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**STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1265**

State of Minnesota,
Respondent,

vs.

Antion Deion Shelby, a/k/a Antione Tony Hill,
Appellant.

**Filed July 10, 2017
Affirmed
Hooten, Judge**

Ramsey County District Court
File No. 62-CR-14-6138

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

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Julie Loftus Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

On appeal from the denial of his petition for postconviction relief, appellant argues that he should have been allowed to withdraw his guilty plea because his plea was not intelligent and that he received ineffective assistance of counsel. We affirm.

FACTS

In August 2014, appellant Antion Deion Shelby was charged with three counts of first-degree criminal sexual conduct for vaginally penetrating his 13-year-old daughter with his finger on three occasions. During each of these occasions, Shelby removed his daughter's clothing and inserted his finger into her vagina to "check" to make sure she was still a virgin. When confronted by police, Shelby offered a full post-*Miranda* confession. Shelby subsequently entered a straight plea to one count of first-degree criminal sexual conduct, and the state dismissed the remaining charges.

Prior to sentencing, Shelby moved for a downward dispositional departure, arguing that he was particularly amenable to probation. After determining that Shelby was not amenable to probation, the district court denied Shelby's motion for a downward dispositional departure and sentenced him to 199 months. Shortly after sentencing, Shelby appealed his conviction.

While his direct appeal was pending, Shelby moved to withdraw his guilty plea, arguing that "his attorneys forced him to plead guilty by indicating that a guilty plea could result in a probationary sentence." His direct appeal was stayed, pending the outcome of

his postconviction proceedings. The postconviction court denied Shelby's motion to withdraw his plea. Shelby now appeals.

DECISION

I.

Absent manifest injustice, a defendant does not have an absolute right to withdraw a valid guilty plea. *State v. Farnsworth*, 738 N.W.2d 364, 371 (Minn. 2007); Minn. R. Crim. P. 15.05, subd. 1. “[M]anifest injustice exists where a guilty plea is invalid.” *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). A guilty plea is invalid if it is not “accurate, voluntary, and intelligent.” *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997).

The validity of a plea presents a question of law that an appellate court reviews de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). However, appellate courts “review the postconviction court’s factual findings for clear error, and evaluate the postconviction court’s ultimate decision to deny relief for an abuse of discretion.” *Lussier v. State*, 853 N.W.2d 149, 153 (Minn. 2014).

The requirement that a guilty plea be intelligent “insures that the defendant understands the charges, his or her rights under the law, and the consequences of pleading guilty.” *State v. Wukawitz*, 662 N.W.2d 517, 522 (Minn. 2003) (quotation omitted). Shelby argues that his plea was not intelligent for four reasons. First, Shelby insists that his attorneys guaranteed he would receive probation in exchange for pleading guilty. Second, Shelby claims that at the time of his plea, he did not understand that the first-degree criminal sexual conduct statute, Minn. Stat. § 609.342, subd. 3 (2014), required that the district court evaluate whether a stay of imposition or execution of his sentence would

be in the “best interest” of the victim. Third, Shelby argues that he was not accurately informed about the possible length of his sentence because his attorneys were not aware of his criminal history or criminal-history score. Fourth, Shelby claims he was not properly advised that his probationary status at the time of his criminal conduct made it less likely he would be granted a downward dispositional departure. We address each argument in turn.

Shelby first argues that his two attorneys guaranteed he would receive probation in exchange for pleading guilty. This argument is unsupported by the record.

At the postconviction hearing, Shelby’s lead attorney testified that he made it “absolutely clear” to Shelby that there was no guarantee as to his sentence were he to plead guilty, and the district court determined his testimony to be credible. A postconviction court’s credibility findings will stand unless they are clearly erroneous. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). If “reasonable evidence” supports the credibility findings, they will not be disturbed. *Id.* at 685.

The potential for a prison sentence was discussed repeatedly before the district court ruled on Shelby’s motion for a downward dispositional departure. At a pre-trial hearing where a potential plea was discussed, the state offered “that the defendant could plead to any of the three counts and the other two would be dismissed at sentencing. The [s]tate would agree to a guidelines sentence at the low end of the box.” The district court asked the state if the “only offer is that [Shelby] would go to prison,” to which the state replied, “Yes.”

At the plea hearing, Shelby's lead attorney informed the district court that Shelby had "no plea agreement with the [s]tate." Instead, Shelby's lead attorney described the plea as a "straight-up plea." Shelby's lead attorney informed the district court that the defense would "make a motion for either a stay of imposition or a stay of execution," which the defense presumed the state would oppose. Shelby's attorney acknowledged that "all elements of sentencing will be up to the [district] [c]ourt."

When entering his guilty plea, Shelby informed the district court that his plea was voluntary, and that no one had guaranteed him a specific sentence if he pleaded guilty. Shelby's lead attorney also stated during the plea recital that "we're going to make a motion for a probationary sentence, but the [s]tate will most likely oppose that, and the [district court] does not have to grant our motion. If [the district court] does not grant that motion, you cannot withdraw your guilty plea." Shelby responded that he understood. During the plea recital, it was stated four times that the district court had discretion in granting Shelby's motion for a probationary sentence.

As a whole, the record contains reasonable evidence to support the postconviction court's credibility determination and does not support Shelby's argument that his attorneys guaranteed he would receive probation in exchange for a straight plea.

Second, Shelby argues that the district court and his attorneys only focused on the necessity of treatment and that he was therefore unaware that a downward dispositional departure required a finding that such departure would be in the best interest of the victim. A district court may stay imposition or execution of a first-degree criminal sexual conduct sentence if the victim has a significant relationship with the offender, the victim was under

16 years of age at the time of the offense, the district court finds that “a stay is in the best interest of the [victim] or the family unit,” and “a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.” Minn. Stat. § 609.342, subd. 3.

However, even if we assume that Shelby was not adequately informed of the “best interest” prong of Minn. Stat. § 609.342, subd. 3, this error is harmless beyond a reasonable doubt. *See Hauwiller v. State*, 295 N.W.2d 641, 643 (Minn. 1980) (harmless error standard applies to postconviction review). Generally, a downward dispositional departure is only authorized if the district court finds that “the defendant is particularly amenable to probation or if offense-related mitigating circumstances are present.” *State v. Love*, 350 N.W.2d 359, 361 (Minn. 1984). At sentencing, the district court did not address the best interest of the victim, but instead stated it could not find Shelby was amenable to probation.

Shelby has a number of prior domestic assault convictions, the most recent of which was in 2013. Additionally, Shelby has violated probation on at least four occasions in the past and was on probation at the time he committed the current offense. Therefore, even if the district court did not consider the best interests of the victim, there is sufficient support in the record for the district court’s imposition of the presumptive sentence, due to Shelby’s lack of amenability to probation. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (concluding there is no requirement for district court to explain decision not to depart from presumptive sentence).

Third, Shelby argues that “because his attorneys failed to fully evaluate his situation, their estimate of his presumptive sentence was unnecessarily flawed.” In support of his

position, Shelby points to one of his attorneys' statement at the plea hearing that based on conversations between Shelby and his attorney, his attorney "[thought] a guideline prison sentence in this case . . . *could* be 168 months or 180 months." (Emphasis added).

At the outset, we note that this statement by Shelby's attorney is equivocal and is not a guarantee of any particular sentence. As we have previously discussed, Shelby's attorneys testified at the postconviction hearing that they repeatedly informed Shelby both before and after the plea hearing that no sentence was guaranteed as part of the straight plea, and the postconviction court found the testimony of Shelby's attorneys to be credible.

Shelby's lead attorney admitted that he did not know Shelby's criminal-history score at the time of the plea hearing. Shelby's lead attorney stated the reason for his lack of knowledge was that a presentence investigative report (PSI) had not been completed before the plea hearing. The postconviction court took judicial notice that obtaining a PSI before a plea hearing was not a standard practice in Ramsey County.

Shelby's second attorney testified that she reviewed the sentencing guidelines with Shelby and informed him that the sentence "would be in accordance with where his criminal history fell." Shelby's second attorney testified that she was basing her sentencing estimates on her discussions with Shelby about his criminal history prior to Shelby's plea hearing. Further, the plea petition Shelby signed before his plea hearing indicated that there were "no agreements" with the state about a sentence, and that the maximum penalty he faced was 30 years in prison.

At the postconviction evidentiary hearing, Shelby did not discuss his alleged misunderstanding about the 168- or 180-month sentencing timeframe. Instead, Shelby

repeatedly testified that his attorneys informed him “the only way they could keep [Shelby] out of prison” was if he pleaded guilty. Shelby testified that he understood this to mean that if he pleaded guilty, probation was “guaranteed.”

The Minnesota Supreme Court has been “unwilling to hold that a defendant must be questioned by the trial court at the time he enters his guilty plea to insure that he understands what the presumptive sentence is under the Minnesota Sentencing Guidelines.” *State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983). Also, we observe that Shelby fails to acknowledge that in his motion for a downward dispositional departure, which was filed after the plea was entered but before it was accepted by the district court, Shelby identified that the presumptive middle-of-the-box sentence would be 234 months, which is the correct presumptive sentence for a first-degree criminal sexual conduct offender with Shelby’s criminal-history score. *See* Minn. Sent. Guidelines 4.B (2014). The PSI, which Shelby received before sentencing, also correctly identified the presumptive middle-of-the-box sentence as 234 months.

Shelby, therefore, knew before his sentencing hearing what his presumptive sentence would be if the district court did not grant his motion for a downward dispositional departure. He made no mention of his claimed misunderstanding at the sentencing hearing, despite ample opportunity to do so before the district court accepted his plea and ruled on his motion for a downward dispositional departure. Therefore, this misstatement by Shelby’s attorney at the plea hearing regarding the potential sentence, without more, is insufficient to rise to the level of manifest injustice necessary to render Shelby’s plea invalid. *Cf. Trott*, 338 N.W.2d at 252–53 (concluding that defendant not entitled to

withdraw plea after mistake as to presumptive sentence when defendant informed of mistake before sentencing).

Shelby finally argues that his attorneys and the district court failed to advise him of the fact that, because he was currently on probation for domestic assault at the time he committed the criminal conduct, his motion for a downward dispositional departure was less likely to be granted.

Shelby provides no legal authority for the position that either his attorneys or the district court has a responsibility to inform Shelby in advance of what the “odds” are that his motion for downward dispositional departure would be granted, and we are unable to find any such authority.

In sum, Shelby’s arguments fail to rise to the level of manifest injustice necessary to render Shelby’s plea invalid.

II.

Shelby next argues that he must be allowed to withdraw his plea because he received ineffective assistance of counsel. We disagree.

“A defendant’s guilty plea may be constitutionally invalid if the defendant received ineffective assistance of counsel.” *Sames v. State*, 805 N.W.2d 565, 567 (Minn. App. 2011), *review denied* (Minn. Dec. 21, 2011). Appellate courts “review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact.” *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013). However, a postconviction court’s factual findings, including

credibility determinations, will not be reversed unless clearly erroneous. *Bobo*, 860 N.W.2d at 684.

For Shelby to demonstrate that his counsel was ineffective, he must show *both* that his “(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 Shelby cannot demonstrate his counsel’s performance was objectively unreasonable, we need not address the effect of that performance on the outcome. *Id.* “There is a strong presumption that a counsel’s performance falls within the wide range of ‘reasonable professional assistance.’” *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Shelby argues that his counsel’s performance fell below an objective standard of reasonableness because his counsel had no reasonable basis to advise Shelby that he would receive a probationary sentence if he pleaded guilty. An unqualified promise of a particular sentence can be grounds for an ineffective assistance of counsel claim. *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, Shelby’s attorney testified that he made no promises to Shelby with regard to a potential sentence, and the postconviction court found this testimony to be credible. This credibility determination is supported by the record, and is not clearly erroneous.

Shelby’s attorney testified that, in his opinion, entering a straight plea and moving the district court for downward dispositional departure, rather than going to trial on three counts of first-degree criminal sexual conduct and attempting to overcome a post-*Miranda*

confession, was Shelby's best chance at leniency.¹ It is perhaps true that Shelby's attorney was more confident in the chances of success on a motion for downward dispositional departure than the average attorney would have been in his situation. However, the postconviction court ultimately agreed that the strategy employed by Shelby's attorney was reasonable, stating that "[i]f [Shelby] wanted to avoid prison, his most viable option was to plead guilty and attempt to convince the [district court] to depart" based on amenability to probation.

We conclude that the actions of Shelby's counsel do not depart from the actions of a reasonable attorney to a degree sufficient to overcome the strong presumption of attorney competence.

Affirmed.

¹ Shelby does not suggest at any point in his brief that this confession does not exist, is not valid, or is inadmissible.