STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0900

State of Minnesota,
Respondent,

vs.

Antwon Jones,
Appellant.

Filed June 9, 2009
Affirmed
Minge, Judge

Ramsey County District Court
File No. 62-K4-07-002163

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

Susan Gaertner, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, Perssis Meshkat (Certified Student Attorney) Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Katherine Clark, The Wolfgram Law Firm, 100 North Sixth Street, Suite 445A, Minneapolis, MN 55403 (for appellant)

Considered and decided by Stauber, Presiding Judge; Minge, Judge; and Larkin, Judge.

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

MINGE, Judge

Appellant Antwon Jones challenges his conviction of first-degree possession of crack cocaine under Minn. Stat. § 152.021, subd. 2(1) (2006), arguing: (1) his counsel provided ineffective assistance in that she did not contest the admissibility of the cocaine evidence; (2) the evidence was insufficient to support his conviction; and (3) the district court erred by refusing to depart from the presumptive sentence. We affirm.

D E C I S I O N

I.

The first issue is whether appellant received ineffective assistance of counsel because his attorney failed to contest the admissibility of the crack cocaine evidence. Generally, an ineffective-assistance-of-counsel issue is better raised in a postconviction proceeding in which a defendant has the opportunity to present additional facts to support the claim. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). Nevertheless, in the interest of judicial economy and because this issue is resolvable on the present record, we address appellant's ineffective-assistance-of-counsel argument here. *See* Minn. R. Crim. P. 28.02, subd. 11 (stating that appellate courts may review matters as the interest of justice may require).

The right to effective assistance of counsel forms a part of the Sixth Amendment right to a fair trial under the United States Constitution. U.S. Const. amend. VI; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

> [Appellant] 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 results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'

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)). "The reviewing court considers the totality of the evidence . . . in making this determination . . . [and] need not address both the performance and prejudice prongs if one is determinative." *Rhodes*, 657 N.W.2d at 842 (citation omitted). A strong presumption exists "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). Reviewing courts may not use the advantage of hindsight in reviewing counsel's tactical decisions involving trial strategy. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003).

Appellant argues that the stop, the basis for a search, and the discovery of drugs were so flawed that there is a reasonable likelihood that, if his counsel had challenged any of these events, the district court would have excluded the evidence discovered incident to the stop and search, and the case would have been dismissed. Appellant is correct that evidence obtained by unconstitutional means is generally inadmissible. *State v. Bergerson*, 659 N.W.2d 791, 797 (Minn. App. 2003). However, to conclude that appellant had ineffective legal counsel, this court needs to determine that there is a reasonable likelihood that there was not an adequate basis for the stop or the search or that there was not a substantial basis for attributing the drugs that were found to

appellant, and that by not challenging these matters, appellant's counsel failed to provide an acceptable level of legal representation.

The record shows that at trial two St. Paul police officers testified that they observed the car driven by appellant was swerving in and out of its established lane of travel. Because this driving constituted a traffic offense and indicated possible health-related problems, the officers had reasonable, articulable suspicion to make a traffic stop. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) ("A brief investigatory stop requires only reasonable suspicion of criminal activity, a lesser quantum of proof than probable cause."). One officer testified that, as he and his partner walked toward the stopped vehicle, appellant furtively reached forward with his hands as if trying to conceal something. The officer also testified that, when appellant was asked for his license, he noted that appellant's eyes were bloodshot, red, and watery, his speech was slow and slurred, his car smelled like burnt marijuana, and a plastic baggie containing marijuana-like material was on the dash. The officers then ordered appellant out of the car and searched him. The numerous indicia of intoxication and marijuana justified prolonging the stop, taking appellant out of the car, and searching him. *State v. Ortega*, 749 N.W.2d 851, 854 (Minn. App. 2008) (holding that the odor of marijuana provides an officer with probable cause to suspect criminal activity, search a vehicle from which the odor is emanating, and search the occupants of the vehicle), *review granted* (Minn. Aug. 19, 2008); *cf. State v. Gilchrist*, 299 N.W.2d 913, 916 (Minn. 1980) (holding that, once an officer stops a vehicle, the officer may, for his safety, order the vehicle's occupants to exit the vehicle).

The officer continued his testimony by recounting that, after he asked appellant to place his hands on his head and spread his feet apart, two clear plastic bags containing a white powdery substance fell from appellant's right pant leg. Ultimately, testing revealed that the bags contained 50 grams of crack cocaine. The observation of suspicious bags falling from appellant's pants justified seizing the bags. *State v. Zanter*, 535 N.W.2d 624, 631 (Minn. 1995) (permitting seizure of evidence of a crime in plain view, provided the police are in a lawful place, have a lawful right of access to the object, and immediately recognize its incriminating nature); *cf. Minnesota v. Dickerson*, 508 U.S. 366, 375-76, 113 S. Ct. 2130, 2137 (1993) (permitting seizure of evidence of a crime during a valid pat-down search, provided the officer locates what he immediately and without further manipulation has probable cause to believe is evidence of a crime).

Appellant denied that he had possession of the bags of crack cocaine or that the bags fell from his pants. This is a question of credibility on which we defer to the district court. *State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003). At an omnibus hearing, a motion to suppress evidence will not be granted unless the officers acted improperly. We conclude that, because there was an adequate basis for the search, a pretrial motion to suppress would have been denied. As a result, we further conclude that this case does not provide a basis for finding that appellant's counsel's performance fell below an objective standard of reasonableness. *See State v. Asfeld*, 662 N.W.2d 534, 546 (Minn. 2003) (holding that representation is reasonable when counsel does not object to properly-admitted evidence).

Finally, we note that the cross-examination of the officers at trial failed to discredit their testimony. This further supports the conclusion that appellant's claim that he received ineffective assistance of trial counsel is without merit.

II.

The second issue is whether the evidence was sufficient to support the conviction of possession of a controlled substance. Our review of claims that there was insufficient evidence to support a jury verdict is limited to a "painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, [is] sufficient to allow the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We must assume that the jury believed the state's witnesses and disbelieved any contrary evidence, *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), especially if resolution of the matter depends mainly on conflicting testimony, *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence" and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted). We examine the "facts in the record and the legitimate inferences that can be drawn from those facts" to determine if a jury could have reasonably found the defendant guilty. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978). Determinations of witness credibility and the weight to be given to each witness's testimony is left to the jury. *State v. Bliss*, 457 N.W.2d 385, 390 (Minn. 1990). All

inconsistencies in the evidence are resolved in favor of the jury's verdict. *State v. Bergeron*, 452 N.W.2d 918, 924 (Minn. 1990).

Appellant was convicted under section 152.021, subdivision 2(1), which provides that a person is guilty of a first-degree, controlled substance crime if he or she "unlawfully possesses one or more mixtures of a total weight of 25 grams or more containing cocaine." At trial, appellant denied that anything fell out of his pants and claimed that the officers lied about every significant aspect of the encounter. On appeal, appellant argues that, because the officers disagreed about which of them saw the baggies fall out of his pants, because the jury heard conflicting testimony regarding the origin of the cocaine, and because there is no way of knowing exactly where the cocaine came from, the evidence was insufficient.

Here, the most substantive objection is that the officers disagreed on their discovery of the baggies: one officer testified that he believed that he was the first person to notice the cocaine fall from appellant's pants and that he directed another officer to the baggies, whereas the other officer testified that he too observed the cocaine fall out of appellant's pants, without the aid of his partner. A reasonable jury could infer that the inconsistency is minor, that the two officers testified truthfully, and that the inconsistency may have been a product of one's limited subjectivity or memory, not of fabrication. Appellant's other claims are inconsequential. Because the jury could have reasonably concluded that appellant possessed more than 25 grams of cocaine, we conclude that there was sufficient evidence to support appellant's conviction.

III.

The third issue is whether the district court abused its discretion in refusing to depart from the presumptive 86-month executed prison sentence. The district court *may* depart from the guidelines if the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *State v. Anderson*, 463 N.W.2d 551, 555 (Minn. App. 1990) (applying the abuse-of-discretion standard in evaluating downward departure), *review denied* (Minn. Jan. 14, 1991). But even when substantial and compelling circumstances are present, the district court is not required to depart, and only in a "rare" case will we reverse an imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

At sentencing, appellant moved for a downward-dispositional or, in the alternative, downward-durational departure from the sentencing guidelines. He argued that he merited a downward departure because he (1) had no prior felony record; (2) had family support; (3) suffers from Crohn's disease; and (4) had three children, one of whom suffers from a chronic lung disease. His conviction had a severity level of nine, which has a presumptive sentencing range of incarceration for 74 to 103 months. Minn. Sent. Guidelines IV, V. The district court acknowledged that it had reviewed a sentencing worksheet, a presentence investigation conducted by Ramsey County probation which recommended the presumptive 86-month commitment, and appellant's motion for downward departure. In addition, the record reflects that the district court listened to arguments by appellant's and respondent's attorneys and considered appellant's and his

father's request for leniency and a "second chance." Then, without elaboration, it denied the motion and ordered an 86-month sentence.

Appellant argues that the district court should have disclosed on the record its rationale for rejecting his motion or should have separately analyzed why appellant failed to merit either a durational or dispositional departure. However, the sentencing guidelines only require such elaboration if there actually is a departure. *See* Minn. Sent. Guidelines II.D (stating that, when departing from the presumptive sentence, "the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence."); *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (citing Minn. R. Crim. P. 27.03, subd. 4(c)) (stating that if the district court decides to depart, it must explain its reasons on the record). If the court "considers reasons for departure but elects to impose the presumptive sentence," no explanation is necessary. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Appellant does not argue that the factors he raised in support of his motion rise to the level of "substantial and compelling circumstances" such that a failure to make a downward dispositional or durational departure was an abuse of discretion. Furthermore, he cites no legal support for his claim that his medical problems, lack of a criminal history, or needs and support of his family compel such a departure. Indeed, his lack of felony convictions is factored into his sentence through his criminal-history score, and nothing in the record suggests the other factors are per se substantial and compelling circumstances. As for departing durationally, appellant fails to explain why possession of

50 grams of cocaine was less serious than that typically involved in the commission of his same offense. *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985).

We conclude that the district court did not abuse its broad discretion in determining that appellant did not present substantial and compelling circumstances requiring a downward sentencing departure.

Affirmed.

Dated: