STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1177

Michael David Larson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 8, 2020
Affirmed
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CR-16-601

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

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

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

RODENBERG, Judge

Appellant Michael David Larson appeals from the district court's order denying him postconviction relief. Appellant argues that his *Alford* plea was induced by his counsel's inaccurate assurance that he would likely receive probation if he pleaded guilty to an amended charge and that he should therefore be allowed to withdraw the guilty plea. We affirm.

FACTS

On February 17, 2016, respondent State of Minnesota charged appellant with one count of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (2014). The complaint alleged that appellant had sexually assaulted A.P., the four-year-old child of J.P., with whom appellant previously had a relationship. A.P. lived with J.P. during the relationship.

Trial was scheduled for August 22, 2016. On that day, the state proposed to amend the complaint to add multiple counts of criminal sexual conduct. From 9:00 a.m. until 2:00 p.m., the parties negotiated, with attorney Kloster representing appellant. By the lunch hour, appellant's counsel felt as though appellant wanted to resolve the charges against him without a trial. The state eventually made two alternative plea offers to appellant: (1) plead guilty to second-degree criminal sexual conduct and support the plea with a full factual basis with the possibility of a 90-month prison sentence or (2) plead

guilty by way of an *Alford* plea to first-degree criminal sexual conduct with a sentencing cap of 144 months.[1]

By 2:00 p.m., the parties had reached an agreement. The agreement called for amendment of the complaint to add an additional charge of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2014), to which appellant would plead guilty. Conditioned on appellant pleading guilty to that charge by way of an *Alford* plea, the state agreed to dismiss the other count of first-degree criminal sexual conduct. Appellant entered an *Alford* plea to a charge of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g), because it allowed him to move for a stayed sentence under Minn. Stat. § 609.342, subd. 3 (2014), if, among other conditions, such a sentence would be in the best interests of the victim or the victim's family unit. The state agreed that it would seek only a 144-month prison sentence.

During the plea colloquy, the district court asked appellant if he had any questions and whether he was sure of his decision to plead guilty. Appellant said that he had no questions and that he wanted to plead guilty. Ms. Kloster also questioned appellant. Ms. Kloster asked appellant if he understood "that [the state] still thinks [he] should go to prison" and that she was "going to make an argument at sentencing that [appellant] should not go to prison." Appellant answered, "Yes." Ms. Kloster also asked appellant if he understood that it would be difficult to later change his decision to plead guilty, to which

[1] In limited circumstances, a criminal defendant may be allowed to plead guilty despite denying the facts alleged by the state in the criminal charge, so long as the record contains sufficient evidence of the defendant's guilt and the plea is entered "voluntarily, knowingly, and understandingly." *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970).

appellant answered, "Correct." Ms. Kloster asked appellant if he was "telling the Court today that no one's made any threats or promises to [him], [his] family, anybody [he] know[s] to force [him] to plead guilty?" Appellant answered, "Yes." Ms. Kloster also asked appellant if he was pleading guilty "based upon [his] own decisions, information that [he] ha[s] from [Ms. Kloster], and this agreement for the *Alford* plea." Appellant again answered, "Yes."

Appellant then admitted that the state had sufficient evidence to convict him at trial. He specifically acknowledged that the state would present at trial testimony from J.P. and A.P. and a recording of appellant confessing to having sexual contact or penetration with A.P. Appellant testified that J.P. was his ex-girlfriend and that he lived with both J.P. and A.P. for a short period of time. The district court accepted appellant's guilty plea.

On August 26, 2016, appellant moved for a dispositional departure under Minn. R. Crim. P. 27.03 and Minn. Stat. § 609.342, subd. 3. At the sentencing hearing on November 18, 2016, Ms. Kloster argued that a stayed sentence was in the best interest of the complainant and the complainant's family unit because the guilty plea avoided the prospect of J.P. and A.P. having to go through a trial. Ms. Kloster also argued that appellant's ability to pay restitution would be enhanced if he were not in prison. Ms. Kloster argued that appellant's criminal history was limited to a single misdemeanor DWI and that appellant was "amazingly forthcoming in the personal details that he provided" during his presentence investigation and psychosexual evaluation. She argued that appellant has family and community support, has employment, would respond to treatment, and has complied with previous court orders.

The district court's sentencing comments began with the court stating that it "had the opportunity to review . . . the defense motions for a departure." The district court had received approximately 40 letters of support for appellant and observed that the courtroom was full of people supporting appellant. However, the district court stated that it was "unable to find substantial and compelling reasons to depart from the guidelines" and was unable to conclude "that a dispositional departure under Minnesota Statute 609.342 would be warranted." Appellant was sentenced to the mandatory minimum of 144 months in prison with ten years of conditional release.

On November 2, 2018, appellant petitioned for postconviction relief, arguing that he had received ineffective assistance of counsel. Appellant argued that Ms. Kloster "misinformed him that he could receive a stayed sentence and a downward dispositional departure" under Minn. Stat. § 609.342, subd. 3, and that appellant "would not have pleaded guilty if his attorney had informed him about the actual sentencing consequences of his plea."

The district court held an evidentiary hearing on appellant's postconviction petition at which appellant and Ms. Kloster testified.

Appellant testified that he would have gone to trial instead of entering the *Alford* plea if he had known that probation was not possible under the statute. Appellant testified that Ms. Kloster told him that he had a "very good chance" of getting probation and that "there was only a slim chance that they might send [appellant] to prison." Appellant agreed that he knew "the prosecutor was going to be asking for prison," and that it was "made very clear that it was . . . the judge's decision whether or not to send [him to prison]."

Ms. Kloster testified that she has experience defending people charged with criminal-sexual-conduct crimes, has been practicing in Dakota County since 1990, appears regularly in front of the sentencing judge in this case, and had previously appeared in front of this sentencing judge on cases involving sex crimes. She testified that she was hired "[a]mazingly early" in appellant's case and that she was prepared for trial. Ms. Kloster testified that, after the state came forward with an amended complaint that added multiple counts of first-degree criminal sexual conduct, plea negotiations began in earnest. Ms. Kloster testified that she was focused on making sure that appellant would be able to enter an *Alford* plea, because she knew that doing so was important to appellant. She also testified that she "just wanted to make sure that [she] would have an opportunity to argue for departure, because [she] felt like [they] had a great departure case." Ms. Kloster testified that she believed, based on her experience, that appellant was "a perfect candidate to be treated in the community" and that the sentencing judge was one who would "find a way to depart when [the judge] feels it's appropriate."

In response to the court's questioning, Ms. Kloster explained that her decision to argue for a dispositional departure under Minn. Stat. § 609.342, subd. 3, was based on her feeling "that with the prior significant relationship, the allegation of the significant relationship issue, with everything that [she] had done to set [appellant] up before going into sentencing with his own treatment, his own doctors, his examinations, everything he was doing in the community, [she] thought it would be a slam dunk departure argument." Ms. Kloster agreed that her plan was to argue for departure both under Minn. Stat. § 609.342, subd. 3, and based on appellant's particular amenability to probation.

Ms. Kloster explained that she discussed with appellant what would happen if the judge did not depart, and discussed possibilities of county jail time, registration, treatment, conditional release, and restitution. Ms. Kloster testified that she was "sure [she] didn't make a guarantee" that the district court would depart from the sentencing guidelines, but explained that she "was probably very supportive of the fact that . . . [appellant was] a good candidate for departure." Ms. Kloster testified that she does not "normally say to [her] clients that they have to take offers or that they should take offers," but instead tells them to weigh their risks. Ms. Kloster testified that the decision to accept the state's plea offer was "[appellant]'s decision with the support of his family and friends."

Ms. Kloster testified that Dakota County is "a little loose about motion filing," meaning that "generally it was understood that [she] wasn't only making a departure motion under [Minn. Stat. § 609.342, subd. 3(g)], but also just that there [were] substantial and compelling factors to justify a departure."

On May 30, 2019, the district court denied appellant's request to vacate his guilty plea because he received ineffective assistance of counsel. In doing so, the district court stated that "[b]ased on the plea record and testimony at the evidentiary hearing, it is clear that Ms. Kloster was not relying exclusively upon Minn. Stat. § 609.342, subd. 3 in moving for a dispositional departure and advising [appellant] that he had a 'very good chance' of probation." The district court further explained that "Ms. Kloster's analysis was sound and her advice to [appellant] was competent." The district court ultimately found that appellant "failed to demonstrate that counsel performed below an objective standard of reasonableness."

This appeal followed.

D E C I S I O N

The postconviction court did not err in concluding that appellant was not denied effective assistance of counsel.

Appellant argues that he was denied effective assistance of counsel because he entered an *Alford* plea "based on defense counsel's misleading advice that the plea made probation 'very likely,'" only to later find out that Ms. Kloster "moved for a dispositional departure on an impossible basis." Therefore, he argues, he should be allowed to withdraw his guilty plea.

"We review the denial of postconviction relief for abuse of discretion." *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). "We review issues of law de novo and findings of fact for sufficiency of the evidence." *Uselman v. State*, 831 N.W.2d 690, 693 (Minn. App. 2013). "A postconviction court's decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo." *Carter v. State*, 787 N.W.2d 675, 678 (Minn. App. 2010).

A criminal defendant is guaranteed the right to effective assistance of counsel under both the United States and Minnesota Constitutions. *See* U.S. Const. amend. VI; Minn. Const. art. I, § 6. To prevail on a claim of ineffective assistance of counsel, appellant must show that (1) "counsel's performance was deficient" and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Appellant asserts that he wanted a trial, but agreed to enter the *Alford* plea under Minn. Stat. § 609.342, subd. 1(g), "only because [defense] counsel claimed that a

plea under this subdivision would make probation probable under Section 609.342, subd. 3."

"A defense counsel's performance is deficient if it falls below an objective standard of reasonableness." *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000). "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).

Under Minn. Stat. § 609.342, subd. 1(g), the district court had the option of staying imposition or execution of appellant's sentence if it found both that "(a) a stay is in the best interest of the complainant or the family unit; and (b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program." Minn. Stat. § 609.342, subd. 3. Appellant contends that such a benefit was "factually impossible" in this case because a stayed sentence could never have been shown to be in the best interest of the complainant or the family unit. This impossibility, he argues, is because "[t]he complainant's mother stated that she and the complainant wanted [appellant] to go to prison." Appellant also argues that he could not prove that a stay was in the best interest of the family unit because "[appellant] and the complainant's mother ended their relationship before the charges were filed."

At the sentencing hearing, Ms. Kloster argued that a stayed sentence was in the best interest of the complainant and family unit because it would allow J.P. and A.P. to avoid testifying at, or otherwise participating in, the trial. At the evidentiary hearing, Ms. Kloster testified that appellant preferred to enter an *Alford* plea and she wished to retain the opportunity to argue for a dispositional departure. Ms. Kloster also testified that because

of "everything that [she] had done to set [appellant] up before going into sentencing with his own treatment, his own doctors, his examinations, everything he was doing in the community, [she] thought it would be a slam dunk departure argument."

We agree with appellant that there is no reasonable argument that the district court should have departed because appellant's plea saved A.P. from having to testify at trial. Appellant had already pleaded guilty by the time the district court considered the sentencing-departure motion. Nevertheless, appellant did not demonstrate to the postconviction court's satisfaction that a downward dispositional departure under Minn. Stat. § 609.342, subd. 3, was "impossible." The district court could have concluded, based upon the constellation of arguments made by Ms. Kloster in support of the departure motion, that the best-interests consideration under the statute would be met by appellant's ability to make restitution if not imprisoned, and could easily have found that appellant had been accepted into and would have responded to a treatment program. Ms. Kloster may have been overly optimistic about appellant's chances to receive a downward departure, but the district court found, and the record supports, that she made no guarantee of a sentencing departure.

Appellant also argues that Ms. Kloster performed deficiently because she failed to request a dispositional departure on any basis apart from Minn. Stat. § 609.342, subd. 3.

At the sentencing hearing, Ms. Kloster presented the district court with facts and argument that tended to show that appellant was amenable to probation, including his minimal criminal history, his cooperation and openness in the presentence investigation

and psychosexual evaluation, family and community support, employment, and compliance with previous court orders.

At the evidentiary hearing, Ms. Kloster testified, the district court found, and the prosecutor agreed that motion filing is "a little loose" in Dakota County. The postconviction court accepted Ms. Kloster's testimony as accurate, and we defer to the district court on that factual finding.

Ms. Kloster contended that she put the district court on notice that she would be arguing for a departure based on section 609.342, subdivision 3, and on other grounds. And the sentencing court appears to have considered Ms. Kloster's departure request as not being limited to section 609.342, subdivision 3. The district court's statement that it was "unable to find substantial and compelling reasons to depart from the guidelines" confirms Ms. Kloster's testimony that her motion for a downward departure was also based on appellant's claimed particular amenability to probation.

The postconviction court found that Ms. Kloster "was not relying exclusively upon Minn. Stat. § 609.342, subd. 3 in moving for a dispositional departure and advising [appellant] that he had a 'very good chance' of probation." The record supports the postconviction court's determination.

Ms. Kloster was retained early on and was ready for trial. She presented appellant with plea offers from the state and let appellant decide what route he wanted to take. Ms. Kloster testified that she tells her clients to weigh their risks and that the ultimate decision to take the offer from the state was "[appellant]'s decision with the support of his family and friends." She also advised appellant of the possible outcomes of his case.

Ms. Kloster guaranteed nothing. Instead, she discussed with appellant the possibility of a sentencing departure. Appellant acknowledged in his plea testimony that he was aware that the state was asking for a prison sentence and that it was ultimately the judge's decision whether to depart from the sentencing guidelines. That acknowledgment is inconsistent with a belief that a departure was a foregone conclusion. Ms. Kloster has practiced in Dakota County for many years, has appeared before the sentencing judge on criminal-sexual-conduct cases in the past, and believed that the sentencing judge would likely grant a departure. The district court found as a fact—and the record supports—that Ms. Kloster told appellant that he had a "very good chance" of getting probation, but did not promise him any particular outcome.

Ms. Kloster did not perform deficiently when representing appellant. "We need not address both the performance and prejudice prongs [in the ineffective-assistance-of-counsel analysis] if one is determinative." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003).

Affirmed.