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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0049**

Kevin Scott Smith, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 16, 2020
Affirmed
Cochran, Judge**

McLeod County District Court
File No. 43-CR-17-1246

Richard L. Swanson, Chaska, Minnesota (for appellant)

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

Michael K. Junge, McLeod County Attorney, Lauren M. Johnson, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Bratvold, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Appellant challenges the postconviction court's denial of his petition for postconviction relief without holding an evidentiary hearing. Because the district court did

not abuse its discretion when it denied appellant's petition for postconviction relief, we affirm.

FACTS

This case arises out of appellant Kevin Scott Smith's third-degree assault conviction and his related postconviction claim of ineffective assistance of trial counsel. In 2017, the state charged Smith with felony third-degree assault based on allegations that Smith hit his estranged wife in the face, breaking her nose and palate. Prior to trial, the state offered a plea deal to Smith in which Smith would plead to the charged felony offense, receive 30 days in jail, and be subject to certain postrelease conditions. Smith rejected the plea offer and proceeded to a jury trial. At trial, Smith claimed self-defense but the jury found him guilty. Smith appealed his conviction and this court affirmed. *State v. Smith*, No. A18-0823, 2019 WL 1890556, at *4 (Minn. App. Apr. 29, 2019), *review denied* (Minn. July 16, 2019).

Shortly after we issued our opinion, Smith petitioned the district court for postconviction relief on the basis of ineffective assistance of trial counsel. In his petition, Smith argued that his trial counsel's performance was deficient because his counsel failed to advise him that the state would have accepted a plea to a gross-misdemeanor offense—a lesser offense than the original charge. Smith filed a supporting affidavit in which he asserted:

After an appeal was filed with the appellate court, while consulting with my present attorney, I became aware that the State would have accepted a charge to a gross misdemeanor. I became aware for the first time that the State would have

accepted a plea to a gross misdemeanor offense after the jury verdict of guilty was returned.

Smith's petition and affidavit further stated that Smith would have accepted a plea to a gross misdemeanor because the felony conviction prevents him from carrying a firearm and coaching his child in sports. Smith requested an evidentiary hearing on the matter.

In its answer to Smith's petition, the state argued that Smith was not entitled to postconviction relief because (1) his ineffective-assistance-of-counsel claim was procedurally barred, and (2) regardless, his petition for postconviction relief was insufficient on its face because Smith failed to include any evidence relaying how or where he learned of the claimed plea offer. Along with its answer, the state filed an affidavit of the prosecutor who handled the case. His affidavit states, in relevant part, "the State . . . did not offer a gross misdemeanor settlement in this matter."

The postconviction court denied Smith's petition without an evidentiary hearing. The court concluded that nothing in Smith's affidavit or the record supported Smith's claim that the state had offered him a gross-misdemeanor plea agreement. The postconviction court noted that the transcript of the January 2018 settlement conference reflects that the plea offer made by the state was to the felony third-degree assault charge set forth in the complaint. The court also relied on the prosecutor's sworn statement that the state did not offer a gross-misdemeanor plea deal. The postconviction court accordingly concluded that the performance of Smith's trial attorney did not fall below an objective standard of reasonableness, and that Smith was not entitled to a hearing on his ineffective-assistance-of-counsel claim. This appeal follows.

DECISION

Smith contends that the postconviction court abused its discretion by denying his petition for postconviction relief without holding an evidentiary hearing. A court may dismiss a petition for postconviction relief without conducting an evidentiary hearing if “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 (2018). To determine whether an evidentiary hearing is required, the postconviction court must consider the facts alleged in the petition as true and view them in “the light most favorable to the petitioner.” *Anderson v. State*, 913 N.W.2d 417, 422-23 (Minn. 2018) (quotation omitted). If there are material facts in dispute and “the allegations in the petition, if true, would entitle the petitioner to relief, then the court must schedule an evidentiary hearing.” *Martin v. State*, 825 N.W.2d 734, 740 (Minn. 2013). Conversely, the postconviction court need not hold an evidentiary hearing “if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested.” *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A petitioner will not meet his burden if he merely offers “conclusory, argumentative assertions, without factual support.” *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007).

We review a postconviction court’s decision to not hold an evidentiary hearing for an abuse of discretion. *Chavez-Nelson v. State*, ___ N.W.2d, ___, ___, 2020 WL 5539812, at *4 (Minn. Sept. 16, 2020). “In doing so, we review the postconviction court’s underlying factual findings for clear error and its legal conclusions de novo.” *Morrow v. State*, 886 N.W.2d 204, 206 (Minn. 2016). Because claims of ineffective assistance of counsel involve mixed questions of law and fact, we review the postconviction court’s legal

conclusions on such questions de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). “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.” *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013) (quotation omitted).

To receive a hearing on an ineffective-assistance-of-counsel claim, a postconviction petitioner must “allege facts that, if proven by a fair preponderance of the evidence,” would satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Chavez-Nelson*, 2020 WL 5539812, at *4. The *Strickland* test requires the petitioner to establish “(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*, 466 U.S. 668 at 688, 694, 104 S. Ct. at 2064, 2068). There is a strong presumption that an attorney’s conduct was reasonable. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

In his postconviction petition, Smith asserted that his trial attorney was ineffective because he failed to inform Smith of the “option” to plead guilty to a gross misdemeanor. Based on its review of Smith’s affidavit and other documents in the record, the postconviction court determined that Smith’s trial attorney’s performance did not fall below an objective standard of reasonableness because Smith failed to allege sufficient facts to show that the state actually made a gross-misdemeanor plea offer.

On appeal, Smith again argues that his trial attorney was ineffective because he never informed Smith of a “gross misdemeanor plea option.” On that basis, he contends that the district court abused its discretion when it dismissed his petition without holding a hearing on his ineffective-assistance-of-counsel claim.

Based on our careful review of the record, we agree with the postconviction court that Smith failed to allege sufficient facts to support his claim of ineffective assistance of counsel. In support of his petition, Smith provided only his own affidavit alleging that he “became aware” sometime after he filed his direct appeal that “the State would have accepted a plea to a gross misdemeanor offense.” Smith’s affidavit offers no specific facts to support the notion that the state made a gross-misdemeanor plea offer. And Smith did not provide any further evidence to support his claim. Smith did not file an affidavit from his trial attorney or his appellate attorney to support his general assertion or otherwise provide any information about when and how the offer was made, to whom it was made, or when and how he learned of it. Moreover, Smith’s statements in his affidavit fail to specifically allege that any plea offer was made at all. He merely asserts that he “became aware” that the state “would have accepted” such a plea. Such claims, without more, constitute mere conclusory, argumentative assertions, without factual support. Additionally, the prosecutor’s affidavit provided further evidence that the state did not make the purported plea offer. The postconviction court did not abuse its discretion when it determined that Smith was not entitled to his requested relief because the petition, files, and records of the proceeding—even when viewed in the light most favorable to Smith—do not show that a gross-misdemeanor plea offer existed. *See Turnage*, 729 N.W.2d at 599

(stating a petitioner “has the burden on postconviction to set forth facts entitling him to the relief requested”).

We are not persuaded otherwise by Smith’s additional arguments in support of his contention that the district court abused its discretion. First, relying on *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), Smith argues that his trial counsel was required to inform him of the distinctions between a felony and gross-misdemeanor conviction. In *Padilla*, the United States Supreme Court held that an attorney is ineffective if she fails to inform her client that a guilty plea “carries a risk of deportation.” *Padilla*, 559 U.S. at 374, 130 S. Ct. at 1486. Smith’s reliance on *Padilla* is misplaced. Foremost, the record lacks support for the existence of a gross-misdemeanor plea offer. If the state made no such offer, Smith’s trial attorney had no duty to advise him of the consequence of pleading to a felony as opposed to a gross misdemeanor. Moreover, *Padilla* involved an attorney’s failure to advise her client about a deportation risk, not a failure to advise about the difference between a felony conviction and a gross-misdemeanor conviction. *Padilla* is not pertinent to this case.

Second, Smith argues that the postconviction court erred by denying his petition solely on the ground that Smith failed to satisfy *Strickland*’s first prong. This argument also lacks merit. The supreme court has repeatedly held that a court may dispose of an ineffective-assistance-of-counsel claim if the petitioner fails to satisfy just one prong of the two-prong *Strickland* test. See, e.g., *Jackson v. State*, 817 N.W.2d 717, 722 (Minn. 2012); *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

In sum, the postconviction court correctly rejected Smith's ineffective-assistance-of-counsel claim because Smith presented his claim based solely on conclusory, argumentative assertions, without factual support. Smith's petition thus failed to allege facts that, if proved, would satisfy the first prong of the *Strickland* test for ineffective assistance of counsel. Consequently, we conclude that the postconviction court acted within its discretion when it dismissed Smith's claim that he received ineffective assistance of counsel without first holding an evidentiary hearing.

Affirmed.