STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0537

Louis Ambrose, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 10, 2018
Affirmed
Connolly, Judge

Ramsey County District Court
File No. 62-CR-11-6509

Louis Ambrose, Fairbault, Minnesota (pro se appellant)

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

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

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

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

CONNOLLY, Judge

Appellant, pro se, challenges the district court's denial of his motion to correct his sentence and for postconviction relief arguing that: (1) he was convicted under the wrong

statute; (2) he received an illegal sentence which violated double jeopardy; (3) his criminal-history score was improperly calculated; (4) the restitution order should be reversed because payment of restitution was not part of his plea agreement; (5) his trial and appellate counsel were ineffective; and (6) the sentencing judge had a conflict of interest that invalidated his conviction. Because there was no abuse of discretion in the denial of appellant's motion, we affirm.

FACTS

In August 2011, appellant Louis Ambrose and his girlfriend had an argument at her home. Later that day, appellant started a fire inside the home and intentionally prevented her from leaving the home by blocking her access to the front door. Appellant pleaded guilty to attempted second-degree intentional murder in violation of Minn. Stat. §§ 609.17, subd. 1, .19, subd. 1(1) (2010), and in exchange the state dismissed a charge of arson. The underlying facts for the conviction are set forth in *State v. Ambrose*, No. A17-0568, 2017 WL 3974323 (Minn. App. Sept. 11, 2017), *review denied* (Minn. Nov. 28, 2017).

The district court sentenced appellant to 173 months in prison and ordered restitution in an amount to be determined. After receiving evidence of the damage caused, the district court ordered appellant to pay $1,111.41 in restitution to the building owner. Appellant did not pursue a direct appeal from his conviction or sentence.

Between June and August 2015, appellant filed multiple pro se motions to correct his sentence. *See* Minn. R. Crim. P. 27.03, subd. 9. The district court denied the motions, and appellant appealed, pro se. We reversed and remanded because the record was unclear

regarding whether appellant had been informed of his right to counsel. *Ambrose v. State*, No. A15-1972 (Minn. App. July 20, 2016) (order opinion).

In October 2016, appellant, with the assistance of counsel, filed a motion to correct his sentence. Appellant also filed additional pro se motions to correct his sentence between January 2016 and January 2017. In February 2017, the district court issued an order denying appellant's counseled motion and his pro se motions. We affirmed the district court's order. *Ambrose*, 2017 WL 3974323, at *5.

In December 2017, appellant filed a pro se motion challenging his criminal-history score, contending that he was sentenced under the wrong criminal statute, and requesting a sentence reduction to one year and one day. Appellant failed to properly file the motion or serve it on the state. After being informed of the motion by the district court, the state opposed it on the grounds of improper service.

On January 2, 2018, appellant filed an additional pro se motion again challenging his criminal-history score. He failed to serve this motion on the state as well. On January 18, appellant filed a document labeled "Addendum" and "Notice of Motion 590.2," which again requested resentencing on the grounds asserted in the motion and also raised claims of ineffective assistance of counsel and a conflict of interest of the judge. The addendum was served on the state. The district court denied appellant's motion on its merits rather than on grounds of improper service. This appeal follows.

D E C I S I O N

First, appellant argues that the district court erred by sentencing him under the wrong statutes and that his sentence was a violation of double-jeopardy protections. The

district court denied appellant's motion to correct his sentence. We review the denial of a motion to correct a sentence for an abuse of discretion. *Evans v. State*, 880 N.W.2d 357, 359 (Minn. 2016). Minnesota Rule of Criminal Procedure 27.03, subdivision 9, provides "that the district court may at any time correct a sentence not authorized by law." *Id.* "For a sentence to be unauthorized, it must be contrary to law or applicable statutes." *Id.*

Appellant argues that he should have been sentenced under Minn. Stat. § 609.11, subd. 4 (2010):

> Any defendant convicted of an offense listed in subdivision 9 in which the defendant . . . used . . . a dangerous weapon other than a firearm, shall be committed to the commissioner of corrections for not less than one year plus one day, nor more than the maximum sentence provided by law.

Appellant appears to argue that, because he was convicted of second-degree murder (which is one of the offenses listed in subdivision 9) and he used fire (a dangerous weapon), he should have been given the mandatory minimum sentence of one year plus one day. Appellant also argues that his sentence was illegal and a violation of double-jeopardy protections because it was "from two statute[s] out of one count."

Appellant's arguments fail. Appellant's conviction is proper for the two statutes to which he pleaded guilty. Appellant pleaded guilty to attempted second-degree murder under Minn. Stat. § 609.17 (2010) (criminal statute for attempt) and Minn. Stat. § 609.19 (2010) (criminal statute for murder in the second degree), which carries a maximum term of 240 months imprisonment under Minn. Stat. § 609.17, subd. 4(1). Pursuant to a negotiated plea agreement, appellant was sentenced to a presumptive sentencing guidelines low-end of the box term of 173 months in prison. Because the sentence is not contrary to

law or applicable statutes, the district court did not abuse its discretion in denying appellant's motion to correct his sentence.

Next, appellant challenges his criminal-history score arguing that (1) he was not convicted of two of the four misdemeanors that contributed to this criminal-history score; and (2) his 1999 conviction for third-degree burglary was changed from a felony to a gross misdemeanor. We review the district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Drljic*, 876 N.W.2d 350, 353 (Minn. App. 2016). A defendant's criminal-history score is the sum of points from eligible prior felonies, his custody status at the time of the offense, prior misdemeanors and gross misdemeanors, and prior juvenile adjudications. Minn. Sent. Guidelines 2.B. (2018). Appellant's criminal-history score was determined to be five: one custody-status point; one point for a third-degree burglary conviction in 1999; one and one-half points for a third-degree controlled-substance crime in 1999; one-half point for a fifth-degree controlled-substance crime in 2007; and one point from four misdemeanor units, which include a domestic assault and a violation of an order for protection in 2003.

The only evidence appellant submitted to support his claim is a sentencing worksheet on which he circled the two 2003 misdemeanor convictions, noting that he was not convicted, and the 1999 felony conviction, noting that it was turned into a gross misdemeanor. We agree with the district court's determination that appellant failed to set forth any grounds to change his criminal-history score.

Nevertheless, to address the merits of appellant's claim, we reviewed all three offenses in his criminal record. Despite his assertion, appellant was convicted of a

misdemeanor for domestic assault and a misdemeanor for violation of a protective order in 2003 and his 1999 conviction for burglary in the third degree is correctly characterized as a felony. Consequently, the district court did not abuse its discretion in determining that appellant's criminal-history score was five.

Next, appellant challenges his order to pay restitution because "paying restitution wasn't part of [his plea] deal." We previously concluded that the restitution ordered was lawfully imposed. *Ambrose*, 2017 WL 3974323, at *2-3. Accordingly, we construe appellant's argument as challenging the validity of his guilty plea. "To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent. A defendant bears the burden of showing his plea was invalid. Assessing the validity of a plea presents a question of law that [an appellate court] review[s] de novo." *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010) (citations omitted).

District courts have "wide discretion in ordering restitution and determining the appropriate amount of restitution." *State v. Anderson*, 507 N.W.2d 245, 246 (Minn. App. 1993), *review denied* (Minn. Dec. 22, 1993). Because a plea agreement is considered analogous to a contract between the state and a defendant, alteration of one term may alter the nature of the entire agreement. *State v. Meredyk*, 754 N.W.2d 596, 603 (Minn. App. 2008). Accordingly, this severely limits the district court's otherwise broad discretion to modify restitution after the district court accepts a plea agreement that expressly calls for a specific, bargained-for restitution amount. *Id.* "[A] district court generally should not alter the terms of a restitution obligation negotiated as part of a plea agreement if it materially changes the expectations of the parties to the bargain." *Id.* at 604.

Appellant's plea petition did not call for a specific, bargained-for restitution amount because it did not address restitution. On December 16, 2011, the district court sentenced appellant and left the issue of restitution open for 90 days. At the sentencing hearing, after appellant expressed confusion about restitution, the district court explained:

> THE COURT: And I'm also going to order restitution in an amount to be determined by probation within 90 days from today's date. If you have an objection to the amount you could ask [your lawyer] to bring the matter back before me for a restitution hearing.
> APPELLANT: Okay.
> THE COURT: Mr. Ambrose, do you have any questions?
> APPELLANT: Nope.

After the Ramsey County Community Corrections filed a request for restitution on behalf of the building owner, the district court ordered appellant to pay him $1,111.41 in restitution. Appellant made restitution payments on July 24, 2013, October 11, 2013, January 17, 2014, and April 30, 2014. Appellant first challenged his restitution obligation on May 15, 2015, "because this was not what [he pleaded] to."

State v. Chapman, 362 N.W.2d 401 (Minn. App. 1985) discusses plea agreements accepted with no mention of restitution.

> While the condition of restitution of a small amount might be acceptable because it would not necessarily materially alter the expectations of the parties to the bargain, restitution of a large amount should have been part of the plea bargain or the possibility of its inclusion as a condition of probation made known and agreed to by the bargainers.

Chapman, 362 N.W.2d at 404 (quoting *United States v. Runck*, 601 F.2d 968, 970 (8th Cir. 1979)). In *Chapman*, the amount of the contested restitution was about $31,000, which the

court characterized as "substantial." *Id.* Here, the amount of restitution is much smaller than the amount in *Chapman* and unlikely to materially alter the expectations of the parties.

In *State v. Anderson*, the defendant was ordered to pay $10,227.12 in restitution when restitution had not been contemplated during plea negotiations. 507 N.W.2d at 246. We affirmed, noting that the record suggested that the defendant "should have been aware that the victim might seek and the court might order restitution." *Id.* at 247. As in *Anderson*, appellant should have been aware that the district court might order restitution because it told him during sentencing that restitution might be ordered, and when asked if he had any questions, he responded, "Nope." Despite this warning during his December 2011 hearing, appellant did not object to the restitution until May 2015. We conclude that the district court did not abuse its discretion in ordering restitution because the order did not materially change the expectations of the parties to the bargain and appellant did not object to it for more than three years.

Additionally, appellant argues that the state violated the plea deal by asking him about the arson and using it to convict him. This argument fails. Although the state agreed to dismiss the charge of arson, the plea agreement does not stop the state from eliciting information regarding the underlying facts of the attempted second-degree murder. The attorney was asking questions of appellant to establish proof of guilt of the attempted second-degree murder, not the dismissed charge of arson.

Next, appellant seeks postconviction relief claiming his sentencing judge had a conflict of interest and his trial and appellate counsel were ineffective, all of which invalidate his conviction. A criminal offender may file a postconviction petition to

challenge his criminal conviction. Minn. Stat. § 590.01, subd. 1 (2018). A postconviction 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) (2018). "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 (2018). A district court may deny a petition for postconviction relief without an evidentiary hearing if "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Id.*, subd. 1 (2018). As a general rule, we apply an abuse-of-discretion standard of review to a postconviction court's denial of relief. *Sanchez v. State*, 890 N.W.2d 716, 719-20 (Minn. 2017).

Appellant raises these challenges about six years after his conviction. Although it addressed the merits of his claims, the district court noted that any petition for postconviction relief is time-barred. Minn. Stat. § 590.01, subd. 4(a) (2018) prohibits the filing of a petition "more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." But there are several exceptions to the statutory time limitation, such as for newly discovered evidence, a change in the law, or the filing was precluded by a physical disability. Minn. Stat. § 590.01, subd. 4(b) (2018). "A lengthy delay in filing a petition for postconviction relief may in itself provide a sufficient basis for affirming the

dismissal of the petition when there has already been a direct appeal." *Sutherlin v. State*, 574 N.W.2d 428, 432 (Minn. 1998).

Appellant claims he was not able to ask the court to review his case in 2013-2014 because he had at least two strokes and a blood clot in his head. He submits medical documentation to support his claim. It appears appellant's initial visit for these concerns was in August 2013. Even if appellant's claim of physical disability during 2013-2014 were a sufficient exception to the statutory time limitation, it does not explain why he failed to file for postconviction relief when he began filing *pro se* motions to correct his sentence in June 2015. Although appellant's claims appear to be time-barred, we will evaluate the merits of the issues raised. *See id.* at 433 (deciding to evaluate the merits of petitioner's claims although his ten-year delay "alone may be sufficient grounds" for dismissing his petition).

The district court did not have an evidentiary hearing or make any factual findings regarding appellant's claims of conflict of interest or ineffective assistance of counsel. The district court concluded that although appellant's filing referenced claims of conflict of interest and ineffective assistance of counsel, the only relief sought was a sentence reduction, and "none of these claims entitle [appellant] to a reduction of sentence."

Appellant argues that his sentencing judge had a conflict of interest because he had presided over appellant's fifth-degree controlled-substance case. "Criminal defendants have a constitutional right to be tried before a fair and impartial judge." *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). There is a presumption that a judge has discharged his or her judicial duties properly. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

The fact that the sentencing judge presided over another proceeding in itself does not show that he was not fair. *Cf. Johnson v. State*, 486 N.W.2d 825, 828 (Minn. App. 1992) ("The mere fact a judge presided at trial is not cause for removal in a postconviction proceeding."). Here, there was no trial, and the judge gave appellant a low-end-of-the-box guidelines sentence for a crime to which appellant pleaded guilty. Appellant fails to make any argument or cite to any facts that show the sentencing judge was biased or acted improperly. Furthermore, appellant's counsel never objected to the judge presiding or requested his recusal. Appellant's claim that his sentencing judge had a conflict of interest fails on the merits.

Appellant claims both his trial counsel and appellate counsel were constitutionally ineffective. "To prevail on a claim that his counsel was ineffective, appellant must demonstrate that (1) the attorney's performance fell below an objective standard of reasonableness; and (2) a reasonable probability exists that, but for the attorney's unprofessional error, the outcome would have been different." *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). Appellant claims his trial counsel was ineffective because "she let everything happen to [him]." Appellant provides no other facts or evidence to support his claim and fails to explain what his trial counsel did that was unreasonable. Appellant's allegation is nothing more than an argumentative assertion without factual support. *See Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995) ("The petitioner's allegations must be more than argumentative assertions without factual support.") (quotation omitted).

Appellant also claims his appellate counsel was ineffective because he told appellant that *State v. Moyer*, 298 N.W.2d 768 (Minn. 1980) was too old to be helpful to his case.

Appellant appears to mistakenly believe that *Moyer* entitles him to a mandatory minimum sentence of one year plus one day. *See Moyer*, 298 N.W.2d at 770. The district court correctly stated that "*Moyer* is a pre-guidelines case and does not therefore apply to [appellant's] sentence." *See* Minn. Sent. Guidelines 2 ("The presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by the Sentencing Guidelines in effect on the date of the conviction offense . . . ."). Appellant's appellate counsel appears to have correctly advised him of this. Appellant fails to make any other arguments about how his appellate counsel's performance was unreasonable.

Because appellant makes only argumentative assertions without factual support and the facts that he alleges would not entitle him to the requested relief, no evidentiary hearing on his postconviction petition was required. *See Sutherlin*, 574 N.W.2d at 436. The district court did not abuse its discretion in denying appellant's postconviction challenges because his petition and the files and records of the proceeding conclusively show that he is entitled to no relief.

Affirmed.