STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0913

Patrick P. Toogood, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 19, 2009
Reversed and remanded
Johnson, Judge
Dissenting, Ross, Judge

Olmsted County District Court
File No. 55-CR-06-1518

Lawrence Hammerling, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

Considered and decided by Ross, Presiding Judge; Toussaint, Chief Judge; and Johnson, Judge.

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

JOHNSON, Judge

After Patrick Toogood pleaded guilty to burglary, the district court imposed a sentence that includes a restitution obligation of $2,825. Toogood later filed a postconviction petition in which he alleged that, prior to the sentencing hearing, his attorney did not inform him of the restitution request or his right to challenge the request. The postconviction court denied Toogood's petition without conducting an evidentiary hearing. We conclude that, based on Toogood's detailed allegations, the district court erred by not conducting an evidentiary hearing. Therefore, we reverse and remand.

FACTS

In March 2006, the state charged Toogood with seven counts of burglary and one count of receiving stolen property. Toogood pleaded guilty to two counts of burglary, including the charge that he entered a service station with intent to steal welding equipment. At the plea hearing, Toogood admitted to stealing welding equipment from the service station, which is owned by D.M.

Toogood's sentencing hearing occurred in September 2006. Before the sentencing hearing, D.M. submitted an affidavit requesting restitution from Toogood. D.M.'s affidavit identified a number of items that he said had been taken or damaged, which he valued at $1,285. D.M. also sought $1,000 for "loss of use" of the items identified. In addition, D.M. sought "lost wages" of $540. At the sentencing hearing, the following exchange occurred:

> THE COURT: [Addressing Toogood's attorney], do you know if Mr. Toogood is objecting to the restitution in your file of $2,825?
>
> [TOOGOOD'S ATORNEY]: No, I don't believe he's not [sic], Your Honor.

The district court sentenced Toogood to 24 months of imprisonment and ordered him to pay $2,825 in restitution for the benefit of D.M. Toogood did not pursue a direct appeal.

In February 2008, Toogood filed a petition for postconviction relief. He alleged that his attorney provided him with ineffective assistance of counsel, and he requested a hearing to challenge the restitution obligation. In an affidavit accompanying the petition, Toogood made the following statements:

> 6. Prior to sentencing, when I met privately with my legal counsel . . . , he did not inform me that restitution was being requested.
>
> 7. I did not know about the restitution claim until I was in front of the Judge and my legal counsel agreed to it.
>
> 8. I was not informed at any time, by [my attorney], of my right to challenge the requested restitution.
>
> 9. Had I known of the restitution claim and my right to challenge it, I would have contested it.
>
> 10. I did not have an opportunity to present my objections to the court.
>
> 11. I discovered that I could challenge the restitution when I called the State Public Defender's Office regarding restitution in a different case.
>
> 12. I did not take the following items claimed on the restitution affidavit: chop saw, torches, cart, hose, regulators, torch head, welding tips, rosebud tip.
>
> 13. I did take, without permission: one argon gas tank, one wire feed welder.

> 14. The items I took were returned in the condition in which they were taken.
>
> 15. I never used the items I took.
>
> 16. Upon my arrest, I worked with a Rochester Police Investigator to ensure that all of the property I had taken from [D.M.] was returned.
>
> 17. It is my understanding that [D.M.'s business] has not been in business since 2003.

The postconviction court denied the petition without conducting an evidentiary hearing. Toogood appeals.

D E C I S I O N

Toogood makes two arguments on appeal. First, he argues that the district court erred by denying his postconviction petition without conducting an evidentiary hearing. Second, he argues that the district court erred by not conducting a hearing on Toogood's challenges to D.M.'s restitution request.

A postconviction court must hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). "'Any doubts as to whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing.'" *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008) (quoting *State v. Rhodes*, 627 N.W.2d 74, 86 (Minn. 2001)). To receive an evidentiary hearing on a claim of ineffective assistance of counsel, a petitioner must "allege facts that would affirmatively show [1] that his attorney's representation fell below an objective standard

of reasonableness, and [2] that but for the errors, the result would have been different." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted) (citing *Strickland v. Washington*, 466 U.S. 668, 690-94, 104 S. Ct. 2052, 2066-68 (1984)). In this situation, we review questions of law on a *de novo* basis and review questions of fact to determine whether there is sufficient evidence to support the findings. *Sanchez-Diaz*, 758 N.W.2d at 846.

With respect to the first prong of the *Strickland* test, Toogood argues that his attorney's representation was unreasonable because he failed to inform Toogood of D.M.'s restitution request and Toogood's right to challenge the request. Toogood's affidavit supporting his postconviction petition is straightforward and thorough. In this procedural posture, we must assume the facts alleged by Toogood to be true. *See Leake*, 737 N.W.2d at 536; *Zenanko v. State*, 587 N.W.2d 642, 644 (Minn. 1998); *State ex rel. Gray v. Tahash*, 279 Minn. 248, 250, 156 N.W.2d 228, 229 (1968). Given that assumption, we conclude that Toogood's petition and affidavit allege "facts that, if proven, would affirmatively show that his attorney's representation fell below an objective standard of reasonableness." *Leake*, 737 N.W.2d at 536 (quotation omitted). At present, the district court record does not include the testimony of Toogood's former attorney or a sworn statement in lieu of testimony. Until such evidence is part of the record, "the postconviction court cannot make a judgment about which story is true and which is false." *Wilson v. State*, 726 N.W.2d 103, 107 (Minn. 2007).

With respect to the second prong of the *Strickland* test, Toogood's affidavit states facts that are facially valid reasons for denying D.M.'s restitution request. According to

Toogood's affidavit, D.M. was not deprived of the items listed because the items were, or should have been, returned to D.M. Furthermore, according to Toogood's affidavit, D.M. did not suffer any financial injury due to "loss of use" because D.M.'s service station was not in business during the relevant period of time. Accordingly, we conclude that the facts alleged by Toogood, if proven, would establish that "but for the [alleged] errors, the result would have been different." *Leake*, 737 N.W.2d at 536 (quotation omitted).

In its order denying the petition, the postconviction court reasoned that Toogood must have known about the restitution request because it was attached to the PSI and because, during the same sentencing hearing, Toogood's attorney in a different criminal case challenged a restitution request filed in the other case. The district court's order indicates that the PSI was served on Toogood's attorney, but there is nothing in the district court record to establish that Toogood personally received a copy of the restitution request. It may be assumed, for present purposes, that Toogood should have been made aware of the restitution request, but that is the principle that Toogood seeks to vindicate. The conclusion that Toogood actually saw D.M.'s restitution request before the sentencing hearing can be reached only by allowing speculation or supposition to trump Toogood's affidavit.

In addition, the challenge to the other restitution request was asserted by Toogood's other attorney at a *later* point in the sentencing hearing, *after* Toogood's attorney in this case waived objection to D.M.'s restitution request. There is nothing in the record as to whether Toogood consulted with the other attorney before the sentencing hearing or, if there was consultation, what was discussed. Even if certain knowledge

about restitution procedures may be imputed to Toogood based on the other attorney's challenge, the record indicates only that Toogood acquired that knowledge *after* his attorney in this case had waived objection to D.M.'s restitution request. The district court's reasoning essentially imposes on Toogood a personal obligation to initiate reconsideration of D.M.'s restitution request after his attorney had waived objection to it but before the district court adjourned the sentencing hearing. The law does not impose such obligations on represented defendants in criminal cases or require that they take such action to preserve an ineffective-assistance claim. A typical layperson does not possess either the knowledge or self-confidence to second-guess his or her own attorney in the middle of a hearing or possess the clarity of analysis and expression to do so successfully. "The purpose of the right to counsel is to protect the layperson who lacks the skill and knowledge for self-representation." *State v. Clark*, 698 N.W.2d 173, 178-79 (Minn. App. 2005), *aff'd*, 722 N.W.2d 460 (Minn. 2006).

In its order denying the petition, the postconviction court also reasoned that, even if Toogood's attorney failed to inform him of D.M.'s restitution request and his right to challenge it, Toogood could have challenged the restitution request after the sentencing hearing. The district court's reasoning apparently is based on Minn. Stat. § 611A.045, subd. 3(b) (2008), which permits an offender to challenge restitution "within 30 days of sentencing." But the district court's reasoning assumes that Toogood was aware that he had a right to challenge restitution after the sentencing hearing. There is no evidence in the record to indicate that Toogood had any communications with his attorney following the sentencing hearing or that, during the 30-day period, Toogood otherwise was aware

of the statute permitting him to challenge restitution after a sentencing hearing. The district court's reasoning essentially imposes on Toogood a personal obligation to correct the alleged ineffectiveness of his attorney at the sentencing proceeding based on law that a layperson is unlikely to know. Again, Toogood's right to counsel cannot be conditioned on an obligation to, in essence, serve as back-up counsel. *See Clark*, 698 N.W.2d at 178-79.

In *Robinson v. State*, 567 N.W.2d 491 (Minn. 1997), the supreme court considered a postconviction petitioner's allegation that his trial counsel's failure to inform him of two plea offers required an evidentiary hearing. *Id.* at 495. The court stated that such a claim could be evaluated only after the district court received testimony from individuals with knowledge of the communications between the attorney and the client.

> In order to evaluate such a claim, a court needs to hear testimony from the defendant, his or her trial attorney, and any other witnesses who have knowledge of conversations between the client and the attorney. Only after hearing such testimony could a court determine whether in fact the trial attorney communicated the plea offers.

Id. Similarly, Toogood's allegations raise questions of fact that require an evidentiary hearing and factfinding.

Thus, we must conclude that the district court record does not "conclusively show that the petitioner is entitled to no relief" and, accordingly, that the postconviction court erred in dismissing Toogood's petition without holding an evidentiary hearing. *See* Minn. Stat. § 590.04, subd. 1; *see also Gustafson*, 754 N.W.2d at 348.

In light of our disposition of Toogood's first argument, we need not consider his second argument, that he is entitled to a hearing to challenge D.M.'s restitution request. Such a hearing would be an appropriate remedy if Toogood were able to prove his claim of ineffective assistance.

Reversed and remanded.

ROSS, Judge (dissenting)

I respectfully dissent from the majority's holding that the district court erred by failing to conduct an evidentiary hearing to determine whether Toogood suffered constitutionally deficient representation.

How can Toogood possibly prove—with or without an evidentiary hearing—that he suffered any conceivable prejudice by his attorney's alleged failure to inform him of his right to challenge restitution before sentencing when he so obviously knew of the right? It is indisputable that, *before sentencing*, the district court expressly asked Toogood's attorney in Toogood's presence whether "Mr. Toogood is objecting to the restitution." Just 33 lines later in the transcript of the same proceeding, Toogood's other attorney expressly acknowledged that Toogood had already challenged a different restitution demand. And it is equally incontestable that, *after sentencing*, the then-informed Toogood had 30 days to challenge restitution, Minn. Stat. § 611A.045, but he did not.

I disagree that the district court's reasoning would obligate Toogood to correct the alleged ineffectiveness of his attorney. Rather, I believe that the district court logically recognized that Toogood was not (and could not have been) prejudiced by his supposed unawareness of a right he clearly understood. I am confident that the Sixth Amendment did not lose any sleep even if Toogood's attorney failed to inform him of the right to challenge restitution because the record unquestionably demonstrates that Toogood knew about the right in time to have exercised it.

I would affirm.