STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1384

State of Minnesota,
Respondent,

vs.

Soong See,
Appellant.

Filed August 19, 2008
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. K9-05-88

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street Southeast, Rochester, MN 55904-3712 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Melvin R. Welch, Sara L. Martin, Assistant Public Defenders, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Huspeni, Judge.*

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

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his conviction of first-degree controlled-substance crime on the ground that he received ineffective assistance of counsel, because his counsel failed to move to suppress evidence that was obtained when police entered his hotel room without a warrant. Because we conclude that appellant's counsel made a tactical decision when he did not move to suppress the evidence and that a suppression motion would not have affected the outcome of the trial because appellant did not demonstrate a subjective expectation of privacy in the hotel room, we affirm.

FACTS

On January 4, 2005, the manager of a Rochester hotel requested police assistance in removing a person from a hotel room. When the police arrived, the hotel manager told them that the room in question, which was registered in the name of John Yang, smelled of marijuana and that there was a lot of "foot traffic" from males entering and leaving the room.

One of the officers reported that as he walked down the hotel hallway toward the room, he could smell burnt marijuana. The door to the room was open, and when the police stopped at the door, one officer saw an individual in the room who was later identified as appellant Soong See. Appellant stepped behind a wall, and an officer yelled "Hey, come here," but appellant did not respond. The officer then entered the room and saw appellant with a duffle bag and a backpack at his feet and his arms and hands inside a jacket draped over his shoulders.

The officer asked appellant if he was John Yang, the name of the registered renter, and appellant replied that he was not. Appellant told the officer that he was from California and had no identification. The officer told appellant the police were called because someone at the hotel smelled marijuana. The officer asked appellant about the bags by his feet, and appellant said that neither the bags nor the jacket were his. As appellant was being questioned, he kept putting his hands in his pockets despite the officer's orders to keep his hands in plain view. The officer therefore conducted a weapons frisk and discovered and removed from appellant's pocket a bag containing multiple individually wrapped packages of white powder. The officer then did a full search of appellant and found, among other items, a small plastic bag of marijuana.

The officer called an officer at the narcotics unit, who told him to secure the area until more officers arrived. Officers from the narcotics unit obtained and executed a search warrant for the room. Two magnetic hotel keys for the hotel room were found in appellant's pocket. In examining the plastic bag removed from appellant's pocket, the officers found that it contained 24 individual bags of a substance that tested positive for cocaine. The officers searched the duffel bag that had been at appellant's feet and found a bag of white powder, which also tested positive for cocaine. The duffel bag also contained clothing, which the officers estimated was appellant's size. The name on the duffel bag's luggage tag was later confirmed to be that of appellant's sister.

Appellant admitted that the cocaine removed from his pocket belonged to him and that he was selling it, although he maintained that the cocaine in the duffle bag did not belong to him. Appellant was charged with first-degree controlled-substance crime in

violation of Minn. Stat. § 152.021, subd. 1(1) (2004). Before trial, appellant's counsel did not move to challenge the evidence obtained from the search of appellant or otherwise. At trial, after the state rested its case, the district court recessed and appellant and his counsel conferred. Appellant's counsel confirmed that she had discussed appellant's right to testify with him, and appellant waived his right to testify on the record. In appellant's defense, his counsel argued there was reasonable doubt as to whether the cocaine found in the duffel bag belonged to appellant, in part because the room was registered to another person.

Appellant petitioned for postconviction relief on the ground that the evidence in his hotel room was unlawfully seized and his counsel's failure to move for suppression constituted ineffective assistance of counsel because the evidence should have been suppressed. In his petition, appellant argued that the search and seizure was unlawful because there was no probable cause or exigent circumstances that justified the warrantless entry of police into the hotel room.

The state responded to appellant's petition by arguing that (1) the police had a lawful basis to enter the room and search appellant, (2) appellant waived his right to challenge the entry and search by waiving any challenges at the omnibus hearing, and (3) appellant's counsel's choice to waive the omnibus hearing was a tactical decision and therefore not ineffective assistance of counsel. The state also argued that in his petition, appellant did not allege sufficient facts to support his claim of reasonable expectation of privacy in the hotel room such that appellant would have standing to challenge the

constitutionality of the search. The district court held an evidentiary hearing on appellant's petition for postconviction relief.

Appellant's counsel appeared at the postconviction hearing, but appellant did not appear in person. It is unclear as to why appellant did not appear at this hearing. Prior to the hearing, the district court issued a writ directing authorities to bring appellant to the hearing. Appellant's counsel did not call the sheriff to confirm that appellant would be brought to court and stated that she assumed that such a call would not be necessary. The prosecutor stated that appellant's counsel had left a message for him suggesting that appellant's postconviction case could be submitted on the record. As a result of this message, the prosecutor told appellant's trial counsel, whom the prosecutor had planned to call as a witness to rebut appellant's ineffective-assistance-of-counsel claim, that she would not be needed as a witness.

Neither party offered testimony or other evidence at the postconviction hearing; rather, appellant's counsel argued that evidence in the record was sufficient to sustain a challenge to the evidence obtained from the warrantless entry and that failure to move for suppression on these grounds was ineffective assistance of counsel per se. The prosecutor argued that appellant never alleged facts establishing his privacy interest in the hotel room, never addressed the issue of standing before the postconviction hearing, and consistently argued at trial that neither the room nor the drugs were his.

In its postconviction order, the district court denied appellant's request for relief, observing that appellant's counsel failed to procure appellant for the hearing and did not intend to call appellant's trial counsel as a witness and that appellant did not set forth any

evidence in support of his claims. The court found that appellant failed to meet his burden because he did not provide evidence that the search and seizure was unlawful or that he received ineffective assistance from his counsel.

D E C I S I O N

Appellant asserts that his trial counsel's failure to challenge the warrantless entry of police into his hotel room amounts to ineffective assistance of counsel because such a challenge would have been outcome determinative. For a claim of ineffective assistance of counsel, the burden of proof is on the petitioner to demonstrate that (1) his counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's errors, the result of the trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984); *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003).

We consider first whether appellant's trial counsel's conduct fell below an objective standard of reasonableness. "There is a strong presumption that an attorney acted competently." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). In this case, appellant offered no evidence at his postconviction hearing to rebut this presumption. Moreover, appellant's trial counsel's decision not to challenge the search and seizure appears to have been a tactical decision; an argument that appellant had a privacy interest in the room would have been contrary to appellant's defense at trial, which was that neither the room nor the drugs were his. Strategic decisions should be left to the discretion of defense counsel. *Sanderson v. State*, 601 N.W.2d 219, 226 (Minn. App. 1999), *review denied* (Minn. Mar. 28, 2000).

Appellant argues that the notion that his trial counsel strategically refrained from challenging the search and seizure before trial in order to prevent the use of the challenge against him at trial lacks merit. Appellant argues that his counsel could have pursued contrasting strategies about his expectation of privacy in the hotel room before and during trial, citing *Simmons v. United States*, 390 U.S. 377, 394, 88 S. Ct. 967, 976 (1968), in which the United States Supreme Court held that a defendant's testimony offered to prove standing to challenge a search and seizure may not be used against him on the issue of guilt. But it has not yet been settled whether similar testimony from a defendant could be used against him for impeachment purposes. *See United States v. Salvucci*, 448 U.S. 83, 89-90, 100 S. Ct. 2547, 2550 (1980) (stating that *Simmons* did not hold that a defendant's testimony at a suppression hearing could not be used to impeach the defendant's testimony at trial). Given the uncertainty of the law on this point, we reject appellant's argument that the decision to challenge the search and seizure could not have been a strategic decision.

Appellant argues that the American Bar Association Standards for Criminal Justice required his trial attorney to challenge the warrantless search and seizure. These standards provide in part that defense counsel "should consider all procedural steps which in good faith may be taken, including . . . moving to suppress illegally obtained evidence . . . and seeking dismissal of the charges." *Standards for Criminal Justice: Standards Relating to the Prosecution Function and the Defense Function* § 3.4-3.6 (1993). American Bar Association standards are not binding, but have been considered by the United States Supreme Court to be useful in determining effective assistance of counsel.

Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. But this requirement does not preclude counsel from choosing not to try to suppress evidence for strategic reasons. *Id.* at 690-91, 104 S. Ct. at 2066 (stating that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," although counsel has a duty to make a reasonable investigation before making such choices.); *cf. Kimmelman v. Morrison*, 477 U.S. 365, 385, 106 S. Ct. 2574, 2588 (1986) (determining unreasonable an attorney's failure to "file a timely suppression motion, not due to strategic considerations," but because he was unaware of the state's intention to introduce evidence). Here, appellant does not argue that his counsel failed to make a reasonable investigation of law or facts, and appellant's counsel's failure to challenge the warrantless search and seizure was consistent with the theory of appellant's defense. We conclude that appellant's trial counsel's decision not to raise this challenge was strategic and therefore not subject to review.

Moreover, a claim of ineffective assistance of counsel requires the claimant to show a reasonable probability that his counsel's error affected the outcome of the trial. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. We conclude that appellant's counsel's refusal to raise this challenge would not have affected the outcome of the trial because such a challenge would have failed. The United States and Minnesota Constitutions protect persons against unreasonable searches and seizures in their "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, 10. A defendant must have a reasonable expectation of privacy in an area searched in order to challenge either

the entry into or search of the area by police. *State v. Carter*, 596 N.W.2d 654, 658 (Minn. 1999).

To be entitled to Fourth Amendment protection, appellant must meet the following two-part test: (1) he must have a demonstrated subjective expectation of privacy and (2) the expectation must be one that society is willing to recognize as reasonable. *State v. Sletten*, 664 N.W.2d 870, 876, 879 (Minn. App. 2003) (citing *Katz v. U.S.*, 389 U.S. 347, 361, 88 S. Ct. 507, 516 (Harlan, J. concurring)), *review denied* (Minn. Sept. 24, 2003).

To determine if there is a demonstrated subjective expectation of privacy, we focus our inquiry on "the individual's conduct and whether the individual '[sought] to preserve [something] as private.'" *In re Welfare of B.R.K.*, 658 N.W.2d 565, 571 (Minn. 2003) (quoting *Bond v. United States*, 529 U.S. 334, 338, 120 S. Ct. 1462, 1465 (2000)). In examining appellant's conduct, we conclude that he did not seek to preserve the privacy of his hotel room. The door to the room was left open, appellant made no attempt to exclude police from his room, and appellant did not assert that the room and its contents belonged to him. Appellant argues that his stepping behind a wall when police entered and refusing to answer them demonstrated an actual subjective expectation of privacy. These actions alone by appellant did not show that he intended to preserve the hotel room as private, but merely that he did not want to be seen by the police.

We contrast appellant's case with *Sletten*, where we determined that a social guest who was in a hotel room conducting a drug transaction exhibited an actual subjective expectation of privacy in the room because he was in the room with the door locked and attempted to prevent the police from forcing their way into the room. 664 N.W.2d at 876.

We also contrast appellant's case with *B.R.K.*, in which the defendant was held to have an actual subjective expectation of privacy as a social guest in a private home because he sought to conceal his presence in the home, in part by attempting to lock all exterior doors, turning off lights, and hiding behind a furnace in a basement and closing the door. 658 N.W.2d at 572. Here, appellant did not take any of the precautions that these defendants took to protect their privacy. In light of appellant's failure to take any action to preserve the privacy of the hotel room, we conclude that appellant did not exhibit an actual subjective expectation of privacy in the room and that a challenge of the warrantless entry by police into the room and the resulting search and seizure would have failed. Therefore, appellant did not meet either prong of his ineffective-assistance-of-counsel claim.

Affirmed.