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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-0144  
A11-1859**

State of Minnesota,  
Respondent,

vs.

Timothy James Helm,  
Appellant.

**Filed September 4, 2012  
Affirmed  
Rodenberg, Judge**

Renville County District Court  
File No. 65CR09398

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

David Torgelson, Renville County Attorney, Laurence Stratton, Assistant County Attorney, Olivia, Minnesota (for respondent)

John E. Mack, Mack & Daby, P.A., New London, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Halbrooks, Judge; and Rodenberg, Judge.

**UNPUBLISHED OPINION**

**RODENBERG, Judge**

In this consolidated appeal, appellant argues that the district court erred when it denied his motion for a continuance and proceeded with sentencing upon his prior plea of

guilty, that it erred when it denied his motion to withdraw his guilty plea prior to sentencing, and that it erred in denying his petition for post-conviction relief based upon a claim of ineffective assistance of trial counsel. We affirm.

## **FACTS**

Appellant Timothy James Helm was arrested in Renville County on September 2, 2009, and was subsequently charged with multiple counts of first- and second-degree criminal sexual conduct and one count of soliciting a child to engage in sexual conduct. The complaint alleged conduct beginning on or about January 1, 2006, and continuing through August 1, 2009. The alleged victim was appellant's relative and was under 13 years of age during the relevant time period. Appellant was initially represented by a public defender.

On the day the jury trial was scheduled to begin, appellant pleaded guilty to one count of first-degree criminal sexual conduct. Appellant was advised by the court and his attorney to undergo a sex-offender evaluation prior to sentencing, which he subsequently failed or refused to do. Sentencing was scheduled for November 2, 2010. At sentencing, the district court denied appellant's motion for a continuance and imposed an executed 173-month sentence.

On January 25, 2011, appellant filed a direct appeal, alleging that the district court erred by (1) refusing to either grant a continuance or allow him to withdraw his guilty plea at the scheduled sentencing hearing; (2) refusing to grant a dispositional departure; and (3) using the 2008, instead of the 2006, Minnesota Sentencing Guidelines. Appellant also argued that he had received ineffective assistance of counsel. On May 6, 2011,

appellant filed a motion for postconviction relief, seeking to withdraw his guilty plea on the basis that he had received ineffective assistance of counsel.

This court stayed appellant's direct appeal so that the postconviction court could rule on appellant's motion to withdraw his plea. Following an evidentiary hearing, and by order dated September 12, 2011, the postconviction court denied appellant's motion to withdraw his plea. Appellant then appealed from the postconviction court's ruling. On October 31, 2011, this court issued an order consolidating appellant's direct appeal and his appeal from the postconviction court's denial of relief.

Leading up to his scheduled trial date, appellant was offered various proposed plea arrangements. Appellant denied those offers. On the day trial was scheduled to commence, the court began by asking counsel whether a plea agreement had been reached. Appellant emphasized that he was "not willing to consider prison." The court explained to appellant that if he were tried and convicted by a jury, each of the counts, except for the count of soliciting a child, would result in a presumptive commitment to the commissioner of corrections for 144 to 173 months. Appellant reiterated that he was not willing to consider prison time and opined that having a record as a sex-offender would stop him from seeing his own daughter, an idea that was "not acceptable" to him.

Eventually, and after further discussion, an agreement was reached whereby appellant would plead guilty to one of the first-degree criminal sexual conduct charges,<sup>1</sup> and sentencing would be left to the court. The prosecution agreed to dismiss the

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<sup>1</sup> Specifically, amended count three, in violation of Minn. Stat. § 609.342, subs. 1(g), 2(a) (2008).

remaining counts and argue for the maximum guidelines sentence, while appellant's counsel would argue for a dispositional departure.

The court recessed briefly so that appellant, his family, and his counsel could discuss the agreement. When court resumed, appellant stated that he was willing to accept the arrangement and enter a guilty plea. Before accepting the plea, the court extensively reviewed the agreement with appellant and answered appellant's questions regarding whether he would have the opportunity to have contact with his daughter after she turns 18 years old. Appellant then entered his plea, based on an incident that occurred in August 2008. Appellant testified that he could recall the date of the incident because he and the victim were decorating the house in preparation for a celebration of the wedding anniversary of appellant and his then-wife. It was while they were decorating the house that appellant sexually assaulted his then-11-year-old relative on the dining room table. The court accepted the plea.

Appellant's sentencing hearing was scheduled for November 2, 2010. At the hearing, there was some initial confusion about which sentencing guidelines were applicable because the count to which appellant pleaded guilty had a date range from January 2006–August 2009, but the specific offense that formed the factual basis for appellant's plea of guilty occurred in August 2008. The court explained that, "based on the [2008] offense date that [appellant] admitted to and the court accepted," the 2008 guidelines, with a presumptive sentence range of 144 to 173 months, would be applicable. Both attorneys agreed on the record that the court was using the proper sentencing guidelines and range.

Although appellant's attorney was prepared to present arguments on his motion for a departure, the court first addressed appellant's own request for a continuance of the sentencing hearing. Appellant explained that he was requesting a continuance "[t]o give me a little more time to find an attorney to make a motion to rescind the plea and to again take the trial." The court asked appellant why he felt he had a valid reason to withdraw his plea and what efforts he had made to find a new attorney. Appellant explained that for the past 30 to 45 days he had been calling attorneys, but that he had yet to come to a financial agreement with any attorney.

When asked directly to state his basis for his request to withdraw his plea, appellant responded that he had been informed by the public defender's dispositional adviser that

I should not take the [sex-offender] evaluation because by taking the evaluation for some reason they can tell that if I wrote that something happened they could tell the way I wrote it that I'd be lying that it never happened and it just wouldn't look good to take a plea for something I didn't do.

In response to the court's request for clarification, appellant further explained that

if I filled out the [sex-offender evaluation] questionnaire that they give you, if I said that this happened with [the victim] they could tell by the way I wrote it that I'd be lying that that happened to [the victim] so it would look bad in the court to have them turn that in and say you know he's lying about this stuff happening.

The court reminded appellant that his plea had been accepted, that he, as presiding judge throughout the proceedings, believed at the time the plea was entered and still believed that it had been valid, and that the other counts against appellant had been

dismissed in exchange for the guilty plea. The court then denied appellant's request for a continuance. The court heard arguments regarding sentencing from both counsel, together with victim impact statements, and denied appellant's motion for a downward departure. "[B]ased on the sentencing guidelines and given the severity of this offense," the court sentenced appellant to a 173-month commitment to the commissioner of corrections.<sup>2</sup>

This consolidated appeal follows.

## D E C I S I O N

### I.

In his direct appeal, appellant argues that it was error for the district court to deny his motion to continue the sentencing hearing.

The decision whether to grant a continuance is "within the trial judge's discretion, and his decision should be based on all facts and circumstances surrounding the request. A defendant may not demand a continuance for the purpose of delay or obtain a continuance by arbitrarily choosing to substitute counsel at the time of trial." *State v. Vance*, 254 N.W.2d 353, 358 (Minn. 1977) (citation omitted). "An unreasoned or arbitrary denial in the presence of a justifiable request for delay constitutes an abuse of discretion." *State v. Sime*, 669 N.W.2d 922, 925 (Minn. App. 2003). "A defendant must show prejudice to justify reversal." *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987).

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<sup>2</sup> On April 26, 2012, the district court amended appellant's sentence from 173 to 172 months. That amendment is not at issue in this consolidated appeal.

Appellant argues that the district court's denial of his motion for a continuance prejudiced him in that "his withdrawal request was not formulated or argued by counsel of any sort." Appellant's statement fails to present any showing of prejudice. At the sentencing hearing, there was no motion to withdraw appellant's guilty plea. The only motion made was for a continuance. The court discussed appellant's plea only insofar as it felt necessary to evaluate appellant's request for a continuance.

The court based its decision to deny appellant's motion for a continuance on the facts and circumstances surrounding appellant's request. The judge questioned appellant regarding why he was seeking the continuance and what he had done to secure counsel in the three months leading up to the sentencing hearing. The judge considered appellant's proffered basis for the continuance: his desire to secure counsel in order to withdraw his guilty plea. The same judge presided over both the plea hearing and the sentencing hearing. In denying the motion for continuance, the court recalled the plea and recalled and believed that it had been validly offered and accepted. Additionally, counsel, the corrections agent, and the victim and her mother were all present at the hearing and prepared to proceed. On these facts, the district court did not abuse its broad discretion in denying appellant's motion for a continuance.

Appellant was sentenced according to the sentencing guidelines effective August 1, 2008. In his direct appeal, appellant also argues that the district court (1) failed to

sentence him pursuant to the applicable sentencing guidelines, and (2) erred in refusing to depart from the guidelines by staying the execution of his sentence.<sup>3</sup>

Appellant did not argue the issue of the appropriateness of the 2008 guidelines at sentencing, and in fact agreed through counsel that the 2008 guidelines were properly applied. He now argues that the 2006 guidelines should have been applied, because the offense to which he pleaded guilty had a date range beginning in January 2006.

The parties agree that “[t]he maximum sentence which can be imposed is the maximum at the time of offense, not the time of sentencing.” Modifications to the sentencing guidelines apply only to offenses committed on or after the specified effective date. Minn. Sent. Guidelines III.F (2008). Appellant pleaded guilty to an incident of criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g), that occurred in August 2008. The August 1, 2008 guidelines sentencing grid provided a presumptive commitment to prison and a durational range of 144 to 173 months for such a conviction. Appellant was sentenced to 173 months. At sentencing, all parties discussed and agreed that use of the grid effective August 1, 2008 was correct. The district court did not err in applying the 2008 guidelines.

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<sup>3</sup> Without citing any legal authority in support, appellant also claims that the district court took improper factors, such as appellant’s lack of remorse, into consideration when deciding whether to depart. The district court stated that its decision to impose the maximum presumptive sentence was “based on the sentencing guidelines and . . . the severity of [the] offense.” This court declines to address allegations unsupported by legal analysis or citation. *Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994).



Review of a district court's decision whether to depart from a presumptive sentence provided by the guidelines is "extremely deferential." *Dillon v. State*, 781 N.W.2d 588, 595–96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

The sentencing guidelines provide that:

The sentence ranges provided in the Sentencing Guidelines Grids are presumed to be appropriate for the crimes to which they apply. Thus, the judge shall pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids. . . . [I]n exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.

Minn. Sent. Guidelines II.D (2008).

The sentence imposed by the district court was within the presumptive range of the applicable guidelines sentence, albeit at the "top of the box," and is therefore presumed appropriate. Because appellant refused to undergo the sex-offender evaluation, he rendered himself ineligible for the dispositional departure he was hoping to receive. *See* Minn. Stat. § 609.342, subd. 3 (2010) (providing that a court may grant a stay of execution only if several requirements are met, one of which is acceptance into a treatment program, which in turn requires a sex-offender evaluation). The district court did not abuse its discretion when it refused appellant's request for a downward dispositional departure.

## II.

Appellant argues that he received ineffective assistance of counsel, claiming that he received misleading advice and that his attorney had a conflict of interest. The postconviction court concluded, after a hearing at which testimony was received, that appellant did not receive ineffective assistance of counsel.

Claims of ineffective assistance of counsel involve mixed questions of law and fact and are reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). This court analyzes claims of ineffective assistance of counsel under the two-prong test set forth by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). First, the claimant must demonstrate that his trial counsel's representation "fell below 'an objective standard of reasonableness.'" *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992) (quoting *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). There is a "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). Second, the claimant must demonstrate that "a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). When a claimant fails to prove either deficient performance of counsel or resulting prejudice, the claim of ineffective assistance of counsel fails. *Id.*

Relying on *Padilla v. Kentucky*, appellant argues that his counsel failed to properly inform him of the probable consequences of his guilty plea. 130 S. Ct. 1473, 1478, 1486–87 (2010) (setting aside a guilty plea as invalid due to ineffective assistance of

counsel because counsel had misinformed the defendant of the immigration consequences of his plea). Appellant alleges that his counsel did not advise him of the probabilities of a prison term or of the statutory requirements for receiving a departure. In this regard, appellant argues that “grossly misleading advice is a form of ineffective assistance” requiring reversal.

Minnesota statutes provide, for a person found guilty of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g), that the court may stay the execution of the sentence for such a conviction if the court finds that (1) “a stay is in the best interest of the complainant or the family unit,” and (2) “a professional assessment indicates that the offender has been accepted by and can respond to a treatment program.” Minn. Stat. § 609.342, subd. 3.

The record shows that appellant’s trial counsel testified before the postconviction court that he informed appellant that his plea would likely result in an executed prison sentence, that a departure was only a possibility, that a sex-offender evaluation was necessary in order for the court to depart, and that the assessment would impact whether there would be a departure. Counsel testified that he had notes from a follow-up call with his office’s dispositional adviser, who had met with appellant in order to help appellant schedule a sex-offender evaluation session. The record does not support appellant’s claim that his trial counsel failed in any way to properly advise him of the consequences

of his plea.<sup>4</sup> The postconviction court properly concluded that appellant did not receive erroneous or misleading advice from his attorney.

Appellant's second basis for claiming ineffective assistance of counsel is that his counsel had a conflict of interest at the time of the sentencing hearing at which appellant requested a continuance.

The Sixth Amendment right to counsel includes the "right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981); *see also Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065 (holding that "[r]epresentation of a criminal defendant entails certain basic duties," including "a duty to avoid conflicts of interest"). When claiming that a conflict of interest resulted in counsel's unreasonable performance, whether appellant is able to meet the burden of proof "depends on whether and to what extent the alleged conflict was brought to the trial court's attention." *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997).

Relying on Minn. R. Prof. Conduct 3.3(a)(3), which prohibits an attorney from offering evidence known by the attorney to be false, appellant argues that his trial counsel had a conflict of interest in that he had assisted in entering appellant's guilty plea and

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<sup>4</sup> Appellant also relies on *Missouri v. Frye*, which holds that the right to effective assistance of counsel extends to informal plea bargaining contexts and specifically includes the consideration of plea offers that lapse or are rejected. 132 S. Ct. 1399, 1404, 1407–08 (2012). In *Frye*, the Court found that counsel's performance fell below an objective standard of reasonableness when he failed to inform the defendant of a written plea offer before it expired. *Id.* at 1408–09. Here, the record contains no evidence that counsel failed to inform appellant of a plea offer. Appellant has never alleged that his counsel had failed to communicate an offer to him.

then did not withdraw as counsel when appellant indicated he wanted to withdraw his plea because he really had not committed the offense to which he had pled guilty. Appellant's argument that his trial counsel had a conflict of interest is laden with assumptions (which appellant concedes in his brief to this court). Appellant's argument is meritless.

The "conflict of interest" of which appellant complains proceeds from the unsupported argument that appellant's desire to offer testimony contrary to that previously supplied by him at the time of his plea gave rise to an ethical quandary which should have required his attorney to withdraw. Appellant cites no applicable caselaw in support of this contorted argument (despite multiple pages of briefing addressing the subject). Moreover, appellant did nothing to bring the alleged conflict to the district court's attention. The facts here are therefore unlike those in *State v. Paige*, 765 N.W.2d 131 (Minn. App. 2009) and *Butala v. State*, 664 N.W.2d 333 (Minn. 2003).

Minn. R. Prof. Conduct 3.3(a)(3) prohibits attorneys from offering testimony known by counsel to be false. The rule does not preclude or impair an attorney's ability to ethically present testimony different than that previously offered. If appellant wished to testify that his prior version of the facts was false or in some manner incorrect, his attorney would not have been prohibited from assisting him in offering that testimony, and the attorney would presumably have been ethically obligated under Minn. R. Prof. Conduct 1.2(a) to "abide by the client's decision . . . as to a plea to be entered . . . and whether the client will testify." If appellant wished to perjure himself in requesting

withdrawal of the prior plea, any attorney would be prohibited from assisting in such an endeavor under Minn. R. Prof. Conduct 3.3(a)(3).

Appellant's claim that he received ineffective assistance of counsel due to a conflict of interest fails.

### III.

Finally, appellant argues that it was error for the postconviction court to deny his motion to withdraw his plea. In reviewing a postconviction order, this court determines whether there is sufficient evidence to support the postconviction court's factual findings, and will not disturb the postconviction court's decision absent an abuse of discretion. *Walen v. State*, 777 N.W.2d 213, 215 (Minn. 2010). But the validity of a guilty plea is a question of law which is reviewed de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

A defendant does not have an absolute right to withdraw a guilty plea. *Id.* at 93. A guilty plea may be withdrawn at any time in order 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. A valid guilty plea is one that is accurate, voluntary, and intelligent. *Id.* A party seeking to withdraw his guilty plea has the burden of establishing that the plea is invalid. *Id.*

The requirement that a guilty plea be accurate protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to a trial. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). To determine whether a plea is voluntary, the court examines what the parties reasonably understood to

be the terms of the plea agreement. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). The voluntariness requirement ensures that a defendant is not pleading guilty due to improper pressure or coercion. *Trott*, 338 N.W.2d at 251. The intelligence requirement ensures that a defendant understands the charges against him, the rights he is waiving, and the consequences of his plea. *Id.*

Appellant argues that he should be able to withdraw his plea because he was “misled” by trial counsel’s allegedly unreasonable advice and allegedly inadequate assistance of counsel due to a conflict of interest. As previously discussed, appellant’s arguments that he received ineffective assistance of counsel are without merit.

Moreover, we have carefully reviewed the record here, which is exemplary in its thoroughness, and there is ample support for the district court’s conclusion that appellant’s plea was accurate, voluntary, and intelligent. Before appellant entered his plea, the district court was very careful to ensure that appellant understood the details of the arrangement to which he was agreeing and that an executed prison sentence was likely. Appellant was represented by experienced and capable counsel and was questioned fully by the court and counsel at the plea hearing. The court and appellant’s counsel explained to appellant at length that the plea contained no agreement as to a prison term, and that a prison sentence was a likely outcome of his plea of guilty. Appellant’s counsel and the court correctly and fully informed appellant that statutory requirements (i.e., being amenable to treatment) needed to be met in order for appellant to be eligible for a dispositional departure at sentencing. Appellant admits he did not complete the sex-offender evaluation as he was instructed by the court and his counsel.

Appellant confirmed in both sworn testimony and in his signed plea petition that he was satisfied with his attorney's representation, that he was satisfied his attorney was fully informed as to the facts of the case, that nobody had made any promises to him (other than dismissal of the other counts) in order to obtain or induce his guilty plea, and that he was making no claim that he was innocent.

The postconviction court did not err in denying appellant's motion to withdraw his plea of guilty.

**Affirmed.**