STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0815

State of Minnesota,
Respondent,

vs.

Patrick James Cahill,
Appellant.

Filed September 16, 2008
Affirmed
Schellhas, Judge

Stearns County District Court
File No. KX-04-3215

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Janelle Kendall, Stearns County Attorney, Stearns County Administration Center, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Kyle D. White, 332 Minnesota Street, Suite W-1710, St. Paul, MN 55101 (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 the denial of his petition for postconviction relief, arguing that (1) the district court erred in summarily denying his petition and (2) he received ineffective assistance of counsel because his counsel failed to seek disclosure of a confidential informant, misunderstood the procedural posture of the case at sentencing, and failed to present mitigating facts in support of a downward departure. We affirm.

FACTS

Appellant Patrick James Cahill was charged with four counts of a controlled substance crime for the unlawful possession and sale of a mixture containing cocaine after having been previously convicted of a felony-level drug offense. The complaint filed against appellant alleges that on March 16, 2004, appellant provided crack cocaine to Major Owens, who sold it to a confidential informant (CI). The state alleges that in two controlled buys, appellant appeared at Owens's house in his motor vehicle and provided Owens with drugs, which Owens sold to the CI.

Appellant was stopped by the police after the second controlled buy. Officers searched appellant's vehicle and found a digital portable scale, a small piece of crack cocaine under the driver's seat, and six small rocks wrapped in plastic baggies in an empty cigarette box on the passenger's side of the vehicle. Officers searched appellant's person and found two bags of crack cocaine, one that weighed 6.1 grams and one that weighed 7.8 grams. Officers also found cash that matched the pre-recorded currency provided to the CI for use in the transactions. Appellant admitted that he was the driver

who arrived at Owens's residence for both controlled buys and that he and the passenger were partners in dealing drugs.

A probation officer filed a sentencing worksheet describing the presumptive sentences for the charged offenses. Most relevant to this appeal are the sentences for counts one and two. For count one, a first-degree controlled substance crime for selling ten grams or more after having been convicted of a felony-level drug offense, appellant's presumptive sentence was 158 months with a range of 153–163 months, determined on the basis of a severity level of 9 with 14 criminal history points. Appellant's criminal history score was calculated based on 15 prior felony convictions and 2 prior misdemeanor convictions. For count two, a second-degree controlled substance crime for possessing six or more grams of a substance containing cocaine, appellant's presumptive sentence was 108 months with a range of 104–112 months, determined on the basis of a severity level of 8 and 16 criminal-history points, 2 of which were assigned to appellant because of his conviction on count one and 14 of which were assigned based on appellant's prior 15 felony convictions and 2 misdemeanor convictions.

Prior to trial, appellant moved to suppress evidence seized at the scene of the crime and his statements, arguing that the evidence was seized in an unlawful search and seizure and his statements were obtained in violation of his statutory and constitutional rights. Defense counsel did not seek disclosure of the CI.

The district court conducted an omnibus hearing at which testimony was received from Sergeant James Steve. Sergeant Steve testified that during the first sale transaction, six to eight officers maintained visual surveillance on all sides of Owens's house and saw

two occupants in a gray vehicle meet with someone from inside the house. During the second transaction, the same vehicle with the same license-plate number again appeared at Owens's residence, and the occupants met with someone from inside the house. When the gray vehicle left Owens's residence, officers followed it. The vehicle made a stop at another residence during which the occupants exited and returned to the vehicle. Shortly after leaving the second residence, officers stopped the vehicle. On cross-examination, defense counsel elicited testimony from Sergeant Steve revealing that the CI had said that a brown Honda made in the 1980's had come by Owens's house and that the CI probably smoked crack cocaine while he was in the house. Sergeant Steve testified that appellant was the driver when the vehicle was stopped and that descriptions of the occupants of the vehicle were being given out "all the time" during the transactions. He also testified that he believed that officers stopped the same vehicle with the same occupants who had been at Owens's residence. The district court denied the motion to suppress the evidence.

In September 2006 appellant signed a petition to enter a guilty plea to count two, the second-degree controlled substance offense for possession of more than six grams. The prosecution agreed to a 104-month sentence and to dismiss the remaining three counts. The prosecution also agreed not to seek an upward departure as a dangerous or recurring offender and not to "ask for top of the box or interim commit at this stage of the proceedings."[1] Appellant pleaded guilty but did so with the understanding that he was preserving his right to appeal the pretrial ruling.

[1] The presentence investigation reflects that appellant had worked as a confidential informant and that he was afraid for his safety in prison. Nothing in the record of the

Before sentencing, defense counsel realized that appellant had proceeded incorrectly in his attempt to preserve his right to appeal the pretrial ruling by entering a "conditional" guilty plea. Defense counsel informed the district court of the mistake and that the guilty plea must be entered pursuant to *State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980). Appellant requested that his guilty plea be withdrawn and that the case proceed under *State v. Lothenbach* with a stipulated-facts trial, but also asked that "the sentence that was agreed to under that plea would be maintained."

The district court "agreed to allow [appellant] to withdraw his plea conditioned on the fact that he enters a *Lothenbach* today." Defense counsel clarified with the court that the presumptive sentence was 104 months, that the defense was seeking a "low end of the box," and "that number that was written into the plea agreement will be the number that [the court] would be sentencing [appellant] to." After clarifying that "104 was the agreement," the court said, "104. All right" and then "[t]hat agreement will stand." The stipulated facts were offered in Exhibit 1, which consisted of the complaint, police reports, statements, BCA reports, "some kind of blurry pictures of photographs," and an exhibit index.

The district court issued its verdict in January 2007, reciting all four counts of the complaint, acknowledging dismissal of counts one, three, and four, and finding appellant guilty of count two, second-degree controlled substance crime in violation of Minn. Stat. § 152.022, subd. 2(1), subd. 3(b) (2002), for unlawfully possessing 6 grams or more of a

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plea hearing reflects that appellant's previous work as a CI served as consideration for the state's participation in the plea agreement.

mixture containing cocaine. In its order, the court recites the facts of the case, noting that a police report identifies the vehicle observed during the second controlled buy as a small gray car with a rear spoiler and license-plate number LBF486, that appellant's car was a gray Mitsubishi Gallant with the license plate LBF486, and that the CI identified the vehicle stopped as the vehicle that had been at the Owens's residence.

At sentencing, the prosecution argued for a sentence of 104 months on the bases that appellant had 15 prior felonies on his record, one of which resulted in a death, and that appellant was on parole in Florida when the offense was committed. Defense counsel noted that appellant had worked to be law abiding and to obtain employment, that he had made great progress, and that his family was supportive. Defense counsel also stated that "[appellant's] not happy about going in but he understands that this is the result of his plea and he's prepared to go forward." The district court sentenced appellant to 104 months' imprisonment.

A direct appeal was taken and stayed while appellant pursued postconviction relief. The district court denied the postconviction petition, and this appeal follows.

D E C I S I O N

I.

A person convicted of a crime who claims that the conviction or the sentence was illegal may petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2006). A postconviction proceeding is reviewed "only to determine whether there is sufficient evidence to sustain the postconviction court's findings." *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992). Findings of fact will not be reversed unless clearly erroneous.

Dukes v. State, 621 N.W.2d 246, 251 (Minn. 2001). A postconviction court's determinations of legal issues are reviewed de novo. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006). "[A] postconviction court's decision will not be disturbed absent an abuse of discretion." *Scruggs,* 484 N.W.2d at 25.

Appellant's first argument is that the district court abused its discretion in "summarily denying" appellant's petition for postconviction relief. The term "summarily denying" usually refers to denial of a petition for postconviction relief without holding an evidentiary hearing. *See Stutelberg v. State*, 741 N.W.2d 867, 874 (Minn. 2007) (holding that where petitioner was entitled to an evidentiary hearing, the district court abused its discretion in "summarily denying" the petition). A district court must hold a hearing on a petition for postconviction relief unless "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief" or successive petitions for similar relief are made on behalf of the same petitioner and have been previously addressed by an appellate court. Minn. Stat. § 590.04, subd. 1, 3 (2006). But, here, in a letter to the district court, defense counsel waived an evidentiary hearing on the petition for postconviction relief. Appellant's challenge to the lack of an evidentiary hearing is similarly waived on appeal. *See State v. Rainer*, 502 N.W.2d 784, 787 n.1 (Minn. 1993) (deeming issue waived at district court level waived on appeal).

II.

A defendant complaining of ineffective assistance of counsel "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2068 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quoting *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.) "There is a strong presumption that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Appellant argues on appeal that he received ineffective assistance of counsel because (1) defense counsel failed to seek disclosure of the CI's identity and (2) defense counsel mistakenly believed that appellant's sentencing was proceeding under a plea agreement and failed to argue for a downward departure.

A. CI's Identity

Appellant argues that defense counsel should have sought disclosure of the CI's identity under Minn. R. Crim. P. 9.01, subd. 2(3), which allows the district court to require, upon motion of the defendant, disclosure of relevant information shown to relate to the guilt or innocence of the defendant. Appellant argues that the informant had exculpatory information that the car that delivered the drugs to Owens's residence was a *brown* Honda Prelude. He argues that defense counsel's failure to seek testimony from the CI and to attack the CI's credibility were prejudicial errors. The district court concluded that defense counsel's failure to seek the CI's identity and testimony were part of defense counsel's strategy. We agree.

Matters of trial tactics or strategy are within counsel's discretion and are not usually reviewed for error. *Rainer*, 502 N.W.2d at 788 ("We generally will not review an attorney's trial tactics."); *see also State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998) ("[W]e have recognized that counsel must have the discretion and flexibility to devise a trial strategy that best serves the client."). Because strategy and tactics are not independently reviewed, a district court's determination that a trial tactic was reasonable will be upheld if it is supported by sufficient evidence. *Rainer*, 502 N.W.2d at 788. Here, the determination that defense counsel's decision-making was a matter of tactics or strategy that was reasonable is supported by the record. Defense counsel argued that the police should not have relied on information from the CI. The district court did not abuse its discretion in determining that this was reasonable. Further, even if defense counsel made a professional error, the error was not prejudicial to appellant because there was substantial testimony that implicated appellant's vehicle. Testimony at the contested omnibus hearing demonstrated that officers maintained constant visual contact with the car while it was at Owens's address and after it left Owens's address after the second-controlled buy. Moreover, the CI identified appellant's car as the one that had been at the house. Appellant has not demonstrated a reasonable probability that the suppression ruling would have been different but for defense counsel's failure to seek the CI's testimony.

B. Plea Agreement

Appellant finally argues that his defense counsel erred at sentencing by mistakenly believing the parties were proceeding under a plea agreement and accordingly failing to argue for a downward departure based on mitigating factors.

Under the Minnesota Sentencing Guidelines, offenders can argue for downward departures in sentencing because of mitigating factors. Minn. Sent. Guidelines II.D.2.a. (stating nonexclusive list of mitigating factors including that "[o]ther substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense"). Appellant argues that mitigating factors that justified a downward departure are presented in his work as an informant after his arrest and because he anticipated the birth of a child that was expected to have significant birth defects. Appellant argues that defense counsel never disclosed these factors to the district court and that no record of them was established before sentencing. Appellant attributed this error to what he argues was defense counsel's mistaken belief that the parties were proceeding under the plea agreement.

Because the district court rejected appellant's sentencing argument under the prejudice portion of the *Strickland* analysis, it did not address the strategy on this point. *See Gates*, 398 N.W.2d at 561-62 (quoting and applying language from *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069, stating that if an insufficient showing is made in either part of the inquiry, the other part of the inquiry need not be addressed). Without a district court finding on this issue, it is appropriate to inquire whether the strategies employed are

reasonable under all the circumstances, keeping in mind that counsel must have discretion and flexibility in devising strategy. *Brocks*, 587 N.W.2d at 43.

We conclude that the actions of defense counsel were due to his strategy in sentencing, not a mistaken understanding of the procedural posture of the case. Defense counsel pursued the strategy of reducing appellant's exposure to a longer sentence by seeking continued adherence to the prosecution's promise to dismiss counts one, three, and four and continued adherence to the sentencing provisions of the plea agreement. Count one was the most serious crime charged and carried a much longer presumptive term than count two. The prosecution had also made clear early on that it would seek departure by arguing that appellant was a dangerous and recurring offender. Particularly considering the deference warranted to matters of strategy, defense counsel's actions in seeking adherence to the agreement for a bottom-of-the-box presumptive sentence were reasonable under the circumstances and therefore did not amount to ineffective assistance of counsel.

Further, even if defense counsel erred in this regard, any error was not prejudicial. Departures are discouraged and allowed only where justified by substantial and compelling circumstances. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999) ("The purposes of the sentencing guidelines will not be served if the trial courts generally fail to apply the presumptive sentences found in the guidelines."); *see also* Minn. Sent. Guidelines II.D. (stating that substantial and compelling circumstances are required).

The district court did not abuse its discretion when it concluded that appellant was not prejudiced from defense counsel's failure to argue that mitigating factors justified a

downward departure. Appellant has not demonstrated a reasonable probability that a downward departure, durational or dispositional, would have been granted. We cannot conclude that a downward durational departure would have been granted because appellant cited offender-related, rather than offense-related, factors. Offender-related factors are not generally used to support a durational departure. *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). Similarly, we cannot conclude that the district court would have granted a downward dispositional departure. Although the district court would have properly considered offender-related factors, *State v. Allen*, 706 N.W.2d 40, 46 (Minn. 2005), a dispositional departure would have been a significant departure in this case. The guidelines indicate that stayed sentences are usually imposed for lower-severity-level offenses committed by offenders with lower criminal-history scores. Minn. Sent. Guidelines IV. In contrast, the presumptive disposition for appellant's high-severity-level offense, even for an offender with a criminal-history score of zero, is commitment to prison. *Id.* We cannot conclude that a dispositional departure would have been granted for an offender with a criminal-history score of 14 and 15 prior felonies. Appellant has therefore not shown prejudice from any error.

Because appellant has shown no error on the part of his defense counsel in following the sentencing terms of the plea agreement and any alleged errors were not prejudicial, the district court did not abuse its discretion in concluding that appellant failed to demonstrate that he received ineffective assistance of counsel at sentencing.

Affirmed.