STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0176

State of Minnesota,
Respondent,

vs.

Rilwan Olasunkanmi Alowonle,
Appellant.

Filed July 28, 2009
Reversed and remanded
Toussaint, Chief Judge

Washington County District Court
File No. K5-06-8172

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

Douglas H. Johnson, Washington County Attorney, Michael C. Hutchinson, Assistant County Attorney, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Jean M. Brandl, Cloutier & Brandl, P.A., 12 South Sixth Street, Suite 510, Minneapolis, MN 55402 (for appellant)

Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and Willis, 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

TOUSSAINT, Chief Judge

Appellant Rilwan Olasunkanmi Alowonle challenges the denial of his petition for postconviction relief without an evidentiary hearing following his jury conviction of third-degree criminal sexual conduct. Because facts alleged in the record entitle appellant to an evidentiary hearing prior to the district court's postconviction decision, the district court abused its discretion in summarily denying appellant's postconviction petition, and we reverse and remand.

D E C I S I O N

Following a jury trial, the district court sentenced appellant to the presumptive sentence of 48 months. This court stayed appellant's direct appeal to permit him to pursue postconviction relief. After the district court denied his postconviction petition and motion for reconsideration without an evidentiary hearing, this appeal was reinstated. "We review a postconviction court's findings of fact for an abuse of discretion and questions of law de novo." *Bonga v. State*, 765 N.W.2d 639, 642 (Minn. 2009).

To warrant an evidentiary hearing on a postconviction petition, a petitioner must allege facts that, if proved, would entitle him to the requested relief. *State v. Kelly*, 535 N.W.2d 345, 347 (Minn. 1995); Minn. Stat. § 590.04, subd. 1 (2006). "A postconviction court is required to hold an evidentiary hearing only when there are disputed material facts that must be resolved to determine the merits of the postconviction claims." *Vance v. State*, 752 N.W2d 509, 512-13 (Minn. 2008). Any doubts about whether an evidentiary hearing is required should be resolved in favor of the petitioner. *Patterson v.*

State, 670 N.W.2d 439, 441 (Minn. 2003). But allegations in a postconviction petition "must be more than argumentative assertions without factual support." *Williams v. State*, 764 N.W.2d 21, 27 (Minn. 2009).

Appellant contends that he was deprived of his right to a fair trial due to the ineffective assistance of his trial counsel. In order to prove this claim, appellant must demonstrate by a preponderance of evidence that counsel's performance fell below an objective standard of reasonableness, such that he failed to exercise the customary skills and diligence of a reasonably competent attorney and appellant was so prejudiced thereby that, but for the errors, the result of the proceeding would have been different. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). "We review the totality of the evidence to determine prejudice." *Williams*, 764 N.W.2d at 30.

The facts appellant alleges are based on the trial record and on two affidavits: one by appellant regarding his communications with his public defender and a second by his first defense (and now appellate) counsel, outlining the facts she received from witnesses during interviews and her planned defense based on that investigation.

According to appellant's supporting affidavit, defense counsel never interviewed him about the facts of the case, did not appear to have reviewed the file or the interview notes written by his former counsel, and instructed the defense investigator who met with appellant not to conduct any investigation. Appellant further contends that defense counsel never discussed with appellant his trial plans, whether defense witnesses would be called, or whether or not appellant would testify, and never prepared appellant to

testify. He claims that during the trial, when he insisted on testifying, defense counsel allegedly spent two 15-minute breaks from the trial trying to dissuade appellant from testifying and then advised him to give only "yes" and "no" answers and to not elaborate on any of his responses. Appellant alleges that defense counsel never went over the content of appellant's testimony nor prepared him in any meaningful way to testify. Defense counsel elicited on direct only appellant's denial that the assault occurred and did not elicit any positive information about appellant, his family, his marriage, or his education.

According to the supporting affidavit of appellate counsel, six potential defense witnesses, co-workers of both the victim and appellant, and appellant's wife were available to testify and would raise the following doubts regarding the victim's story: (1) that the victim's supervisor slept at the group home on nights when the victim worked, even though this was against company policy, and that the two were inappropriately close, giving rise to an assumption that they were having an extra-marital affair; (2) that shortly before the victim brought the assault allegations, the victim's supervisor fought with appellant, during which the supervisor threatened to have appellant fired, demonstrating that the supervisor had a vendetta against appellant; (3) that the victim's supervisor was disciplined based on appellant's report of the argument; (4) that the night after the alleged assault, the victim introduced appellant as the "new guy," followed appellant down to the basement, and was there alone with him, contradicting the victim's testimony that she avoided appellant and stayed away from him after the assault; and (5) that appellant came home on time on the night of the alleged assault.

There is nothing in the record explaining why defense counsel chose not to pursue these witnesses. Appellant contends that defense counsel never explained why he chose not to call these witnesses and appeared not to recognize some of the names of these witnesses when asked on the first day of trial whether they were subpoenaed. It also appears from the record that defense counsel never reviewed the videotape of the police interview with the victim until after the victim testified and after the prosecution wanted the tape to be viewed by the jury.

If these facts are true, defense counsel's performance could be found to have fallen below the wide range of reasonable assistance permissible under the constitution. Failure to prepare can constitute sufficient grounds to find ineffective assistance of counsel. *See Foster v. Lockhart*, 9 F.3d 722, 727 (8th Cir. 1993) (holding that defendant was denied effective assistance of counsel when defense counsel failed to investigate, develop, and present strong defense of impotency in rape prosecution).

Respondent State of Minnesota argues that each of these alleged errors amounts to strategy or trial tactics, which are granted broad deference. *See State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (stating that there is a "strong presumption" that counsel's performance fell within wide range of reasonableness and "[p]articular deference is given to the decisions of counsel regarding trial strategy.") Strategy deference presupposes counsel's strategy and tactical decisions are made only after an adequate investigation to make them well-informed. *Strickland*, 466 U.S. at 690-91, 104 S. Ct. at 2066. If there is not a complete or thorough investigation, then the inquiry becomes whether the limitations of the investigation were professionally acceptable. *Id.*;

see Wiggins v. Smith, 539 U.S. 510, 524, 123 S. Ct. 2527, 2536 (2003) (finding that decision of counsel not to investigate defendant's life history for mitigating evidence beyond presentence investigation fell short of prevailing professional standards); *but see Gustafson v. State*, 477 N.W.2d 709, 713 (Minn. 1991) (stating that defense counsel is not required to pursue leads "not reasonably likely to produce favorable evidence"); *Gates v. State*, 398 N.W.2d 558, 562-63 (Minn. 1987) (holding that defense counsel is not required to interview all individuals named in police report).

The errors appellant cites may or may not amount to a performance below the objective standard of reasonableness. We cannot make this determination on the current record that is devoid of any evidence from appellant's defense counsel regarding his communications, or lack thereof, or concerning the reasons for his trial decisions. An evidentiary hearing providing inquiry into defense counsel's communications with appellant and his pre-trial preparation "may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066.

Because any doubts about whether an evidentiary hearing is required should be resolved in favor of the petitioner and because Minn. Stat. § 590.04, subd. 1, requires a hearing unless the petition and record conclusively show the petitioner is entitled to no relief, we find that there are enough facts alleged requiring, at a minimum, an evidentiary hearing to determine if sufficient facts could be presented implicating defense counsel's alleged lack of preparation and ultimate trial representation.

Reversed and remanded.