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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0495**

Tony Terral Kelly, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 4, 2017
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CR-13-27546

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

Considered and decided by Smith, Tracy M., Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from the denial of his petition for postconviction relief, appellant Tony Terral Kelly argues that he received ineffective assistance of counsel at sentencing because

his attorney failed to (1) move for a continuance and (2) identify mitigating sentencing factors and argue for a downward durational departure from the presumptive sentence. We affirm.

FACTS

Kelly was arrested and charged with first-degree controlled-substance crime after police saw him sitting in his vehicle with cocaine on his lap. Kelly appeared for a jury trial on August 25, 2014, and, after conferring with his attorney, entered a straight guilty plea. Upon accepting the plea, the district court said to Kelly:

If you do appear [for sentencing] and also cooperate with the Pre-Sentence Investigation and it's a favorable one, the Court will look favorably at the very least I would give you the lower end of the bottom of the box, but I would consider a downward durational departure understanding however that because of the prior Felony there is no, the Court's not considering a probationary sentence, you understand that, right?

The district court scheduled Kelly's sentencing hearing for October 23, 2014.

At the sentencing hearing, the district court noted that the presentence investigation (PSI) had not been completed because the contact information Kelly gave to his probation officer was incorrect. The telephone number that Kelly provided did not "accept calls," and a letter sent to Kelly at the address he provided was returned because it had "an improper address." The district court also noted that Kelly's criminal-history score was four, rather than three. The lower score, which the parties had relied on at the plea hearing, failed to account for the fact that Kelly committed the current offense while on probation for a prior offense.

At the sentencing hearing, the prosecutor objected to Kelly receiving any sentence that constituted a downward durational departure, arguing that there were no factual grounds for departure from the presumptive sentence. Kelly's attorney asked for an 82-month sentence, which had been alluded to, although not agreed upon, at Kelly's plea hearing when the parties were mistaken about Kelly's criminal-history score. Kelly's attorney conceded that it was Kelly's obligation "to make the PSI," and informed the district court that Kelly attempted to contact his probation officer two weeks before the sentencing hearing but was told that there was not enough time to complete the PSI before the hearing.

The district court imposed the presumptive 114-month executed sentence, stating that there was no factual basis to support imposing a downward durational departure from that sentence. The district court noted that the sentence was at the bottom of the presumptive-sentence range based on the severity level of the offense and Kelly's criminal-history score. *See* Minn. Sent. Guidelines 4.A. (2012) (establishing a presumptive-sentence range of 114-160 months for a first-degree controlled-substance crime when the offender has a criminal-history score of four).

In seeking postconviction relief, Kelly now argues that his attorney was ineffective because he failed to (1) move for a continuance of the sentencing hearing in order to complete the PSI and (2) identify mitigating factors that would have supported a downward durational departure and make an argument at the sentencing hearing to support a durational departure. The district court denied the petition without an evidentiary hearing.

DECISION

An appellate court reviews a postconviction court's denial of a petition for postconviction relief for abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). Abuse of discretion occurs when the postconviction court "exercise[s] its discretion in an arbitrary or capricious manner, base[s] its ruling on an erroneous view of the law, or ma[kes] clearly erroneous factual findings." *Id.* (quotation omitted).

"Trial counsel is ineffective if [counsel's] representation fell below an objective standard of reasonableness and a reasonable probability exists that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Pearson*, 891 N.W.2d at 600. Because these two requirements involve mixed questions of law and fact, the postconviction court's analysis of them is subject to de novo review. *Id.* But the postconviction court's findings of fact are subject to the clearly erroneous standard. *Id.* An appellate court "need not address both requirements if one is determinative." *Id.*

Kelly cannot satisfy either requirement. There is no evidence that Kelly's attorney's performance fell below an objective standard of reasonableness. This standard calls for "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Reed v. State*, 793 N.W.2d 725, 733 (Minn. 2010) (quotation omitted). Kelly argues that his attorney "provided ineffective counsel by failing to seek a continuance of [his] sentencing so that a PSI could be conducted and by failing to make reasonable efforts to present mitigating factors which might have supported a downward durational departure."

Failure to seek a continuance

When Kelly appeared for sentencing, he had already had nearly two months to cooperate with probation to complete his PSI, and the PSI was not completed. Kelly argues on appeal that the failure to complete a PSI before sentencing “was not due to [his] refusal to cooperate with the PSI, but to a difficulty in communication between the PSI investigator and [Kelly].” At the sentencing hearing, however, Kelly asserted only that he could not receive calls and mail at the telephone number and address that he provided to the court; he did not provide details as to why he did not contact probation about the PSI until two weeks before sentencing. As the postconviction court explained, the fact that Kelly could not receive telephone calls or mail did not explain why he had not contacted probation sooner. The court found that if Kelly had intended to cooperate with the PSI, he had ample time to contact his probation officer or his attorney, and he failed to do so.

Kelly also argues on appeal that because his “failure to complete the PSI was accidental,” his attorney should have sought a continuance. This argument is not supported by the district court record. At the plea hearing, the district court twice told Kelly that the PSI would take at least seven weeks to complete. The district court then set the sentencing hearing for eight weeks later. Kelly was on notice when he pleaded guilty that he needed to do his part to complete the PSI before the sentencing hearing, but he failed to do so.

Because there was no factual basis to support Kelly’s claims that the failure to complete the PSI was not due to his failure to cooperate with the PSI or that his failure to complete the PSI was accidental, Kelly’s attorney’s decision to not seek a continuance did not fall below an objective standard of reasonableness. It was not unreasonable to not seek

a continuance when the district court had explicitly directed Kelly to cooperate with the PSI and there was no evidence that Kelly was prevented from cooperating with the PSI.

Because there was no factual basis to support a request for a continuance, Kelly has also failed to show that there is a reasonable probability that, but for his attorney's failure to request a continuance, the result of the sentencing hearing would have been different. Nothing in the record suggests that, if Kelly's attorney had requested a continuance, a continuance would have been granted.

Failure to present mitigating sentencing factors to support a departure

Kelly argues that his attorney failed to identify and argue mitigating factors that would have supported a downward sentencing departure. In requesting a departure at the sentencing hearing, Kelly's attorney directed the court's attention to the fact that Kelly eventually contacted his probation agent to initiate the PSI and emphasized that "[i]t wasn't a situation where [Kelly] was completely blowing it off."

Kelly argued to the postconviction court that his personal circumstances would have warranted a downward durational departure. But, as the postconviction court recognized, "[a] durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Kelly's personal circumstances were not a permissible basis for a durational departure.

Kelly also argued to the postconviction court that the amount of cocaine found in his possession (29.2 grams) did not significantly exceed the statutory threshold of 25 grams for a first-degree offense, Minn. Stat. § 152.021, subd. 2(a)(1) (2012), and his attorney

should have asserted that fact as a basis for a downward durational departure. But a court must impose a sentence within the presumptive-sentence range unless there are “identifiable, substantial, and compelling circumstances to support a sentence outside the appropriate range.” Minn. Sent. Guidelines 2.D.1 (2012). “A downward durational departure is justified only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Solberg*, 882 N.W.2d at 624 (quotation omitted).

The postconviction court found that the 29.2 grams of cocaine that Kelly possessed exceeded the statutory threshold by nearly 20% and rejected Kelly’s argument that exceeding the threshold by only 4.2 grams was a basis for a downward durational departure. Kelly does not cite any authority that indicates how much cocaine is typically involved in a first-degree controlled-substance crime or that suggests that exceeding the statutory threshold by 4.2 grams is significantly less serious conduct than the conduct typically involved in a first-degree controlled-substance crime.

Because neither of the factors that Kelly argues his attorney should have argued to the district court was a mitigating factor that would have supported a downward durational departure, Kelly’s attorney’s failure to identify and argue these factors to the district court at sentencing did not fall below an objective standard of reasonableness. There is not a reasonable probability that, if these factors had been argued, Kelly would have received a downward durational sentencing departure. The postconviction court did not abuse its discretion when it denied Kelly’s petition for postconviction relief.

Affirmed.