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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-2356**

David Jay Zehringer, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed December 2, 2008  
Affirmed  
Harten, Judge\***

Big Stone County District Court  
File No. K9-93-44

Lawrence Hammerling, Chief Appellate Public Defender, Richard Schmitz, 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; and

William J. Watson, Big Stone County Attorney, 37 Northwest Second Street, Ortonville, MN 56278 (for respondent)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Harten, Judge.

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\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**HARTEN**, Judge

Appellant challenges the denial of his petition for post-conviction relief seeking to withdraw his 1993 guilty pleas. Because the district court did not abuse its discretion in determining that appellant's petition was untimely and that the withdrawal of his pleas was not necessary to correct a manifest injustice, we affirm.

### FACTS

In August and September 1992, appellant David Zehringer committed offenses that resulted in his being charged with one count of theft in March 1993. In October 1993, an amended *Spriegl* notice alleged 26 other property offenses. An amended complaint later charged appellant with three felonies: theft (double billing for over \$100,000); defeating security on personalty (failing to pay secured creditor approximately \$10,000), and theft by swindle (double billing in excess of \$200,000).

At a hearing, appellant agreed to plead guilty to these three charges in exchange for a stayed sentence and for no prosecution of the crimes alleged in the amended *Spriegl* notice. He was ordered to make restitution and sentenced to two concurrent terms of one year and one day and to a consecutive term of 18 months. The district court acknowledged that the consecutive sentence was an upward durational departure that was justified by the severity of appellant's offenses and his failure to show remorse.

Between 1994 and 2005, appellant committed various probation violations for which he served some time. His final probation violation resulted in the district court

vacating the stay of execution of his sentence; he served the remainder of the sentence. When he was released, he was discharged from probation.

On 31 July 2007, appellant filed a postconviction petition seeking to withdraw his 1993 guilty pleas because his consecutive sentences were a manifest injustice. After an evidentiary hearing, the postconviction court denied his petition. He challenges the denial, arguing that it was an abuse of discretion.

## **D E C I S I O N**

“The decisions of a postconviction court will not be disturbed unless the court abused its discretion.” *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). The district court denied appellant’s petition on the grounds that it was untimely and that he was not entitled to withdraw his guilty plea.

### **1. Untimeliness**

The timeliness of an action to withdraw a guilty plea depends on the district court’s interest in the finality of convictions, the defendant’s diligence in attempting to withdraw the plea, and undue prejudice to the state in prosecuting after a lapse of time. *Black v. State*, 725 N.W.2d 772, 776 (Minn. App. 2007). Appellant pled guilty in 1993 and sought to withdraw his pleas in 2007; the pleas and sentences went unchallenged for 14 years.

Because restitution to the victims was part of the sentence, the district court has a significant interest in the finality of appellant’s convictions. Appellant’s 14-year lack of diligence in attempting to withdraw his pleas is obvious. The prejudice to the state in attempting to retry appellant’s case some 15 years after the offenses may be inferred from

the transcript of the postconviction hearing, at which witnesses repeatedly claimed that they could not remember what had happened with any detail. The *Black* factors support the determination that appellant's petition was untimely.

Appellant relies on *Hoagland v. State*, 518 N.W.2d 531, 532 (Minn. 1994) (remanding to postconviction court for determination of whether new trial eight years after original trial would be unduly prejudicial to state). He argues that, because the state has the burden of showing undue prejudice if a new trial is granted, *id.* at 536, and because the state here offered no evidence that it would be unduly prejudiced by the withdrawal of appellant's guilty plea, his petition to withdraw was not untimely. But *Hoagland* does not involve withdrawal of a guilty plea. Here, the state would be faced with attempting to prove beyond a reasonable doubt a case that was never tried and is based on offenses committed in 1992.

While we affirm the denial of appellant's petition as untimely, we address his other arguments in the interests of justice. *See* Minn. R. Civ. App. P. 103.04.

## **2. Withdrawal of Guilty Plea**

“The court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Appellant argues that withdrawal is necessary to correct a manifest injustice because he was given consecutive sentences after being promised in his plea agreement that there would be no departures from the sentencing guidelines and because he received ineffective assistance of counsel in negotiating the pleas.

**a. Consecutive Sentences**

In 1994, when the district court sentenced appellant to consecutive sentences rather than the concurrent sentences set out in the sentencing guidelines, it observed that “there really has not been a significant or acceptable remorse shown by [appellant] and also really no understanding that the actions that [he] took are definitely criminal in nature” and that “those sentencing guidelines do not adequately address the severity of the crimes.” The district court imposed consecutive sentences, stating that it was

making this upward departure from the sentencing guidelines because this is a major economic offense in that it involved a monetary loss substantially greater than the usual offense, and it involved a high degree of planning. [Appellant] also used [his] position of trust to facilitate the commission of this offense . . . [and] the losses involved have had a profound effect on a significant number of persons . . . .

Appellant alleges that imposition of consecutive sentences was a “manifest injustice” because his plea agreement promised no departures. Even if appellant had been promised no departures, “[a sentencing] court . . . is *not* bound by a plea agreement as to any sentence to be imposed.” *State v. Dircks*, 412 N.W.2d 765, 768 (Minn. App. 1987), *review denied* (Minn. 24 Nov. 1987). Moreover, the transcripts of both the plea hearing and the sentencing hearing refute appellant’s allegation.<sup>1</sup>

At the plea hearing, appellant’s attorney stated:

[I]n exchange for [appellant’s] plea of guilty to those three counts, it’s . . . agreed, that the . . . State will not prosecute on any other offenses that it has now adjudged as of today . . . more particularly . . . [the 26 offenses] set forth in the Amended *Spriggl* Notice filed herein . . . and finally there is no agreement regarding sentencing, and both sides are free to argue sentencing . . . .

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<sup>1</sup> The record does not include a copy of the petition to enter a guilty plea.

Appellant's attorney went on to state that he thought both sides agreed that the felonies would "be sentenced per the guidelines. There would be no departures." The prosecutor disagreed: "I guess we really didn't discuss that . . . in terms of the departures . . . ." Thus, the prosecutor did not agree that there would be no departures.

The pre-sentence investigation report (PSI) corroborated the absence of an agreement on sentencing as part of the plea agreement. The probation officer stated that "[Appellant] will plead guilty to the offenses . . . identified in the amended complaint . . . . In exchange for this plea, any further charges will not be prosecuted. . . . Furthermore, there is no specific agreement regarding sentencing and both parties are free to argue the matter of sentencing." The PSI identified four aggravating factors and recommended an upward departure from the sentencing guidelines.

At the sentencing hearing, appellant's attorney stated, "We have reviewed the recommendations . . . in the [PSI] and [appellant] is ready to accept those terms . . . ." Thus, appellant declared his willingness to accept a departure, which he presumably would not have done if he believed he had been promised no departure.

The transcript of the postconviction hearing confirms the absence of any such promise. The attorney who had represented appellant at the plea hearing was asked if he recalled an agreement as to consecutive or concurrent sentencing. He answered, "No . . . I don't recall that being discussed at all." When asked, "[W]as it your belief that there was an agreement that there be no departures in this case?", he answered, "No . . . I don't

recall that there was . . . . I don't remember anything about a departure one way or the other. . . . [T]he word departure, I don't think ever came up.”

Because the record refutes appellant's argument that he was promised a guideline sentence in exchange for his guilty plea, the postconviction court did not abuse its discretion in concluding that withdrawal of the plea is not necessary to correct a manifest injustice.

**b. Ineffective Assistance of Counsel**

In his pro se supplemental brief, appellant argues that the attorney who negotiated his plea bargain provided ineffective assistance.<sup>2</sup> He alleges that his counsel's errors “were so serious as to deprive [him] of a fair trial,” but he does not specifically identify those errors.

The postconviction court concluded that appellant was not deprived of the effective assistance of counsel in 1993 because his counsel's “effort to negotiate a plea agreement that contemplated no prison time . . . [and] an agreement from the State not to prosecute any other property-related charges . . . were reasonable and resulted in no prejudice to [appellant].” The court further noted that appellant was prejudiced only “by his own inability to comply with his probationary terms over the years.”

At the postconviction hearing, appellant asserted ineffective assistance because his counsel had refused to review a 1991 decision of the Agricultural Stabilization and

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<sup>2</sup> In his pro se supplemental brief, appellant also argues that the state failed to investigate his offenses, that it lacked probable cause for its accusations, and that he was prejudiced by an abuse of process. These arguments lack merit and appear to be raised for the first time in this court; thus, they are not properly before us. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Conservation Service (ASCS) finding that appellant had participated in a scheme designed to evade payment limitation and payment eligibility rules” and that appellant was jointly and severally liable for refunding with interest all 1991 and 1992 payments received. Appellant testified that he could have given his counsel a copy of this decision but had not done so. At the plea hearing, when the attorney asked appellant, “And do you think that you’ve told me everything about the case?” appellant had answered, “Everything that I possibly can, yes.” Appellant’s attorney could not be at fault for failing to consider documents that appellant concealed from him.

Both because appellant’s postconviction petition was untimely and because no manifest injustice occurred as a result of his guilty plea, we conclude that the postconviction court did not abuse its discretion in denying the petition.

**Affirmed.**