

*This opinion is nonprecedential except as provided by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
A21-0813**

State of Minnesota,
Respondent,

vs.

Dale Eugene McDonald,
Appellant.

**Filed May 23, 2022
Affirmed in part, reversed in part, and remanded
Wheelock, Judge**

Washington County District Court
File No. 82-CR-19-4656

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Max Brady Kittel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Wheelock, Judge; and Smith, John, Judge.*

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

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

In this appeal from the conviction and sentence following his guilty plea to third-degree burglary, appellant argues that his attorney provided him with ineffective assistance of counsel by failing to request plea withdrawal and a downward durational departure. Because the record on the plea-withdrawal request is insufficient for review on direct appeal, we affirm on that issue. But because the attorney's conduct related to the durational-departure request was objectively unreasonable and prejudiced appellant, we reverse on that issue and remand.

FACTS

Appellant Dale Eugene McDonald pleaded guilty to third-degree burglary in January 2020. He entered a *Norgaard* plea, agreeing to the facts of the case as presented by respondent State of Minnesota because he did not have a full recollection of the facts due to his drug use.¹

In November 2019, a homeowner returned to his home in the late morning and found McDonald standing inside his detached garage. The homeowner, who restrained McDonald until law enforcement arrived, reported that items worth more than \$500, which

¹ A *Norgaard* plea occurs when a defendant “claims a loss of memory . . . regarding the circumstances of the offense,” but the record “establish[es] that the evidence against the defendant is sufficient to persuade the defendant and his or her counsel that the defendant is guilty or likely to be convicted of the crime charged.” *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

is the gross-misdemeanor threshold, had been “basically thrown to the ground” and were broken.

After McDonald agreed to these facts, the district court furloughed McDonald to a treatment facility and ordered him to cooperate and fully participate in treatment. The court warned him that if he left the treatment facility, he would likely be charged with escaping from custody and that at sentencing, his attorney would likely be unsuccessful in arguing that the court should not send McDonald to prison. The plea petition also included a specific statement that appellant would argue for a downward durational departure at his sentencing hearing although the state did not agree to a departure.

At a sentencing hearing on August 7, 2020, McDonald’s attorney asked for a continuance so that he could use an updated progress-summary report in his request for a departure. McDonald had been unsuccessfully discharged from the treatment facility to which he had been furloughed, and he told the district court that he was currently homeless and was having difficulty getting into a new treatment facility due to COVID-19 precautions and long wait lists. At a follow-up sentencing hearing in September, McDonald did not appear, and his sister told the district court that he had been missing since August and was likely still homeless. The court issued a warrant for McDonald’s arrest.

In May 2021, law enforcement arrested McDonald on the warrant. On May 28, 2021, the district court sentenced McDonald to 23 months and credited him 97 days of time

served in pretrial confinement.² During the sentencing hearing, McDonald's attorney mentioned the potential for arguing for a downward durational departure and McDonald's interest in withdrawing his guilty plea but did not move for a durational departure or to withdraw his plea.

McDonald appeals.

DECISION

McDonald argues that his attorney provided him ineffective assistance of counsel during his sentencing hearing. Criminal defendants are guaranteed the right to effective assistance of counsel under the Due Process Clause of the Fourteenth Amendment. U.S. Const. amend. XIV, § 1; *see also Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002). The right to assistance of counsel applies to all “critical stages” of criminal proceedings, including sentencing. *State v. Maddox*, 825 N.W.2d 140 (Minn. App. 2013). The right to counsel is a right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). We review a claim of ineffective assistance of counsel de novo. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016).

² In addition to his ineffective-assistance-of-counsel arguments, McDonald argues that the district court erred in calculating his time served. “A criminal defendant is entitled to jail credit for time spent in custody in connection with the offense or behavioral incident being sentenced.” *State v. Clarkin*, 817 N.W.2d 678, 687 (Minn. 2012) (quotation omitted). “The sentencing court does not have discretion in awarding jail credit.” *Id.* Both parties agree that McDonald was entitled to 100 days of jail credit, and if he is convicted and resentenced, he should be awarded an amount of jail credit that is based on an accurate calculation.

We evaluate claims of ineffective assistance of counsel using the *Strickland* test, which requires determining that (1) the attorney’s performance fell below an objective standard of reasonableness and (2) a reasonable probability exists that the outcome would have been different but for counsel’s errors. *Strickland*, 466 U.S. at 687; *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). An attorney acts within the objective standard of reasonableness when “he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances.” *Pierson*, 637 N.W.2d at 579 (quotation omitted). “There is a strong presumption that counsel’s performance ‘falls within the wide range of reasonable professional assistance.’” *Id.* (quoting *Strickland*, 466 U.S. at 689). “A reasonable probability is a probability sufficient to undermine confidence in the outcome of the case.” *Mosley*, 895 N.W.2d at 591 (quotations omitted). This court may dispose of a claim on one prong without considering the other. *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015).

I. McDonald received ineffective assistance of counsel based on his attorney’s failure to move for a downward durational departure during the sentencing hearing.

McDonald argues that his attorney provided ineffective assistance because the attorney (1) should have moved for a durational departure and failed to do so; (2) considered requesting a continuance to file a motion for a durational departure and failed to do so; and (3) only argued *against* a downward departure in his statements to the district court.

McDonald's attorney told the district court:

I advised or actually told Mr. McDonald that given the fact that he did not complete treatment and he had a conditional release violation back last April, *I didn't have the basis to file anything in terms of a departure motion because I didn't have anything to base his particular amenability to probation on.*

I'm looking at the police reports in this matter and it reeks to me as Mr. McDonald being under the influence when he was in this garage and I don't even know if I am within a—to borrow a phrase of horseshoes and hand grenades, *I don't know if I am anywhere close to even making an argument for a durational departure that this thing was less serious than the typical third degree burglary.* He did go into the garage. He was seen wearing a pair of gloves and asking—or said he was looking for his dad. I don't know if that was a comment made to get himself out of trouble or if he was seriously not there at the time which maybe goes to the issue of intent.

I guess I am left at two spots since this is a straight plea. There is no basis for a durational—for a dispositional departure no matter what I do here, Your Honor. I don't—and *if I were to try to make an argument for a durational in all fairness to [opposing counsel], I would need to file a motion and try to base why this would be different.*

Looking at the low end of the box on the worksheet here, Mr.—if I could scroll back up, Your Honor—low end of the box would be 23 months which would be roughly 16 months to serve minus his credit which would get him pretty close to a year. Like I said, I don't—I think he is not eligible for a dispositional. *I don't know if Mr. McDonald wants me to ask to continue the sentencing, make as best of an effort I can to convince you of a durational departure and then we see where that goes, but he has really put himself behind the 8 ball here.* And since it's a straight plea, *I will ask Mr. McDonald* and obviously I think out of fairness to [opposing counsel] they should give me their input as well if he is asking for a continuance so I can file that.

There is no record of McDonald's attorney then asking McDonald if he would like to move for a durational departure or of the court taking a recess so that McDonald's attorney could conference with McDonald to discuss it. McDonald's attorney did not make a motion either for a durational departure or for a continuance to file such a motion.

Instead, the court asked McDonald if there was "anything else that [he] would like to say." McDonald responded by expressing remorse and his desire to introduce evidence and witnesses to prove that he was bettering himself and to explain the circumstances and reasons for the offense in the first place. After McDonald spoke, the district court sentenced him to the bottom of the presumptive sentencing range, saying, "I look at the circumstances and look at what's happened in the last year and a half, and I just can't—you know, there is a presumed sentence . . . you are supposed to get unless I find good reasons not to, and I just don't see them."

A. McDonald's attorney's failure to request a downward durational departure did not meet an objective standard of reasonableness.

McDonald argues that his attorney failed to satisfy his most basic duty of loyalty and advocacy to McDonald because his attorney did not argue for a durational departure. We presume that the attorney acted reasonably, and *Strickland* acknowledges that, to allow for attorney strategy, there are not specific rules outlining the reasonableness standard. *Strickland*, 466 U.S. at 688-89. McDonald's attorney's statements on the record were confusing, but it appears that McDonald's attorney both considered and rejected his client's ability to obtain a downward durational departure in his statements to the district court during his client's sentencing hearing. The state argues that because McDonald did not

interject or say in his statement that his attorney should have argued for a downward durational departure, his attorney's advocacy was reasonable.

The decision to ask for a durational departure can be understood as a matter of strategy—it is conceivable that the attorney might think a durational departure would be so unlikely that requesting one might undermine his client's chances to receive a lower sentence within the presumptive range. However, based on the record in this case, the attorney does not appear to be making a strategic decision but rather determining out loud, in the presence of the district court and opposing counsel, whether he should request a continuance to move for a durational departure. We have difficulty imagining how stating “[McDonald] has really put himself behind the 8 ball,” or “I don't know if I am anywhere close to even making an argument for a durational departure that this thing was less serious than the typical third-degree burglary,” could be part of an attorney's strategy to advocate for their client.

McDonald's attorney did not meet an objective standard of reasonableness when he not only failed to advocate for McDonald and failed to argue for a durational departure, but also made arguments against McDonald's interest that served to undermine a motion for a downward durational departure.

B. His attorney's failure to request a downward durational departure prejudiced McDonald.

This court must next determine whether a reasonable probability exists that the outcome would have been different but for counsel's errors. *Strickland*, 466 U.S. at 687.

Although McDonald concedes that it is likely that he no longer had an argument for a dispositional departure, he argues that he likely would have been able to obtain a durational departure based on the facts of his offense. “A dispositional departure typically focuses on characteristics of the defendant that show whether the defendant is particularly suitable for individualized treatment in a probationary setting.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). “By contrast, a durational departure is a sentence that departs in length from the presumptive guidelines range. A durational departure must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *Id.* (citing Minn. Sent. Guidelines 1.B.5.b). “A downward durational departure is justified only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *Id.* at 624 (quotation omitted).

McDonald pleaded guilty to third-degree burglary. A person commits third-degree burglary when a person enters a building without consent intending to steal or commit a felony or gross misdemeanor inside the building, or when a person enters a building without consent and steals or commits a felony or gross misdemeanor. Minn. Stat. § 609.582, subd. 3 (2018).

Here, appellant’s plea petition showed that he intended to argue for a durational departure, and there are facts in the record that his attorney could have used to argue that the offense was less serious than the typical third-degree burglary. For example, McDonald entered the garage without consent during the winter, damaged belongings while entering the garage, and was discovered wearing stolen gloves. When the homeowner found him,

McDonald told him he was looking for his dad, and the homeowner tackled him and held him on the ground. McDonald did not resist. It is possible that a district court could reasonably conclude that, in comparison to other cases involving the same offense, McDonald's offense was significantly less serious than a typical third-degree burglary.

It is true that the district court stated that it did not consider McDonald to be a candidate for a "downward departure." The court stated:

I get that you had intentions, but I can't give you credit for intentions. It really is about actions. It really is about what you do. And I look at the circumstances and look at what's happened in the last year and a half, and I just can't—you know, there is a presumed sentence . . . that you are supposed to get unless I find good reasons not to, and I just don't see them.

The district court only addressed factors that would support a downward dispositional departure, and it did not address whether it considered the circumstances of McDonald's case to be significantly less serious than typical third-degree burglaries, which would support a downward durational departure.

The circumstances of McDonald's case show a basis for a court to find that the offense was less serious than a typical case and to find that a durational departure was appropriate. Because of the attorney's ineffective assistance, the district court did not hear any motion or argument on behalf of McDonald for a downward durational departure. The district court cannot evaluate and make findings on a motion not made to it, and we cannot know how the district court would have decided the motion. Because a reasonable probability exists that the outcome would have been different but for counsel's errors,

McDonald was prejudiced. Therefore, we conclude that McDonald received ineffective assistance of counsel. We reverse his sentence on this ground and remand for resentencing.

II. The trial record is not sufficiently developed such that this court may consider an ineffectiveness argument related to his counsel's failure to request a withdrawal of McDonald's plea.

McDonald also argues that he received ineffective assistance of counsel when his attorney discussed McDonald's intention to withdraw his plea at the sentencing hearing before the district court but did not request that the court allow McDonald to withdraw his guilty plea. "Generally, an ineffective assistance of counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal." *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). A postconviction hearing allows for the development of "additional facts to explain the attorney's decisions," so as to properly consider whether a defense counsel's performance was deficient." *Id.* (quoting *Black v. State*, 560 N.W.2d 83, 85 n.1 (Minn. 1997)). An appellate court considers an ineffectiveness argument on direct appeal if the district court record is sufficiently developed such that the claim can be decided based on the district court record. *See Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004) (holding that an ineffective-assistance claim is not barred from consideration in a collateral postconviction proceeding if the appellate court cannot decide it based on the district court record).

In this case, there is no record on what arguments McDonald would have advanced for plea withdrawal; thus, the trial record, by itself, does not allow for a determination of his claim of ineffective assistance of counsel for failure to request a plea withdrawal at the sentencing hearing. This court regularly declines to consider a claim of ineffective

assistance on direct appeal when the record is not fully developed. *See, e.g., State v. Arrington*, No. A14-1945, 2016 WL 102476, at *3 (Minn. App. Jan. 11, 2016). Here, we will not consider this issue on direct appeal because the record is insufficient; however, McDonald's right to assert the claim regarding his plea-withdrawal request in a future postconviction proceeding is preserved. *See State v. Christian*, 657 N.W.2d 186, 194 (Minn. 2003); *Gustafson*, 610 N.W.2d at 321; *State v. Xiong*, 638 N.W.2d 499, 504 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002).

Affirmed in part, reversed in part, and remanded.