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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1099**

Berkeley Read Lewis, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 22, 2019
Affirmed
Schellhas, Judge**

Ramsey County District Court
File No. 62-CR-15-5422

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

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Worke, Judge; and Kirk, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the denial of his postconviction petition without an evidentiary hearing. We affirm.

FACTS

In July 2015, respondent State of Minnesota charged appellant Berkeley Lewis with two counts of second-degree assault, one count of threats of violence, and one count of domestic assault by strangulation. In October, Lewis filed a petition to plead guilty to second-degree assault with a deadly weapon and domestic abuse by strangulation in exchange for concurrent sentences based on the Minnesota Sentencing Guidelines and dismissal of the remaining counts.

At Lewis's plea hearing, the district court questioned Lewis about the waiver of his trial rights and explained how the court would determine his sentence under the sentencing guidelines, including an explanation about the application of Lewis's criminal-history points to the sentencing guidelines grid to determine his presumptive sentence. Throughout the questioning of Lewis regarding the factual basis for his plea, Lewis repeatedly answered, "I don't remember," and the court recessed. After the recess, the court advised Lewis that it could not accept his plea if he asserted that he could not remember the details of the alleged offense. Lewis then admitted to facts to support his guilty plea to second-degree assault and domestic assault by strangulation against A.L., and the court found that Lewis was competent and that his plea was knowing, voluntary, and intelligent. The court delayed acceptance of the plea until sentencing.

Prior to sentencing, Lewis filed a notice of an affirmative defense and a request for a rule 20.02 examination. When the district court addressed Lewis's request, the court advised Lewis that if he wished to assert an affirmative defense, he would have to first withdraw his guilty plea. And the court noted that if Lewis withdrew his plea, "the State would be charging [Lewis with] attempted murder." The court gave Lewis an additional week to consider whether he wished to withdraw his plea. Lewis did not pursue withdrawal of his plea. At sentencing, he argued that the court should consider mental-health treatment for him but explicitly stated that he was not asking for a stay of imposition. The court accepted Lewis's guilty pleas and sentenced him under the guidelines to 21 months' imprisonment for second-degree assault, 15 months concurrent for domestic assault by strangulation, and dismissed the remaining counts.

Lewis petitioned for postconviction relief, arguing that his plea was invalid due to his lack of memory and contradictory statements at the plea hearing and the district court's failure to advise him of his trial rights, that he received ineffective assistance of counsel, that the court abdicated its sentencing authority, and that the court erred by sentencing him for both convictions because the offenses arose from the same behavioral incident. The postconviction court vacated Lewis's conviction of, and sentence for, domestic assault by strangulation and summarily denied the remainder of his petition.

This appeal follows.

DECISION

Summary denial of postconviction request to withdraw guilty plea¹

Lewis challenges the postconviction court's partial denial of his postconviction petition without an evidentiary hearing, arguing that his petition shows that: (1) his plea was inaccurate and involuntary; (2) the court "improperly interfered in plea negotiations and abdicated its sentencing authority"; (3) he received ineffective assistance of counsel; and (4) the postconviction court made improper credibility determinations and relied "upon [it]s own unsworn explanations for the judicial conduct" that Lewis challenged. This court reviews a postconviction court's denial of a petition for an abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Brown v. State*, 895 N.W.2d 612, 617 (Minn. 2017) (quotation omitted).

Upon the filing of a postconviction petition, a postconviction court must hold an evidentiary hearing "unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Andersen*, 913 N.W.2d at 422 (quotation marks omitted) (citing Minn. Stat. § 590.04, subd. 1 (2016)). "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Id.* at 422–23 (quotation omitted). To receive an evidentiary hearing, the facts

¹ Although Lewis entered guilty pleas to two offenses, he refers to his guilty plea in the singular, and we do the same in this opinion.

alleged by the petitioner must “prove[] by a fair preponderance of the evidence” that he or she is entitled to the requested relief. *Brown*, 895 N.W.2d at 618. (quotation omitted).

Validity of Lewis’s plea

Lewis argues that his petition and supporting affidavit contain facts, that if true, entitle him to withdraw his plea as invalid because it was inaccurate and involuntary. We review the validity of a guilty plea de novo. *Dikken v. State*, 896 N.W.2d 873, 876 (Minn. 2017). “A defendant does not have an absolute right to withdraw a guilty plea once it has been entered,” but “a court must allow a defendant to withdraw a guilty plea after sentencing only when the defendant establishes that withdrawal is necessary to correct a manifest injustice.” *Id.* (quotations omitted). “A manifest injustice exists if a guilty plea is not valid,” and a guilty plea is not valid if it is inaccurate, involuntary, or unintelligent. *Id.* (quotation omitted).

Accuracy of Lewis’s plea

“The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial,” and “[t]o be accurate, a plea must be established on a proper factual basis.” *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A plea is inaccurate if a defendant lacks the memory to explain the “circumstances surrounding the crime,” unless he enters into an *Alford/Goulette* plea or a *Norgaard* plea. *State v. Johnson*, 867 N.W.2d 210, 215 (Minn. App. 2015) (quotation omitted), *review denied* (Minn. Sept. 29, 2015).² To be guilty of

² In an *Alford/Goulette* plea, a defendant enters a guilty plea and “maintains his innocence but reasonably believes, and the record establishes, the state has sufficient evidence to

second-degree assault, Lewis needed to provide facts at the plea hearing to establish that he “assault[ed] another with a dangerous weapon.” See Minn. Stat. § 609.222, subd. 1 (2014) (establishing elements of crime). “Assault” is “the intentional infliction of or attempt to inflict bodily harm upon another.” Minn. Stat. § 609.02, subd. 10(2) (2014). “Dangerous weapon” means “any device designed as a weapon and capable of producing death or great bodily harm.” *Id.*, subd. 6 (2014).

Lewis claims that he adequately established facts to withdraw his plea as inaccurate because he stated in his supporting affidavit that he told the district court and prosecutor that he could not remember the alleged assault because he “blacked out.” The record belies Lewis’s claim. While Lewis stated that he had drank prior to assaulting A.L. and “*believe[d]*” he had blacked out, he also stated that he can “usually drink much more than that and still not black out.” (Emphasis added.) After Lewis stated that he did not remember the facts and before the court recessed, the court told Lewis: “I want you to think long and hard about what pieces of this you do remember, and taking a look at the evidence once again might help you remember certain pieces. If you can’t remember it, then I can’t take a plea like we were doing before.” After the recess, the prosecutor described the evidence that Lewis had reviewed during the recess and confirmed that Lewis had adequately consulted with his attorney and was not raising any defenses.

obtain a conviction”; and in a *Norgaard* plea, a defendant cannot remember the facts of the offense, “but the record establishes that the defendant is guilty or likely to be convicted of the crime charged.” Johnson, 867 N.W.2d at 215 (quotation omitted); see *North Carolina v. Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 167 (1970); see also *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977); *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867, 871–72 (Minn. 1961).

Lewis then recounted throwing a mattress off a bed, taking a “kind of broken pole,” and hitting the “coverings over [A.L.],” in order to “hurt her” because he was “angry” with her. Lewis acknowledged that he caused A.L. to suffer a “three-inch long laceration in her head.” These facts establish that Lewis “intentionally inflicted or attempted to inflict” “bodily harm” upon A.L. with a “device” capable of “causing death or great bodily harm.” We conclude that the postconviction court did not abuse its discretion by concluding that Lewis’s plea was accurate. *See State v. Trott*, 338 N.W.2d 248, 252 (Minn. 1983) (concluding that district court did not err in denying plea-withdrawal petition based on court’s reliance on defendant’s plea petition and plea over sworn testimony provided at plea-withdrawal hearing).

Voluntariness of Lewis’s plea

“To be voluntary, a guilty plea may not be based on any improper pressures or inducements.” *Dikken*, 896 N.W.2d at 876–77 (quotation omitted). The state “may not produce a plea through actual or threatened physical harm, or by mental coercion overbearing the will of the defendant,” nor can the state “induce a guilty plea based on a promise by the prosecutor that goes unfulfilled or was unfulfillable from the state.” *Id.* at 877 (quotations omitted).

Lewis argues that he adequately established facts to withdraw his plea as involuntary because he stated in his supporting affidavit that he “was concerned that if [he] rejected the state’s offer, [he] would get charged with attempted murder,” and that he was “scared.” But he fails to cite to any authority to support his contention that the threat of a more serious charge or being “scared” makes a plea involuntary. The record establishes

that Lewis was properly questioned about the voluntariness of his plea. We conclude that the postconviction court did not err in concluding that Lewis's plea was voluntary.

District court's alleged interference with plea process and abdication of sentencing authority

Lewis argues that he is entitled to relief because he pleaded facts that show that the district court improperly interfered with plea negotiations and abdicated its sentencing authority. But Lewis fails to identify what facts he has alleged, that if true, entitle him to relief. We therefore conclude that Lewis has forfeited this argument. *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (“An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” (quotation omitted)).

Ineffective assistance of counsel

Lewis argues that he alleged sufficient facts to establish a claim of ineffective assistance of counsel, arguing that his counsel failed to pursue a mental-illness defense or request a mental-health screening, and otherwise provided “erroneous advice during the plea process.” Ineffective assistance of counsel can render a guilty plea involuntary. *See Leake v. State*, 737 N.W.2d 531, 540 (Minn. 2007) (stating that “a defendant may bring an ineffective assistance of counsel claim if he was induced to enter a guilty plea by the objectively unreasonable advice of his attorney”). Appellate courts apply a two-step analysis to determine if counsel rendered ineffective assistance: a defendant must show that the attorney’s performance fell below an objective standard of reasonableness; and that

a reasonable probability exists that, but for the attorney's unprofessional error, the outcome would have been different. *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014) (citing *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). If one of the two prongs is determinative, the reviewing court need not address the other prong. *Id.*

Lewis's postconviction supporting affidavit does not allege that but for his attorney's failure to pursue a mental-illness defense, he would not have pleaded guilty. Indeed, the record shows that after Lewis's attorney filed a notice that he would seek a rule 20.02 examination, Lewis chose not to pursue that defense. Moreover, what defense an attorney decides to pursue "represents an attorney's trial strategy," and we generally do not review an ineffective-assistance-of-counsel claim based on trial strategy. *Id.* at 267. Lewis's affidavit also contains no factual assertions to support his argument that his counsel failed to advise him of his trial rights; at no point does he reference his counsel's failure to advise him of his trial rights, nor does he state that due to this alleged failure, he would not have pleaded guilty. Lewis's ineffective-assistance-of-counsel claim fails to establish either prong of the *Strickland* test. Lewis therefore has not alleged adequate facts that, if true, amount to a successful ineffective-assistance-of-counsel claim and the postconviction court did not err in denying this claim.

Improper credibility determination and reliance on unsworn statements

Lewis essentially argues that by ignoring his claims in his affidavit that he blacked out and told a false story, the postconviction "court made improper credibility judgments," and improperly relied on unsworn statements to support its decision. We disagree.

“[W]hen considering a postconviction petition, a postconviction court cannot make credibility determinations without first holding an evidentiary hearing.” *Andersen*, 913 N.W.2d at 424. Here, the postconviction court concluded that “consistent portions” of Lewis’s testimony during the plea hearing “are sufficient indicia of credibility” supporting the court’s finding of guilt for second-degree assault. Lewis cites *Andersen*, 913 N.W.2d 417, and *Henderson v. State*, 906 N.W.2d 501 (Minn. 2018), to support his allegations, but both cases are inapposite.

In *Andersen*, the supreme court concluded that a postconviction court erred in making credibility determinations of two witnesses seeking to recant their trial testimony. 913 N.W.2d at 423–24. And in *Henderson*, the supreme court concluded that a postconviction court erred by making credibility determinations regarding newly discovered evidence but nevertheless affirmed the denial of an evidentiary hearing because the newly discovered evidence, even if true, did not exculpate the defendant. 906 N.W.2d at 507. Both cases are distinguishable because they address circumstances not present here.

Lewis’s petition challenges only his own sworn testimony at the plea hearing—that he remembered the details of the offense. *See Trott*, 338 N.W.2d at 252 (concluding that defendant could not withdraw plea where he claimed he was induced by his counsel to plead guilty in his withdrawal petition, but his plea petition and statements at the plea hearing “negated” his claim); *see also State v. Healy*, 521 N.W.2d 47, 50 (Minn. App. 1994) (stating that when defendant gives testimony under oath he or she “consciously affirms the truth of the testimony he or she gives”), *review denied* (Minn. Oct. 27, 1994). Here, the district court gave Lewis multiple opportunities to withdraw his plea if he did not

remember the facts related to the offense, and Lewis chose to proceed and recounted the details of the offense. The postconviction court did not have to speculate about whether Lewis pleaded guilty without remembering the facts of the offense. Based on the record here, we discern no legal error in the rejection of Lewis's allegations that he could not remember the facts of his offense.

Lewis also argues that the postconviction court "abused its discretion by offering its own unsworn, one-sided account of events that contradicted allegations" in his petition. But Lewis fails to identify the unsworn statements on which the court allegedly relied. Because prejudicial error is not obvious following our mere inspection of the record, we conclude that Lewis has forfeited this argument. *Andersen*, 871 N.W.2d at 915; *see also State v. Dorsey*, 701 N.W.2d 238, 248–49 (Minn. 2005) (stating that "it is presumed that judges will set aside collateral knowledge and approach cases with a neutral and objective disposition . . . and make decisions based solely on the merits of cases before them" (quotation omitted)). We conclude that the postconviction court did not abuse its discretion by denying Lewis's postconviction petition because it attacked the credibility of his own sworn testimony.

District court's abdication of sentencing authority and improper participation in plea negotiations

Lewis argues that the district court "committed reversible error by relying on a legal mistake to limit its inherent judicial sentencing authority," by "believing that [] Lewis would have violated the parties' agreement to a 'guidelines' sentence by arguing for a stayed sentence." Lewis also argues that the court improperly participated in plea

negotiations by “mishandling [] the prosecution’s threat to amend the complaint to charge [] Lewis with attempted murder.” Neither argument is availing.

Central to Lewis’s argument on appeal is the allegation that the district court judge erroneously informed or affirmatively misled Lewis concerning the meaning of a “guidelines sentence” and the potential consequences of attempted murder, the charge threatened by the state if Lewis decided not to enter a guilty plea. The state argues that Lewis forfeited this argument because he failed to properly raise the allegation in his postconviction petition. We agree.

“‘It is well settled that a party may not raise issues for the first time on appeal’ from denial of postconviction relief.” *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quoting *Robinson v. State*, 567 N.W.2d 491, 494 n.2 (Minn. 1997)). In *Azure*, the supreme court concluded that a defendant waived an ineffective-assistance-of-counsel claim where he failed to “raise the claim in his postconviction petition and the postconviction court made no findings on the issue.” *Id.* And in *Robinson*, the supreme court made a similar conclusion where a defendant’s failure to “detail” an alleged erroneous jury instruction in his postconviction petition was deemed a failure to properly raise the claim, stating that “[b]ecause it was not raised below, this claim is not properly before this court.” 567 N.W.2d at 495.

Here, Lewis argues on appeal that the district court “erroneously believed that the plea agreement barred [a probationary sentence], and . . . inaccurately told [] Lewis that the state would . . . charge him with attempted murder, which would carry a presumptive 20-year sentence, if he argued for probation.” And similar to *Azure* and *Robinson*, Lewis’s

postconviction petition fails to provide detail that he misunderstood the meaning of “guidelines sentence” as it related to providing for a presumptive stay, and that the court misadvised him about the presumptive sentence for attempted murder. We conclude that Lewis failed to properly raise the issue below and therefore the issue is not properly before this court.

Lewis also argues that the district court abdicated its sentencing authority “by determining that the plea agreement nullified the court’s statutory power to consider the defendant’s veteran and mental health status.” The postconviction court did not rule on this issue. We interpret statutes de novo. *State v. Overweg*, 922 N.W.2d 179, 182–83 (Minn. Jan. 23, 2019).

“When a defendant appears in court and is convicted of a crime, the court shall inquire whether the defendant is currently serving in or is a veteran of the armed forces of the United States.” Minn. Stat. § 609.115, subd. 10a (2018). “If the defendant is currently serving in the military or is a veteran and has been diagnosed as having a mental illness,” then “the court may” order probation to consult with the United States Department of Veteran Affairs and “consider the treatment recommendations of any diagnosing or treating mental health professionals” when imposing a sentence. *Id.*, subd. 10(b). Here, Lewis’s lawyer informed the district court that Lewis was a veteran and had been diagnosed with combat stress. When the court asked how section 609.115, subdivision 10, would affect sentencing, if considered, Lewis’s lawyer stated, “Nothing.” Because section 609.115, subdivision 10, includes the permissive “may,” we conclude that the court was not required to follow its recommendations, and Lewis cites to no authority to the contrary. *See* Minn.

Stat. § 645.44, subds. 15, 16 (2018) (stating that “may” is permissive, and “shall” is mandatory). The postconviction court therefore did not abuse its discretion in summarily denying these claims.

Recusal of postconviction court judge

Lewis argues that if this court remands his petition for an evidentiary hearing, the postconviction judge “should be recused from considering” his petition. Because we are not remanding for an evidentiary hearing, we need not address this argument. *Court Park Co. v. County of Hennepin*, 907 N.W.2d 641, 645 n.4 (Minn. 2018) (declining to address issue when case decided on other grounds (citing *State v. Kuhlman*, 729 N.W.2d 577, 584 (Minn. 2007))).

Affirmed.