STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0479

State of Minnesota,
Respondent,

vs.

Thomas William Fickett,
Appellant.

Filed December 16, 2008
Affirmed
Collins, Judge[*]

Stearns County District Court
File No. K6-05-2914

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

Janelle P. Kendall, Stearns County Attorney, Sarah E. Hilleren, Assistant County Attorney, Administrative Center, 705 Courthouse Square, Room 448, St. Cloud, MN 56303 (for respondent)

Christopher J. Zipko, 200 Central Avenue, Buffalo, MN 55313 (for appellant)

Considered and decided by Chief Judge Toussaint, Presiding Judge; Halbrooks, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appealing from the district court's denial of his motion for postconviction relief, appellant argues that the district court erred by finding that appellant did not receive ineffective assistance of counsel. We affirm.

D E C I S I O N

Appellant Thomas Fickett maintains that he received ineffective assistance of counsel from his attorney, John Ellenbecker. Fickett was found guilty of two counts of first-degree criminal sexual conduct after a stipulated-facts trial. Following an evidentiary hearing, the district court denied Fickett's motion for postconviction relief.

A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "The defendant 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) (quotation omitted) (recognizing the two-prong "performance" and "prejudice" test laid out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). There is a strong presumption that a counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). An insufficient showing on one of these

requirements defeats a claim of ineffective assistance of counsel. *Gates*, 398 N.W.2d at 562 n.1 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

As outlined by the district court, Fickett argues that he received ineffective assistance of counsel because Ellenbecker (1) failed to devote attention to Fickett's case because of the time Ellenbecker had to spend on his mayoral re-election campaign; (2) failed to investigate Fickett's computer to determine whether the dates on which child pornography was accessed would provide an alibi or an alternative-perpetrator defense; (3) failed to offer defense evidence at the stipulated-facts trial; (4) had a conflict of interest in that Ellenbecker stopped working on the case when Fickett failed to pay him; and (5) induced Fickett to proceed with a stipulated-facts trial to possibly gain a more lenient sentence. Fickett argues that Ellenbecker's representation violated the Minnesota Rules of Professional Conduct and that the violations "made the trial in this matter a mockery of justice and were unprofessional to such a degree that the representation provided in this matter was ineffective as a matter of law."

1. Failure to devote attention to Fickett's case due to the mayoral campaign

Ellenbecker was the incumbent mayor of St. Cloud. Fickett contends that Ellenbecker stopped working on the case while he was campaigning for re-election and, as a result, failed to follow up on information related to Fickett's defense. Fickett maintains that he rarely spoke with Ellenbecker through the course of his representation, which began shortly after the charges were filed in June 2005, though he did speak with Ellenbecker's office staff and was able to consult with Ellenbecker before or after scheduled court appearances. Ellenbecker acknowledged that running for office took

time away from Fickett's case in 2005, but the district court found that the campaign did not interfere with Ellenbecker's representation once the election was over in November 2005.

There is merit in the argument that allowing outside activities to interfere with client representation does not comport with the standard of reasonableness, and it does appear that Fickett's ability to communicate with Ellenbecker was limited by Ellenbecker's campaign for re-election. But although Ellenbecker admitted that campaigning diverted some time from the case, Ellenbecker devoted considerable attention to Fickett's case in 2005, including preparation and filing of motions, attendance at hearings, and involvement in plea negotiations. And Fickett does not claim that the campaign interfered with Ellenbecker's representation in 2006 or 2007. While Ellenbecker's admission that his re-election campaign may have interfered with his representation of Fickett is of concern, such distraction ended with the election in November 2005. On this issue, Fickett has failed to establish that Ellenbecker's overall representation fell below an objective standard of reasonableness. Moreover, because there was more than a full year between the 2005 election and the January 2007 trial, any substandard representation of Fickett isolated to 2005 does not result in the prejudice required under the second prong of the *Strickland* test.

2. Failure to investigate and develop alibi or alternative-perpetrator defense

Fickett argues that he informed Ellenbecker of facts relevant to Fickett's defense but Ellenbecker failed to investigate and adequately prepare the case. Specifically, Fickett asserts that (1) he told Ellenbecker that, while in jail, Fickett learned of a previous

claim by the victim of sexual abuse by a juvenile and (2) Fickett suggested that an investigation of his computer could provide an alibi if it showed that pornography had been viewed at times when Fickett was out of town. Ellenbecker acknowledged that he did not act on Fickett's information. However, Ellenbecker explained that he chose not to investigate the allegation of other sexual abuse of the victim based on his opinion that he lacked the requisite legal justification to access the juvenile records. Ellenbecker also contended that any reason to investigate Fickett's computer did not arise until a child-pornography charge was added, because the victim did not identify specific dates on which the originally charged offenses allegedly occurred.[1] After the complaint was amended to add the child-pornography charge, Ellenbecker sought to have the computer investigated, although there is some question about whether he failed to take advantage of opportunities offered by the prosecution to investigate the computer.

Trial counsel's decisions regarding which persons to interview and call as witnesses are tactical decisions properly left to trial counsel's discretion. *State v. Wright*, 719 N.W.2d 910, 919 (Minn. 2006). Following the evidentiary hearing, the district court found that Ellenbecker was a credible witness and that Ellenbecker's decisions not to investigate the possible defenses raised by Fickett were based on his "professional judgment as part of his trial strategy." Ellenbecker did not adequately explain to Fickett his reasons for not following up on these possible defenses. However, while the lack of communication is troubling, given the presumption that an attorney's performance is

[1] Upon discovering certain images on Fickett's computer, in August 2006 the state amended the complaint to add one count of possession of child pornography. That count was subsequently voluntarily dismissed.

reasonable and the recognition of counsel's discretion in making strategic decisions, this does not compel a finding of ineffective assistance of counsel.

Furthermore, Fickett was not prejudiced by Ellenbecker's failure to investigate. Fickett argues that he has been prejudiced because investigation into these issues would have provided a defense and, had he known Ellenbecker was not investigating, he would have hired a different attorney. However, Fickett fails to establish that any fruits of such investigation would have been admissible or useful. Rape-shield laws likely would have precluded admission of evidence of other alleged sexual abuse of the victim. *See* Minn. R. Evid. 412 (excluding evidence of previous sexual conduct involving victim in most cases). And, following dismissal of the child-pornography charge, the dates of computer usage were not probative as to any active charge because the victim had not related specific dates or times to the original counts. Fickett's argument, therefore, fails on the "prejudice" prong of the *Strickland* test as well as on the "performance" prong.

3. Failure to present defense evidence

Fickett next argues that Ellenbecker "stipulated to the State's entire case without offering one bit of evidence," and therefore "failed to provide customary skill and diligence." At the hearing on January 2, 2007, Fickett waived his right to a jury trial, agreeing to proceed with a stipulated-facts trial.[2] Based on the record, the contention that

[2] The hearing was at times mischaracterized as "a *Lothenbach* procedure" rather than a trial on stipulated facts. And the district court referred to "this process known as a *Lothenbach* trial" in its findings of fact. But the district court also correctly stated that what took place was a stipulated-facts trial under Minn. R. Crim. Proc. 26.01, subd. 3. The comment to rule 26 describes the difference between these two procedures:

Ellenbecker did not offer defense evidence is accurate, and Ellenbecker did stipulate to the state's packet of proposed stipulated facts. However, as the district court observed, offering a defense in the context of a stipulated-facts trial is "normally not done." As was explained by Ellenbecker to Fickett, in a stipulated-facts trial "you reach an agreement on what the stipulated facts are. The [district court] makes its determination based on those stipulated facts." The district court questioned Fickett as to his understanding of the process, including describing the trial as "basically a paper trial" in which the state would present all of its evidence to the judge and that Fickett was giving up his right to offer testimony.

Fickett may have been confused, as he maintains that he continued to believe that he was going to be able to offer evidence in his defense, namely, the computer. This may

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> Rule 26.01, subd. 4 (Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling), implements the procedure authorized by *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). The rule . . . distinguishes the *Lothenbach*-type procedure it implements from Rule 26.01, subd. 3 (Trial on Stipulated Facts). The latter rule should be used if there is no pretrial ruling dispositive of the case, and if the defendant wishes to have the full scope of appellate review, including a challenge to the sufficiency of the evidence. *See State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002).

Minn. R. Crim. P. 26 cmt. Here, there was no pretrial ruling dispositive of the case, and the parties agreed that the matter would be tried by the district court based on stipulated facts, which is the circumstance contemplated in rule 26.01, subd. 3. Under rule 26.01, subd. 3, "[i]f the defendant is found guilty based on the stipulated facts, the defendant may appeal from the conviction and raise issues on appeal the same as from any trial to the court." Therefore, Fickett fully preserved his right to appeal by proceeding with a stipulated-facts trial. On this appeal, Fickett is entitled to assert his claim of ineffective assistance of counsel because this was a stipulated-facts trial and not a *Lothenbach* proceeding, under which only review of pretrial issues is preserved.

have been the result of a colloquy regarding Ellenbecker's request for a continuance in order to analyze the computer. The continuance was denied; however, at the end of the hearing, Ellenbecker again requested the opportunity to inspect the computer. The district court understood (and Ellenbecker confirmed at the evidentiary hearing) that the computer analysis was not anticipated to be relevant to the stipulated-facts trial, but rather it would be used for the purpose of appeal if exculpatory evidence was discovered. The district court found that Ellenbecker adequately informed Fickett on this issue. While Fickett may have been confused about what occurred, Ellenbecker took reasonable steps to explain what was happening, at least to the extent necessary to satisfy the "performance" prong of the *Strickland* test.

As to the "prejudice" prong of the test, Fickett argues that he would not have gone forward with the stipulated-facts trial had he understood that he would not be able to present a defense. He contends that he waived his right to a jury trial and believed that he was proceeding with a typical court trial based on Ellenbecker's communications with Fickett and Fickett's mother. Fickett's misunderstanding of what was happening may have been detrimental, in that he gave up his rights to a jury trial and to present a defense. The question is, however, whether such prejudice was a result of Ellenbecker's "unprofessional errors." *Gates*, 398 N.W.2d at 561 (quotation omitted). At the evidentiary hearing, Ellenbecker contended that he described the process fully, while Fickett countered that Ellenbecker misled him into believing that he would be able to present a defense. Thus, assessment of the credibility of the two witnesses is crucial, but for that function we defer to the district court. *See State v. Yang*, 627 N.W.2d 666, 672

(Minn. App. 2001) (stating that it is the fact-finder's role to resolve conflicting testimony by determining relative credibility of witnesses). Here, the district court found that Ellenbecker explained the process to Fickett adequately. Accordingly, on this issue Fickett has failed to meet his burden of proving prejudice attributable to the quality of Ellenbecker's representation.

4. Conflict of interest

Fickett also asserts that Ellenbecker had two conflicts of interest that impaired his ability to represent Fickett adequately. First, Fickett contends, Ellenbecker "stopped working on this case while he campaigned for his re-election as mayor." This issue was disposed of above. Second, Fickett made one payment toward legal fees on the day Ellenbecker was retained but made no subsequent payments, and Fickett argues that Ellenbecker "failed to work on [Fickett]'s case because [Ellenbecker] had not been paid." Fickett points to Ellenbecker's evidentiary-hearing testimony that "[o]ne of the issues here was that Mr. Fickett was not paying his bill." But this testimony was given in the context of the reasoning of why Ellenbecker did not hire an investigator and, as the district court found, "[c]ontrary to [Fickett]'s assertion, Mr. Ellenbecker did not stop working on [Fickett]'s case as a result of [Fickett]'s failure to pay his legal bill." Ellenbecker continued to prepare and file motions, attend hearings, and participate in plea negotiations. Moreover, because not pursuing investigation into the information provided by Fickett was a strategic decision, Fickett cannot establish that Ellenbecker's failure to pay for someone to carry out such investigation fell below an objective standard of reasonableness or resulted in prejudice.

5. Inducement to proceed with stipulated-facts trial

Finally, Fickett argues that he was induced to proceed with the stipulated-facts trial by Ellenbecker's assurances that, if convicted, Fickett would receive a reduced sentence. Fickett maintains that Ellenbecker advised him that if he "went this way with the trial and not put anybody through testifying that I still have a shot at a fair trial, and, if I do get convicted, that the sentence would be more lenient because of not putting anybody through testifying." At the evidentiary hearing, Ellenbecker testified that, based on pre-plea discussions with the judge and prosecutor, he did tell Fickett that the judge was likely to look favorably on proceeding with a process that did not require the victim to testify, and that a mitigated sentence departure from 144 months to 120 months was possible. And Fickett concedes that Ellenbecker did not promise that his sentence would be of a specific duration.

Advising of possible sentences when discussing the decisions to be made by a client is fundamental to a criminal-defense attorney's role. On this issue, the record does not establish that Ellenbecker's performance fell short of the standard required under the "performance" prong of the *Strickland* test. Moreover, as found by the district court, Fickett failed to demonstrate prejudice in that he did not show that Ellenbecker's advice was erroneous. Indeed, Fickett received concurrent 120-month sentences; the exact duration Ellenbecker had held out as possible before Fickett elected to proceed with the stipulated-facts trial.

Affirmed.