STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1777

Charles Winston, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 1, 2018
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-15-9534

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Rodenberg, Judge; and Connolly, Judge.

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

JOHNSON, Judge

In 2016, Charles Winston pleaded guilty to second-degree controlled-substance crime. Before sentencing, he moved to withdraw his guilty plea, but the district court

denied the motion. In 2017, he petitioned for post-conviction relief on the ground that the attorney who represented him in 2016 provided him with ineffective assistance of counsel during the period of time between his plea hearing and his sentencing hearing. The post-conviction court denied the petition. We affirm.

FACTS

In April 2015, the state charged Winston with second-degree controlled-substance crime, in violation of Minn. Stat. § 152.022, subd. 1(1) (2014). The complaint alleged that Winston sold crack cocaine to an undercover police officer on three occasions. Winston and the state entered into a plea agreement in which the state agreed to recommend a sentence of 60 months of imprisonment, which was a downward durational departure from the applicable presumptive guidelines range. *See* Minn. Sent. Guidelines 4.A. (2014). In addition, the state agreed to dismiss four other pending criminal charges against Winston.

At a plea hearing on January 7, 2016, the district court accepted Winston's plea and placed him on conditional release pending sentencing. At the conclusion of the plea hearing, the district court cautioned Winston that he was required to abide by the terms of the plea agreement and to appear for his sentencing hearing:

> I know you understand I'm willing to go along with the plea agreement, including this conditional release that was agreed upon by you and the State. However, *if you don't show up for sentencing, if you don't remain law abiding, and if you don't cooperate, you are facing a very long prison sentence.* And that's the sentence you'll receive. All right. *So I'll see you then on February 24th at 1:30.*

After the plea hearing and while on conditional release, Winston initiated an exchange of e-mail messages with his attorney. On January 14, 2016, he wrote to say that

he was "not feeling good at all" about his guilty plea, that he felt "like [he] did the wrong thing," and that "the time does not add up for the crime." His attorney responded the next day, saying that "60 months is a lot" but that Winston would be "in a much worse position" if there were no agreement on a sentence. On January 20, Winston wrote again, saying, in part, "I'll turn myself in right now . . . the deal is off . . . way too much time." His attorney responded one minute later, saying: "I understand that 60 [months] is a lot, but you will get something much, much worse from the judge. He told you that, and I believe him. It's the least-bad alternative." Winston replied a few minutes later, saying: "I'll take my chances how do we proceed." His attorney responded again six minutes later, explaining that because Winston had five pending cases, the plea agreement was "the best deal possible" and that, if Winston were to withdraw his guilty plea, he might receive a sentence of 100 months or more, which she described as "not a good outcome." Winston and his attorney exchanged three more e-mail messages that day, and she agreed to look into whether Winston would be "eligible for boot camp."

Winston sent his attorney a follow-up e-mail message on January 25. His attorney responded the next day, saying, "I am working on it," and describing her efforts. Winston replied the following day and also sent a follow-up e-mail message on February 4. His attorney responded the next day, saying that she had been in trial all week and was "playing phone tag" with an employee of the department of corrections. Winston sent two more e-mail messages on February 6 and February 8, in which he reiterated that he was "not happy" about "this situation." He sent another follow-up message on February 12. His attorney responded that day with a three-paragraph message concerning the possibility of

boot camp and the benefits of not seeking to withdraw his guilty plea. On February 15, Winston sent two more e-mail messages. In the first, he wrote, "I don't want this deal no more we need to get back in court today . . . I'm ready to turn myself in now." In the second, he wrote, "Email who you need to . . . I'll be waiting to turn myself in asap." No further responses from Winston's attorney are in the record.

On February 24, Winston did not appear for his sentencing hearing. A bench warrant was issued, and Winston was arrested on March 22. The district court rescheduled his sentencing hearing for April 5. One day before the rescheduled sentencing hearing, Winston's attorney filed a written motion to withdraw Winston's guilty plea. In the accompanying memorandum of law, Winston's attorney argued that it would be "fair and just" to permit Winston to withdraw his guilty plea because "he was pressured into taking a plea offer he did not fully understand" and because "he was rushed into making a decision about pleading guilty."

At the beginning of the sentencing hearing on April 5, counsel for the parties presented their oral arguments on Winston's motion. After stating that it had reviewed the motion filed by Winston's attorney, the district court orally denied the motion on the ground that Winston "fully understood the plea agreement, which was a very favorable agreement to him." The district court also noted that the agreement gave Winston an opportunity to be released for a period of time before being sentenced.

The district court then proceeded to the issue of sentencing. The prosecutor requested a presumptive sentence in light of Winston's failure to appear for the originally scheduled sentencing hearing. Winston's attorney requested a 60-month sentence, as

agreed upon earlier, or, in the alternative, the shortest presumptive sentence. When the district court gave Winston an opportunity for allocution, he stated that he had not wanted to plead guilty and that, after he did so, he e-mailed his attorney to say that he instead wanted to go to trial. His attorney interjected to say that she and Winston "were having some email discussions back and forth" before the originally scheduled sentencing hearing but had "not reached a final resolution on that." The district court imposed a sentence of 108 months of imprisonment, which is within the applicable presumptive guidelines range. *See* Minn. Sent. Guidelines 4.A. (2014).

In March 2017, Winston filed a post-conviction petition. He claims that the attorney who represented him at his plea hearing and his sentencing hearing provided him with ineffective assistance of counsel when she "failed to respond to his email request about turning himself in and withdrawing his guilty plea prior to sentencing." He requested relief in the form of leave to withdraw his guilty plea or, in the alternative, the 60-month sentence that was part of the plea agreement. Winston submitted an affidavit in which he stated that he did not appear at the sentencing hearing scheduled for February 24, 2016, "because I had not yet heard back from [my attorney] about my desire to turn myself in and withdraw my plea." The post-conviction court denied Winston's petition in a 12-page order, without an evidentiary hearing. Winston appeals.

D E C I S I O N

Winston argues that the post-conviction court erred by denying his post-conviction petition.

A criminal offender may file a post-conviction petition to challenge his criminal conviction. Minn. Stat. § 590.01, subd. 1 (2016). A post-conviction petition "shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired." Minn. Stat. § 590.02, subd. 1(1) (2016). "All grounds for relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein." *Id.* "[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2016). A post-conviction court, in its discretion, "may receive evidence in the form of affidavit, deposition, or oral testimony." *Id.* A district court may deny a petition for post-conviction relief without an evidentiary hearing if "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Id.*, subd. 1; *see also Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). As a general rule, this court applies an abuse-of-discretion standard of review to a post-conviction court's denial of relief. *Sanchez v. State*, 890 N.W.2d 716, 719-20 (Minn. 2017). We apply a *de novo* standard of review to a post-conviction court's determination of a claim of ineffective assistance of counsel if such a claim presents a mixed question of law and fact. *See Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017).

The underlying basis of Winston's post-conviction petition is his claim of ineffective assistance of counsel in violation of the Sixth Amendment to the United States Constitution. Winston intersperses his argument with references to a defendant's right to withdraw a guilty plea to correct a manifest injustice, *see* Minn. R. Crim. P. 15.05, subd. 1, which exists if a guilty plea is inaccurate, unintelligent, or involuntary, *Dikken v. State*,

896 N.W.2d 873, 876 (Minn. 2017); *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). But Winston does *not* allege that his attorney provided him with ineffective assistance *before* or *at the time of* his guilty plea, which, if true, would establish that his guilty plea is invalid because it was involuntary. *See, e.g.*, *Hill v. Lockhart*, 474 U.S. 52, 57, 106 S. Ct. 366, 369 (1985). Instead, Winston alleges that his attorney provided him with ineffective assistance *after* his guilty plea, while he was awaiting sentencing. Specifically, he alleges that his attorney was ineffective on the ground that she was not more responsive to his e-mail messages, in which he expressed his desire to withdraw his guilty plea and go to trial, and did not file a motion for leave to withdraw his guilty plea before his originally scheduled sentencing hearing. His preferred remedy for the alleged ineffectiveness is the withdrawal of his guilty plea. His alternative remedy is a 60-month sentence. We will apply the relevant legal principles to his particular factual allegations and requests for relief.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. A criminal defendant's "'right to counsel is the right to the effective assistance of counsel.'" *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)). A defendant claiming a violation of his constitutional right to the effective assistance of counsel must satisfy two requirements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel"

> guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064; *see also State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). A court need not analyze both requirements if a petitioner is unable to satisfy one of the requirements. *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010).

To satisfy the first requirement, Winston must prove that his attorney did not "exercis[e] the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). As described above, the record reveals that Winston's attorney promptly and thoughtfully responded to most of Winston's e-mail messages. Accordingly, Winston's ineffectiveness argument focuses on the latter part of the correspondence and his allegation that his attorney did not respond to the last two e-mail messages he sent, both of which were dated February 15, which was nine days before the scheduled sentencing hearing.

Winston does not cite any caselaw that would support the conclusion that the attorney's non-responsiveness between February 15 and February 24 is deficient *per se*, and we are not aware of any such caselaw. If we consider the factual record in light of our understanding of the "customary skills and diligence that a reasonably competent attorney would perform under similar circumstances," *id.* at 70, we could identify possible reasons why an attorney might not continue to engage in an exchange of e-mail messages during that nine-day period. Among them is the possibility that the attorney decided to wait until

the day of the sentencing hearing and then speak with Winston in person, which might allow for a more productive conversation. *See* Minn. R. Prof. Conduct 1.2(a), 1.4. Based on our review of the e-mail correspondence, there is no apparent reason why the attorney would expect Winston not to appear at his sentencing hearing. In fact, Winston repeatedly expressed his desire to "turn [him]self in." We can only speculate about the actual reason or reasons why Winston's attorney did not respond to his February 15 e-mail messages or did not file a motion to withdraw based on Winston's expressed desire to repudiate the plea agreement. The attorney did not testify or otherwise make a statement about the matter because the post-conviction court did not conduct an evidentiary hearing and because neither party submitted an affidavit of the attorney.

In any event, Winston cannot satisfy the second requirement of an ineffectiveness claim, which requires a petitioner to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068; *see also Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013). In the context of this case, Winston must show that there would have been a different result if his attorney had either responded to his February 15 e-mail messages before the originally scheduled date of his sentencing hearing or filed a motion to withdraw the guilty plea before the originally scheduled sentencing hearing.

Winston cannot demonstrate that the result of his case would have been different if his attorney had filed a motion to withdraw his guilty plea before the February 24 sentencing hearing. Winston's attorney actually filed a motion to withdraw the guilty plea on April 4, and the district court denied the motion. Winston has not explained why the

district court would have granted the motion if Winston's attorney had filed it at an earlier date. Also, Winston does not argue that the district court erred by denying the motion at the April 5 sentencing hearing. Accordingly, we must assume that, if Winston's attorney had filed the motion at an earlier date, the district court would have denied the motion for the same reasons that it denied the motion at a later date.

Winston also cannot demonstrate that the result of his case would have been different if his attorney had responded to his February 15 e-mail messages before the February 24 sentencing hearing. Winston contends that he would have appeared for his sentencing hearing on February 24 if his attorney had responded to his February 15 e-mail messages. But that contention is illogical and unreasonable. Winston was required to appear for his sentencing hearing regardless of whether his attorney responded to his e-mail messages. As described above, the district court took pains to impress that obligation on Winston at the conclusion of the plea hearing, telling him, "if you don't show up for sentencing, . . . you are facing a very long prison sentence," and "I'll see you then on February 24th at 1:30." Winston acknowledged in writing his receipt of a notice stating that he "must report to court" for sentencing on February 24, 2016, at 1:30 p.m. There is no valid reason why his attorney's alleged non-responsiveness should have caused Winston to believe that he was not obligated to appear for sentencing or to believe that his failure to appear would not have adverse consequences. Winston's failure to appear for his sentencing hearing was the reason why he was sentenced to 108 months of imprisonment instead of 60 months.

Thus, Winston cannot satisfy the second requirement of an ineffectiveness claim, which requires him to "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. Accordingly, "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1.

Before concluding, we note that Winston has filed a *pro se* supplemental brief with several additional arguments. In response, the state argues that Winston did not preserve those arguments by including them in his post-conviction petition. We agree. Winston's post-conviction petition alleged only one claim: that his attorney provided him with ineffective assistance of counsel. A post-conviction petitioner may not raise issues for the first time on appeal. *Taylor v. State*, 910 N.W.2d 35, 38 (Minn. 2018). Thus, Winston's *pro se* arguments have been forfeited.

In sum, the post-conviction court did not err by denying Winston's petition without an evidentiary hearing.

Affirmed.