

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1217**

Jesse Toluwannimi Babatunde, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 17, 2021
Affirmed
Klaphake, Judge***

Hennepin County District Court
File No. 27-CR-18-3346

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Connolly, Judge; and Klaphake, Judge.

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

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

Appellant Jesse Toluwannimi Babatunde argues that the district court abused its discretion by denying his petition for postconviction relief because he received purportedly ineffective assistance of counsel, preventing him from understanding the consequences of his guilty plea. Because Babatunde's trial counsel appropriately advised him, we conclude that the district court did not abuse its discretion by denying Babatunde's postconviction-relief petition, and we affirm.

DECISION

Appellant argues that he involuntarily and unintelligently entered his plea because his counsel erroneously advised him that he could seek a downward durational departure for his first-degree burglary conviction. Appellant contends that, because his prior March 2017 burglary conviction involved a dangerous weapon, he could not receive a downward departure on his current 2018 unlawful-possession-of-ammunition conviction under Minnesota Statutes section 609.11, subdivisions 8(b), 9 (2020). We review a postconviction court's denial of a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction court abuses its discretion if it acts arbitrarily or capriciously, bases its decision on an erroneous legal interpretation, or makes clearly erroneous factual findings. *Id.* Because there are different first-degree burglary subdivisions describing different ways to commit a burglary, and because appellant was not convicted under the dangerous-weapon burglary subdivision, we conclude that appellant was eligible for a downward durational departure.

The state charged appellant in 2016 with first-degree burglary under Minnesota Statutes section 609.582, subdivision 1(a) (2016), which provides that someone who

enters a building without consent and with intent to commit a crime, or enters a building without consent and commits a crime while in the building . . . commits burglary in the first degree . . . if: (a) the building is a dwelling and another person, not an accomplice, is present in it when the burglar enters or at any time while the burglar is in the building.

Subdivision 1(a) does not involve possessing a dangerous weapon during the burglary. *Id.* Subdivision 1(b), on the other hand, does. *See id.*, subd. 1(b) (2016) (“the burglar possesses, when entering or at any time while in the building, any of the following: a dangerous weapon. . . .”). Appellant’s conviction of first-degree burglary under the subdivision that does not involve weapons poses no burden to the district court to exercise its discretion by granting a downward durational departure on his subsequent ineligible-possession-of-ammunition conviction.

A defendant who ineligibly possesses a firearm or ammunition after being convicted of a burglary generally faces a minimum sentence of five years. Minn. Stat. § 609.11, subd. 5(a)-(b) (2020); *see also id.*, subd. 9 (2020) (listing burglary as a crime generally requiring a mandatory minimum sentence). A judge may, however, sentence a defendant without regard to a mandatory minimum sentence unless “the defendant previously has been convicted of [a burglary] in which the defendant used or possessed a firearm or other dangerous weapon.” Minn. Stat. §609.11, subd. 8(b) (2020); *see also id.*, subd. 9. Appellant was not convicted of a subdivision 1(b) burglary, in which he “possess[ed] . . . a dangerous weapon.” Minn. Stat. § 609.582, subd. 1(b). He was convicted of a burglary under

subdivision 1(a), in which he entered an occupied dwelling. *Id.*, subd. 1(a). Because appellant was not convicted under the first-degree-burglary subdivision that references using a dangerous weapon, his trial counsel appropriately advised him that he could seek a downward durational departure on his subsequent ineligible-ammunition-possession conviction.

Appellant contends that, because the statement of probable cause for his 2017 burglary charge notes he carried a box-cutter,¹ his first-degree burglary conviction involved a dangerous weapon and rendered him ineligible of receiving a downward durational departure. But appellant's 2017 burglary involved two dates, August 12 and August 14. Appellant possessed a box-cutter on August 14 when police apprehended him before he entered the same dwelling he had successfully entered on August 12. Appellant's conduct on August 14 does not qualify as burglary under Minnesota Statutes section 609.582, subdivision 1(b), which requires that "the burglar possesses, *when entering or at any time while in the building . . .* a dangerous weapon." (Emphasis added.) Appellant did not enter the dwelling on August 14 when he carried the box-cutter. Nor does appellant's conduct on August 12 satisfy subdivision 1(b) because police did not apprehend him on that date when he successfully entered the dwelling and therefore had no evidence on whether he possessed a dangerous weapon when he entered or was in the dwelling. Indeed, appellant was charged and convicted under the person-present subdivision 1(a) for conduct that

¹ A box-cutter qualifies as a dangerous weapon. *See* Minn. Stat. 609.02, subd. 6 (2020) (defining "dangerous weapon" as "any device designed as a weapon and capable of producing death or great bodily harm").

occurred on August 12, not the dangerous-weapon subdivision or for conduct occurring on August 14. The postconviction court appropriately denied appellant's postconviction petition because it correctly concluded that it did have discretion to grant him a downward durational departure. Appellant's ineffective-assistance-of-trial claim was premised on his interpretation of Minnesota Statutes section 609.11, subdivisions 8(b) and 9. Accordingly, we affirm.

Affirmed.