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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-447**

Michael Erin Docken, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed January 12, 2010  
Affirmed  
Johnson, Judge**

Ramsey County District Court  
File No. 62-K6-07-003301

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Considered and decided by Lansing, Presiding Judge; Johnson, Judge; and  
Crippen, Judge.\*

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\*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**JOHNSON**, Judge

Michael Erin Docken pleaded guilty to first-degree possession of a controlled substance. In this postconviction action, he seeks to withdraw his guilty plea on the ground that the district court denied his motion for a downward dispositional departure at his sentencing hearing. We conclude that the district court did not abuse its discretion by denying Docken's postconviction petition without an evidentiary hearing and, therefore, affirm.

### FACTS

In September 2007, a New Brighton police officer stopped the vehicle that Docken was driving because he failed to signal a turn. The police officer arrested Docken upon learning that he had outstanding arrest warrants in other counties. During an inventory search of Docken's vehicle, the officer found three small bags that contained 28.8 grams of methamphetamine.

In September 2007, the state charged Docken with first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(1) (2006). In February 2008, Docken's counsel and the prosecutor engaged in plea negotiations, but no agreement was reached. Nonetheless, Docken entered a plea of guilty. At the plea hearing, after an off-the-record discussion, Docken's counsel informed the district court that Docken would move for a downward dispositional departure, and the prosecutor informed the district court that the state would oppose the motion. The district court deferred acceptance of the guilty plea, stating to Docken that "if you plead straight up, I

won't accept your plea, but I will wait until . . . the sentencing date to see how you have progressed and whether you've made some steps toward cleaning up yourself and changing your lifestyle.”

The sentencing hearing was held in July 2008. The district court denied Docken's motion for a downward dispositional departure, finding that Docken was not amenable to probation and that there were no substantial and compelling reasons for a departure. Specifically, the district court noted that Docken had failed to appear for a sentencing hearing that was scheduled for April 2008 and that he had tested positive for methamphetamine upon his admission to a treatment program in May 2008. The district court explained to Docken the reasons that he was not amenable to probation: “You've been on probation seven times. You failed every time. You have had the chance to do treatment numerous times. You never chose to do it. You've been using since you pled guilty in front of me, and you used right up until the day you went into treatment.”

Docken then moved to withdraw his guilty plea. Docken's counsel informed the district court that Docken understood that there was a prior agreement that if the district court were to deny his motion for a departure, Docken would be allowed to withdraw his guilty plea. Docken's counsel admitted that he did not recall such an agreement but, nonetheless, conveyed to the district court Docken's expressed belief that counsel had informed him of such an agreement at the time of the plea hearing. The state opposed the motion to withdraw, and the district court denied it. Docken addressed the district court directly to seek reconsideration, stating, “I was under the impression that if I wasn't found amenable to probation that I could withdraw my plea.” The district court

responded, “My notes don’t indicate it, and I make very good notes.” The district court then sentenced Docken to 94 months of imprisonment, which is at the low end of the presumptive guidelines range. Docken did not take a direct appeal from his conviction and sentence.

In November 2008, Docken filed a postconviction petition in which he alleged that he should be permitted to withdraw his guilty plea because the district court did not grant his motion for a downward dispositional departure. In support of his petition, he filed an affidavit of his attorney, who stated that he “understood from the court that, although the court would not agree in advance to a dispositional departure, it would consider such a motion and, if it did not agree to a dispositional departure, the petitioner would be permitted to withdraw his guilty [plea] and proceed to trial.” In January 2009, the district court denied the petition without holding an evidentiary hearing, concluding that plea withdrawal is not necessary to correct a manifest injustice. Docken appeals.

## **D E C I S I O N**

Docken argues that the district court erred by denying his postconviction petition without an evidentiary hearing. A postconviction petition filed pursuant to chapter 590 of the Minnesota Statutes “shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired,” and “[a]ll grounds for relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein.” Minn. Stat. § 590.02, subd. 1 (2008). “[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence.” Minn. Stat. § 590.04, subd. 3 (2008). The district court,

in its discretion, “may receive evidence in the form of affidavit, deposition, or oral testimony.” *Id.* A postconviction court must hold an evidentiary hearing on a postconviction petition “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2008); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). To be entitled to an evidentiary hearing, Docken must allege facts sufficient to entitle him to the relief requested and must make allegations that are more than “argumentative assertions without factual support.” *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008).

A defendant does not have an absolute right to withdraw a guilty plea. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998). The Minnesota Rules of Criminal Procedure provide that a guilty plea may be withdrawn in two situations. First, a district court must permit a defendant to withdraw a guilty plea upon a showing that withdrawal is necessary to correct “manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. Second, a district court may, in its discretion, permit a defendant to withdraw a guilty plea before sentence is imposed “if it is fair and just to do so.” *Id.*, subd. 2. In this case, Docken twice sought to withdraw his plea. First, he moved for plea withdrawal at his sentencing hearing, before the district court imposed sentence. Second, he sought plea withdrawal in his postconviction petition. He appeals only from the second ruling; he did not file a timely notice of appeal from the final judgment on his conviction and sentence. *See* Minn. R. Crim. P. 28.02, subd. 4(3). Thus, the district court properly applied the manifest-injustice standard of rule 15.05, subdivision 1.

Manifest injustice exists if a defendant has proved that a guilty plea is invalid. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). To be valid, a guilty plea “must be accurate, voluntary and intelligent.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). Docken contends that he is entitled to an evidentiary hearing because he has alleged that, prior to his guilty plea, the district court agreed to allow him to withdraw his plea if his motion for a downward dispositional departure were denied, even though there was no plea agreement with the state providing for a downward dispositional departure. In essence, Docken contends that his guilty plea was unintelligent because he erroneously believed that he would be permitted to withdraw his plea if he was unsuccessful in his motion for a downward dispositional departure. “The purpose of the requirement that the plea be intelligent is 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. Farnsworth*, 738 N.W.2d 364, 372 (Minn. 2007) (quotation omitted).

In its order denying Docken’s postconviction petition, the district court stated, “This issue was already addressed at the sentencing hearing . . . after the Court heard arguments by both sides.” At the sentencing hearing, both Docken and his counsel urged the district court to allow him to withdraw his guilty plea based on a purported agreement, but the district court ruled that no such agreement ever existed. In fact, it would be improper for a district court to enter into such an agreement. *See Anderson v. State*, 746 N.W.2d 901, 905 (Minn. App. 2009).

Docken attempts to overcome the district court’s prior finding by pointing to the affidavit of his counsel. The affidavit states that Docken’s counsel met with the

prosecutor and the district court in chambers prior to the plea hearing and that the district court indicated that if it did not grant the motion for a downward departure, Docken would be permitted to withdraw his plea. The affidavit also states that a similar discussion was held off the record during the plea hearing.<sup>1</sup> The affidavit, however, is in conflict with the affiant's statement at the sentencing hearing to the effect that he did not recall an agreement of the type described by his client. A self-serving affidavit that contradicts a prior statement cannot create an issue of fact requiring an evidentiary hearing. *See Risdall v. Brown-Wilbert, Inc.*, 759 N.W.2d 67, 72 (Minn. App. 2009), *review denied* (Minn. Mar. 17, 2009).

Docken also contends that the district court should have conducted an evidentiary hearing to allow his counsel and the prosecutor to testify about off-the-record discussions with the district court. But even if counsel's affidavit were not in conflict with the sentencing transcript, no purpose would be served by an evidentiary hearing because the district court has independent knowledge of the relevant discussions and already found that there was no agreement between Docken and the court.

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<sup>1</sup>Docken's counsel's affidavit describes the agreement as one in which Docken "would be permitted to withdraw" his plea if the district court denied his motion for a downward dispositional departure. In Docken's brief to this court, the same attorney states that the district court deferred acceptance of Docken's plea because it "would be easier for the court to permit the appellant to withdraw his guilty plea." By deferring acceptance of the plea, the district court actually made it possible to reject the plea without the necessity of considering a motion to withdraw. The district court did not explain its decision to defer acceptance of Docken's guilty plea. It is possible that the district court wished to retain maximum flexibility at sentencing. Regardless, the record reflects that, at sentencing, the district court came to the firm conclusion that Docken was not amenable to probation. Accordingly, the district court both accepted the guilty plea and denied the motion for a downward dispositional departure.

Furthermore, the district court record contains additional evidence contradicting Docken's postconviction allegations. At the plea hearing, Docken stated that he understood that the presumptive sentence for his crime is a term of imprisonment. He stated that he understood that he was entering a straight guilty plea and that there was no agreement with either the state or the district court concerning his sentence. Finally, at the conclusion of the plea hearing, the district court told Docken to be prepared for imprisonment: "[Y]ou must reappear for sentencing; and you must come to court ready to serve some jail time. Whether it's prison, workhouse, I won't know until that date, but you should be prepared on that date to be going into some sort of custody." The district court's concluding statement would have been unnecessary if the district court had agreed to give Docken an unconditional choice between a downward dispositional departure and a trial to determine his guilt.

Thus, the district court did not err by denying Docken's postconviction petition without an evidentiary hearing.

**Affirmed.**