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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1816**

Irving S. Stapleton, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 16, 2008
Affirmed
Klaphake, Judge**

Ramsey County District Court
File No. K5-99-0178

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge;
and Worke, Judge.

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Irving S. Stapleton challenges the postconviction court's denial without a hearing of his request for postconviction relief. Because the postconviction court's

denial is supported by sufficient evidence in the record that conclusively shows that appellant is not entitled to relief, we affirm.

D E C I S I O N

A petition for postconviction relief must state the remedy sought. Minn. Stat. § 590.02, subd. 1(1) (2006). The petitioner must establish facts that show, by a preponderance of evidence, entitlement to relief. Minn. Stat. § 590.04, subd. 3 (2006). The court may deny a petition without a hearing if the petition, files, and records conclusively show that the petitioner is not entitled to relief. *Id.*, subd. 1 (2006). This court reviews the denial of a postconviction petition under an abuse-of-discretion standard. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). A reviewing court will consider only whether a postconviction court's conclusions are supported by sufficient evidence. *Shoen v. State*, 648 N.W.2d 228, 231 (Minn. 2002).

In his petition, appellant stated that his sentence violated his rights under Minnesota law because he was not advised that it represented a departure from sentencing guidelines, and the record findings did not justify the departure; but appellant failed to state what remedy he sought, as required by Minn. Stat. § 590.02, subd. 1(1). Appellant now claims that the postconviction court abused its discretion by failing to either resentence him or allow him to withdraw his plea because *he did not understand* that his sentence represented a departure from the guidelines. Appellant contends that (1) he was not advised of his right to be sentenced under the guidelines, and (2) his agreement to depart from the guidelines was not knowing, intelligent, and voluntary. *See State v. Givens*, 544 N.W.2d 774, 777 (Minn. 1996) (holding that a plea agreement alone

can support a departure from the guidelines). The Minnesota Supreme Court overruled *Givens*, concluding that an agreement between the parties standing alone would no longer be sufficient to support an upward durational departure, but specifically holding that its ruling was not retroactive. *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002). *Givens* was controlling law at the time of appellant's sentencing.

Givens required that the accused be advised of his right to be sentenced under the guidelines and have the opportunity to consult with counsel concerning the waiver, and that the waiver be approved by the district court. 544 N.W.2d at 777. *Givens* further indicated that these requirements *could* be met through “[a]n examination by the sentencing court, consistent with the approach of Minn. R. Crim. P. 15” *Id.* Appellant contends that the record does not evidence this type of examination. However, questioning by the court is generally not required to ensure that a waiver of rights is intelligent or that the defendant is aware of the consequences of a plea; consultation with counsel can also satisfy this requirement. *State v. Chounard*, 299 Minn. 216, 217, 216 N.W.2d 908, 909 (1974). Defendants need not state explicitly, as appellant argues, that they are waiving a particular right. *State v. Propotnik*, 299 Minn. 56, 58, 216 N.W.2d 637, 638 (1974) (holding that plea was made voluntarily and intelligently although defendant was not specifically asked whether he waived his right to confront his accusers at a trial where the record showed that he had full opportunity to consult with his counsel before entering his plea, and the court presumed that counsel informed him adequately concerning this right).

The postconviction court found that the record demonstrated that appellant knew the terms of the plea agreement and that his sentence was an upward departure. The postconviction court also noted that appellant was represented by “an experienced and very competent lawyer who the [c]ourt knows diligently and thoroughly communicates with his clients.” The court further stated that it “relied on the aggravating factors submitted and stated by the prosecutor and agreed upon by [appellant] for its departure.” On appeal, a reviewing court affords great deference to such findings of fact and will not reverse those findings unless they are clearly erroneous. *Shoen*, 648 N.W.2d at 231.

There is sufficient evidence in the record to support the postconviction court’s determination that appellant knew that he had agreed to an upward durational departure in exchange for the state’s agreement not to file an amended complaint with a higher charge calling for a presumptive sentence exceeding the sentence to which he agreed. Further, appellant’s claim that the record does not reflect findings to justify the departure is without merit. Statements made by the state and acknowledged by appellant in both the plea hearing and the sentencing hearing refer to the aggravating circumstances justifying the upward departure, including the victim’s young age and relationship to appellant, the manner in which the victim was murdered, and the place where he was murdered, in addition to appellant’s failure to aid the victim after the crime.

Further, a defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). A defendant may withdraw a guilty plea if withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. Manifest injustice exists when a defendant can show that a guilty plea was not

accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A guilty plea is intelligent only if the criminal defendant is aware of his rights under the law and the direct consequences of pleading guilty. *Alanis*, 583 N.W.2d at 577. Appellant has the burden of establishing facts warranting the reopening of his case. *Id.*

Appellant argues that his plea was not knowing, voluntary, and intelligent because he did not fully understand the rights he waived and the consequences of his plea agreement with respect to the departure from the sentencing guidelines. As stated above, the postconviction court denied appellant's motion for relief finding that appellant "knew what the plea agreement constituted and that his sentence was an upward departure," and was satisfied that his attorney communicated with him. Based on a review of the record and transcripts of the plea hearing and sentencing hearing, there is ample support for the postconviction court's finding that appellant knew and understood the consequences of his plea agreement with respect to the departure from the sentencing guidelines. Appellant has not met his burden to establish facts that warrant the reopening of his case, and the postconviction court did not err in concluding that appellant was not entitled to relief.

Appellant also contends that the postconviction court abused its discretion by refusing to hold a hearing on his petition. Appellant has the burden of raising an evidentiary question that merits a hearing. *Bruestle v. State*, 719 N.W.2d 698, 706 (Minn. 2006). An evidentiary hearing is not required unless appellant has alleged facts that, if proved, entitle him to the requested relief. *Id.* Appellant must present facts to support the allegations in his petition to meet this burden. *Hodgson v. State*, 540 N.W. 2d

515, 517 (Minn. 1995). Appellant claims that a factual dispute exists as to whether his understanding of his sentence in the context of the plea agreement was knowing, intelligent, and voluntary. However, appellant did not present any facts to support this allegation. “[Appellant’s] allegations must be more than argumentative assertions without factual support.” *Id.* (quotation omitted). Because appellant failed to raise an evidentiary question that merits a hearing, the postconviction court did not abuse its discretion by denying appellant’s request for relief without a hearing. *Bruestle*, 719 N.W.2d at 706.

The postconviction court did not abuse its discretion by denying appellant’s request for postconviction relief without a hearing because there is sufficient evidence in the record that conclusively shows that appellant is not entitled to relief.

Affirmed.