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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2145**

State of Minnesota,
Respondent,

vs.

Tescil Romalis Mason-Kimmons,
Appellant.

**Filed May 18, 2020
Affirmed in part, reversed in part, and remanded
Rodenberg, Judge**

Hennepin County District Court
File No. 27-CR-17-30036

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Segal, Chief Judge; Rodenberg, Judge; and Kirk, Judge.*

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

In this combined appeal from the judgment of conviction for second-degree murder
and the district court's denial of his petition for postconviction relief, appellant Tescil

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

Romalis Mason-Kimmons argues that (1) his guilty plea was involuntary because the district court denied his meritorious motion to continue the trial, (2) his guilty plea was involuntary because the district court did not inquire into the state's promise of leniency to a third party, and (3) he should be entitled to postconviction relief because his attorney was ineffective.

We affirm in part, reverse in part, and remand for an evidentiary hearing on appellant's petition for postconviction relief.

FACTS

On September 15, 2017, Minneapolis police responded to a report of a shooting in South Minneapolis. Upon arriving at the scene, police discovered J.R.L. lying face down on the sidewalk with blood pooled around his head. J.R.L. was later pronounced dead as a result of a single gunshot wound to the head. As part of their investigation, police retrieved surveillance footage of the area surrounding the crime scene. The surveillance footage showed an African American man in a blue hooded sweatshirt get out of the passenger side of a green Subaru. The man approached J.R.L. from behind, raised his right hand, and fired a pistol at J.R.L.'s head. The man left the scene in the Subaru. According to a witness, the Subaru was driven by E.R.D., who was, herself, later charged in J.R.L.'s murder. Investigation led police to believe that the man who shot J.R.L. was appellant Tescil Romalis Mason-Kimmons.

After securing a warrant to search appellant's home, police discovered a blue hooded sweatshirt and a box of .38 caliber ammunition. Police also determined that, three days before the shooting, appellant had been arrested for stabbing J.R.L. In phone calls

from the jail after that arrest, appellant was recorded telling E.R.D. that he intended to kill J.R.L.

On November 30, 2017, the state charged appellant with second-degree murder. On March 1, 2018, a grand jury indicted appellant for first-degree murder and possession of a firearm by an ineligible person. A public defender was appointed to represent appellant.

On March 2, 2018, appellant discharged his public defender and retained private defense counsel, who represented appellant at hearings on March 15 and April 24. A trial date was set for August 13, 2018.

On May 31, appellant's counsel moved the district court to continue the trial date. Counsel claimed that he had not had an adequate opportunity to investigate appellant's case because the state had failed to disclose the identity of a particular unidentified witness (UW1) and that the volume of discovery would require additional time to prepare for trial. The district court denied the motion to continue the trial, but it ordered that defense counsel be allowed to interview UW1.

On August 9, 2018, appellant's counsel again moved the district court to continue the trial, because counsel did not feel prepared to try the case the following week. Specifically, the lawyer told the district court that his investigator had been unable to speak to an additional unidentified witness (UW2), whose identity the state declined to disclose, and that UW2 may have exculpatory information. Additionally, counsel believed that UW2 may know the names of other witnesses to the shooting. Counsel stated that the people for whom his investigator was looking are "street people" and therefore difficult to find. The district court expressed that it understood that defense counsel wanted to locate

eyewitnesses, but it questioned whether the defense’s investigator would find eyewitnesses who had so far refused to come forward.

Appellant’s counsel also told the district court that he recently learned that another witness, who is at places in the record referred to as “Chicken Wing,” had given a statement to police that was inconsistent with the statement that he provided to the defense investigator. Counsel requested additional time to review the statement and conduct further investigation to assist in appellant’s defense.

Lastly, appellant’s counsel stated that he needed additional time to prepare for both cross-examination of the state’s witnesses and direct examination of the defense witnesses, and to review discovery with appellant. He told the district court that he was “not prepared . . . to start a trial next Monday,” that doing so would be “ineffective assistance of counsel,” and that it would “deny [appellant] his right to a fair trial.”

The state opposed the continuance request, arguing that counsel had been provided sufficient time to prepare for trial. Among other things, the state noted that it had been experiencing witness-location issues similar to those that defense counsel was having. Like defense counsel, the state had been unable to find that witness. Concerning the witnesses it had managed to locate, the state assured the district court that it had provided defense counsel with the names of the identified witnesses.

The district court denied appellant’s motion to continue the trial. The district court stated that “from a factual development standpoint I’m comfortable that you’ve got the information that you need,” and that counsel will “be able to be prepared so that [appellant] get[s] a fair trial.” The district court noted that counsel was an experienced and skilled

attorney who had considerable trial experience and that the motions filed by counsel until that point indicated that counsel had a “good handle on [the] issues and facts.” Concerning witnesses, the district court noted that the defense investigator had spent months “diligently looking for people that are really hard to find.” Defense counsel responded that despite the district court’s “arbitrary determination that . . . you’ve given me enough time,” counsel had not in fact had adequate time to prepare.

On the scheduled trial date, appellant’s counsel filed a third motion for continuance. He indicated that the state had provided him with an extensive amount of additional discovery material on August 1, 2018, and that he was unable to review that material until after the hearing on August 9, 2018. Counsel noted that the additional discovery included information that required that he attempt to locate and speak with the additional witnesses.

Additionally, counsel stated that the new discovery included information about a man who was charged with murder “one month to the day after the murder in this case.” According to counsel, the witnesses to that other murder said that the perpetrator in that case had features similar to the person who killed J.R.L., a fact that warranted investigation.

Appellant’s counsel stated he that was not prepared to go to trial, that he did not intend to go to trial, and that if the district court made him go to trial, he would “have no alternative” but to seek immediate relief from the court of appeals. The district court responded to counsel, “you’ve had your investigator looking for these people for several months. I don’t understand why you can’t be ready [to] go to trial. So my intention is to continue to go to trial.”

At that point, and without prompting from the district court or the prosecutor, appellant's counsel proposed "as an alternative" that the parties discuss resolving the case by agreement. The district court granted the parties time to "talk about the case" and stated, "we'll come back and deal with issues in about an hour."

Approximately 90 minutes later, the parties informed the district court that they had reached an agreement to resolve all matters before the court concerning appellant. Appellant agreed to plead guilty to an amended count of second-degree murder in this case. In exchange, the state agreed to dismiss the charge of possession of a firearm by an ineligible person in this case and all the charges against appellant in a separate pending case. The state agreed to appellant's request for leniency for his co-defendant, E.R.D., and agreed to offer her a plea agreement that would include a probationary sentence. The parties agreed that appellant would be sentenced to an executed 366 months in prison for second-degree murder, which was at the lower end of the presumptive guidelines sentence "based on [appellant's] criminal history [score] of seven points."

The district court then asked appellant whether appellant understood the plea agreement and stated that it was "[appellant's] decision to make." Appellant indicated that he understood the agreement. The district court further inquired:

DISTRICT COURT: And like I said, it's a big decision and I know there's been some time pressure. I don't want to pressure you into it. And I know it seems like I've been trying to move the case forward. But as I mentioned a couple of times, I recognize this is a big case for you and for [counsel]. And I don't want the pressure of the moment to be the only thing that allows you to make your decision. Do you know what I'm saying?

APPELLANT: I hear what you're saying, but you didn't give us no time to speak to the other witnesses, though. Yeah.

DISTRICT COURT: All right. You understand that you'd be giving up your right to continue to ask for a continuance, as well as to go forward with the trial in this case?

APPELLANT: Yes, Your Honor.

DISTRICT COURT: All right. And knowing the options that you have, is this the option you want to exercise?

APPELLANT: Yes, Your Honor.

DISTRICT COURT: Okay. Do you have any questions of me, or do you need any more time to talk to [defense counsel] . . . ?

APPELLANT: No.

Appellant entered a plea of guilty to second-degree murder. Defense counsel presented appellant with the signed plea petition. Appellant acknowledged that he and defense counsel went through each line of the document; he understood his rights; he understood that by entering a plea of guilty, he would waive those rights; he did not have any questions for defense attorney or the court; and he had signed the plea petition. Appellant then testified that, on September 15, 2017, he approached J.R.L. from behind, "raised [his] hand with a revolver in it or gun in [his] hand," intentionally shot J.R.L. in the back of the head, and that J.R.L. died as a result. The district court accepted appellant's guilty plea.

On March 29, 2019, appellant appeared for sentencing. Appellant stated to the district court that he "apologize[s] for taking the plea agreement, but [that he] wasn't going to get a fair trial." He told the district court that the "prosecuting attorney was withholding evidence . . . and gave it to [defense counsel] two weeks before, so [counsel wasn't] prepared for trial, which made [for] ineffective [assistance of] counsel." Appellant made no motion to withdraw his guilty plea.

The district court sentenced appellant to 366 months in prison, consistent with the plea agreement.

Appellant filed a notice of direct appeal but requested a stay and remand for postconviction proceedings, which this court granted. Appellant filed a petition for postconviction relief with the district court.

In his postconviction petition, appellant asserted that his guilty plea was involuntary because it was the product of a “Hobson’s choice” between pleading guilty or proceeding to an unconstitutional trial with unprepared counsel. Additionally, he argued that his plea was invalid because the district court did not conduct an inquiry into the state’s agreement to show leniency to a third party, E.R.D. Appellant also contended that his lawyer was ineffective during plea negotiations because his lawyer’s failure to adequately prepare rendered him unable to advise appellant concerning the strength of the state’s evidence, possible defenses, or the relative risks of going to trial or entering a guilty plea.

The postconviction court denied appellant’s petition for postconviction relief without an evidentiary hearing, noting that appellant’s counsel had been unprepared, but that his unpreparedness was a “self-inflicted circumstance.” The district court noted that it had denied appellant’s continuance motion on the morning of trial, but it nevertheless determined that appellant’s plea was voluntary and that appellant was not denied his right to effective assistance of counsel.

This combined appeal followed.

D E C I S I O N

On de novo review of the plea record, appellant has not established that his guilty plea was involuntary.

Appellant argues that his plea was involuntary and that we should therefore reverse his conviction and remand for trial. A “manifest injustice exists where a guilty plea is

invalid” because it is inaccurate, involuntary, or unintelligent. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). In explaining the validity requirement, the supreme court has stated that “[t]he purpose of the voluntariness requirement is to insure that the defendant is not pleading guilty because of improper pressures.” *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983); see *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). To determine whether a plea is voluntary, courts must consider “all of the relevant circumstances surrounding” the plea. *State v. Danh*, 516 N.W.2d 539, 544 (Minn. 1994). An appellant bears the burden of demonstrating that his plea is invalid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). We assess the validity of a guilty plea de novo. *Id.*

Appellant supports his argument—that his lawyer’s unpreparedness for trial presented appellant with a “Hobson’s choice” between pleading guilty or proceeding to trial with an unprepared lawyer—with citations to federal case law. A “Hobson’s choice” is generally defined as “the choice of taking either that which is offered or nothing; the absence of a real alternative [1640-50; after Thomas Hobson (1544-1631), of Cambridge, England, who rented horses and gave his customer only one choice, that of the horse nearest the stable door].” *The Random House Dictionary of the English Language* 909 (2d ed. 1987). Although not binding on Minnesota courts, federal courts have held that a “Hobson’s choice” is “something one must accept through want of any real alternative.” *U.S. v. Blum*, 65 F.3d 1436, 1442 (8th Cir. 1995) (quotation omitted). It has been held that a defendant faces a “Hobson’s choice” in plea negotiations when defense counsel has not

undertaken any factual investigation but instead pressures the defendant into pleading guilty. *See, e.g., U.S. v. Bliss*, 84 F. App'x 820, 822 (9th Cir. 2003).

We note that the state argues on appeal that appellant's continuance motion on the morning of trial was *not* denied and that appellant's lawyer was prepared to seek emergency appellate relief from this court had the parties not resolved the case by agreement. We reject the state's argument as unsupported by the record. The district court itself noted in its order and memorandum denying appellant's petition for postconviction relief that it "did deny trial counsel's oral motion for a continuance on the day of trial." While the transcript is not crystal clear concerning whether the continuance motion was denied, the district court found as a fact that it had denied the motion. And the district court is best situated to determine that fact. Appellant's counsel had repeatedly told the district court that he was unprepared to go to trial. The district court nevertheless stated its "intention . . . to continue to go to trial" on the scheduled date. For purposes of appellate review, the record supports the district court's factual finding that appellant's morning-of-trial continuance motion was denied.

After the district court denied the motion to continue and the discussion of the possibility of seeking emergency appellate relief, appellant's counsel proposed—without prompting—that the parties discuss resolving the case by way of a plea agreement. The parties discussed the options and arrived at what appears to our review of the record to be a plea agreement favorable to appellant. He was able to avoid a first-degree-murder conviction and, at appellant's request, E.R.D. was provided the opportunity for a probationary sentence for her involvement in the murder.

Nothing in the record indicates that defense counsel or the district court pressured appellant into pleading guilty. *Cf. Bliss*, 84 F. App'x at 822 (holding that a defendant faces a “Hobson’s choice” in plea negotiations when a defense counsel pressures the defendant into pleading guilty). Instead, the district court ensured that appellant understood the plea agreement and told appellant that it was “[appellant’s] decision to make.” Appellant clearly expressed in the plea colloquy that he understood his rights and that he voluntarily gave up those rights. Appellant acknowledged in his written and signed plea agreement that “[n]o one—including my attorney . . . has made any promises to me . . . to obtain a guilty plea from me,” and that “[n]o one—including my attorney . . . has threatened me . . . to obtain a guilty plea from me.”

Although appellant made the plea agreement while facing the immediacy of a trial and the prospect of a life sentence if he were to be found guilty of the charged first-degree murder, the record as constituted reveals no “improper pressures” brought to bear on appellant. *Trott*, 338 N.W.2d at 251. Appellant retained a meaningful choice between standing trial—which could have resulted in either acquittal or conviction of first-degree murder—or accepting the plea offer which afforded him an opportunity to both reduce appellant’s own sentencing exposure and obtain leniency for a person important to him. We are satisfied on our de novo review of the plea record that appellant has not demonstrated that his guilty plea was involuntary.

Appellant’s plea was not coerced by an offer of third-party leniency.

Appellant argues that his “guilty plea [was] not voluntary because the district court did not inquire into the state’s plea promise to show leniency to” E.R.D. The state responds

that appellant's plea was "not coerced by an offer of third-party leniency," because appellant initiated the prospect of third-party leniency for E.R.D.

In considering whether a plea is voluntary, additional scrutiny is required when there is a "package deal" in which the plea agreement includes leniency for a defendant's accomplices. *Butala v. State*, 664 N.W.2d 333, 339 (Minn. 2003); *Danh*, 516 N.W.2d at 542.

In *Danh*, the defendant entered into a plea agreement that was dependent upon a "package deal" for his three codefendants, including a more-lenient sentence for the defendant's younger brother. 516 N.W.2d at 540-41. The district court conducted a rule 15.01 inquiry before accepting the plea but was not informed of the offers of leniency to the brother. *Id.* at 541. The defendant later moved to withdraw his plea, and the district court denied the motion. *Id.*

On appeal, the supreme court commented that plea agreements that include third-party-leniency promises, while not per se invalid, are "generally dangerous because of the risk of coercion" because of the "risk that a defendant, who would otherwise exercise his or her right to a jury trial, would plead guilty out of a sense of family loyalty." *Id.* at 542. The supreme court therefore held that, to ensure that package-deal plea agreements are voluntarily made, "the state must fully inform the [district] court of the details of these agreements," and that the district court must conduct "further inquiries" beyond the standard rule 15.01 inquiry. *Id.*

In *Butala*, the defendant and his attorney engaged in plea negotiations with the state concerning charges of first-degree murder and arson. *Butala*, 664 N.W.2d at 335. While

negotiating with the state, Butala requested immunity for family members in exchange for his guilty pleas. *Id.* The state provided Butala’s defense counsel a letter “certifying that in exchange for appellant’s pleas of guilty” the state would not prosecute any of Butala’s immediate family members. *Id.* at 336 (alterations omitted). The state thereafter filed a subsequent letter with the district court outlining the terms of the plea agreement, but the letter did not mention family immunity. *Id.* That same day, Butala appeared in district court and pleaded guilty with the assistance of counsel. *Id.* The district court additionally conducted a rule 15.01 inquiry. *Id.* However, no mention of the third-party family immunity was made during the plea proceedings. *Id.* at 337.

Nearly two years later, Butala filed a petition for postconviction relief, seeking plea withdrawal. *Id.* An evidentiary hearing followed, at which defense counsel testified that Butala had initiated discussions of immunity for his family members. *Id.* The postconviction court denied Butala’s request to withdraw his pleas. *Id.* at 338.

On appeal, the supreme court affirmed the postconviction court, reasoning that, although the third-party-immunity condition had not been placed on the record at the time of the plea, withdrawal of the guilty plea was not warranted under *Danh*. The supreme court reasoned that withdrawal was not warranted because Butala had himself initiated the subject of third-party immunity for his family members, the district court had conducted a thorough rule 15 inquiry, Butala stated on the record that he had chosen to plead guilty, and that Butala had not disclosed the third-party condition on the record despite initiating the subject of such immunity. *Id.* at 340.

Appellant argues that his plea was involuntary under *Danh* because the district court did not “adequately inquire into the voluntariness of the plea at the time of the guilty plea.” In our view, this case is very similar to *Butala*. Appellant initiated the discussions of third-party leniency for E.R.D. Although appellant initially requested that the “charges against [E.R.D. be] dismissed,” the parties eventually agreed that E.R.D. would be allowed to “plead to an amended count . . . but receive a probationary sentence.” It is clear from the record that appellant was the originator of the third-party-leniency discussion and he makes no contrary argument on appeal. Appellant was not pressured by the state to plead guilty in exchange for leniency for E.R.D.; instead, he insisted on leniency for her before he would plead guilty to the reduced charge of second-degree murder.

The district court, fully aware of the leniency agreement for E.R.D., made a thorough rule 15 inquiry on the record, supplemented with a plea petition that appellant read, agreed to, and signed. Nothing in the plea record indicates any pressure on appellant as a result of the state’s agreement with appellant’s wish that E.R.D. be treated leniently. We see no improper coercion of appellant by the state’s agreement to appellant’s request for leniency to the benefit of his friend and accomplice, E.R.D.

Appellant’s postconviction petition warrants an evidentiary hearing.

Appellant argues that he did not have the effective assistance of counsel because his lawyer’s lack of preparation rendered him unable to adequately consult with appellant about the case.

A criminal defendant is guaranteed the right to effective assistance of counsel under both the United States and Minnesota Constitutions. See U.S. Const. amend. VI; Minn.

Const. art. I, § 6. “A postconviction court’s decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo.” *Carter v. State*, 787 N.W.2d 675, 678 (Minn. App. 2010).

A postconviction court must hold an evidentiary hearing on a petition for postconviction relief “[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 (2016); *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). “An evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested.” *Davis v. State*, 784 N.W.2d 387, 392 (Minn. 2010). Moreover, allegations in a postconviction petition are required to be “more than argumentative assertions without factual support.” *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995) (quotation omitted).

Minnesota courts apply a two-part test to claims of ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see *State v. Eling*, 355 N.W.2d 286, 293 (Minn. 1984) (applying *Strickland* to Minnesota courts). To succeed on an ineffective-assistance-of-counsel claim, appellant must show (1) “that [his] counsel’s performance was deficient” and (2) “that the deficient performance prejudiced [his] defense.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Courts analyze the first part of the test using an objective standard of reasonableness. *Id.* at 687-88, 104 S. Ct. at 2064. Courts consider under the second part of the test whether the petitioner has shown that “there is a reasonable probability that, but for counsel’s unprofessional errors, the

result of the proceeding would have been different.” *Ecker*, 524 N.W.2d at 718 (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068).

Appellant asserts that he was entitled to an evidentiary hearing on his postconviction petition to demonstrate that his counsel’s unpreparedness amounted to ineffective assistance of counsel.

As recited above, appellant’s trial counsel had thrice requested that the district court afford him more time to prepare, alleging that his investigation and discovery was insufficient. The district court correctly recited the applicable case law in its order denying appellant’s postconviction petition. But then, having previously observed in the very order that denied appellant’s postconviction petition that defense counsel’s unpreparedness was “a self-inflicted circumstance,” it held without an evidentiary hearing that defense counsel’s performance was not unreasonable. Without an evidentiary hearing, we cannot on this record affirm that appellant received effective assistance of counsel during the hastily arranged plea discussions. Appellant contends that defense counsel “stated that he was unprepared for trial” and “could not provide a full assessment of the evidence and the likelihood of conviction after trial.” Moreover, appellant claims in his postconviction petition that he “only agreed to plead guilty because [he] did not believe a trial was a reasonable option based on [defense counsel’s] statements that he was unprepared to represent [appellant].” Having carefully reviewed the record, we conclude that appellant has made at least a prima facie showing of ineffective assistance of counsel. An evidentiary hearing is warranted. Accordingly, the postconviction court erred in finding that the record conclusively showed that appellant was not entitled to an evidentiary hearing.

The district court did not address the second part of the *Strickland* test. To our review of the record, appellant made at least a prima facie showing that his lawyer's deficient performance prejudiced him and that he would not have pleaded guilty but for that deficiency. Here again, appellant made a sufficient showing under *Strickland* to have warranted an evidentiary hearing.

We therefore reverse the summary denial of appellant's petition for postconviction relief and remand for an evidentiary hearing on that petition.¹

Affirmed in part, reversed in part, and remanded.

¹ We do not by this remand express any indication concerning whether appellant actually received effective assistance from his trial counsel or whether the result of this case would have been any different had it not been for any such deficiency. As noted above, there are aspects of this plea agreement that, in light of the record evidence, suggest that the plea agreement was favorable to appellant. And, as discussed, the guilty-plea record as currently constituted demonstrates that appellant's plea was voluntary. The questions on remand are factual: Was the performance of appellant's trial counsel deficient and, if so, was appellant prejudiced in the plea negotiations as a result? And, of course, any relief afforded to appellant in the postconviction proceedings would reinstate the first-degree-murder indictment.