STATE OF MINNESOTA
IN COURT OF APPEALS
A10-262

Elwood Nevin Duehn, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 24, 2010
Affirmed
Harten, Judge*

Pipestone County District Court
File No. 59-K4-04-394

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James E. O'Neill, Pipestone County Attorney, Damain D. Sandy, Assistant County Attorney, Pipestone, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Stauber, Judge; and Harten, Judge.

* Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that his plea was invalid because it did not mention the statutory conditional release term mandated for his offense. Because we see no abuse of discretion and no error of law in the denial of appellant's petition, we affirm.

FACTS

In December 2004, appellant Elwood Nevin Duehn was charged with (1) two counts of first-degree driving while impaired (DWI) under Minn. Stat. §§ 169A.24, .276 (mandating a five-year conditional release term for those imprisoned for violations of Minn. Stat. § 169A.24 (2004)); (2) driving after cancellation; and (3) possession of marijuana in a motor vehicle. In April 2005, pursuant to a plea agreement, appellant pleaded guilty to one count of first-degree DWI, and the state dismissed the other charges. In May 2005, appellant's sentencing worksheet provided for a presumptive sentence of 54 months in a range of 51-57 months. The presentence investigation report recited that appellant pleaded guilty to one count of DWI and recommended that the execution of the presumptive sentence be stayed and that appellant receive seven years' probation. The district court rejected this plea agreement.

In July 2005, pursuant to a revised plea agreement, appellant pleaded guilty to one count of first-degree DWI under Minn. Stat. § 169A.24. The revised plea agreement provided for an executed sentence of 51 months and credit for time served. The district court, when imposing appellant's sentence, included "any conditional release periods

which might be required by statute." In August 2005, a sentencing order and a warrant of commitment were issued; neither mentioned conditional release.

The Department of Corrections (DOC) imposed a conditional release term on appellant's sentence. In February 2007, acting pro se, appellant moved the sentencing court to eliminate the conditional release term. The sentencing court wrote a letter saying it had not imposed a conditional release term, and the prosecutor wrote saying that appellant's issue was with the DOC, not the sentencing court.

In July 2007, the DOC noted on a sentence detail for appellant that "it was [] the Judge's intent not to impose conditional release on this sentence" and listed no conditional release term.

In April 2009, the DOC noted on another sentence detail that "it was [] the Judge's intent not to impose conditional release on this sentence," but also that the sentence included a five-year conditional release term, expiring on 27 March 2013, under Minn. Stat. § 169A.276, subd. 1(d). In August 2009, an examination of the transcript of appellant's July 2005 sentencing hearing revealed that the sentencing court had imposed a sentence that included "any conditional release periods which might be required by statute."

In September 2009, appellant petitioned for postconviction relief, seeking permission to either withdraw his plea or have his sentence modified to eliminate the conditional release. The state opposed the petition on the ground that appellant had not objected to the imposition of conditional release at the July 2005 hearing.

The postconviction court denied appellant's petition for relief and amended the August 2005 sentencing order to include a conditional release term. Appellant challenges the denial of his petition, arguing that the postconviction court abused its discretion.

D E C I S I O N

"The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

> Withdrawal [of a guilty plea] is permitted in two circumstances. First, a court *must* allow withdrawal of a guilty plea if withdrawal is necessary to correct a 'manifest injustice.' Minn. R. Crim. P. 15.05, subd. 1. Second, a court *may* allow withdrawal any time before sentencing if it is 'fair and just' to do so. Minn. R. Crim. P. 15.05, subd. 2.

State v. Raleigh, 778 N.W.2d 90, 93 (Minn. 2010) (emphasis added). "A manifest injustice exists if a guilty plea is not valid. . . . Assessing the validity of a plea presents a question of law that we review de novo." *Id.* at 94 (citations omitted). To meet his burden of showing that the plea was invalid, appellant must demonstrate that it was inaccurate, involuntary, or not intelligent. *See id.*

Appellant argues that his plea was invalid because it did not include the conditional release term. But the plea specified that appellant was being sentenced for violation of Minn. Stat. § 169A.24, and sentences for violation of that statute carry a five-year conditional release mandated by Minn. Stat. § 169A.276. Moreover, when imposing sentence after accepting the plea, the district court told appellant it was imposing "any

conditional release periods which might be required by statute." Neither appellant nor his counsel objected.

"[A] postconviction court [does] not abuse its discretion in determining that [a] defendant's plea was intelligent where the defendant did not object at sentencing to the addition of a mandatory 5-year conditional release term that was not expressly included in [the] plea agreement." *State v. Rhodes*, 675 N.W.2d 323, 324 (Minn. 2004). *Rhodes* declined to extend *State v. Wukawitz*, 662 N.W.2d 517, 520 (Minn. 2003) (adding a conditional release term that results in a sentence exceeding the maximum executed sentence agreed to violates the plea bargain) because, in *Wukawitz* and similar cases, "the conditional release term was not mentioned at the sentencing hearing or included in the initial sentence." *Id.* at 327. *Rhodes* rejected the argument that "the focus in ascertaining the validity of a guilty plea should be on what the defendant knew at the time he decided to plead guilty, not what he may have subsequently learned . . . at the sentencing hearing." *Id.* The *Rhodes* court concluded that "the postconviction court could infer from Rhodes' failure to object to . . . the court's imposition of the sentence, that Rhodes understood from the beginning that the conditional release term would be a mandatory addition to his plea bargain." *Id.* Here, the district court's statement that it was imposing "any conditional release periods which might be required by statute" was not questioned or objected to by appellant or his attorney. Thus, under *Rhodes*, appellant's petition was properly denied.

Appellant attempts to distinguish *Rhodes* on the basis that the district court in that case was more explicit: at sentencing, "the [district] court stated that Rhodes was subject to the 5-year conditional release term and said 'so you'll be on the five-year conditional release after you get out of prison.'" *Id.* at 325. In the instant case, appellant and his attorney were free to ask if a conditional release period was required, and, if so, how long the period would be. Extending *Rhodes* to require that the mention of conditional release at the sentencing hearing must specify the length of the term is beyond the scope of this court. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. 18 Dec. 1987).

Appellant also relies on the district court's statement in a letter that it "did not impose any terms of conditional release at the time of sentencing." But that statement was erroneous: the transcript shows that the district court did impose "any conditional release periods which might be required by statute" when it sentenced appellant.[1] And imposition of a conditional release term was mandatory. *See* Minn. Stat. § 169A.276 (2004).

Affirmed.

[1] The district court's statement may have meant that it did not sua sponte impose a further conditional release term.