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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1313**

State of Minnesota,
Respondent,

vs.

Rebecca Lavaughn McGowan,
Appellant.

**Filed May 21, 2018
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge**

Otter Tail County District Court
File No. 56-CR-15-2311

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General,
St. Paul, Minnesota; and

Michelle Eldien, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jessica Merz Godes, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Rebecca Lavaughn McGowan appeals from the postconviction court's
denial of her petition alleging that her trial attorney was ineffective. Appellant also argues

that her sentence must be reversed and remanded for resentencing under the modified sentencing grid of the Drug Sentencing Reform Act (DSRA). We affirm in part, reverse in part, and remand.

FACTS

The state initially charged appellant with one count of simple robbery and one count of fifth-degree controlled-substance possession arising from a series of events on August 4, 2015. The state amended the complaint four times. It first added a charge of first-degree controlled-substance possession. The state then filed a second amended complaint, adding four counts of aiding and abetting false imprisonment, two counts of aiding and abetting second-degree assault, and two counts of aiding and abetting kidnapping, all of which were felony-level offenses. The charges in the second amended complaint alleged that appellant and several others trapped and brutally assaulted multiple victims in a hotel room while demanding money owed to appellant as a drug debt. The state again amended its complaint by removing two counts of false imprisonment and reducing the first-degree controlled-substance possession charge to a charge of second-degree possession of six grams or more of cocaine, heroin, or methamphetamine.

Sometime after the third amended complaint was filed and before appellant bailed out of jail on November 8, 2015, the prosecutor offered a plea agreement, which appellant's trial counsel presented to appellant. The proposed agreement called for appellant to plead guilty to the second-degree controlled-substance and simple-robbery charges in exchange for the dismissal of all other charges. The agreement called for appellant to pay restitution, serve one year in the local jail, complete a chemical use assessment and follow its

recommendations, and serve 25 years on probation. The agreement also required appellant's cooperation "in providing further truthful statements and testimony against" her codefendants. Appellant declined this offer.

The prosecutor emailed appellant's trial counsel on January 6, 2016 stating that the state planned to amend the charges to include a count of first-degree controlled-substance sale. The email stated that the state would refrain from filing the first-degree charge if appellant would plead guilty to the existing second-degree controlled-substance charge. The state proposed to agree to an executed 48-month sentence. The proposal also called for appellant to plead guilty to one count of aiding-and-abetting kidnapping and serve a sentence concurrent with the sentence for the controlled-substance charge.

The state's proposal of January 6 was not accepted and, on January 8, the state filed its fourth amended complaint. This amended complaint added the charge of first-degree controlled-substance sale referenced in the prosecutor's earlier email, but was otherwise identical to the previous complaint. The case was tried to a jury on the 10 felony counts in the fourth amended complaint: first-degree controlled-substance sale (count one), second-degree controlled-substance possession (count two), simple robbery (count three), fifth-degree controlled-substance possession (count four), two counts of aiding and abetting false imprisonment (counts five and six), two counts of aiding and abetting second-degree assault (counts seven and eight), and two counts of aiding and abetting kidnapping (counts nine and ten).

A jury found appellant guilty of all charges. The district court entered convictions on seven counts.¹ The district court sentenced appellant to 86 months in prison on count one, 108 months on count two, 18 months on count three, and 36 months for each of counts seven through ten.² Appellant timely appealed. We later granted appellant's motion to stay the appeal so she could petition the district court for postconviction relief.

Appellant petitioned for postconviction relief, alleging ineffective assistance of counsel. Specifically, appellant alleged that her trial counsel failed to inform her of the prosecutor's January 6, 2016 plea offer and contended that she would have accepted that offer had she been informed of it.

The postconviction court held an evidentiary hearing. Appellant testified that her trial attorney gave her a copy of the first proposed plea agreement while she was in jail. After appellant bailed out of jail, she met with him and declined the plea agreement because she "felt they came so fast with that Plea Agreement that there would be a better one if [she] held out." She also testified that she was afraid of her codefendants and was "very apprehensive about testifying" against them.

Appellant testified that her lawyer never informed her that the state had made another plea offer on January 6, 2016. According to appellant, she did not learn about that

¹ The district court did not adjudicate appellant guilty on the fifth-degree controlled-substance possession charge or the two false-imprisonment charges because those are lesser-included offenses of other charges of which appellant was convicted.

² The district court made all of the sentences concurrent to the sentence on count one. Appellant's only sentencing challenge on appeal concerns count one. She makes no other challenge on appeal to the order or manner of sentencing.

plea offer until after her trial when she asked her lawyer for all of the papers involved with her case. She further testified that, had she been informed of the January 6 offer, she would have accepted it and pleaded guilty because she realized that “[i]t wasn’t getting better.” She also explained that the January 6 offer did not include a cooperation agreement, which was important to her because she was scared of her codefendants. On cross-examination, appellant agreed that the January 6 email “wasn’t a complete description of what a plea to felony offenses would include.” She also agreed that she did not know if that offer would have included a cooperation agreement.

Appellant’s trial counsel testified at the postconviction evidentiary hearing that he recalled receiving an email with a plea offer on January 6, and that such “informal” methods of communicating offers were “not unusual.” He testified that he remembered telling appellant about the January 6 offer at an in-person meeting at some point between January 6 and January 8, 2016, but he did not document that meeting in his case notes. Appellant’s trial counsel stated that he “remember[ed] the conversation very well.” He testified that he understood that, if appellant were to accept the email offer, some specific terms would need to be clarified. In his experience, informal offers were often incomplete. He did not clarify these matters with the prosecutor before meeting with appellant, because there was a short time frame within which to decide whether to accept the offer. Appellant’s trial counsel recalled that, when he told appellant about the January 6 offer, “[s]he cocked her head slightly, paused for a second or two . . . [and] said ‘can’t do it.’” This interaction stood out in his mind, and he recalled that appellant responded “in exactly th[ose] words.” Appellant’s trial counsel explained that, while additional implied terms to

the agreement needed to be clarified, he did not discuss those with appellant because “[s]he expressed her lack of interest immediately.”

The prosecutor also testified at the postconviction evidentiary hearing. He stated that a cooperation agreement with appellant was “fundamental to the agreement” because the case involved multiple offenders. The prosecutor sent the January 6 offer via email, consistent with his routine practice concerning amended plea offers, but testified that it did not include all terms and details of agreement. The prosecutor testified that he intended that the January 6 email offer would include the same terms as the previous offer, including the cooperation agreement. Because appellant did not accept the plea offer, he did not further discuss those additional terms with appellant’s lawyer. The prosecutor testified that, had appellant wished to accept the revised plea proposal, he would have prepared a more formal plea agreement which would have then been disseminated to law-enforcement officials and the victims, as was his usual practice, before being presented to the court.

The district court denied appellant’s petition for postconviction relief. Appellant appealed that denial. Appellant then moved to reinstate her previous appeal. We granted that motion, allowing appellant to appeal “issues raised and decided in the postconviction petition and order, as well as challenges to the proceedings preceding the conviction and to the sentence.”

DECISION

I. We see no error in the postconviction court's determination that appellant failed to establish prejudice on her ineffective-assistance-of-counsel claim.

Appellant argues that the postconviction court erred in determining that she was not prejudiced by her lawyer's failure to inform her of the January 6, 2016 plea offer. She argues that she would have accepted the offer had it been communicated to her.

A criminal defendant has the right to "effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). This right extends to the plea-negotiation process. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To succeed on a claim that trial counsel was ineffective, appellant must show both that trial counsel's performance "(1) fell below an objective standard of reasonableness (performance prong), and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors (prejudice prong)." *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). We need not address both factors if either one is determinative. *Id.*

"We review ineffective assistance of counsel claims de novo because they involve mixed questions of law and fact." *Id.* "We review legal issues de novo. However, our review of factual matters is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *State v. Blom*, 682 N.W.2d 578, 624 (Minn. 2004) (quotation and citation omitted). This standard applies when an appeal from a postconviction order merges with issues from a stayed direct appeal. *Id.* We review the postconviction court's credibility determinations using the clearly erroneous standard. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). Findings are clearly erroneous only if

the reviewing court is “left with the definite and firm conviction that a mistake has been made.” *State v. Roberts*, 876 N.W.2d 863, 868 (Minn. 2016).

“[A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused.” *Missouri v. Frye*, 566 U.S. 134, 145, 132 S. Ct. 1399, 1408 (2012). If defense counsel allows an offer to expire without presenting it to the defendant or allowing her to consider it, defense counsel fails to render effective assistance under the Sixth Amendment. *Id.* To demonstrate prejudice from defense counsel’s failure to inform her of a plea offer, “a defendant must demonstrate a ‘reasonable probability’ that the defendant ‘would have accepted the plea,’ ‘the plea offer would have been presented to the court,’ ‘the court would have accepted its terms,’ and the sentence ‘under the offer’s terms would have been less severe.’” *Pearson v. State*, 891 N.W.2d 590, 598 (Minn. 2017) (quoting *Lafler v. Cooper*, 566 U.S. 156, 164, 132 S. Ct. 1376, 1385 (2012)). “A reasonable probability means a probability sufficient to undermine confidence in the outcome.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (quotation omitted).

The postconviction court found that appellant failed to show that she was prejudiced by the claimed failure of her trial counsel to convey the January 6 offer to her.

First, the postconviction court found that the emailed January 6 offer was incomplete and would not have been presented to the district court as appellant now construes it. The postconviction court explicitly found credible the prosecutor’s testimony “that the terms communicated in the email were not exhaustive, and that a finalized, more formal plea agreement would still include other terms, including the cooperation

agreement.” The postconviction court also implicitly credited the testimony of appellant’s trial counsel that he understood the January 6 offer to contain only some of the terms that would be in a final plea agreement, and that other terms would be included if appellant found the amount of time to be served acceptable. Both lawyers testified that, if appellant had agreed to the terms contained in the January 6 email, they would have clarified these other terms before a finalized agreement was presented to the court. Appellant agreed and understood that the January 6 email required additional terms. There is no record evidence to support appellant’s assertion that other terms, including the cooperation agreement, would not have been included in any final agreement. The state could have withdrawn from the plea agreement had the parties not reached agreement on the cooperation term. *See State v. Johnson*, 617 N.W.2d 440, 443 (Minn. App. 2000) (holding that “the state may withdraw from a plea agreement at any time before a defendant enters a guilty plea, unless the defendant has detrimentally relied upon the agreement”). The record supports the district court’s finding that the state would not have agreed to any negotiated plea that did not contain a cooperation agreement.

The case on which appellant relies involves a situation where the terms of a plea agreement were presented to the district court on the record. *In re Ashman*, 608 N.W.2d 853, 854 (Minn. 2000). That case has no application here. Here, no plea agreement was ever presented to the district court, and the postconviction court found as a fact that the January 6 email proposal was incomplete. That finding is supported by the record. It is not our proper role to find different facts or to reevaluate the postconviction court’s credibility determinations. *Blom*, 682 N.W.2d at 624; *Bobo*, 860 N.W.2d at 684.

Second, the postconviction court found that appellant failed to demonstrate a reasonable probability that she would have accepted the January 6 offer *even if it contained a cooperation agreement*. When asked if there was “anything about the terms of the second deal that were importantly different to [her] than the terms of the first deal,” appellant stated that the email did not include anything about testifying against her codefendants. She said that the lack of a cooperation provision was important to her because she was afraid of her codefendants.

The record supports appellant’s argument that the cooperation agreement was not her sole reason for rejecting the first offer, but the record also shows that appellant was concerned and “very apprehensive” about that requirement. In her postconviction testimony, appellant did not say that she would have accepted the email offer even with a cooperation agreement. Instead, her attorney asked if she would have accepted the terms as listed in the email. She said she would have. But the postconviction court implicitly found that appellant failed to prove that she would have accepted the January 6 offer with or without the cooperation agreement. (“Even if the Court were to credit Petitioner’s testimony that she would have agreed to plead guilty . . .”).

The record does not “undermine confidence in [this] outcome” by showing that appellant would have accepted the January 6 offer regardless of whether it contained a cooperation agreement. *Leake*, 767 N.W.2d at 10. Instead, the record supports the postconviction court’s factual findings.

The postconviction court properly applied the law to findings that are supported by the record. It concluded that appellant failed to demonstrate prejudice, the second element

of *Strickland*. The postconviction court therefore did not reach the first *Strickland* element. It is nevertheless worth observing the importance of counsel exercising care in plea negotiations. The prosecutor's informal emailed offer, coupled with the failure of appellant's trial counsel to document his communications with appellant, resulted in an ambiguous record concerning what really happened. Nevertheless, on this record, the postconviction court's finding that appellant failed to establish that she was prejudiced is not clearly erroneous.

II. Appellant is entitled to resentencing on count one under the DSRA.

Appellant argues that her case must be remanded for resentencing on count one under the DSRA-amended sentencing grid. The state agrees.

The Minnesota Sentencing Guidelines provide presumptive sentences for criminal offenders. Minn. Sent. Guidelines (Supp. 2015). The guidelines were amended by the DSRA, which was signed into law on May 22, 2016. 2016 Minn. Laws. ch. 160, § 22, at 592. The majority of the act's provisions became effective on August 1, 2016, while section 18 (amending the sentencing grids) went into effect on May 23, 2016. 2016 Minn. Laws ch. 160, §§ 1-18, at 591; 22, at 592. Section 18 of the DSRA reduced the severity level of first-degree controlled-substance crimes from a severity level 9 to a D8 on the newly created Drug Offender Grid. *Compare* Minn. Sent. Guidelines 4.A (Supp. 2015), *with* Minn. Sent. Guidelines 4.C (2016). Under the revised guidelines, the presumptive sentence for a first-degree controlled-substance crime where the offender has a criminal history score of zero is 65 months, with a range of 56 to 78 months. Minn. Sent. Guidelines 4.C (2016). The supreme court has held that the amended DSRA sentencing grid applies

to cases where judgment was not final as of May 23, 2016. *State v. Kirby*, 899 N.W.2d 485, 496 (Minn. 2017).

A district court enters final judgment in a criminal case when it “enters a judgment of conviction and imposes or stays a sentence.” Minn. R. Crim. P. 28.02, subd. 2(1). A defendant may appeal from a final judgment “within 90 days after final judgment” in a felony or gross misdemeanor case. Minn. R. Crim. P. 28.02, subd. 4(3)(a). Appellant was sentenced on May 16, 2016, one week before section 18 became effective. The 90-day time period within which appellant could file her direct appeal had not yet elapsed when section 18 took effect on May 23, 2016; therefore, appellant’s sentence was not yet final when section 18 became effective. Accordingly, we reverse appellant’s sentence on count one and remand for resentencing consistent with the DSRA-amended sentencing grids.

Affirmed in part, reversed in part, and remanded.