STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1163

State of Minnesota,
Respondent,

vs.

Christopher Michael Walsh,
Appellant.

Filed June 3, 2008
Affirmed
Shumaker, Judge

Sherburne County District Court
File No. K5-04-2407

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Kathleen A. Heaney, Sherburne County Attorney, Arden J. Fritz, Assistant County Attorney, 13880 Highway 10, Elk River, MN 55330 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Shumaker, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

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

SHUMAKER, Judge

On appeal from denial of his petition for postconviction relief, appellant argues that he should have received a downward departure from the presumptive sentence and contends, in his pro se supplemental brief, that he did not receive effective assistance of counsel. Because there are no substantial and compelling circumstances to support a departure from the presumptive sentence and because appellant has failed to demonstrate any merit to his ineffective-assistance-of-counsel claim, we affirm.

FACTS

On the morning of October 19, 2004, appellant Christopher Michael Walsh entered the bedroom of his eight-year-old adopted daughter and sexually assaulted her. Shortly afterwards, he confessed the incident to his wife and pastor.

When his pastor reported the incident to authorities, Walsh voluntarily went to the Sherburne County Sheriff's Department, where investigators interviewed him. He admitted that, on October 19, he entered his adopted daughter's bedroom, removed her underwear, touched her vagina with his fingers and genitalia, performed oral sex on her, and then masturbated and ejaculated on her. Police arrested Walsh, and the state charged him with two counts of criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1(a) (2004), and Minn. Stat. § 609.342, subd. 1(g) (2004).

On March 3, 2005, Walsh pleaded guilty to one count of criminal sexual conduct in the first degree, in exchange for which the state agreed to dismiss the second count.

The district court accepted Walsh's guilty plea and ordered a presentence investigation, an adult sex-offender psychological assessment, and set a date to return for sentencing.

Before sentencing, Walsh moved for a downward dispositional or durational sentencing departure. But the court denied the motion and imposed the presumptive executed sentence of 144 months.

Walsh did not directly appeal his conviction or his sentence. Instead, in October 2006, he filed a pro se petition for postconviction relief, alleging six separate grounds for relief including ineffective assistance of counsel. In January 2007, the Minnesota State Public Defender's Office, acting on Walsh's behalf, filed a supplemental petition for postconviction relief, alleging that the district court had abused its discretion by failing to grant the motion for a downward sentencing departure.

The district court denied Walsh's petition and the supplemental petition for postconviction relief in all respects. The court concluded that Walsh had not shown any substantial and compelling circumstances that warranted a dispositional or downward departure from the sentencing guidelines. Regarding his other claims, including his ineffective-assistance-of-counsel claim, the court found that Walsh had not factually supported his allegations. This appeal followed.

D E C I S I O N

An appellate court "will disturb the postconviction court's decision only if the court abused its discretion." *Stutelberg v. State*, 741 N.W.2d 867, 872 (Minn. 2007). "We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record" and "will not reverse the findings unless they are

clearly erroneous." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). But we review legal determinations de novo. *Stutelberg*, 741 N.W.2d at 872.

A district court may depart from the presumptive sentence provided by the Minnesota Sentencing Guidelines only if "substantial and compelling circumstances" warrant such a departure. Minn. Sent. Guidelines II.D; *State v. Kindem*, 313 N.W.2d 6, 7-8 (Minn. 1981) (affirming district court's refusal to downwardly depart for lack of substantial and compelling circumstances). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Whether to depart from the guidelines rests within the district court's discretion, and this court will not reverse the decision "absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare case" would the refusal to depart warrant reversal. *Kindem*, 313 N.W.2d at 7.

Walsh contends that a downward departure was warranted because he is amenable to probation and, therefore, he and society would be best served if he receives a probationary sentence instead of the presumptive executed guidelines sentence. In support of his argument, Walsh points out that he has no prior criminal record, that he is remorseful and has taken full responsibility for his actions, and that the adult sex-offender assessment concluded that he was a suitable candidate for outpatient sex-offender treatment.

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that a district court may use as reasons for granting a downward departure. Minn. Sent.

Guidelines II.D.2. Amenability to probation is not listed, but the district court may impose probation "in lieu of an executed sentence when the defendant is particularly amenable to probation." *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). To assess a defendant's amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court may focus "on the defendant as an individual," and determine "whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). But a defendant's amenability to probation does not require that a district court depart from the presumptive sentence. *State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

Walsh argues that he should have been given probation, in lieu of the executed presumptive sentence, because he has no prior criminal record. But the Minnesota Supreme Court has stated that "a defendant's clean record does not by itself justify mitigation of sentence because that factor, in the form of defendant's criminal history score, has already been taken into account by the Sentencing Guidelines in establishing the presumptive sentence." *Trog*, 323 N.W.2d at 31. Here, Walsh's lack of a criminal record was accounted for by the presumptive sentence, which was calculated using his criminal history score of zero.

Walsh next asserts that a probationary disposition is appropriate because he is remorseful and has taken full responsibility for his actions. He points out that he confessed the incident to his wife, pastor, and police; expressed his desire for counseling

so he would gain insight into his actions; and stated during sentencing that he did not "blame anybody other than [him]self" and was "one hundred percent responsible" for his actions. But during sentencing proceedings, the district court questioned the sincerity of Walsh's claimed remorse, noting that he had attributed his criminal conduct to numerous factors, including his relationship with his wife, medication, and depression. We defer to the district court's ability to assess a defendant's remorse because it "ha[d] an opportunity to actually observe the defendant throughout the proceedings" and could properly assess "the sincerity and depth of the remorse and what weight it should receive in the sentencing decision." *State v. Woelfel*, 621 N.W.2d 767, 775 (Minn. App. 2001) (quotation omitted), *review denied* (Minn. Mar. 27, 2001). Moreover, the district court's assessment of the nature and extent of Walsh's remorse is supported by the presentence investigation and the adult sex-offender assessment. The presentence investigation noted that, although Walsh "display[ed] remorse and guilt for his abuse," he also "tend[ed] to blame exogenous factors," such as his relationship with his wife, as contributing to the etiology of the crime. Even the adult sex-offender assessment, containing a recommendation of outpatient treatment, concluded that Walsh blamed the abuse on circumstances such as his medication, court proceedings against his first wife, and financial strain.

Lastly, Walsh argues that probation is appropriate because the adult sex-offender assessment recommended outpatient sex-offender psychotherapy. The district court considered the recommendation, but ultimately determined that the presumptive sentence was appropriate here. At sentencing, the district court noted that the assessment

concluded that Walsh was "amenable to probation and a good candidate for treatment." But the district court also noted that Walsh could receive treatment in prison and that the presentence investigation recommended prison, not probation. During sentencing, the district court explained that the presumptive sentence was appropriate given the facts of this case, which "speak in favor of incarceration and treatment" during incarceration, not probation. In particular, the court found that Walsh was not truly remorseful; he did not take full responsibility for his criminal conduct, but rather focused on the effect of his medication and his relationship with his wife; he sexually objectified the victim; he treated the victim in a cruel and demeaning manner by ejaculating on her; he failed to prevent his acts when he could have developed a safety plan in response to the sexual dreams he was having regarding the victim and could have stopped when the victim physically resisted him during the assault; the victim wanted no contact with him; and Walsh could be appropriately treated in prison. *Cf. Evenson*, 554 N.W.2d at 413 (concluding there was no abuse of discretion where the defendant had committed egregious crimes in an egregious manner).

Because there were no substantial and compelling circumstances to support a departure, the postconviction court did not abuse its discretion by denying Walsh's petition for postconviction relief.

Walsh also argues, in his pro se supplemental brief, that he received ineffective assistance of counsel. In denying Walsh's petition for postconviction relief, the district court concluded that the ineffective-assistance-of-counsel claim failed because Walsh did not provide factual support for the claim. On appeal, Walsh has pointed to particular

instances that he alleges constituted ineffective assistance. Specifically, he claims that his trial counsel erred by not seeking a removal of the district court judge whom, he argues, had "female bias"; by failing to seek a rule 20 evaluation despite knowledge of Walsh's psychological disorder and his requests for a "death sentence"; and by discussing a plea agreement with him while he was on suicide watch. Although Walsh alleges these matters in his supplemental brief, he fails to support his claims with any citation to the record. *See Hecker v. Hecker*, 543 N.W.2d 678, 681 n.2 (Minn. App. 1996) (requiring that material assertions of fact be supported by citation to the record), *aff'd*, 568 N.W.2d 705 (Minn. 1997).

Walsh did not raise these matters in his petition for postconviction relief; rather, his petition simply alleged that he was denied effective assistance of counsel, without pointing to any facts whatsoever. The district court, as a result, did not have the opportunity to consider the issues Walsh raises now on appeal, and there does not appear to be any record to support his claim. The state argues that Walsh has waived this claim because a reviewing court will generally not consider matters raised for the first time on appeal from the denial of postconviction relief. *See Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (stating the established rule "that a party may not raise issues for the first time on appeal from denial of postconviction relief").

Although we do not treat this issue as waived, we conclude that Walsh has failed to show his ineffective-assistance-of-counsel claim with any particularity or to show that it has any merit. Ineffective-assistance-of-counsel claims involve mixed questions of law and fact, and we review them de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn.

2004). A party alleging ineffective assistance of counsel "must affirmatively prove that his counsel'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) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). An attorney's representation falls below an objective standard of reasonableness when the attorney does not exercise the customary skills and diligence that a reasonably competent attorney could provide under the circumstances. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted). Under the prejudice prong, "the defendant must show that counsel's errors 'actually' had an adverse effect in that but for the errors the result of the proceeding probably would have been different." *Gates*, 398 N.W.2d at 562. This court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Walsh has failed to meet his burden on his ineffective-assistance-of-counsel claim. He has not shown that his attorney's decision not to remove an assigned judge amounted to misconduct. This court has previously stated that an attorney's failure to seek the trial judge's removal is "generally [a] matter[] of trial strategy, upon which this court will not pass judgment." *Gorman v. State*, 619 N.W.2d 802, 808 (Minn. App. 2000), *review*

denied (Minn. Feb. 21, 2001); *see also Opsahl*, 677 N.W.2d at 421 ("[W]e generally will not review attacks on counsel's trial strategy.").

Similarly, Walsh has not cited any authority or provided any argument demonstrating that his attorney's conduct fell below the requisite objective standard when she discussed the plea agreement with him while he was allegedly under suicide watch or failed to request the rule 20 evaluation. He has not shown that, but for this conduct, he would not have pleaded guilty or would have received a different sentence. Thus, he has not met his burden on the prejudice prong.

We conclude that Walsh has failed to demonstrate that his ineffective-assistance-of-counsel claim has merit, and therefore the district court did not abuse its discretion by denying his petition for postconviction relief.

Affirmed.