STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1943

State of Minnesota,
Respondent,

vs.

Christian Rosario-Torres,
Appellant.

Filed October 21, 2024
Affirmed
Frisch, Judge

Hennepin County District Court
File No. 27-CR-21-337

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

Mary F. Moriarty, Hennepin County Attorney, Matthew D. Hough, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Mark D. Kelly, Law Offices of Mark D. Kelly, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Connolly, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant challenges the execution of his sentence for criminal sexual conduct, arguing that he received ineffective assistance of counsel. Because appellant failed to meet

his burden to establish that his trial counsel's assistance was constitutionally ineffective or that he was prejudiced by this allegedly deficient performance, we affirm.

FACTS

On January 18, 2022, appellant Christian Rosario-Torres pleaded guilty to second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(c) (2020). On March 29, the district court stayed imposition of Rosario-Torres's prison sentence for three years, placed him on probation, and ordered that he serve 365 days in jail. The district court's sentencing order noted that, "if you are revoked from probation, it would likely result in a 90-month prison sentence with a 10-year term of conditional release if you are sent to prison."

On May 31, 2022, the district court received a probation-violation report that Rosario-Torres had failed to remain law-abiding because respondent State of Minnesota charged Rosario-Torres with felony domestic assault. A probation officer filed an addendum on May 8, 2023, setting forth additional probation violations for failing to remain law-abiding associated with other criminal charges for firearm possession by an ineligible person and chemical-test refusal.

On August 22, 2023, the district court held a hearing to resolve all of Rosario-Torres's outstanding criminal matters pursuant to a global plea agreement.[1] The plea agreement provided that Rosario-Torres would plead guilty to possession of a firearm by an ineligible person and receive a downward durational sentencing departure to 48

[1] Two other misdemeanor charges were also the subject of the hearing.

months in prison, that he would also plead guilty to refusing to submit to a chemical test, and that the state would dismiss the felony domestic-assault charge.

Also as part of the plea agreement, Rosario-Torres agreed to admit to violating the terms of his probation related to the criminal-sexual-conduct conviction. The parties agreed that the executed sentence on the criminal-sexual-conduct case would be served concurrently with the 48-month sentence for the firearm charge. The state represented that "[b]y making the admission to the probation violation, [Rosario-Torres] is being revoked on his remaining time on his [criminal-sexual-conduct case], which balances out to about the same amount of time, 48 months." Rosario-Torres then entered a plea of guilty to the firearm and test-refusal charges. The district court ordered a presentence investigation and scheduled the case for sentencing.

At the sentencing hearing, the district court imposed a downward durational departure sentence of 48 months in prison for the firearm charge and 364 days in jail for the test-refusal charge, to be served concurrently.

The district court next addressed the probation violations for the criminal-sexual-conduct conviction. Rosario-Torres agreed to waive his right to a contested probation-violation hearing, admitted to the violations, and requested imposition and execution of his previously stayed 90-month sentence. Trial counsel confirmed with Rosario-Torres that he understood the implications of executing this sentence:

> Q: You know if you wanted to, Mr. Torres, you would not have to have that sentence executed on the criminal sexual conduct . . . do you remember that?
> A: Yes.

> Q: So you know that when you got out of prison, you could actually still go back and be on probation and not have to serve that additional time, correct?
> A: Correct.
>
> Q: Actually in this particular situation, with all of your jail credit you have, I believe you're going to be darn close to getting it all executed at the same time as this new sentence, as it will run concurrent; do you understand that?
> A: Yes.

The district court then imposed and executed the 90-month prison sentence to run concurrently with the 48-month sentence for illegal possession of a firearm. The district court also confirmed that Rosario-Torres would be on supervised release for 30 months, concurrent with a 10-year term of conditional release.

Rosario-Torres appeals.

DECISION

Rosario-Torres contends that he was denied his right to the effective assistance of counsel. Generally, claims of ineffective assistance of counsel "should be raised in a postconviction petition for relief, rather than on direct appeal" because a postconviction hearing allows the district court to develop an evidentiary record to evaluate defense counsel's performance. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). But where "a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal." *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). "We review a claim of ineffective assistance of counsel de novo." *State v. Bell*, 971 N.W.2d 92, 106 (Minn. App. 2022), *rev. denied* (Minn. Apr. 27, 2022).

The Sixth Amendment of the United States Constitution and article I, section 6 of the Minnesota Constitution guarantee a criminal defendant the right to the effective assistance of counsel. *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016) (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)). Rosario-Torres bears the burden to establish his counsel's "deficient performance" by proving that counsel's performance "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. He must also show prejudice by demonstrating "a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (quotation omitted). "In evaluating claims of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable." *Andersen*, 830 N.W.2d at 10. We conclude that Rosario-Torres failed to meet his burden to establish that his trial counsel's performance fell below an objective standard of reasonableness or that he was prejudiced because of this allegedly deficient performance.

Counsel's Performance

Rosario-Torres first argues that his trial counsel's performance fell below an objective standard of reasonableness because counsel misrepresented "his anticipated release date" for the firearm charge, which induced him to request execution of the stayed sentence in his criminal-sexual-conduct case. Specifically, he claims that trial counsel erroneously asserted that the two concurrent sentences he was to receive "would result in the same duration of sentence on each file." To support this contention, he points to a single statement made during the sentencing hearing in which trial counsel stated: "I

believe you're going to be darn close to getting it all executed at the same time as this new sentence." We disagree.

Rosario-Torres fails to meet his burden to establish that trial counsel's performance fell below an objective standard of reasonableness. *See Strickland*, 466 U.S. at 687-88. The record does not support Rosario-Torres's contention that trial counsel failed to accurately advise him about the relative durations of his sentences. First, nothing in the record shows that trial counsel affirmatively advised Rosario-Torres of an erroneous anticipated release date or otherwise advised that Rosario-Torres would serve the same duration on both files. Rosario-Torres therefore failed to establish that counsel's performance fell below an objective standard of reasonableness.

Second, Rosario-Torres failed to meet his burden to establish that trial counsel's statement that Rosario-Torres would be "darn close to getting it all executed at the same time as this new sentence" fell below an objective standard of reasonableness. We do not read this statement as a misrepresentation of the relative durations of the concurrent sentences; we instead read this statement as an indication that Rosario-Torres would likely finish serving the in-custody portion of the executed sentence for the criminal-sexual-conduct conviction around the same time that his supervised release for the firearm conviction would terminate. And Rosario-Torres identifies no authority standing for the proposition that a similar representation or statement by counsel—made on the record and in the presence of a defendant—by itself amounts to performance below an objective standard of reasonableness.

We therefore conclude that Rosario-Torres failed to meet his burden to establish that his trial counsel's performance fell below an objective standard of reasonableness.

Prejudice

Even if trial counsel misrepresented the duration of incarceration, Rosario-Torres's ineffective-assistance claim still fails because he has not met his burden to establish prejudice based on trial counsel's performance. To establish prejudice, Rosario-Torres must demonstrate "a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Peltier*, 946 N.W.2d at 372 (quotation omitted). Rosario-Torres argues that "[b]ut for the representations of [trial counsel] and the prosecutor, there is no logical reason" for him to have requested execution of the criminal-sexual-conduct sentence.[2] We disagree for four reasons.

First, there is no evidence in the record—such as a motion to withdraw the plea, an affidavit, or testimony—to support the claim that but for counsel's alleged misrepresentation of the duration of incarceration, Rosario-Torres would have proceeded with a contested probation-revocation hearing, and that the ultimate results would have been different or more favorable to Rosario-Torres. *See Ellis-Strong*, 899 N.W.2d at 540 (finding insufficient record evidence to determine prejudice where defendant "never

[2] Rosario-Torres appears to argue that alleged misrepresentations made by the prosecutor should be considered in his ineffective-assistance-of-counsel claim. But prosecutorial misconduct and ineffective assistance of counsel are separate inquiries. An ineffective-assistance-of-counsel claim is concerned with *defense* counsel's performance, not with prosecutorial error or misconduct. Thus, the prosecutor's alleged misrepresentations have no bearing on our determination of Rosario-Torres's ineffective-assistance-of-counsel claim.

submitted an affidavit or testified that he would not have pleaded guilty but for [trial counsel's] misadvice").

Second, there is ample evidence in the record establishing that Rosario-Torres knew that the two sentences at issue called for different periods of incarceration, and that execution of his previously stayed sentence would result in additional prison time. The original sentencing order for the criminal-sexual-conduct conviction notified Rosario-Torres that violating the terms of his probation would likely result in a 90-month prison sentence with ten years of conditional release. And at the sentencing hearing, the district court ordered Rosario-Torres to serve that sentence. As to the firearm charge, the district court notified Rosario-Torres that it was imposing a 48-month sentence and that he would only serve two-thirds of that sentence if he behaved lawfully. Thus, despite trial counsel's alleged misrepresentation, Rosario-Torres was still properly informed about the duration of each sentence.

Third, Rosario-Torres agreed to request execution of his sentence as part of a beneficial global plea agreement. Pursuant to the plea agreement, the state dismissed pending felony domestic-assault and misdemeanor charges. The agreement also provided for a downward durational departure for the firearm charge and specified that the two sentences be served concurrently. In the absence of this global agreement, the state could have chosen to prosecute all Rosario-Torres's pending cases, seek the maximum penalty in the event of conviction on each charge, and request that the district court impose consecutive—rather than concurrent—sentences. Therefore, even assuming trial counsel misinformed Rosario-Torres about the relative durations of his sentences, there is no

reasonable probability that Rosario-Torres would have jeopardized the benefits of the global plea agreement by refusing to request execution of his sentence.

Fourth, the record reflects that Rosario-Torres agreed to the terms of the plea agreement well before the sentencing hearing, belying his contention that trial counsel's alleged misrepresentation induced him to request execution of his sentence. At the plea hearing a month before the sentencing hearing, trial counsel informed the district court that the agreement called for "a 48-month commit to prison" on the firearm case, "that will run concurrent to the probation revocation." At the same hearing, the prosecutor also represented that "[b]y making the admission to the probation violation, he is being revoked on that remaining time on his [criminal-sexual-conduct] case." And in the written plea petition—filed on the same day as the plea hearing—Rosario-Torres agreed in writing to execute his previously stayed sentence and to serve that sentence concurrent with the 48-month sentence for the firearm case, further undermining Rosario-Torres's claim that his attorney's alleged misrepresentation a month later induced him to request execution of his sentence. *See State v. Jenson*, No. A23-1790, 2024 WL 3493886, at *3 (Minn. App. July 22, 2024) (rejecting defendant's claim that his attorney was ineffective for failing to inform him of his potential sentence in part because he signed a plea petition expressly stating that the plea agreement included the possibility that such a sentence could be imposed).[3]

[3] We cite nonprecedential authority for its persuasive value. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

In sum, Rosario-Torres's ineffective-assistance-of-counsel claim fails because he has not demonstrated that his trial counsel's performance fell below an objective standard of reasonableness. And even assuming deficient performance, the claim still fails because he has not established prejudice.[4]

Affirmed.

[4] Rosario-Torres also argues that alleged misrepresentations made by the prosecutor "circumvented his State and Federal rights to procedural due process of law." But Rosario-Torres provides no analysis of how the prosecutor's alleged misrepresentations constituted such a violation. "An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (quotation omitted). Because Rosario-Torres has provided no substantive analysis to support his due-process claim, and prejudicial error is not apparent, we consider this argument waived.