jury would have made that decision, and appellant agreed at the plea hearing that significant evidence supported every count.

Appellant also argues that a reasonable attorney would not have "promise[d] mercy from the court when there is no agreement as to sentencing." But nothing in the record reflects that appellant's attorney did "promise mercy from the court," and the transcript shows that appellant and the attorney discussed both the state's attempt to seek an upward departure and the aggravating factors. Appellant's attorney stated in his affidavit that he spoke to appellant about aggravating factors and sentencing options and

the options of going to trial or pleading guilty, and that appellant decided to plead guilty. Nothing in the plea hearing or sentencing-hearing transcripts refutes this.

Appellant argues that, but for his counsel's errors, he would not have pleaded guilty or agreed to waive his *Blakely* rights on the aggravating factors.[1] This argument fails for two reasons. First, appellant does not identify any errors. Second, appellant provides no evidentiary support for the argument: the transcript shows that he repeatedly asserted to his counsel, to the prosecutor, and to the district court that he had discussed pleading guilty with his attorney, that he understood what he was doing, and that he had not been coerced.

2. Improper Pressure and Inducement by Counsel

A guilty plea must be accurate, voluntary, and intelligent. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). Appellant argues that his plea was not voluntary because his attorney improperly pressured and induced him to plead guilty. "To determine whether a plea is voluntary, the court examines what the parties reasonably understood to be the terms of the plea agreement." *Id.* at 96. Review of whether a plea is voluntary is de novo. *See, e.g.*, *id.*

The transcript indicates that appellant "reasonably understood . . . the terms of the plea agreement." He answered "Yes" when his attorney then asked him if he knew that, by pleading guilty, he was giving up the right to go to trial, to subpoena witnesses, and to

[1] The State asserts that appellant did not raise the waiver of his *Blakely* rights in the district court and therefore is not entitled to raise it in this court. *See Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (providing that a party may not raise an issue for the first time on an appeal from a denial of postconviction relief). Appellant does not refute this assertion in a reply brief.

decide to testify or remain silent, and if he had talked with his attorney about the case "for quite some time." The attorney then said, "Probably almost two years, correct?" and appellant answered "Three years." Appellant answered "No" when the attorney asked if "[A]nybody forced [him,] promised [him] or threatened [him] with anything other than what [he had] heard here in open court." He answered "Yes" when the district court asked him if he understood the charges, if he had gone through them in detail with his attorney, if he understood the rights he was waiving, if he understood that he was leaving his sentence to the court's discretion, and if he was "entering this plea voluntarily, freely and willingly, of [his] own accord." An examination of what appellant reasonably understood to be the terms of the plea agreement indicates that his plea was voluntary.

Appellant asserts that he "would not have pleaded guilty if counsel had been prepared and willing to go to trial or had not advised him that pleading guilty meant receiving mercy from the judge at sentencing." Trial was scheduled for July 12, 2010; on July 7, appellant signed a petition to plead guilty. In his affidavit, appellant states that, on July 7, his attorney said that "(1) he would not be ready for trial, (2) he would need more money to take [the] case to trial, and (3) he would not request a continuance to prepare for trial." These statements are opposed by both appellant's attorney's affidavit and the transcript. In his affidavit, appellant's attorney states that he "did prepare for trial in [appellant's] case" and "would have tried [appellant's] case if he had wanted me to."

At the beginning of what became a plea hearing, the district court and appellant's counsel had the following exchange.

> The Court: . . . We are here today on a scheduling conference. This matter is set for trial starting Monday of next week. [Appellant's attorney], you advised me that there have been some considerations that have been ongoing. Have you come to any decision today?
>
> Appellant's counsel: We have, Your Honor. I've discussed this case with my client thoroughly. We've discussed the offers from the State and he knows that he has the right to start trial next Monday morning. He also knows that he's charged with eight felony counts of theft by swindle and that the State has moved for an upward departure pursuant to some aggravating factors. He knows what those are. . . .

Appellant's counsel would not have told the court that appellant "ha[d] the right to start trial next Monday morning" if he could not have been ready for trial at that time.

Appellant has not shown that pressure or inducement from his attorney made his plea involuntary.

3. Sentencing

"We review a sentencing court's departure from the sentencing guidelines for abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

The district court used the *Hernandez* method to compute appellant's criminal history score by imposing the guideline sentence on each of the first seven convictions, then imposing a double-durational departure on the eighth conviction, which was of theft by swindle of more than $35,000 between January 31 and July 23, 2008. The district court stated that, in this sentence, it was "relying solely on the facts relating to count 8, so as not to run afoul of the purposes of *State v. Jones*[, 745 N.W.2d 845, 849 (Minn. 2008) (holding that conduct underlying one conviction cannot be relied on to support a departure in a sentence for another conviction)].

The district court considered each aggravating factor in relation to the eighth conviction:

> From January to July of 2008 [the period of the offenses in count 8, appellant] committed 14 thefts totaling $194,992.56. . . . [T]here were multiple victims to this offense. . . . [T]he first [aggravating factor], multiple victims, is satisfied.
> . . . [T]he offense involved a high degree of sophistication and planning or occurred over a lengthy period of time. . . . [F]rom January through July of 2008, . . . at least three Automated Clearance House funds transferred to accounts that were under your personal control. . . . [A]t least one [fictitious explanation of a transfer] indicated "reimbursement for loan." . . . [T]his crime did involve a high degree of sophistication and planning.
> . . . [T]he six-month period involved in count eight is a lengthy period of time. . . . [T]he Minnesota Court of Appeals has recognized as a lengthy period of time periods occurring over two months . . . and three-month periods[2] . . . . Thus . . . the second aggravating factor is present. . . .
> . . . [B]y . . . January of 2008 . . . , you were in the position of executive director of the school. . . .[I]t was a position that you used . . . not only to make the illegal funds transfers, but to cover them up and to discourage others [from] investigating the transfers. . . . [T]he third aggravating element, use of the position of trust [to facilitate commission of the offense], is established beyond a reasonable doubt.

Thus, the upward departure on the eighth conviction was based on aggravating factors related to that conviction.

Appellant relies on *State v. Pittel*, 518 N.W.2d 606, 607 (Minn. 1994) (holding that "use of [the] *Hernandez* method in computing . . . criminal history scores for a number of related theft convictions precluded . . . using the conduct underlying all of the

[2] *See State v. Simmons*, 646 N.W.2d 564, 566 (Minn. App. 2002) (three months); *State v. O'Brien*, 429 N.W.2d 293, 296 (Minn. App. 1988) (less than three months), *review denied* (Minn. Nov. 16, 1988).

offenses as support for a durational departure with respect to one of the offenses"). But *Pittel* is distinguishable. It concerned seven thefts committed over five months; the district court imposed concurrent guidelines sentences on the first six offenses, then imposed a double-durational departure, based on "all of the underlying conduct of all the offenses," on the seventh. *Id.* at 608. Here, the departure was based only on conduct underlying the eighth conviction.

The district court did not abuse its discretion in sentencing appellant, and appellant is not entitled to withdraw his guilty plea on the basis of his counsel's ineffective assistance or improper pressure.

Affirmed.