STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1554

David Allen Anderson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 30, 2008
Affirmed
Peterson, Judge

Blue Earth County District Court
File No. CR-05-448

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Y. Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Ross Arneson, Blue Earth County Attorney, Christopher J. Rovney, Assistant County Attorney, 410 South Fifth Street, P.O. Box 3129, Mankato, MN 56002-3129 (for respondent)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Peterson, Judge.

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

PETERSON, Judge

In this appeal from an order denying his petition for postconviction relief, appellant argues that he is entitled to withdraw his guilty plea because his attorney misinformed him that if he pleaded guilty, he would be eligible for the Challenge Incarceration Program or another program available to drug offenders. We affirm.

FACTS

In November 2005, appellant David Allen Anderson pleaded guilty to a charge of conspiracy to commit first-degree controlled-substance crime. Under the plea agreement, a witness-tampering charge was dismissed and appellant would be sentenced to an executed term of 104 months in prison, which is the low end of the presumptive range for a severity-level-IX offense committed by an offender with appellant's criminal-history score of three. *See* Minn. Sent. Guidelines IV (providing presumptive sentence of 122 months with presumptive range of 104 to 146 months).

During the plea hearing, after appellant indicated that he wished to waive a presentence investigation (PSI) and be sentenced that day, the following discussion took place:

> THE COURT: [Appellant], your lawyer has suggested that you want to go ahead and have sentencing today without the benefit of a pre-sentence investigation and an updated sentencing worksheet. I believe his phrase was that you wanted to get into the custody of the Commissioner of Corrections so you could start whatever programming or classes or things that are available. And you understand that I don't have any –
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> . . . .

> THE COURT: -- control over what programming or classes or anything that may be available?
> [APPELLANT:] Yes I do, Your Honor.

Appellant then asked about his application to participate in the Minnesota Teen Challenge Program, which had been accepted by the program but was opposed by the prosecutor. The district court stated that it would not sentence appellant to the program that day but explained that appellant might benefit from a PSI because it would at least leave the door open to such a possibility. Following a discussion with defense counsel, appellant waived a PSI and was sentenced to an executed term of 104 months.

While in prison, appellant applied to be admitted to two early-release programs. Although appellant met the statutory eligibility criteria for at least one of the programs, the prosecutor opposed his admission, and appellant was denied admission to both programs.

In February 2007, appellant filed a petition for postconviction relief, seeking to withdraw his guilty plea on the ground that he pleaded guilty based on defense counsel's assurances that he would be admitted into an early-release program. Appellant stated in an affidavit:

> 3. When I discussed the plea with my attorney, . . . he told me that I would qualify for the early release program, the Challenge Incarceration Program (CIP), at the DOC. I relied on this when I decided to waive my rights and plead guilty. The fact that I could go to a program like CIP and perhaps be able to reduce my time in prison was critical in my decision to plead guilty to a 104-month sentence.
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> 4. At the time that I pled guilty, I had no idea that the prosecutor would object to me getting into the CIP, and that his objection would prevent me from going to that program.

> Had I known this when I pled guilty, I would not have done so.
>
> . . . .
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> 6. The news of ineligibility shocked me because [defense counsel] had assured me at the time I pled guilty I would be able to participate in the program. I would never have agreed to plead guilty if I had known this at the time.

At the postconviction hearing, appellant testified that his attorney

> assured me that with my record, that I would be eligible for any of the programming that they had at the DOC with [the witness-tampering charges being dismissed]. He showed me the criteria and the requirements for the Conditional Release Program and he stated that I would be eligible and I'd be out within two years with programming if I took this deal.

Appellant testified that he did not know that opposition by the prosecutor could result in the denial of admission to an early-release program.

The district court denied appellant's petition and explained:

> There is no evidence that [defense counsel] promised [appellant] that he would be accepted into a drug program at prison. At [appellant's] plea/sentence hearing, the court made it very clear that it had no control over whether or not the D.O.C. would admit [appellant] into a program. [Appellant] acknowledged this fact. The court also made it clear that the sentence to be imposed would not involve drug programs but would be consistent with the joint recommendation of a 104-month prison term. [Appellant] acknowledged this fact.
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> . . . The State made no representation that it would recommend [appellant] for any drug offender programs at the D.O.C. and is not obligated to do so. [Appellant] was aware or should have been aware of this fact at the sentencing hearing, particularly considering [the prosecutor] and [defense counsel] acknowledged the State's opposition to [appellant] entering Teen Challenge.

D E C I S I O N

"A petition for postconviction relief is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). In reviewing a postconviction court's denial of 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); *cf Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (holding that courts "extend a broad review of both question of law and fact" when reviewing a denial of postconviction relief). A postconviction court's decision will not be reversed absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001).

The district court may allow a defendant to withdraw a guilty plea on "proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1; *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A manifest injustice results when a defendant's plea is not entered accurately, voluntarily, and intelligently. *Alanis*, 583 N.W.2d at 577. Whether to permit withdrawal of a guilty plea is committed to the district court's discretion and the district court's decision will not be reversed absent an abuse of discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Appellant argues that his plea was not entered intelligently because it was "based on his attorney's promises that he would be able to get into the DOC early release programs for drug offenders." For a plea to be intelligently entered, the defendant must understand the charges, the rights that he waives by pleading, and the consequences of his

plea. *Kaiser v. State*, 641 N.W.2d 900, 903 (Minn. 2002). The order denying postconviction relief shows that the district court found that appellant's claim that his attorney promised him that he would be accepted into an early-release program was not credible. This court defers to the postconviction court's credibility determinations. *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) (stating that the appellate standard of review gives "considerable deference" to the postconviction court's credibility determinations, noting that the postconviction court "is in a unique position to assess witness credibility").

In *Alanis*, the supreme court rejected the defendant's argument that he should be allowed to withdraw his plea because the prosecutor had promised him that he would be eligible for a six-month boot camp. 583 N.W.2d at 578. The court explained:

> The record here indicates that the district court and the prosecutor clearly explained to Alanis, and he indicated that he understood, that he was being sentenced to 54 months in prison. That 54-month sentence made him eligible for the boot camp program. Although the concurrent sentences for the AFDC and the food stamp convictions initially caused a problem with respect to entry into the program, that problem was resolved relatively quickly after Alanis called it to the attention of the district court judge who accepted his plea. Once the problem was resolved, Alanis was accepted into and scheduled to begin the boot camp program. It was only after the INS placed a detainer on him that he was excluded from the program. Thus, Alanis received the sentence agreed to and contemplated by his plea agreement and that sentence made him eligible for the boot camp program.

Id.

As in *Alanis*, when appellant pleaded guilty, the district court explained to him that he was being sentenced to 104 months in prison, and appellant indicated that he

understood. Although the early-release programs were not discussed at the plea hearing, the Teen Challenge Program was discussed. Defense counsel explained to appellant that even though he had been accepted by the program, he was unlikely to be admitted into the program due to the prosecutor's opposition. To the extent that appellant's testimony at the postconviction hearing refers to representations that he would be eligible for early-release programs, the record indicates that he was eligible for those programs. However, the discussion about the Teen Challenge Program at the plea hearing put appellant on notice that meeting program eligibility requirements did not guarantee acceptance into a program.

Appellant argues that his waiver of a PSI supports his claim that he was promised acceptance into an early-release program because there was no other reason for him to waive the PSI. But at the plea hearing, the district court stated that it understood that appellant wanted to waive the PSI because he wanted to "start whatever programming or classes or things that are available." The district court then explained that it had no control over the availability of programs or classes and that appellant might benefit from a PSI because it would at least leave the door open for appellant to enter the Teen Challenge Program. The district court also noted the accuracy of defense counsel's statement "that in certain cases the recommendation of the prosecution is very important." Appellant's waiver of a PSI does not demonstrate that appellant was promised that his admission to an early-release program was guaranteed.

Appellant also argues that he pleaded guilty based on his misunderstanding that the more-serious charge was being dismissed when in fact witness tampering is less

serious than first-degree controlled-substance crime. But although the district court referred in passing to the more-serious charge being dismissed, the record does not demonstrate that appellant entered his plea based on an understanding that witness tampering was the more-serious offense. Instead, the record shows that appellant was concerned about a possible 200-month sentence if he was convicted of both offenses and a sentencing departure was imposed.

Nothing in the record before appellant filed his postconviction petition supports appellant's claim that he was promised acceptance into an early-release program. Therefore, the district court's finding that appellant was not promised that he would be accepted into a program at prison is not clearly erroneous, appellant did not show that his guilty plea was not intelligently entered, and the district court did not abuse its discretion in denying postconviction relief.

Affirmed.