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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A07-0550**

State of Minnesota,  
Respondent,

vs.

Larry B. Olson,  
Appellant.

**Filed January 6, 2009  
Affirmed  
Stoneburner, Judge**

Kanabec County District Court  
File No. CR06245

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

Amy R. Brosnahan, Kanabec County Attorney, Lisa B. Jones, Assistant County Attorney, Suite 202, 18 North Vine Street, Mora, MN 55051 (for respondent)

Robert D. Miller, Robert D. Miller & Associates, 2915 Wayzata Boulevard, Minneapolis, MN 55405 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER, Judge**

Appellant challenges the denial of his petition for postconviction relief asserting ineffective assistance of trial counsel. Because the district court did not err in concluding

that appellant failed to establish that he is entitled to postconviction relief on the basis of ineffective assistance of counsel, we affirm.

## **FACTS**

Appellant Larry B. Olson was convicted of burglary, false imprisonment, and fifth-degree assault after an incident in which he and another person forced their way into a mobile home, held one resident captive, and assaulted the other resident after that resident arrived at the mobile home. Olson petitioned for postconviction relief, asserting ineffective assistance of counsel based primarily on counsel's failure to make an offer of proof and request a continuance when a subpoenaed defense witness failed to appear and law enforcement could not locate the witness during the trial. Olson also asserted that counsel failed to interview witnesses, investigate the case, or advise Olson of the possible sentence he could receive if he rejected a plea bargain.

After an evidentiary hearing, the district court denied the petition, concluding that Olson failed to establish ineffective assistance of counsel and that, even if his attorney's performance fell below an objective standard of reasonableness, Olson did not demonstrate that he was prejudiced by the alleged deficiencies. This appeal followed.

## **DECISION**

In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo, and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Vance v. State*, 752 N.W.2d 509, 513 (Minn. 2008); *Opsahl v. State*,

677 N.W.2d 414, 420 (Minn. 2004). To obtain postconviction relief based on ineffective assistance of counsel, a petitioner must affirmatively prove both that (1) “his counsel’s representation ‘fell below an objective standard of reasonableness’ and [(2)] ‘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, 2064, 2068 (1984)). “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

“There is a strong presumption ‘that counsel’s performance fell within a wide range of reasonable assistance.’” *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003) (quoting *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998)). Judicial scrutiny of an attorney’s performance must be highly deferential: “the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy’ \* \* \*.” *Dukes v. State*, 660 N.W.2d 804, 811 (Minn. 2003) (quoting *Strickland*, 446 U.S. at 689, 104 S. Ct. at 2065).

Olson asserts that the witness who failed to respond to subpoena (the witness) was a critical eyewitness for the defense and the only witness the defense intended to call at trial. Olson ultimately testified, against the advice of counsel.

At the postconviction hearing, the witness testified that he drove Olson to the mobile-home park to talk to the victims about money owed to Olson’s friend for purchase of the mobile home. The witness testified that before he left the scene, he saw Olson talking to one of the victims outside of the mobile home for 45 to 60 minutes. The

witness testified that he could not hear the discussion but said the conversation appeared calm and not combative.

Olson testified at the postconviction hearing and admitted that, before trial, his attorney had discussed the case with him at least briefly. He admitted that counsel must have done some investigation because counsel was able to locate and subpoena the witness before trial.

We conclude that counsel's decision not to make an offer of proof or seek a continuance, when the witness failed to appear and could not be found, was a matter of trial strategy within counsel's discretion that does not support a claim of ineffective assistance of counsel. And the record does not support Olson's allegations that counsel failed to investigate his case, interview relevant witnesses, or that any of counsel's alleged shortcomings affected the outcome of Olson's trial.

The witness's testimony at the postconviction trial plainly established that even if he had testified at trial, there is no reasonable probability that the result of the proceeding would have been different. Both victims testified, and the jury apparently found their testimony credible. The witness was not present for much of the incident and was unable to hear what was said by Olson when the witness was present. The district court correctly concluded that Olson failed to establish that he was entitled to relief based on the alleged shortcomings of counsel with regard to the missing witness or lack of investigation. And Olson produced no evidence that his conviction was affected by counsel.

**Affirmed.**