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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-396

State of Minnesota,
Respondent,

vs.

Gregory Wimberly,
Appellant.

Filed March 18, 2008
Affirmed
Hudson, Judge

Stearns County District Court
File No. K6-06-1630

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Janelle P. Kendall, Stearns County Attorney, Elizabeth Lamin, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, Minnesota 56303 (for respondent)

John M. Stuart, State Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Collins, Judge.[*]

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[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

HUDSON, Judge

On direct appeal from his sentencing order, appellant argues that: (1) the district court erred when it sentenced appellant to the maximum presumptive sentence based on his post-plea conduct without giving appellant an opportunity to withdraw his guilty plea; (2) the district court erred when it did not hold an evidentiary hearing to determine whether appellant cooperated with the pre-sentence investigation; and (3) he received ineffective assistance of counsel and his criminal-history score was inaccurately calculated. Because appellant was sentenced according to the terms of his plea agreement, the district court was not asked or required to hold an evidentiary hearing, appellant did not prove he received ineffective assistance of counsel, and his criminal-history score was accurately calculated, we affirm.

FACTS

In September 2006, appellant Gregory Wimberly pleaded guilty to one count of burglary in the first degree and one count of check forgery in violation of Minn. Stat. §§ 609.582, subd. 1(a), .631, subds. 2, 4 (2004). Appellant's negotiated plea agreement stated that in exchange for pleading guilty, appellant would receive a 57-month sentence, be allowed to seek a departure, and not have to serve an interim commitment; but that appellant would receive a 71-month sentence if he failed to appear for sentencing or failed to cooperate with the pre-sentence investigation (PSI). After entering the plea, the district court stated:

> The Court finds, sir, that you are represented by an attorney, you've been made aware of all of your various rights through that representation and here on the record, you've knowingly and voluntarily waived those rights. . . .
>
> Court will order a presentence investigation report. [Appellant], you are to cooperate in that process. As indicated, if you do not cooperate in that process and if you fail to appear for sentencing, the Court will continue to accept your guilty plea; however, the terms of the plea agreement will not be honored and, in fact, at that point then the State would be free to argue for the top of the box, which is 71 months, I believe. You are to keep in contact with your attorney, do not leave the State of Minnesota unless prior approval has been given by this Court.

Before the sentencing hearing, a Stearns County Department of Community Corrections (department) agent notified the district court in a letter of appellant's interactions with the department since the entry of his guilty plea. The letter stated that when appellant reported to the agent after his September court date, he did not provide the department with a valid address and left without scheduling a PSI interview appointment. A couple of days later, appellant requested that the department send him a PSI interview appointment date at: "General Delivery; St. Cloud MN 56302." The department sent an appointment letter to the provided address on September 21, 2006, for an October 2, 2006 appointment. Appellant did not appear for the appointment or contact the department to reschedule, and the letter was returned as unclaimed. The department sent a second appointment letter on October 2, 2006, which was also returned as unclaimed.

On October 12, 2006, the district court issued a warrant for appellant's arrest because he failed to report for a PSI interview in violation of the conditions of his release.

Appellant was arrested on November 3, 2006, and later released. On November 7, 2006, appellant's PSI report was filed, stating that appellant "did not cooperate with a pre-sentence investigation interview." On November 14, 2006, appellant arrived at the department office to request that a PSI interview "be completed before his sentence on November 20, 2006." The department informed him it was not possible, and when asked why he had not cooperated with his PSI earlier, appellant stated he had been in Illinois visiting family. In addition, the agent indicated in the letter that she had learned from a police officer that appellant "has been smoking crack cocaine on a daily basis" and that when he visited the department office on November 14, he "appeared to be significantly under the influence of a mood-altering chemical."

Appellant's sentencing hearing took place on November 20, 2006. At the hearing, the prosecution requested that appellant be sentenced to 71 months in prison due to his lack of cooperation with the PSI. Appellant's attorney did not file a motion for a downward departure but argued that appellant should receive the 57-month sentence instead of the 71-month sentence. In response to counsels' arguments, the district court stated:

> I guess I'm bothered by the fact that there [were] numerous attempts at getting this presentence investigation completed. You did not cooperate. In fact, a warrant was issued. . . [.]
>
> . . . .
>
> [T]he court finds you did not cooperate in this presentence investigation process and you had every reason that you should have. You knew that if you didn't what would happen. I have nothing left that I can do but to follow what I said I was going to do if you didn't cooperate.

The district court sentenced appellant to 71 months in prison. This appeal follows.

DECISION

I

Appellant argues that the district court erred when it sentenced him to 71 months without giving him an opportunity to withdraw his guilty plea because: (1) the nature of the plea agreement prevented appellant from making an intelligent guilty plea; and (2) the plea was not made voluntarily when the promise of the 57-month sentence, which induced appellant's guilty plea, was not fulfilled by the prosecution. In his pro se supplemental brief, appellant also contends that imposing the 71-month sentence violated his due-process rights. We disagree.

Appellant appeals directly from the district court's sentencing order; appellant did not request that the district court grant him permission to withdraw his plea. A criminal defendant has a right to challenge his guilty plea on direct appeal even though he has not moved to withdraw the guilty plea in the district court. *State v. Anyanwu,* 681 N.W.2d 411, 413 n.1 (Minn. App. 2004). "[A] direct appeal is appropriate when the record contains factual support for the defendant's claim and when no disputes of material fact must be resolved to evaluate the claim on the merits." *Id.* When a defendant appeals directly from his judgment of conviction, this court looks at the record made at the time of the plea to determine if the plea was inadequate in that it was not accurate, voluntary, and intelligent. *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989); *see also* Minn. R.

Crim. P. 15.05, subd. 1 (stating that a plea may be withdrawn "upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice"); *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997) (stating that a manifest injustice occurs when a guilty plea is not accurate, voluntary, and intelligent).

Intelligent plea

Appellant argues that because the 57-month sentence "was contingent upon appellant cooperating in completing the PSI and appearing at the sentencing hearing, he could not know the maximum possible sentence at the time he pleaded guilty," and therefore, his plea was not intelligently made. But our review of the record convinces us that appellant entered an intelligent guilty plea.

The guilty plea must be intelligent to "to insure that the defendant understands the charges, understands the rights he is waiving by pleading guilty, and understands the consequences of his plea." *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). "[W]hen a defendant is not fairly apprised of the consequences of his plea," it violates his due-process rights. *State v. Wukawitz*, 662 N.W.2d 517, 521 (Minn. 2003).

Here, appellant signed a stipulated plea agreement, which stated that if he appeared for sentencing and cooperated in completing the PSI, he would receive a 57-month sentence; but that if he did not do so, he would receive a 71-month sentence. When appellant entered his plea, he was represented by counsel, and appellant stated that he understood the nature of his plea agreement. Further, when the district court accepted his guilty plea, it re-stated the terms of the plea agreement, emphasizing that if appellant did not participate in the PSI process or appear for sentencing, "the court will continue to

accept your guilty plea," but, pursuant to the plea agreement, he would receive a 71-month sentence.[1]

Appellant also argues in his pro se supplemental brief that because he is illiterate, has attention-deficit disorder, and takes "trazadone," he was unable to comprehend the nature of his plea. But again, appellant was represented by counsel and appellant acknowledged when he entered his plea that he understood the nature of his stipulated plea agreement.

Based on this record, appellant's guilty plea was intelligently made because appellant knew and understood the consequences of his plea agreement.

Voluntary plea

Appellant argues that his guilty plea was not made voluntarily because he did not receive what was promised to him under the plea agreement—the 57-month sentence. But again, our review of the record convinces us that the plea was made voluntarily because appellant received the sentence to which he agreed in his plea agreement.

A defendant must enter the plea voluntarily and not plead guilty because of improper pressures or inducement, and "[i]nducement of a guilty plea by promises that cannot be fulfilled invalidates the plea." *State v. Jumping Eagle*, 620 N.W.2d 42, 43 (Minn. 2000). If the government does not fulfill its promises that induced the guilty plea, then the defendant's due-process rights are violated. *Wukawitz*, 662 N.W.2d at 521.

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[1] Appellant appears to argue in his pro se supplemental brief that all his plea agreement required him to do was show up for sentencing to receive the 57-month sentence. But appellant's stipulated plea agreement and the instructions he received from the court specifically stated that to receive the 57-month sentence he not only had to show up for sentencing, but he also had to cooperate with the preparation of the PSI.

When determining whether a plea agreement was violated, "courts look to what the parties to [the] plea bargain reasonably understood to be the terms of the agreement." *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (alteration in original) (quotation omitted). The district court violates a plea agreement if the sentence imposed exceeds the upper limit of the court-accepted plea petition. *Jumping Eagle*, 620 N.W.2d at 44. What the parties agreed to is a question of fact for the district court to decide, but "interpretation and enforcement of plea agreements involve issues of law that we review de novo." *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004); *Brown*, 606 N.W.2d at 674. And this court reviews the district court's factual findings for clear error. *State v. Critt*, 554 N.W.2d 93, 95 (Minn. App. 1996), *review denied* (Minn. Nov. 20, 1996).

Here, at the sentencing hearing, the district court found the following with respect to what the parties agreed in the plea agreement:

> I remember [when the plea was taken] the State did not argue for interim commitment on the condition that you show up on time and cooperate fully with your [PSI] and you show up for sentencing. It was made very clear to you that if you failed to do either of those things, that the plea agreement or the cap of 57 months was off, that the plea would continue to be accepted, and that the State or the Court could be free to impose 71 months, which is the top of the box on the grid.

Based on the stipulated plea agreement and the statements made by the prosecution and the district court when appellant entered his plea, the district court's findings as to the terms of the plea agreement are not clearly erroneous; indeed, they are amply supported by the record. At the sentencing hearing, the district court concluded that appellant did not cooperate because he did not participate in the PSI interview; he had a warrant issued

for his arrest; and he left Minnesota in violation of the conditions of his release. As a result, the district court stated, "I have nothing left that I can do but to follow what I said I was going to do if you didn't cooperate," and sentenced appellant to 71 months.

Appellant also argues that he should have been allowed to withdraw his plea before sentencing because his post-plea conduct changed the prosecution's and the court's minds as to his sentence. Appellant relies on *State v. Kunshier*, 410 N.W.2d 377 (Minn. App. 1987), *review denied* (Minn. Oct. 21, 1987), for this proposition. But in *Kunshier,* the plea agreement addressed appellant's sentence based only on the offense for which he was charged. *Id.* at 378–79. Thus, this court held that the district court erred when it did not provide the defendant with an opportunity to withdraw his plea upon notification that the district court had rejected the offered plea agreement based on his post-plea conduct and that the district court had decided to impose the presumptive sentence. *See id.* at 379–80 (stating that defendant's "plea was based on a promise, which the trial court had no discretion to reject without tendering to appellant his right to withdraw that plea and stand trial").

By contrast, here, appellant specifically agreed that his post-plea conduct could determine his ultimate sentence. In effect, with the imposition of the 71-month sentence, appellant received exactly what he was promised under his plea agreement if he did not cooperate with the PSI. We also note that the 71-month sentence was not a departure under the sentencing guidelines; rather, it was the maximum presumptive sentence for appellant's first-degree burglary charge with a three-month custody enhancement.

Appellant contends, however, that imposition of the 71-month maximum sentence "cannot be characterized as an inducement for appellant's guilty plea" because "[o]nly the 57-month cap can be properly characterized as a promise given by the state that would induce a guilty plea by appellant." While appellant may be correct that he was ultimately induced to enter the plea based on the 57-month sentence, he also agreed that he would not receive that sentence if certain conditions that were within appellant's control were not met. We conclude that at the time appellant entered his guilty plea, the plea was voluntarily made in that the prosecution fulfilled its promise that it would argue for appellant to receive a 71-month sentence based on specific post-plea conduct. Accordingly, appellant was not entitled to withdraw his guilty plea.

II

Appellant also argues that whether he cooperated with the PSI was a factual issue that required an evidentiary hearing. And in his pro se supplemental brief, appellant contends that he attempted to complete the PSI but was prevented from doing so based on his race and unverified allegations that he was under the influence of controlled substances.

Here, appellant did not ask the district court for an evidentiary hearing to determine whether appellant cooperated with the PSI or otherwise try to present evidence to the district court that appellant cooperated with the PSI. Instead, appellant's attorney argued at the sentencing hearing that, because appellant attempted to complete the PSI interview and made all of his court appearances, "under the circumstances, [he] cooperated or attempted to cooperate with the PSI agent."

Despite his failure to request that the district court hold an evidentiary hearing, appellant argues that Minn. R. Crim. P. 6.03 requires the district court to hold an evidentiary hearing to determine whether appellant cooperated with the PSI. This court reviews questions concerning the interpretation of the rules of criminal procedure de novo. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). Appellant's reliance on rule 6.03 is misplaced because rule 6.03 only concerns procedures regarding violations of conditions of release. Rule 6.03 does not require that the district court hold evidentiary hearings to determine whether a defendant abided by the terms of a plea agreement. Further, appellant does not cite any other authority to support his argument that the district court was required to hold an evidentiary hearing in the absence of a motion by appellant. *See State v. Schroeder*, 401 N.W.2d 671, 675 (Minn. App. 1987) (holding that if a defendant does not ask for an evidentiary hearing to dispute statements made in a PSI, he cannot wait until his appeal to contest the veracity of the report), *review denied* (Minn. Apr. 23, 1987). Accordingly, the district court did not err when it did not hold an evidentiary hearing to determine whether appellant cooperated with his PSI.

In addition, appellant argues in his pro se supplemental brief that he attempted to complete the PSI and that he was prevented from doing so due to his race and unverified allegations that he was under the influence. The record before this court is insufficient to conduct meaningful appellate review of these issues because they were not raised before and considered by the district court.[2] These issues should instead be addressed in a

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[2] We observe, however, that it appears that the district court did not impose the 71-month sentence because appellant was allegedly under the influence when he visited the

postconviction proceeding, "which affords a defendant upon a proper petition an opportunity to prove, and the state to rebut, belated claims unsupported by the record submitted for review on a direct appeal from the judgment of conviction." *State v. Feather*, 288 Minn. 556, 557, 181 N.W.2d 478, 479–80 (1970) (holding that the arguments presented must be raised in postconviction-relief proceeding because appellant's arguments were "unsupported by the record and cannot be viewed otherwise than as mere argumentative assertions, neither presented to nor considered by the trial court").

III

In his pro se supplemental brief, appellant appears to argue that: (1) he was denied effective assistance of counsel because he intended that his attorney would file a motion for a downward departure; and (2) his criminal-history score was inaccurately calculated because it was based on offenses more than 15 years old. These arguments lack merit.

Appellant takes issue with his attorney's failure to file a motion for a downward departure. At the sentencing hearing, appellant's attorney stated that while he originally planned on requesting a downward departure, based on appellant's post-plea conduct, he argued instead that the district court should apply the 57-month sentence rather than the 71-month sentence. First, an attorney's decision to make a particular argument constitutes trial tactics and strategy that lie within the discretion of trial counsel and are generally not reviewable by this court. *State v. Jones*, 392 N.W.2d 224, 236 (Minn.

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corrections office on November 14, 2006. Rather, it appears the district court imposed the 71-month sentence because appellant did not cooperate with the PSI.

1986). Second, appellant's argument does not establish that his attorney's representation "fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State,* 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted).

Appellant also contends that his criminal-history score was inaccurately calculated because it was derived by using offenses that were more than 15 years old. But according to appellant's PSI, the oldest identified offense date was December 31, 1992, 13 years before the date of the offenses for which he was sentenced.

Affirmed.