STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0273

Aldrin Guerrero Munoz, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 7, 2013
Affirmed
Ross, Judge

Anoka County District Court
File No. 02-K5-04-004943

Aldrin Guerrero Munoz, Bayport, Minnesota (pro se appellant)

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

Anthony C. Palumbo, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

ROSS, Judge

Aldrin Munoz slammed the head of his 15-week-old son against a wall, killing him, and he was charged with first-degree murder. Munoz entered an *Alford* guilty plea to

second-degree murder, waived his right to a sentencing jury, and was sentenced based on an upward durational departure to 390 months' imprisonment. He voluntarily dismissed his direct appeal in 2005. In October 2012, Munoz filed a motion for a corrected sentence, arguing that his plea agreement did not justify an upward durational departure and that the sentencing process deprived him of his right to trial by jury. The district court treated his motion as a petition for postconviction relief and denied it. Munoz appeals, arguing that his plea was not knowing and voluntary, contending that it did not support the upward durational sentencing departure, and adding that the district court erred by denying his request for new appointed counsel after he fired his appellate public defender. Because Munoz waived his right to appellate counsel and because his sentencing challenge has no merit, we affirm.

FACTS

In February 2004, Aldrin Munoz was left to care for his 15-week-old son while the child's mother was at work. Shortly after driving her to work, Munoz called the infant's mother and told her the baby was unresponsive and appeared sick. She rushed home and took the baby to the hospital, where an examination revealed severe head trauma, including two skull fractures, bleeding between the skull and brain, brain swelling, brain damage, hemorrhages in his eyes, a mouth laceration, two broken arms, and a broken leg. The baby died.

An investigation revealed an "egg-shaped impression" in the wall near the baby's bassinet, consistent with the shape of a young child's skull and containing the baby's DNA. The state initially charged Munoz with first-degree murder, but Munoz agreed that

the state's evidence would be sufficient to convict him of intentional second-degree murder, so he entered an *Alford* guilty plea to that charge.

During his plea hearing, Munoz was assisted by a Spanish-language interpreter through whom he affirmed that he was pleading guilty to "intentional murder in the second degree . . . in violation of Minnesota Statute 609.19, Subd. 1(1)." The plea petition, rendered in both English and Spanish and signed by Munoz, confirmed that Munoz was pleading guilty to second-degree murder. Munoz agreed to give up his right to have a jury decide whether aggravating factors justified an upward durational sentencing departure, allowing the district court judge to make that determination. He indicated that he understood each of the aggravating factors that the state would attempt to prove. And he verbally acknowledged that the district court judge made no promises about how he would decide. The plea petition stated, "There is no plea agreement as to the sentence."

The district court received evidence from 14 witnesses at the sentencing hearing. It found three aggravating factors justifying an upward-departure sentence: that the baby "was subjected to multiple acts of abuse and the abuse was particularly cruel," that the baby was "particularly vulnerable" due to his age, and that Munoz had "violated a position of trust." It sentenced Munoz to 390 months' imprisonment, an upward durational departure from the presumptive guidelines sentence of 306–313 months.

Munoz appealed from the conviction in 2005, then he voluntarily dismissed his appeal. But in October 2012 he filed a motion to correct his sentence under Minnesota Rule of Criminal Procedure 27.03, arguing that his 390-month sentence violated his plea

agreement and his right to trial by jury. He also moved for appointment of counsel. Before the district court decided his motions, Munoz fired his appointed public defender. The district court held that a "plain reading" of Munoz's sentencing challenge indicated that it was properly characterized as a petition for postconviction relief rather than a rule-27.03 motion for a correction of a sentence. It opined that Munoz's characterization was a "transparent attempt . . . to circumvent the two-year post-conviction limitation" imposed by Minnesota Statutes section 590.01 and by *State v. Knaffla*. The district court denied Munoz's sentencing motion.

Munoz appeals.

D E C I S I O N

I

Munoz argues that his right to appellate counsel was denied when his public defender refused to assist him with his sentencing motion. We are not persuaded. First-time postconviction relief petitioners who have not directly appealed have a right to counsel. *See* Minn. Stat. § 611.25 (2012); *see also Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006). But a dismissed direct appeal does not count against the right. *Paone v. State*, 658 N.W.2d 896, 898–99 (Minn. App. 2003). Improper denial of counsel constitutes a structural error, requiring automatic reversal. *See id.* at 899. The right to the assistance of counsel does not, however, include a right to counsel of an appellant's choosing. *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013). Instead, the district court should replace appointed counsel only if the defendant makes a timely request and if exceptional circumstances justify the replacement. *Id.*

Munoz was not denied his right to counsel. He dismissed his appointed counsel and sent a letter to the district court confirming it. The record does not indicate that Munoz asked the district court for replacement counsel. And although Munoz includes in his appellate brief a copy of a letter he apparently sent to the public defender requesting replacement counsel, we do not consider it on review because it was never provided to the district court and is not part of the record on appeal. *See Plowman v. Copeland, Buhl & Co.*, 261 N.W.2d 581, 583 (Minn. 1997) ("It is well settled that an appellate court may not base its decision on matters outside the record on appeal, and that matters not produced and received in evidence below may not be considered.").

Although our rejection of the letter supports our decision, we also note in passing that Munoz's allegations in the letter would fall far short of "exceptional circumstances" requiring replacement of appointed counsel. Munoz sought to reduce his sentence, but he disagreed with his appointed counsel on how to achieve that goal. The record and the letter suggest that Munoz's counsel told him that the best option was to attempt to withdraw his guilty plea. Munoz disagreed, citing the risk that the state might reinstate the dismissed first-degree murder charge, and he apparently wanted instead to move for a corrected sentenced under Minnesota Rule of Criminal Procedure 27.03. But "[w]hen an appellant and his counsel have divergent opinions as to what issues should be raised on appeal, his counsel has no duty to include claims that would detract from more meritorious issues." *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985). And courts do not second-guess an attorney's professional discretion in choosing which strategies best serve the client's goals. *See State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998). Munoz's

disagreement about strategy did not constitute "exceptional circumstances" requiring replacement of the appointed counsel whom he fired, and so Munoz was not denied his right to effective assistance of counsel.

II

Munoz argues that the district court misconstrued his sentencing motion as a petition for postconviction relief, causing it to erroneously hold that it was time-barred. He asserts that because he seeks only modification of his sentence, his motion is not subject to the statutory two-year time limit. *See, e.g.*, *State v. Amundson*, 828 N.W.2d 747, 751 (Minn. App. 2013) (noting that "properly brought" sentence-correction motions are not governed by the statutory two-year time limit). *But see also Johnson v. State*, 801 N.W.2d 173, 175–76 (Minn. 2011) (holding that sentence-correction motions are not proper vehicles to challenge the validity of a conviction). We do not decide whether his motion was procedurally barred because it clearly fails on its merits. *See Kahn v. State*, 289 N.W.2d 737, 745 (Minn. 1980) (allowing appellate courts to affirm the district court on any basis supported by the record). As presented to the district court and then added to on appeal, Munoz's argument appears to be that his sentence should be reduced because he did not actually (or at least did not intend to) plead guilty to second-degree murder, that the plea agreement required a presumptive guidelines sentence, and that he did not waive his right to have a jury determine the grounds for an upward departure. We review the interpretation and enforcement of plea agreements de novo. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004). And "when a plea rests in any significant degree on a promise or agreement of the prosecutor, . . . such promise must be fulfilled." *State v.*

Brown, 606 N.W.2d 670, 674 (Minn. 2000) (quotation omitted). If a promise made in a plea agreement is not fulfilled, we may allow the defendant to withdraw his guilty plea or we may modify his sentence. *State v. Wukawitz*, 662 N.W.2d 517, 526–27 (Minn. 2003).

The record conclusively shows that all of Munoz's contentions are factually unsupported. During his plea hearing, Munoz explicitly acknowledged that he was pleading guilty to second-degree murder, that the plea agreement did not contain any promise about his sentence, that he was waiving his right to have a jury determine aggravating factors for an upward-departure sentence, and that the district court was making no promises about the outcome of its sentencing determinations. Munoz's plea agreement stated, "There is no plea agreement as to the sentence." The district court also explained to Munoz that the state would try to justify an upward departure, and Munoz said that he understood. Each of the claims that Munoz makes now are contradicted by his words at the sentencing hearing. We conclude that Munoz intentionally pleaded guilty to second-degree murder, that he explicitly waived his right to a sentencing jury, and that his upward-departure sentence did not violate his plea agreement or his right to have a jury determine aggravating factors.

Munoz also attacks the plea itself, claiming that it was not knowing, voluntary, or accurate. Munoz raises this issue for the first-time in his appeal from the district court's denial of postconviction relief, so we reject it. *See Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005). Munoz also cites no facts from the record to support his claim that his plea agreement was invalidly entered into. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (refusing to consider claims in pro se briefs that are not supported by references to

the record). And any challenge to his plea bargain is also statutorily time-barred. *See Lussier v. State*, 821 N.W.2d 581, 586 n.2 (Minn. 2012) (reaffirming that the two-year time limit in Minn. Stat. § 590.01 applies to petitions to withdraw a guilty plea). Munoz has not shown that either his plea agreement or his sentence is invalid.

Affirmed.