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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1092**

State of Minnesota,
Respondent,

vs.

Neil Ray Lystad,
Appellant.

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

Lake of the Woods County District Court
File No. 39-CR-16-164

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

James C. Austad, Lake of the Woods County Attorney, Baudette, Minnesota (for
respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bjorkman, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant Neil Ray Lystad challenges his unlawful-possession-of-a-firearm
conviction, arguing that: (1) the state violated his due-process rights by misleading him

into believing that his civil rights had been restored and then prosecuting him for unlawful possession; (2) the district court breached his plea agreement with the state by imposing a different sentence than that negotiated under the plea agreement; and (3) he received ineffective assistance of counsel. We affirm the conviction and determine that appellant received effective assistance of counsel. However, we reverse and remand the district court's sentencing decision to conform to the terms of the plea agreement.

FACTS

In July 2016, police officers responded to an emergency call at appellant Neil Ray Lystad's home. Upon their arrival, appellant crawled onto the roof of the home and fired a gun in the vicinity of the officers. Appellant stated that he "would only come out locked and loaded." A special response team entered appellant's home, placed him under arrest, and recovered a shotgun and live ammunition. The state charged appellant with first-degree assault, unlawful possession of a firearm, threats of violence, and domestic assault.

Appellant moved to dismiss the unlawful-possession-of-a-firearm charge for lack of probable cause on the ground that his civil rights had been restored. The district court denied the motion. Appellant entered into a plea agreement with the state in which he pleaded guilty to an amended second-degree assault charge and to the threats-of-violence charge. In exchange for these pleas, the state agreed to dismiss the domestic-assault charge and agreed to a 33-month executed sentence on the amended assault charge and a 30-month executed sentence on the threats-of-violence charge. The district court accepted the plea agreement and found a sufficient factual basis for a finding of guilt.

The parties submitted the unlawful-possession charge to the court for a stipulated-facts trial to preserve appellant’s right to appeal the district court’s order denying dismissal. The district court adjudicated appellant guilty of unlawful possession of a firearm and imposed concurrent sentences of 60 months on the felon-in-possession charge, 36 months on the assault charge, and 24 months on the threats-of-violence charge. This appeal follows.¹

DECISION

I. Appellant is not entitled to vacation of his felon-in-possession conviction.

“No person shall be held to answer for a criminal offense without due process of law, and no person shall . . . be deprived of life, liberty or property without due process of law.” Minn. Const. art. I, § 7; *accord* U.S. Const. amend. XIV, § 1. Whether a criminal defendant’s right to due process has been violated is a question of law reviewed de novo. *State v. Lehman*, 749 N.W.2d 76, 82 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008).

Appellant argues that his unlawful-possession conviction violates his due-process rights because the state led him to believe that his civil rights—including his right to possess a firearm—had been restored. Appellant was prohibited from possessing a firearm due to his conviction of a felony-level drug offense in 1999. *See* Minn. Stat. § 624.712, subd. 5 (2016) (identifying controlled-substance crimes as “crimes of violence”). In 2014,

¹ The state did not file a brief and this appeal proceeds under Minn. R. Civ. App. P. 142.03, which directs that if the respondent fails to file its brief, “the case shall be determined on the merits.”

appellant received a copy of his criminal history record from the Minnesota Bureau of Criminal Apprehension (the BCA). Following a reference to a June 2008 impaired-driving offense, the report states:

Civil Rights: All Civil Rights are restored and full citizenship, with full right to vote and hold office, the same as if said conviction had not taken place. This does not apply to any other charges or convictions for which the subject may be incarcerated, on probation, parole, or supervised release.

Appellant argues that this provision amounts to a restoration of his civil rights, including his right to possess a firearm, and requires vacation of his unlawful-possession conviction.

Appellant's argument rests on *Whitten v. State*, 690 N.W.2d 561 (Minn. App. 2005). In that case, the defendant received a probation-discharge order indicating that he was "restored to all civil rights and to full citizenship . . . the same as if said conviction had not taken place." *Id.* at 565. The preprinted order contained an unchecked-box next to a statement indicating that the defendant could not possess a firearm for ten years, which was unchecked. *Id.* When the defendant was later convicted of unlawfully possessing a firearm, we vacated the conviction on the ground that the state was "precluded from prosecuting a person who acts because of reliance on the state's representations." *Id.* We reasoned that "due-process considerations prevent the government from informing a felon that all his civil rights are restored and then prosecuting him for an act that would have been legal if all his civil rights had been restored." *Id.*

Appellant's reliance on *Whitten* is misplaced. In that case, the state affirmatively misled the defendant regarding his rights by failing to check a box indicating that he was prohibited from possessing a firearm. *Id.* (characterizing the state's representation as "the

most indefensible sort of entrapment”). No such affirmative misrepresentation exists here. The language related to the restoration of appellant’s civil rights follows an entry related to an impaired-driving offense in June 2008. The BCA report does not even reference appellant’s 1999 drug offense, which carried the firearm prohibition. Moreover, the provision explicitly provides that the restoration of appellant’s civil rights related to his June 2008 offense “does not apply to any other charges or convictions for which the subject may be incarcerated, on probation, parole, or supervised release,” which includes the 1999 drug offense. We therefore conclude that appellant’s unlawful-possession conviction does not violate his due-process rights because the state did not affirmatively mislead him into believing that his civil rights—and his ability to lawfully possess a firearm—had been restored.

II. The district court’s sentencing decision is erroneous.

Appellant argues that the district court’s sentencing decision is erroneous and urges this court to vacate his concurrent sentences for assault and terroristic threats and to remand for resentencing because the sentences violate the terms of the negotiated plea agreement. We agree. It is well settled that an unqualified promise in a plea arrangement must be honored. *Kochevar v. State*, 281 N.W.2d 680, 687 (Minn. 1979). A guilty plea is involuntary “when it rests in any significant degree on an unfulfilled or unfulfillable promise.” *Uselman v. State*, 831 N.W.2d 690, 693 (Minn. App. 2013) (quotation omitted). When such a promise is breached, the district court may alter the sentence, require specific performance, or allow the defendant to withdraw his guilty plea. *State v. Jumping Eagle*, 620 N.W.2d 42, 43 (Minn. 2000).

Here, appellant agreed to plead guilty to assault and to threats of violence in exchange for 33-month and 30-month executed sentences, respectively. At sentencing, the district court sentenced appellant to 36 months on the assault charge and 24 months on the terroristic threats charge, representing a deviation from the plea agreement. Because the promise that induced appellant's guilty plea was not honored, we determine that the district court's sentencing decision was erroneous and appellant is entitled to resentencing. See *Jumping Eagle*, 620 N.W.2d at 43 (noting that appellate court may require specific performance of plea agreement in lieu of plea withdrawal). On remand, we direct the district court to resentence appellant in conformity with his negotiated plea agreement.

III. Appellant received effective assistance of counsel.

Appellant argued in his pro se brief that he did not receive effective assistance of counsel. A defendant is entitled to effective assistance of counsel. *State v. Bobo*, 770 N.W.2d 129, 137 (Minn. 2009). To prevail on such a claim, a defendant must show “(1) that his counsel’s representation ‘fell below an objective standard of reasonableness’; and (2) ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Trial counsel’s performance is presumed reasonable, *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007), and appellant bears the burden of proving both prongs of the *Strickland* test, *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

Appellant failed to satisfy his burden here. Appellant argues that his counsel’s representation fell below an objective standard of reasonableness because he failed to

investigate the possibility of a mental-illness defense and request a Rule 20 competency evaluation. *See Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011) (recognizing a defendant’s due-process right not to be tried or convicted of a criminal charge if he is legally incompetent). In Minnesota, a defendant seeking to establish a mental-illness defense must meet the *M’Naghten* standard codified at Minn. Stat. § 611.026 (2016). *See State v. Finn*, 257 Minn. 138, 140, 100 N.W.2d 508, 510-11 (1960) (recognizing codification of *M’Naghten* rule). The defendant must prove that “at the time of committing the alleged criminal act the person was laboring under such a defect of reason, from one of these causes, as not to know the nature of the act, or that it was wrong.” Minn. Stat. § 611.026. A district court may order a defendant to undergo a mental examination if the defense notifies the state of its intent to assert a mental-illness defense or if the defendant offers evidence of mental illness or deficiency at trial. *See Minn. R. Crim. P. 20.02*, subd. 1.

On appeal, appellant argues that “something was in fact not right with [him] at the time of the alleged offense” and notes that he has been diagnosed “as having a 70% disability due to his PTSD . . . and alcoholism.” However, appellant failed to identify any evidence in the record supporting these contentions. During the plea colloquy, appellant confirmed that he had sufficient time to discuss any potential defenses with his attorney, and agreed that counsel represented his interests “fully.” Although defense counsel briefly references appellant’s mental capacity as part of the plea colloquy, there are no other references to appellant’s mental state. This solitary reference to appellant’s mental capacity was the extent of the discussion surrounding his competency. Appellant has not

presented evidence suggesting that the court or trial counsel had doubts concerning appellant's competency. Thus, the record does not support a determination that defense counsel's representation fell below an objective standard of reasonableness by failing to raise it as a defense. On this record, we determine that appellant failed to satisfy the first prong of *Strickland* because he did not demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. Because this prong is determinative, we need not address the second *Strickland* prong. *See Strickland*, 466 U.S. at 697, 104 S. Ct. 2069.

In sum, we affirm appellant's unlawful-possession-of-a-firearm conviction and determine that appellant received effective assistance of trial counsel. However, we remand to the district court to modify appellant's sentence to conform to the plea agreement.

Affirmed in part, reversed in part, and remanded.