STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1366

State of Minnesota,
Respondent,

vs.

Michael Wayne Emberton,
Appellant.

Filed October 21, 2008
Affirmed
Ross, Judge

Kanabec County District Court
File No. 33-K4-03-347

Lori Swanson, Attorney General, Peter R. Marker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Amy Brosnahan, Kanabec County Attorney, 18 North Vine Street, Suite 202, Mora, MN 55051 (for respondent)

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Considered and decided by Ross, Presiding Judge; Johnson, 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

ROSS, Judge

This appeal arises from Michael Wayne Emberton's conviction of theft after he purchased a herd of cattle with his employer's money. He contends that he received ineffective assistance of counsel and that the state failed to disclose exculpatory evidence. Because Emberton does not demonstrate that his counsel's performance fell below an objective standard of reasonableness, and because the state disclosed the questioned evidence, we affirm.

FACTS

Michael Emberton was an estimator and project manager for Lloyd's Construction Services in 2002, when Kanabec County engaged Lloyd's to improve a highway. One of Emberton's responsibilities as project manager was to acquire gravel for the project. He contacted Marty Graham, who co-owned a local gravel pit. Graham and Emberton agreed that Lloyd's would purchase gravel from Graham's gravel pit for 40 cents per yard.

Around that time, Graham decided to sell a herd of cows for approximately $32,000. Emberton expressed interest in the herd. He secretly manipulated the gravel-purchase arrangement so that Lloyd's would pay Graham $1.63 per yard for the gravel, which also would cover the cost of the herd. When Graham noticed that Emberton was paying him for the herd through Lloyd's, he became suspicious and spoke with the company's owner, John Lloyd. Lloyd investigated and confirmed that the company had paid excessively for the gravel and that the surplus funded Emberton's cattle purchase.

Emberton's 2002 embezzlement soon became a criminal proceeding that slowly moved toward trial for nearly three years and has finally reached us on appeal. The state charged Emberton in June 2003 with theft of funds or property for embezzling $33,900 from Lloyd's. Emberton soon moved to Colorado. He requested a continuance, which the district court granted. The district court warned that it would continue the matter only once, but that prediction would prove inaccurate.

Emberton requested and received two more continuances in November and December 2003. Public defender Neil Fagerstrom was appointed to represent Emberton in February 2004. On Emberton's behalf, Fagerstrom requested and received a continuance of the omnibus hearing in April 2004. At the omnibus hearing in August 2004, the court determined that Emberton was ineligible for a public defender and it therefore discharged Fagerstrom as Emberton's appointed attorney. The court continued the omnibus hearing to September 2004 so that Emberton could retain private counsel. But Emberton appeared at the September 2004 hearing without counsel, and the court scheduled trial for December 2004. Emberton requested another continuance, and the court granted it, warning that it would be the last. In January 2005, the state moved to continue the trial because an ongoing civil lawsuit between Emberton and Lloyd's appeared close to resolution, and the state considered dismissing the criminal case depending on Emberton's obligations stemming from the potential civil settlement. The district court continued the trial to December 2005.

Emberton and Lloyd's did not resolve the civil suit. And in December 2005, Fagerstrom was again appointed to represent Emberton in the criminal proceedings.

Because Fagerstrom was not notified of this appointment until December, he requested another continuance. The district court denied the request, observing that the case had been continued numerous times and had been pending for three years. Noting that Emberton made minimal effort to participate in and develop his defense, the court faulted Emberton for the delays. Unforeseen circumstances, however, led to yet another continuance; Fagerstrom was injured on December 20, 2005, and he was unable to work. The district court therefore continued the trial to January 24, 2006.

In January 2006, Emberton was tried by jury and found guilty of theft. In April 2006, he hired private counsel to represent him for his sentencing and appeal. In July 2006, he filed a notice of appeal and a motion to stay his appeal during postconviction proceedings. This court granted Emberton's motion to stay his appeal pending the postconviction proceedings in district court. In September 2006, he filed a petition for postconviction relief requesting a new trial on the grounds that he was denied his right to effective assistance of counsel.

The district court conducted a postconviction evidentiary hearing. Fagerstrom testified modestly in a manner that highlighted his perceived deficiencies. He explained that he has been an attorney since 1982 and a public defender since 2001. Between 1982 and 2001, Fagerstrom practiced a mix of criminal, civil, family, and real-estate law. He estimated that he handles approximately 10 to 15 criminal trials per year as a public defender, and Emberton stipulated that Fagerstrom is an experienced trial attorney. Fagerstrom testified that Emberton's case was unusual for him because of the parallel civil litigation and that he had never tried similar cases. He testified that he received the

file in February 2004 and that his office soon sent discovery requests. He received responses to those requests and determined that he needed to conduct more discovery. After his interim removal from the case, however, Fagerstrom did not request discovery materials again until after he was reappointed to represent Emberton in December 2005.

By the time Fagerstrom rejoined the case in December 2005, the discovery materials he had received had been moved to an off-site storage facility. Although Fagerstrom testified that Emberton previously had sent him e-mails discussing what discovery Emberton should undertake, when Fagerstrom met with Emberton in January 2006, Emberton had not obtained any of the material. Fagerstrom explained that after their January 2006 meeting, he sent a facsimile to the prosecutor and received the requested information the next morning. Fagerstrom spoke with Emberton a few times weekly, but he believed preparation was inhibited because of the limitations of telephonic conferencing. Fagerstrom opined that his lack of contact with Emberton had a negative effect on his ability to prepare.

Fagerstrom testified that he did not feel that he had been adequately prepared to try the case. He believed that he had a "little bit of a grasp" on several issues and no knowledge about others. But he acknowledged uncertainty whether any defense attorney ever feels confident about his defense strategy. He did not develop a strategy of questioning witnesses before they testified and admitted that he had to "wing it." Fagerstrom cross-examined witnesses at trial, raised objections, and introduced exhibits, but he believed that Emberton's defense was adversely impacted by his representation. He acknowledged that the documentary evidence that Emberton told him was needed

would not likely have overcome Graham's testimony, which Fagerstrom characterized as the most inculpatory evidence against Emberton. Despite Fagerstrom's testimony that he believed that he had provided Emberton with ineffective assistance, the district court concluded that his representation was not deficient and that Emberton's complaints that Fagerstrom was unprepared and ineffective were attributable to Emberton's own failures. The district court therefore denied Emberton's petition for postconviction relief.

This court dissolved the stay of Emberton's appeal after the district court denied his petition for postconviction relief, and the appeal proceeded.

D E C I S I O N

I

Emberton's claim that he was denied effective assistance of counsel rests on a criminal defendant's federal and state constitutional right to the assistance of counsel. U.S. Const. amend VI; Minn. Const. art. I, § 6. "[T]he right to counsel is the right to effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To establish a claim that he received constitutionally ineffective assistance of counsel, Emberton must show both that Fagerstrom's representation fell below an objective standard of reasonableness and that, but for the substandard representation, the result would have been different. *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064; *Hathaway v. State*, 741 N.W.2d 875, 879 (Minn. 2007). Emberton has the burden of proof and must rebut the strong presumption that Fagerstrom's performance fell within a wide range of reasonable assistance. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). This court may address the two prongs of the *Strickland* test in any order

and dispose of the claim on one prong without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Fagerstrom's testimony at the postconviction hearing strengthens Emberton's claim of ineffective assistance of counsel, because Fagerstrom openly pronounced his trial advocacy to be ineffective. But the district court discredited this testimony, concluding that Fagerstrom tried the case to the best of his ability and that his performance was hindered only by Emberton's lack of cooperation and involvement. The district court determined that Emberton's allegations of ineffective counsel failed to meet the deficiency prong of the *Strickland* test. The district court also concluded that Emberton's allegations failed to meet the prejudice prong, because both the prosecutor and Fagerstrom testified at the postconviction hearing that Graham's inculpatory testimony was difficult to overcome. Because we agree with the district court that none of the alleged failures offered to support Emberton's ineffective-assistance-of-counsel claim meets either the deficiency or prejudice prong of the *Strickland* test, we affirm.

Emberton contends that he was denied effective assistance of counsel because Fagerstrom failed to perform basic investigation and trial preparation; that Fagerstrom failed to construct a strategy for Emberton's trial and therefore had to "wing it"; and that Fagerstrom's trial strategy was flawed because he had no working knowledge of the issues litigated at trial. The district court carefully weighed and appropriately rejected these contentions.

Emberton's brief does not develop his allegation that Fagerstrom failed to perform basic investigation and trial preparation. Emberton argued in his petition for

postconviction relief that Fagerstrom's failure to perform basic investigation and trial preparation demonstrated ineffective assistance of counsel. Emberton points to Fagerstrom's failure to secure "all relevant discovery materials" before trial. Emberton argued that Fagerstrom's failure to understand the complex issues involved in the case prevented Fagerstrom from "formulating questions to witnesses aimed at exposing to the jury exculpatory evidence in [Emberton's] favor" and from undermining the testimony of the state's witnesses. Emberton complained that Fagerstrom did not ask specific, pointed questions to establish Emberton's innocence. He also maintained that Fagerstrom's alleged failure to secure all relevant discovery materials prevented sufficient knowledge of the facts, causing Fagerstrom not to call expert witnesses who could validate Emberton's version.

Emberton does not establish that Fagerstrom's alleged failure to secure other information through the discovery process was defective or prejudicial. Fagerstrom testified that he promptly served discovery after he was appointed and again when reappointed to the case. He sought additional information after Emberton asserted that he needed other documents for his defense. We therefore reject Emberton's argument that Fagerstrom's alleged failure to secure all relevant information during discovery proves ineffective assistance of counsel.

We are not persuaded by Emberton's argument that Fagerstrom's failure to perform basic investigation and trial preparation and his failure to call expert witnesses demonstrated ineffective assistance of counsel. Trial counsel's decisions concerning what evidence to present to the jury are trial tactics, which we generally do not review on

appeal. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). Even if we determined that Fagerstrom's failure to call expert witnesses was error, Emberton does not explain how expert testimony could have made a difference in the outcome of his trial. *State v. Brown*, 597 N.W.2d 299, 306 (Minn. App. 1999), *review denied* (Minn. Sept. 14, 1999); *see also Gates v. State*, 398 N.W.2d 558, 561–62 (Minn. 1987) (noting that a defendant must show that his trial attorney's errors actually had an adverse effect and that but for those errors, the result of the proceeding would have been different).

The record belies Emberton's contention that Fagerstrom's inadequate understanding of the complex issues prevented Fagerstrom from "formulating questions to witnesses aimed at exposing to the jury exculpatory evidence in [Emberton's] favor" and from undermining the testimony of the state's witnesses. Fagerstrom actively cross-examined all witnesses and demonstrated a working understanding about processing gravel for the highway road project. Fagerstrom made multiple objections, successfully prevented the testimony of one of the state's proposed rebuttal witnesses, and advocated Emberton's interests during jury-instruction discussions. The postconviction court observed that Fagerstrom made numerous objections, introduced sixteen exhibits, and "vigorously defended his client." And it found that any flaws in the preparation of Emberton's case were Emberton's fault, not Fagerstrom's. The court therefore concluded that none of Emberton's claims of ineffective assistance of counsel meet the deficiency prong of the *Strickland* test, and our review leads us to affirm this conclusion despite Fagerstrom's critical assessment of his own performance.

Emberton does not develop his assertion on appeal that Fagerstrom failed to construct a reasonable trial strategy. Bare allegations do not establish ineffective assistance of counsel. *State v. Bock*, 490 N.W.2d 116, 123 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992). Because none of Emberton's allegations of ineffective assistance of counsel meet either element of the *Strickland* test, we decline to reverse based on those claims.

II

Emberton also contends on appeal that he was denied access to exculpatory evidence before trial. But the *Brady* challenge fails because the evidence was disclosed. The evidence that Emberton complains was not timely disclosed is the evidence establishing that he had originally planned to purchase gravel for $1.85 per yard from a different gravel pit. Emberton also complains that evidence of tax penalties allegedly levied against John Lloyd was not presented at trial, which Emberton asserts was relevant to Lloyd's credibility.

Although "there is no general constitutional right to discovery in a criminal case," due process requires that criminal defendants have the right to present a jury with evidence that might influence the verdict. *State v. Hummel*, 483 N.W.2d 68, 71 (Minn. 1992). "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97, (1963); *see also* Minn. R. Crim. P. 9.01, subd. 1(6) ("The prosecuting attorney shall disclose to defense counsel any material

or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.").

There are three basic methods in which the state can violate a defendant's due process rights in the treatment of evidence under *Brady*: failure to disclose, failure to preserve, and active interference. *State v. Engle*, 731 N.W.2d 852, 856 (Minn. App. 2007), *remanded on other grounds*, 743 N.W.2d 592, 596 (Minn. 2008). Emberton does not argue that the prosecution failed to disclose, failed to preserve, or actively interfered with evidence. Rather, he argues that evidence was not *timely* disclosed and that Fagerstrom did not appropriately use the evidence because of his unpreparedness. But the evidence was disclosed in time for use at trial, and the evidence that Emberton complains was not admitted appears to be immaterial to Emberton's guilt of theft from Lloyd's. *See State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) (material evidence is evidence that would have created a reasonable probability of a different result had it been disclosed to the defense). Because the evidence was disclosed, and also because parts of it were not material, Emberton's *Brady* challenge fails. His claim that Fagerstrom failed to introduce the evidence at trial is better addressed as an ineffective-assistance-of-counsel claim, but this failure did not constitute defective representation that prejudiced the outcome of the trial.

Affirmed.