

*This opinion is nonprecedential except as provided by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
A19-0031**

State of Minnesota,
Respondent,

vs.

Cedric Antonio Erby,
Appellant.

**Filed January 11, 2021
Affirmed
Larkin, Judge**

Hennepin County District Court
File Nos. 27-CR-18-5880, 27-CR-18-12984

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Larkin,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

In this reinstated direct appeal, appellant challenges the denial of his postconviction petition, which sought plea withdrawal based, in part, on a claim of ineffective assistance of counsel. We affirm.

FACTS

The state charged appellant Cedric Antonio Erby with numerous controlled-substance crimes, including second-degree sale. In a separate case, the state charged Erby with third-degree sale, third-degree burglary, and other crimes. After Erby's private counsel withdrew, he was represented by a public defender (trial counsel).

At several hearings, Erby demonstrated the ability to make his thoughts known to trial counsel and the district court. At two hearings in May 2018, Erby personally interjected on the record, at one point offering information regarding the terms of bail. At a June 2018 hearing, trial counsel told the district court, "in light of some discussions we've had off the record," Erby is "demand[ing] a speedy trial" and a "*Rasmussen*" hearing¹ to address "the plain-view argument made by police." *See State ex rel. Rasmussen v. Tahash*, 141 N.W.2d 3, 13-14 (Minn. 1965) (establishing procedure for addressing certain

¹ The parties refer to the hearing as a *Rasmussen* hearing, and that term appears throughout the record. We therefore use that term in this opinion. However, we note that the Minnesota Rules of Criminal Procedure refer to the hearing as an omnibus hearing. *See* Minn. R. Crim. P. 11.02 (stating that an omnibus hearing is the proper forum for a district court to hear "all motions" relating to evidentiary issues).

evidentiary issues). But trial counsel then told the court, “Erby is telling me he does not want to demand a speedy trial.”

The state extended an offer for Erby to plead guilty to second-degree sale, third-degree sale, and third-degree burglary in exchange for concurrent sentences of 75, 57, and 30 months respectively. Erby moved to suppress evidence, and on July 13, 2018, he appeared for a *Rasmussen* hearing. The state’s plea offer was to expire that day, but the state indicated, on the record, that it would keep the offer open if Erby would waive his right to a *Rasmussen* hearing and “avoid at least that litigation.” Trial counsel requested a continuance, but he stated it was “Erby’s preference” to have the *Rasmussen* hearing that day if the court would not grant a continuance. The district court denied the continuance and held the *Rasmussen* hearing. Erby did not object at any point during the hearing. The court ultimately denied Erby’s suppression motion.

The state extended a new offer, which called for a plea of guilty to second-degree sale, third-degree sale, and third-degree burglary in exchange for concurrent sentences of 84, 57, and 30 months respectively. The state also agreed to Erby’s release pending sentencing. The plea agreement required Erby to appear for sentencing and prohibited him from committing any new offenses. Erby accepted the state’s offer and pleaded guilty. He acknowledged that if he failed to satisfy the requirements of the plea agreement, he could receive a 117-month sentence on the second-degree sale conviction. The district court agreed to release Erby pending sentencing, but it ordered him to abstain from the use of alcohol and controlled substances and to submit to random drug testing. Erby did not object to those conditions.

Erby failed to appear for sentencing as scheduled. Instead, he was arrested for a new narcotics case and was brought before the district court for sentencing in custody. The state therefore requested a 117-month sentence. Trial counsel argued that Erby had “not been charged with any new offenses” but acknowledged that Erby had failed to appear for sentencing. The district court sentenced Erby to serve concurrent sentences of 117 months in prison for second-degree sale, 57 months for third-degree sale, and 30 months for third-degree burglary.

Erby appealed his convictions and later moved to stay the appeal to develop the record in a postconviction proceeding. This court granted Erby’s motion and stayed the appeal.

Erby petitioned for postconviction relief, seeking to withdraw his guilty plea. He argued that his guilty plea was the result of ineffective assistance of trial counsel and therefore involuntary. Erby also argued that his plea admissions did not establish the elements of third-degree burglary and that his plea to that offense was therefore inaccurate. The postconviction court held an evidentiary hearing on Erby’s petition and granted relief in part, vacating Erby’s third-degree burglary conviction because his plea admissions did not establish the elements of that offense. The postconviction court otherwise denied relief.

This court reinstated Erby’s appeal.

DECISION

Erby contends that he is entitled to plea withdrawal or sentence modification because his guilty pleas were involuntary and therefore invalid.

“When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court’s decisions using the same standard that we apply on direct appeal.” *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). The validity of a guilty plea is a question of law and is reviewed de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). “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).

Once a defendant pleads guilty, there is no absolute right to plea withdrawal. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). But “the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1.

A manifest injustice exists if a guilty plea is invalid. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). To be valid, a guilty plea must be voluntary. *Id.* The voluntariness requirement protects a defendant from pleading guilty “due to improper pressure or coercion.” *Nelson v. State*, 880 N.W.2d 852, 861 (Minn. 2016) (quotation omitted). “Whether a plea is voluntary is determined by considering all relevant circumstances.” *Id.* (quotation omitted). “A defendant bears the burden of showing his plea was invalid.” *Raleigh*, 778 N.W.2d at 94.

The United States and Minnesota Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. “[A] guilty plea based on ineffective assistance of counsel creates a manifest injustice as a

matter of law.” *State v. Ellis-Strong*, 899 N.W.2d 531, 541 (Minn. App. 2017). To demonstrate ineffective assistance of counsel, a defendant must satisfy a two-prong test based on the standard from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). First, the defendant must show “that counsel’s representation fell below an objective standard of reasonableness.” *Id.* (quotation omitted). Second, the defendant must show that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quotation omitted). When one prong of the *Strickland* test is determinative, an appellate court need not address the other prong. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

Erby challenges the voluntariness of his plea, arguing that it was the result of ineffective assistance of counsel. He asserts that he “*never* told counsel that he wanted the *Rasmussen* [hearing] to happen that day and counsel did not have [his] permission to say that.” Erby argues that by proceeding with that hearing, trial counsel misrepresented his wishes and effectively forced him to reject the state’s initial plea offer, which proved more favorable than the offer he ultimately accepted. As further evidence that trial counsel acted ineffectively, Erby points to the fact that trial counsel had earlier requested a speedy trial against his wishes.

At the evidentiary hearing on Erby’s petition for postconviction relief, Erby’s trial counsel testified that he spoke to Erby prior to the *Rasmussen* hearing, but that he “didn’t feel at the time that it was enough time to speak.” However, trial counsel testified that he explained the state’s offer to Erby, that he explained the offer would expire if Erby went

ahead with the *Rasmussen* hearing, and that he advised Erby he could face a significant prison sentence. Trial counsel testified that Erby wanted to have the *Rasmussen* hearing. Specifically, trial counsel explained that after the prosecutor stated that she would be willing to keep the offer open only if Erby waived his *Rasmussen* rights, trial counsel conferred with Erby, and Erby instructed him to conduct the *Rasmussen* hearing. Trial counsel testified that he would not have conducted the hearing if Erby had instructed him not to do so. Trial counsel testified that Erby's ultimate goal was "to get the drug case dismissed."

As to the conditions of release, trial counsel testified that he negotiated a deal with the state wherein Erby would be released from jail pending sentencing, but if he did not return for sentencing, Erby would face a more severe sentence. Trial counsel testified that Erby was surprised when the district court imposed drug-testing conditions, but trial counsel did not object because he wanted Erby to be released and did not want to risk losing the deal.

As to the speedy-trial demand, trial counsel testified that Erby had shifted back and forth between wanting and not wanting a speedy trial. But trial counsel testified that "[t]he moment he told me [he did not] want a speedy trial, we notified the [c]ourt."

Erby testified that he never wanted to proceed with the *Rasmussen* hearing because he intended to "take the deal at the end of the road." However, Erby acknowledged that when trial counsel notified the court that Erby wanted to proceed with the *Rasmussen* hearing, Erby did not voice objection. As to the conditions of release, Erby understood the plea negotiation to merely require that he remain law abiding and come to court. He

testified that he never agreed to drug-testing conditions. He also testified that he never told trial counsel to request a speedy trial.

There is a strong presumption that counsel's performance was reasonable. *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). We review a postconviction court's credibility determinations under a clearly-erroneous standard. *State v. Ali*, 855 N.W.2d 235, 245 (Minn. 2014). The postconviction court noted that the testimony from Erby and trial counsel was conflicting regarding whether Erby instructed trial counsel to proceed with the *Rasmussen* hearing. The postconviction court ultimately rejected Erby's testimony that he told trial counsel not to proceed with the *Rasmussen* hearing. The court noted that proceeding with the *Rasmussen* hearing was consistent with Erby's stated goals of prolonging the litigation and beating the charges. Moreover, the court found that "the testimony and transcripts on the record show[ed] that [Erby] was more than capable of alerting [the] court or counsel when something was happening against his wishes." For example, the court noted that when trial counsel "mistakenly invoked [Erby's] right to a speedy trial, [Erby] promptly alerted [trial counsel] of the mistake so it could be corrected." Thus, the court found that Erby's silence at the *Rasmussen* hearing was "telling."

The postconviction court determined that when trial counsel conducted the *Rasmussen* hearing, "he either did so on [Erby's] express instruction, or at the very least did not act contrary to any express instruction." The postconviction court therefore concluded that Erby failed to show that trial counsel's representation was unreasonable. The record supports the postconviction court's findings and rejection of Erby's testimony.

On this record, Erby has not established ineffective assistance of counsel stemming from trial counsel's representation at the *Rasmussen* hearing.

Erby also argues that trial counsel was ineffective because he did not object to the release conditions imposed by the district court. He suggests that the additional release conditions "constituted a breach by [the state] of the negotiated terms of the plea agreement." But to succeed on a claim of ineffective assistance of counsel, Erby must demonstrate a reasonable probability that, but for counsel's failure to object, the outcome would have been different. *Ecker*, 524 N.W.2d at 718. Erby cannot make that showing here because there is no indication that he would have rejected the plea agreement if he had known of the conditions to be imposed by the court.

Moreover, Erby's suggestion that the additional conditions of release "constituted a breach" of the plea agreement is unavailing. The state promised to agree to Erby's release pending sentencing. The state fulfilled that promise, and the district court agreed to release Erby. The record does not suggest that Erby's sentence was in any way based on his violation of the additional conditions regarding chemical use. We fail to discern why Erby's guilty plea was rendered invalid as a result of the district court's imposition of chemical-use and testing conditions that did not prevent his promised release pending sentencing or impact his sentence.

In conclusion, Erby fails to establish that his guilty pleas were invalid. We therefore affirm.

Affirmed.