

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0299**

Jimmie Dunlap, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 27, 2021
Affirmed
Cochran, Judge**

Hennepin County District Court
File No. 27-CR-17-4079

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

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant challenges the district court's order denying his petition for postconviction relief. In his postconviction petition, appellant sought to withdraw his guilty plea based on ineffective assistance of trial counsel. On appeal, he argues that the

district court abused its discretion by denying his petition without first holding an evidentiary hearing. Because the district court did not abuse its discretion, we affirm.

FACTS

In February 2017, respondent State of Minnesota charged appellant Jimmie Dunlap Jr. with first-degree burglary (assault) in violation of Minn. Stat. § 609.582, subd. 1(c) (2016), and felony domestic assault in violation of Minn. Stat. § 609.2242, subd. 4 (2016). After Dunlap's arrest, the district court appointed a public defender to represent Dunlap. The following summarizes the pretrial events most relevant to this appeal.

Dunlap's trial was scheduled for November 27, 2017. On that day, Dunlap's attorney moved for a continuance, in part because his "investigator ha[d] not completed the investigation necessary to establish an alibi [de]fense on behalf of Mr. Dunlap." The state did not oppose the continuance request, and the district court agreed to reschedule the trial for February 2018. The trial was later continued again. On April 9, 2018, Dunlap made a speedy-trial demand. Dunlap's trial was scheduled for June 4, 2018, a date within the speedy-trial timeline.

In May 2018, the parties appeared before the district court at defense counsel's request. The purpose of the hearing was to discuss Dunlap's representation. The public defender handling Dunlap's case did not appear. Instead, another attorney from the public defender's office appeared. That attorney relayed to the district court that Dunlap had requested that the public defender's office assign a different public defender to Dunlap's case.

Dunlap also spoke at the hearing. He told the district court that he was dissatisfied with his attorney's level of responsiveness, particularly in relation to his requests for documents relating to his case. He stated that he had needed to call his trial attorney's supervisors "multiple times" in order to receive discovery materials, motions, and documentation of the attorney's communications with the prosecutor. And Dunlap claimed that he was still missing some of the requested discovery materials. Dunlap also stated that his conversations with his trial attorney often turned into arguments and that his attorney was "not helping [him] at all in the case."

The attorney from the public defender's office who appeared at the hearing told the district court that the public defender's office had "been in constant contact with [Dunlap's trial attorney] with regards to this case." The attorney further stated that she had "checked the files" and knew that "[a]ll of the discovery" had been provided to Dunlap well before Dunlap had contacted his trial attorney or the others from the public defender's office. The attorney also told the district court that the public defender's office would not be assigning a different attorney to Dunlap's case.

After hearing from Dunlap and the attorney from the public defender's office, the district court informed Dunlap that he had three options: he could represent himself, proceed with his current attorney, or retain a private attorney. Dunlap repeatedly stated that he did not want to represent himself and would like the public defender's office to represent him, but that he did not want his current attorney to do so. The district court ultimately declined to discharge the public defender's office and informed the parties that the case would proceed to trial on June 4, 2018, as scheduled.

On May 22, 2018, Dunlap's trial attorney filed a witness list and a notice of an affirmative alibi defense.

The parties appeared for trial on June 4, 2018, but the district court continued the trial to the next day because the judge and prosecutor were finishing other trials. The parties then appeared on June 5 with the intent to start jury selection on June 6. After discussing scheduling and other matters, Dunlap's attorney informed the court that he had filed two amended notices of an alibi defense on June 4, the day before. He also acknowledged that the original notice, filed on May 22, and the first amended notice, filed on June 4, each contained a typographical error and, as a result, listed the incorrect address for Dunlap's alibi witness. The original notice was incorrect by one digit, and the first amended notice was incorrect by two digits. Dunlap's attorney explained that the second amended notice, filed later on June 4, contained the correct address.

On June 6, the parties appeared before the district court to address unresolved motions prior to the start of trial. The state moved to continue the trial, noting that Dunlap's attorney filed the corrected alibi notice just two days earlier. The prosecutor requested "a continuance to do further investigation of that alibi defense." The prosecutor indicated that additional time was necessary because the alibi notice contained only an address—the notice did not include the name of the alibi witness. As a result, the prosecution's ability to investigate the alibi witness was hindered by the errors in the prior alibi notices. In addition, because a continuance would result in the trial occurring outside of the 60-day speedy-trial timeframe, the state requested that the district court find good cause to delay the trial. Dunlap's attorney opposed the motion, arguing that Dunlap was "ready to go"

and that the state had known about the alibi defense for a couple of weeks, although he again acknowledged the typographical errors in the earlier versions of the notice. The district court agreed with the state and found good cause to delay the trial. The district court then rescheduled the trial for July 16.

On June 15, approximately one month before the scheduled trial, Dunlap pleaded guilty pursuant to a plea agreement with the state. Consistent with the agreement, Dunlap pleaded guilty to the first-degree burglary charge, and the state dismissed the felony domestic-assault charge as well as other charges pending against Dunlap in separate court files. The district court sentenced Dunlap, in accordance with the plea agreement, to 67 months in prison, stayed for five years.

In September 2020, Dunlap filed a petition for postconviction relief, requesting to withdraw his guilty plea on the basis of ineffective assistance of counsel. In an accompanying legal memorandum, Dunlap argued that his trial attorney “failed to adequately communicate with [him], failed to investigate his alibi defense, and failed to adequately prepare for trial.” The memorandum also asserted that Dunlap had called the district court twice in March 2018 and left voicemails expressing his concerns that his attorney was not communicating with him, had not yet requested a speedy trial on his behalf, and had refused to investigate his alibi witness. He also purportedly told the district court that he and his attorney were having disagreements about whether to request an evidentiary hearing or present an alibi defense. Dunlap’s memorandum further argued that Dunlap decided to plead guilty after the district court told him that he would need to keep his current attorney or represent himself because he felt that he would not be adequately

represented at trial. Dunlap’s postconviction attorney—who was not his trial attorney—did not file an affidavit from Dunlap, or any other person, to support the assertions in the memorandum. Dunlap’s postconviction attorney later requested an evidentiary hearing on the petition.

The district court denied Dunlap’s postconviction petition without an evidentiary hearing. The district court determined that Dunlap had failed to allege sufficient facts to support a conclusion that his trial attorney was ineffective.

Dunlap appeals.

DECISION

Dunlap argues that the district court abused its discretion when it denied his postconviction petition to withdraw his guilty plea due to ineffective assistance of counsel without first holding an evidentiary hearing. We disagree.

We review a district court’s denial of a postconviction petition, as well as a request for an evidentiary hearing, for an abuse of discretion. *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020). A district court does not abuse its discretion when it denies a petition for postconviction relief unless it has “exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018) (quotation omitted).

A court may dismiss a petition for postconviction relief without conducting an evidentiary hearing if “the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2020). To

determine whether an evidentiary hearing is required, the district court must consider the facts alleged in the petition as true and view them in “the light most favorable to the petitioner.” *Andersen v. State*, 913 N.W.2d 417, 422-23 (Minn. 2018) (quotation omitted). No evidentiary hearing is required “if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested.” *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A petitioner will not meet his burden if he merely offers “conclusory, argumentative assertions, without factual support.” *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007).

“A defendant has no absolute right to withdraw a guilty plea after entering it.” *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). But, upon a timely motion, a district court “must allow” a defendant to withdraw a plea if it “is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. “A manifest injustice exists if a guilty plea is not valid.” *Raleigh*, 778 N.W.2d at 94. “To be constitutionally valid, a guilty plea must be accurate, voluntary, and intelligent.” *Id.*

Dunlap contends that his guilty plea to first-degree burglary was involuntary and therefore invalid because his trial attorney was ineffective. *See Sanchez v. State*, 868 N.W.2d 282, 286 (Minn. App. 2015) (“Ineffective assistance of counsel renders a guilty plea involuntary and unintelligent.”), *aff’d*, 890 N.W.2d 716 (Minn. 2017). To obtain relief on his claim of ineffective assistance of counsel, Dunlap “must allege facts that, if proven by a fair preponderance of the evidence,” would show that (1) his trial attorney’s representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that he would not have pleaded guilty but for his trial attorney’s

errors. *Chavez-Nelson*, 948 N.W.2d at 671 (quotation omitted); *Campos v. State*, 816 N.W.2d 480, 486 (Minn. 2012). We need not address both prongs of the test if one prong is determinative. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020).

Dunlap argues that the district court abused its discretion by summarily denying his postconviction petition because his petition and the record show that his attorney failed to adequately communicate with him, failed to investigate his alibi defense, and failed to adequately prepare for trial. We address each of Dunlap's arguments in turn.

A. Communication

In the memorandum accompanying his postconviction petition, Dunlap argued that his trial attorney "failed to adequately communicate" with Dunlap. Dunlap supported that argument by pointing to two *ex parte* voicemails that Dunlap left for the district court in March 2018 in which he expressed his concern that "his attorney was not communicating with him." Dunlap also relied on statements that he made at the May 2018 hearing, during which he explained to the court that he was unhappy with his trial attorney's level of communication with him. Based on its review of Dunlap's memorandum and the other documents in the record, the district court concluded that Dunlap had not alleged sufficient facts to show that his attorney's communication with Dunlap fell below an objective standard of reasonableness. The district court found that the record reflected that Dunlap's attorney "did in fact communicate with [Dunlap] on several occasions." And the district court determined that, although there may have been some conflict between Dunlap and his attorney that "may constitute imperfect communication," Dunlap had "not alleged any facts that show exactly what his former counsel failed to communicate with him about."

Based on our own careful review of the record, we agree with the district court that Dunlap failed to allege sufficient facts to support his claim that his trial attorney's level of communication with him was objectively unreasonable. Foremost, as the district court concluded, Dunlap did not identify with any specificity the subject matter about which his trial attorney allegedly failed to communicate with him. Dunlap's memorandum to the district court merely summarized the complaints that he made about his trial attorney in the March 2018 voicemails and during his statements at the May 2018 hearing. The memorandum did not make any affirmative assertions that Dunlap's attorney in fact failed to communicate with him about any important information. And Dunlap's appellate brief fails to direct us to any information in the record that would support his conclusory assertion that his trial attorney "failed to adequately communicate" with him.

We acknowledge that Dunlap's petition indicates that Dunlap was disappointed with his trial attorney's level of responsiveness, and it appears that he and his trial attorney had some disagreements regarding trial strategy. But the petition, files, and records of the proceeding—even when viewed in the light most favorable to Dunlap—do not show that his attorney's level of communication fell below an objective standard of reasonableness. The district court did not abuse its discretion by summarily denying Dunlap's postconviction petition on that basis.

B. Investigation of Alibi Defense

Dunlap also argues that his trial attorney was ineffective because he "failed to investigate [Dunlap's] alibi defense." The district court concluded that the record shows that the attorney "did investigate [Dunlap's] alibi defense" and that, therefore, the

attorney's performance was not unreasonable on that basis. We agree with the district court.

The record supports the district court's finding of fact that Dunlap's trial attorney investigated his alibi defense. The record reflects—and Dunlap acknowledges—that Dunlap's trial counsel filed a notice of an alibi defense on May 22, 2018. His trial counsel then filed an amended notice on June 4, 2018, and a second amended notice that same day. The record also reflects that Dunlap's trial attorney informed the district court that the first two notices contained typographical errors regarding the alibi address information, and that the most recent notice had the correct address information. Accordingly, the record conclusively shows that Dunlap's trial attorney did investigate his alibi defense.

Dunlap's arguments on appeal do not persuade us otherwise. In his appellate brief, Dunlap notes that his trial attorney did not file the notice of his alibi defense until after the trial had been continued twice and Dunlap had complained to the district court about his attorney's performance. And he emphasizes that when his trial attorney filed the notice of alibi defense, "it was deficient and required several corrections and resulted in another continuance, beyond Mr. Dunlap's speedy trial timeframe." Dunlap does not explain how either of those allegations supports his position that his attorney "failed to investigate his alibi defense." Instead, he appears to implicitly argue that his attorney was ineffective because he *delayed* his investigation into Dunlap's alibi. But Dunlap does not explicitly make that argument, and he does not allege facts to show that any delay was objectively unreasonable.

Because Dunlap did not provide any support for his allegation that his trial attorney failed to investigate his alibi defense, the district court did not abuse its discretion by summarily denying his postconviction petition on that basis.

C. Preparation for Trial

Dunlap next argues that his trial attorney was ineffective because he failed to adequately prepare for trial. Before the district court, Dunlap appears to have based this argument primarily on his two prior arguments—that his trial attorney failed to adequately communicate with him and failed to investigate his alibi defense. He also argued that his trial attorney “failed to give him his discovery materials as requested.” The district court rejected Dunlap’s argument, concluding that his counsel’s trial preparation did not fall below an objective standard of reasonableness. The district court determined that the attorney “was prepared to proceed to trial on June 6, 2018,” “filed several motions on [Dunlap’s] behalf” both before and after the June 6 hearing, and “made numerous arguments to the court on [Dunlap’s] behalf, including an argument to proceed to trial on June 6, 2018.”

On appeal, Dunlap appears to make largely the same argument as he did before the district court. He also appears to argue that the district court’s description of the record fails to consider that “[t]he first notice or motion [his] attorney filed on his behalf occurred after the continued trial date and after Mr. Dunlap contacted the court to complain about his attorney’s deficient performance.” We are not persuaded that Dunlap has demonstrated an abuse of discretion by the district court.

To the extent that Dunlap's argument regarding his attorney's trial preparation is based either on his contention that his attorney failed to adequately communicate with him or on his claim that his attorney failed to investigate his alibi defense, we conclude, relying on our earlier analyses, that Dunlap has failed to allege sufficient facts to support the argument. Moreover, even if Dunlap's inadequate-trial-preparation argument is distinct from his other arguments, we are unconvinced. Based on our careful review, we conclude that the record supports the district court's findings that Dunlap's trial attorney made several motions and arguments on Dunlap's behalf throughout the pretrial proceedings. For instance, counsel made a speedy-trial demand, filed a defense witness list, and filed notice of Dunlap's alibi defense.¹ At an omnibus hearing, counsel inquired into the state's level of contact with the victim and argued that the district court should not impose a no-contact order against Dunlap. Counsel also argued against the state's continuance request at the June 6, 2018 hearing. There is no indication in the record that Dunlap's counsel was unprepared to proceed to trial on that day. And Dunlap's general complaint that his attorney delayed in filing motions or providing notice of his alibi defense fails to show that his attorney was inadequately prepared. The district court did not abuse its discretion by summarily denying Dunlap's postconviction petition on that basis.

¹ The district court's register of actions also reflects that counsel requested a bail hearing and contested probable cause.

Conclusion

In sum, because Dunlap failed to allege facts sufficient to entitle him to the relief requested and offered only conclusory, argumentative assertions, the district court acted within its discretion when it summarily denied Dunlap's petition for postconviction relief.

Affirmed.