STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1224

Douglas Wayne Braker, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 23, 2022
Affirmed
Jesson, Judge

Cass County District Court
File No. 11-CR-18-1967

David R. Lundgren, Adam T. Johnson, Lundgren & Johnson, PSC, Minneapolis, Minnesota (for appellant)

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

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

Considered and decided by Wheelock, Presiding Judge; Jesson, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Facing six counts of criminal sexual conduct for allegedly abusing his step-granddaughter, appellant Douglas Wayne Braker was given a choice by the prosecution: plead guilty to either one count of first-degree criminal sexual conduct or one

count of second-degree criminal sexual conduct. Both options anticipated a motion for a downward dispositional departure by Braker. Because his attorneys believed Braker was unwilling to admit to multiple sexual acts—a necessity for pleading guilty to the second-degree criminal sexual charge—they explained to Braker that pleading guilty to first-degree criminal sexual conduct was in his best interest. Braker did so. The district court accepted the guilty plea, but at sentencing it denied the dispositional departure and imposed a 144-month sentence.

Braker petitioned for postconviction relief primarily to argue that his plea was tainted by ineffective assistance of counsel. Following an evidentiary hearing, the postconviction court denied Braker's motion. Braker appeals. Because the postconviction court found Braker's attorneys credible and, regardless, the advice to plead guilty amounted to trial strategy, we affirm.

FACTS

Braker's step-granddaughter worked in Braker's gunsmith shop. At times, she stayed overnight at his house. When step-granddaughter was in fourth grade, Braker sexually assaulted her at his workshop. During a portion of Braker's guilty plea colloquy, respondent State of Minnesota asked him about an instance where he inserted his finger into step-granddaughter's vagina in his workshop.

STATE:	And at the time she was under the age of 16 years of age, is that correct?
BRAKER:	Yes.
STATE:	And you did so . . . with the intent to gain some sexual arousal, pleasure in doing so, is that correct?
BRAKER:	Yes.

Other allegations from the complaint (which he did not admit to at the plea hearing) included when Braker had step-granddaughter stand on a table, slid her underwear to the side, and inserted a coin partially into her vagina. Another night, while they shared a bed, Braker placed something into step-granddaughter's vagina "that was not his hands" according to the complaint. By October 2017, when she was 11, step-granddaughter no longer spent the night at Braker's house.

When she was 12 years old, step-granddaughter reported Braker's sexual contact. The state charged Braker with three counts of first-degree criminal sexual conduct and three counts of second-degree criminal sexual conduct stemming from alleged sexual acts against his step-granddaughter.

The two contested counts are counts II and VI. Count II was first-degree criminal sexual conduct (sexual penetration of a victim under the age of 16, significant relationship) in violation of Minnesota Statutes section 609.342, subdivision 1(g) (2014). Count VI was second-degree criminal sexual conduct (sexual penetration of a victim under the age of 16, significant relationship, multiple acts) in violation of Minnesota Statutes section 609.343, subdivision 1(h)(iii) (2014).

The state communicated alternative settlement offers. The first proposal was a guilty plea to one count of second-degree criminal sexual conduct and a dismissal of the remaining counts. This would have resulted in a presumptive sentence of 90 to 108 months based on the Minnesota Sentencing Guidelines, registration as a predatory offender for life, and a ten-year conditional-release period. This offer assumed that Braker would file a

motion for a downward dispositional departure. The second proposal was a guilty plea to one count of first-degree criminal sexual conduct and a dismissal of the remaining counts. Based on the Minnesota Sentencing Guidelines, this count would have a presumptive sentence of 144 to 172 months, registration as a predatory offender for ten years, and a ten-year conditional-release period. This offer contemplated that Braker would file a motion for a statutory stay of execution under Minnesota Statutes section 609.342, subdivision 3 (2018). Ultimately, Braker accepted the second offer and pleaded guilty to first-degree criminal sexual conduct.

Before sentencing, Braker filed a motion for a dispositional departure and for the district court to stay the execution under Minnesota Statutes section 609.342 (2018). The motion highlighted his particular amenability to probation to support the departure.

At sentencing, the district court accepted the guilty plea and executed a 144-month sentence. The district court denied the motion for a dispositional departure, reasoning that Braker was "minimizing [his] behavior and . . . not completely grasping the consequences of [his] actions."

Braker petitioned for postconviction relief, alleging that he was not informed of the first plea offer (the option to plead guilty to second-degree criminal sexual conduct), and that his plea deal was tainted by ineffective assistance of counsel. He requested—and was granted—an evidentiary hearing.

At the hearing, Braker's two trial attorneys (his primary trial attorney J.G. and another attorney D.A.) and Braker all testified. J.G. explained that he believed pleading guilty to first-degree criminal sexual conduct was Braker's best option because "there was

never a chance that Mr. Braker was ever going to plead guilty to multiple acts . . . kind of a non-starter." And he explained that there would be a benefit in asking for a departure from a count with a higher prison sentence because it would give the district court a "thumb on the scale" to ensure Braker would follow the terms of a potential probation. J.G. also justified using the statutory departure approach because it might look better to the district court to see that "the legislature itself thought a first-degree sex case involving these facts was determined by the legislature to be grounds for a departure."

Although he could not recall the exact timeline, D.A. confirmed that Braker would not admit to multiple acts of sexual abuse. D.A. also stressed that he had a conversation with Braker that explicitly mentioned the alternative plea offer, including the prison terms and other differences between the offers. D.A. testified that in his conversation with Braker to discuss the "risk of both counts," Braker allegedly claimed he would "have to lie about what he had done" if he pleaded guilty to multiple acts.

The postconviction court denied the petition for postconviction relief for three reasons. First, it credited the attorneys' testimony, finding that Braker's testimony was "self-serving, and that the evidence indicates he was advised of the alternatives by his counsel." Second, the court acknowledged counsel's concerns "that [Braker] may have had issues providing a sufficient factual basis" to support pleading guilty to multiple acts of criminal sexual conduct. Third, as to the advice recommending he plead guilty to the first-degree count rather than the second-degree count and seek a dispositional departure under Minnesota Statutes section 609.342, the court found this to be a "tactical" choice to

convince the district court to grant a dispositional departure and not a legal error.[1] The postconviction court then concluded that Braker failed to establish a reasonable probability that, but for his attorneys' conduct the result of the proceeding would have been different.[2]

Braker appeals.

DECISION

Braker contends that the postconviction court erred in denying his claim that he received ineffective assistance of counsel when he pleaded guilty to first-degree criminal sexual conduct.

We review a postconviction court's denial of a postconviction petition for relief for an abuse of discretion. *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015). And we will not reverse a postconviction court's denial of a petition for relief unless the court "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." *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010).

To succeed on an ineffective-assistance-of-counsel claim, Braker must first establish that his "counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Review of counsel's performance under this prong is "highly deferential." *Id.* at 689. Under this

[1] The district court also determined that there was no evidence to support that the district court would have accepted a guilty plea to second-degree criminal sexual conduct.

[2] The postconviction court also denied Braker's assertion that, had he succeeded in demonstrating an ineffective-assistance-of-counsel claim, that the remedy would be a vacation of his sentence and the ability to accept the alternative plea offer.

prong we do not review conduct that "falls within trial strategy." *Andersen v. State*, 830 N.W.2d 1, 13 (Minn. 2013) (*Andersen I*). Second, Braker must demonstrate 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. In the plea bargain context, a defendant may show prejudice if there is a reasonable likelihood that he would have rejected the plea agreement had he received proper advice. *See Leake v. State*, 737 N.W.2d 531, 540 (Minn. 2007).

Braker makes two primary arguments to support his ineffective-assistance-of-counsel claim: (1) that the record supports that he was willing to admit to multiple acts of criminal sexual conduct; and (2) that the postconviction court erred when concluding that much of Braker's attorneys' advice amounted to trial strategy. We review these assertions in turn.

Multiple Acts

Braker first argues that his trial counsel erroneously believed that he was unwilling to admit to multiple acts of criminal sexual conduct—an objectively unreasonable belief that resulted in ineffective assistance of counsel.

Here, Braker alleged in his postconviction affidavit that he was also willing to plead guilty to multiple acts of criminal sexual conduct because between the time of the charges and the time of his plea he had "started changing . . . and maturing" during his treatment. But Braker's attorneys testified that his pleading guilty to second-degree criminal sexual conduct at the time of the plea offer was a "non-starter" because the count comprised multiple acts. The postconviction court considered the conflicting testimony of Braker and

his trial attorneys and made detailed findings regarding these claims, including that the attorneys' testimony was more credible. Nothing in the record gives us a "definite and firm conviction" that the postconviction court's findings were mistaken on this point. *State v. Andersen*, 784 N.W.2d 320, 334 (Minn. 2010) (*Andersen II*).[3]

To persuade us otherwise, Braker points to his psychosexual evaluations and two letters from his outpatient sex-offender treatment to verify that he was willing to admit to multiple acts of criminal sexual conduct. His psychosexual evaluations were completed in February and May of 2019—both before he pleaded guilty in July 2019. Braker notes that during these evaluations he described and admitted to multiple instances of inappropriate touching. And the letters from the outpatient treatment facility from June and September 2019 explained that Braker was making progress in his treatment.

[3] Braker makes two additional arguments in passing that his trial counsel was ineffective: (1) that he was not informed about the offer to plead guilty to second-degree criminal sexual conduct, and (2) that he did not care about the length of predatory-offender registry, so trial counsel's justification that a short predatory-offender registration period made pleading to first-degree criminal sexual conduct better was improper. Braker testified at the evidentiary hearing that he was never informed about the offer to plead guilty to second-degree criminal sexual conduct. His attorneys testified that they did inform Braker of both possibilities. The postconviction court made detailed findings regarding these claims and credited his attorneys' testimony. We defer to a postconviction court's credibility assessment. *Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013). Braker presented no evidence to demonstrate that his counsel's representation fell below an objective standard of reasonableness other than his allegations at the evidentiary hearing. *See Griffin v. State*, 941 N.W.2d 404, 408-09 (Minn. 2020) (concluding that in finding a trial counsel's testimony more credible than the appellant, there is no error in denying an ineffective-assistance-of-counsel claim). And considering Braker had the knowledge of the alternative plea deal, the choice between them amounts to trial strategy, which we do not review. *Andersen I*, 830 N.W.2d at 13. As for Braker's claim that he did not care about the length of predatory-offender registration, that assertion is not supported by the record. *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014).

But none of these documents demonstrate that Braker was willing to admit to having sexual intent in any of the instances of contact. For example, in his second psychosexual evaluation Braker described his "first incident" of sexual abuse as occurring when the ten-year-old victim requested a massage. He acknowledged, "my fingers were in the area of her breasts" but he denied sexual intent. And during the evaluation, he also admitted to touching his step-granddaughter while she was in his workshop—first on her chest and escalating to touching her vaginal area—but claimed that it was in a search for wood ticks.

The psychosexual evaluator wrote that Braker "denied any sexual intent with regard to the victim, at any time."[4] And sexual intent is a crucial element for either count of criminal sexual conduct. The record does not support Braker's contention that he was willing to admit to having sexual intent with respect to multiple acts of criminal sexual conduct.

Trial Strategy

Braker, in addition to arguing that his counsel was ineffective based on their plea recommendation, argues his attorneys—specifically J.G.—were ineffective on an additional legal ground: a legally erroneous belief that the statutory basis for departure made a sentencing departure more likely. In the first-degree criminal-sexual-conduct context, a district court has discretion to issue a stay of imposition or execution if it finds that a stay is in the best interest of the family unit, and that an offender has been accepted

[4] We observe that both psychosexual evaluations occurred before Braker entered his guilty plea. By the time of the plea hearing, Braker did admit to having sexual intent during the sole incident of criminal sexual conduct to which he pleaded guilty.

by and can respond to a treatment program. Minn. Stat. § 609.342, subd. 3.[5] Explaining why he sought a statutory stay, J.G. testified that pursuing a stay through a tool designed specifically by the legislature would be more persuasive to the district court than using a standard departure.

This decision amounts to trial strategy, which we do not review on appeal. *Andersen I*, 830 N.W.2d at 13. J.G. believed the district court would be more persuaded by the legislature-created option than one by the sentencing guidelines commission. Even if a statutory stay might, in some circumstances, be less likely than a guidelines departure because the defendant must show participation in treatment, taking that calculated risk is a matter of trial strategy for the trial attorneys and defendant. Because the choice to advocate for a statutory departure amounted to trial strategy, J.G. did not provide ineffective assistance by advising Braker to pursue this option.

In sum, the record supports the trial attorneys' concern about Braker's unwillingness to plead guilty to multiple acts of criminal sexual conduct. It further demonstrates that Braker's trial attorneys believed that a statutory stay would be more attractive to the district court, which amounts to trial strategy. Accordingly, the postconviction court properly

[5] In comparison to the statutory stay, the Minnesota Sentencing Guidelines afford district courts more discretion. A sentencing court can exercise its discretion to depart from the guidelines by focusing on a defendant's individual characteristics and what sentence would be best for the defendant and society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The guidelines provide a nonexclusive list of mitigating factors that may warrant a dispositional departure, including when the defendant is "particularly amenable to probation." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). But the presence of mitigating factors does not obligate the district court to grant a departure. *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013).

concluded that Braker's trial attorneys' representation did not fall below an objective standard of reasonableness. *See Jackson v. State*, 817 N.W.2d 717, 722 (Minn. 2012) (stating that we can dispose of an ineffective-assistance-of-counsel claim if one prong is not met). The postconviction court did not abuse its discretion by denying Braker's petition for postconviction relief when concluding that he did not establish an ineffective-assistance-of-counsel claim.[6]

Affirmed.

[6] Braker also raised an issue about the proper remedy should we find his attorneys' assistance ineffective. Because we conclude that Braker received effective assistance of counsel, we need not address this issue.