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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1639**

Gary Harold Schwich, petitioner,
Appellant,
vs.

State of Minnesota,
Respondent.

**Filed July 21, 2009
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Scott County District Court
File No. 70-2005-07048

Robert J. Kolstad, 1005 West Franklin Avenue, Suite 3, Minneapolis, MN 55405 (for appellant)

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

Patrick J. Ciliberto, Scott County Attorney, Michael J. Groh, Assistant County Attorney, Scott County Justice Center, 200 West Fourth Street, Shakopee, MN 55379 (for respondent)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

A Scott County jury convicted Gary Harold Schwich of aiding and abetting third-degree murder, aiding and abetting fifth-degree possession of controlled substances, and

aiding and abetting second-degree manslaughter. After this court affirmed his conviction and sentence, Schwich sought postconviction relief, arguing that the attorney who represented him at trial and on direct appeal was constitutionally ineffective for six different reasons. The district court denied the postconviction petition without an evidentiary hearing. We conclude that the district court properly denied the petition with respect to five of the claims raised by Schwich but erred by denying the petition with respect to one claim. Therefore, we affirm in part, reverse in part, and remand for an evidentiary hearing on one of Schwich's claims of ineffective assistance of counsel.

FACTS

On March 11, 2005, Scott County deputy sheriffs arrived at Schwich's home in response to a report that a female houseguest was found dead in his hot tub. The death certificate listed cardiac arrhythmia as the immediate cause of death and acute methamphetamine and ethanol intoxication and arrhythmogenic right ventricular cardiomyopathy as underlying causes of death.

When the police arrived, Schwich and Jeanne Stone, another female houseguest, told the police that they were unaware whether the victim had been using drugs. But Stone later recanted her story and told police that prior to the victim's death, Schwich prepared a dose of methamphetamine that she injected into the victim. According to Stone, Schwich wanted to cause the victim to want to have sex. When searching Schwich's home, police found traces of methamphetamine, evidence of burnt syringes, and other drug paraphernalia. The state charged appellant with aiding and abetting third-degree murder, aiding and abetting fifth-degree possession of a controlled substance, and

aiding and abetting second-degree manslaughter in violation of Minn. Stat. §§ 152.025, subd. 2(1), 609.05, subd. 1, .195(b), .205(1) (2004).

A jury convicted appellant on all counts and also found beyond a reasonable doubt the aggravating factor of particular vulnerability. The district court sentenced Schwich to 150 months in prison for aiding and abetting third-degree murder, which is an upward departure from the presumptive sentence of 86 months. The district court stayed execution of the sentence for aiding and abetting fifth-degree possession and declined to impose a sentence for aiding and abetting second-degree manslaughter. Schwich appealed to this court on a number of grounds, and we affirmed the conviction and sentence. *State v. Schwich*, 2007 WL 1815686 (Minn. App. June 26, 2007), *review denied* (Minn. Sept. 18, 2007).

In July 2008, Schwich filed a postconviction petition in which he alleged that the attorney who represented him at trial and on direct appeal was constitutionally ineffective for six different reasons. Later that month, the district court denied Schwich's petition without an evidentiary hearing. Schwich appeals.

DECISION

Schwich argues that the district court erred by denying his postconviction petition without an evidentiary hearing. A postconviction court must hold an evidentiary hearing on a postconviction petition unless “the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2004); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). “On review of a denial of postconviction relief, we inquire as to whether sufficient evidence supported the

postconviction court's findings, and will reverse only for an abuse of discretion." *Brown v. State*, 746 N.W.2d 640, 641-42 (Minn. 2008).

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)). There is a strong presumption that an attorney's performance was reasonable. *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001). Matters concerning trial strategy are given great deference. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). But we "will examine trial strategy when it implicates fundamental rights," such as "whether to plead guilty, waive a jury, testify in [one's] own behalf, or take an appeal." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (quotation omitted).

A claim of ineffective assistance of trial counsel ordinarily must be raised on direct appeal if it can be determined on the basis of the trial record. *Id.* at 847. Thus, a failure to raise such a claim on direct appeal means that it is barred in a subsequent postconviction action. *Id.* (citing *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976)). But if "trial and appellate counsel are the same . . . for purposes of *Knaffla*, failure to raise claims of ineffective assistance of trial counsel is presumptively neither deliberate nor inexcusable and . . . further review should not be barred." *Jama v. State*, 756 N.W.2d 107, 112 (Minn. App. 2008). Schwich's claim that his trial counsel provided

ineffective assistance is not barred by *Knaffla* because the same attorney represented him on direct appeal.

Schwich argues that his trial counsel was constitutionally ineffective in six ways: (1) trial counsel repeatedly assured him that he could not be sentenced to an upward departure; (2) trial counsel repeatedly misadvised him about the burden of proof; (3) trial counsel advised him to waive his right to a 12-person jury; (4) trial counsel failed to inform him of his right to a public trial; (5) trial counsel failed to object to the sentencing jury instructions; and (6) trial counsel failed to object to the district court's "fact-finding" at sentencing.

A. Advice Concerning Upward Departure

Schwich argues that his trial counsel was constitutionally ineffective because he repeatedly told Schwich that "there was no possibility of an upward departure at sentencing." In his postconviction petition, Schwich alleged that he would have accepted an offer to plead guilty in exchange for a 62-month sentence if he had known that an upward departure was possible. As it happened, Schwich was sentenced to 150 months of imprisonment, an upward departure from the presumptive sentence of 86 months, and that sentence was affirmed on direct appeal. *Schwich*, 2007 WL 1815686, at *9. In addition to pleading this claim in his petition, Schwich presented legal argument in support of the allegation in a memorandum of law that accompanied his petition, but the district court did not address the claim in its order denying the petition.

Schwich relies on *Leake*, in which the supreme court stated that "an attorney's advice falls below objectively reasonable standards, thereby constituting ineffective

assistance, when the attorney's inaccurate or misleading factual statements tend to affect a defendant's decision to reject a plea bargain and proceed to trial." 737 N.W.2d at 540. The supreme court also stated that a defendant is prejudiced by ineffective assistance "if there is a reasonable likelihood the plea bargain would have been accepted had the defendant been properly advised." *Id.* The petitioner in that case alleged that his trial counsel had informed him that the longest sentence he could receive was a life sentence with the possibility of release in 30 years, plus an additional consecutive sentence. *Id.* at 539. During trial, the state offered that sentence to Leake in a plea bargain. *Id.* Trial counsel, however, was incorrect in his advice because Leake's first-degree murder charge carried the possibility of a life sentence without parole, which is the sentence he received. *Id.* at 541. On appeal from the district court's denial of postconviction relief, the supreme court remanded for an evidentiary hearing to determine, among other things, whether trial counsel's performance was sub-standard and whether Leake's decision to decline the plea offer was affected by trial counsel's advice. *Id.*

In this case, Schwich's allegations, if proved, may establish the first part of the *Strickland* test, that "his attorney's representation fell below an objective standard of reasonableness." *Id.* at 536 (quotation omitted). Because Schwich was charged with serious crimes relating to the death of a woman in his home, the evidence may be sufficient to prove that trial counsel should have known that Schwich faced the possibility of an upward departure upon conviction. As in *Leake*, "we cannot say with any certainty" that Schwich's counsel's performance "did not fall below an objective standard of reasonableness." *Id.* at 541. Schwich's allegations also may establish the

second part of the *Strickland* test, that “but for [trial counsel’s] errors, the result would have been different.” *Id.* at 536 (quotation omitted). Thus, we must remand to the district court for an evidentiary hearing on Schwich’s ultimate claim that his trial counsel provided ineffective assistance by informing him that there was no possibility of an upward departure.

B. Advice Concerning Burden of Proof

Schwich next argues that his trial counsel was constitutionally ineffective because he advised him that the state did not have sufficient evidence to obtain a conviction because it could not prove that the victim’s death was caused by methamphetamine intoxication. Again, Schwich contends that if he had known that the state’s evidence was sufficient, he would not have rejected the state’s plea offer.

It is apparent from the trial record that, for most of the trial, both defense counsel and the district court understood that the state needed expert testimony that the victim died from Stone’s injection of methamphetamine. The district court repeatedly expressed its view that if the state did not present testimony of a medical expert to a reasonable degree of medical certainty, the state’s case would not survive a directed verdict. But during trial, the prosecutor presented legal argument and caselaw to the district court that convinced the district court that such expert testimony was unnecessary. On direct appeal, this court held that the state’s evidence was sufficient without the testimony of medical experts. *Schwich*, 2007 WL 1815686, at *5. We noted, “The state does not need to prove the actual mechanism of death -- only that defendant’s conduct contributed to

death.” *Id.* (citing *State v. Torkelson*, 404 N.W.2d 352, 357 (Minn. App. 1987), *review denied* (Minn. June 25, 1987)).

Trial counsel’s argument to the district court concerning the state’s burden of proof ultimately was unsuccessful. But trial counsel’s approach was a reasonable means of defending against the charges. Whether trial counsel appropriately advised Schwich is a different question. We believe that Schwich’s allegations, even if proved, would not establish the first part of the *Strickland* test, that “his attorney’s representation fell below an objective standard of reasonableness.” *Leake*, 737 N.W.2d at 536 (quotation omitted). The reasonableness of the position that expert testimony is required -- which we assume for present purposes to be the advice given to Schwich -- is demonstrated by the fact that the district court initially was convinced of the proposition before the prosecutor prompted reconsideration. Thus, the district court did not err by denying the postconviction petition with respect to this issue.

C. Advice Concerning Waiver of 12-Person Jury

Schwich next argues that his trial counsel was constitutionally ineffective because he advised Schwich to waive his right to a 12-person jury. Schwich argues simply that “[n]o reasonably competent criminal defense lawyer would suggest accepting a jury of less than twelve [jurors].”

Schwich’s allegations, if proved, would not establish the first part of the *Strickland* test, that “his attorney’s representation fell below an objective standard of reasonableness.” *Id.* (quotation omitted). Schwich’s contention essentially is that an attorney never may reasonably advise a client to waive a 12-person jury. The fact that

such a waiver is permissible under the rules of criminal procedure, *see* Minn. R. Crim. P. 26.01, subd. 1(2)(c), indicates that it is not *per se* unreasonable to recommend such a waiver. Furthermore, Schwich's allegations, if proved, would not establish the second part of the *Strickland* test, that "but for [trial counsel's] errors, the result would have been different." *Leake*, 737 N.W.2d at 536 (quotation omitted). Schwich makes no allegation or argument as to why, if he had not waived his right to a 12-person jury, the result of his trial would have been different. Thus, the district court did not err by denying the postconviction petition with respect to this issue.

D. Failure to Assert Right to a Public Trial

Schwich next argues that his trial counsel was constitutionally ineffective because he failed to object to the district court's questioning of a juror in chambers rather than in an open courtroom. The juror twice expressed concern about his safety. The first time, the district court met with the juror in chambers in the presence of Schwich, defense counsel, and the prosecutor. The next day, the district court made a record in which both attorneys and Schwich stated that they had agreed to the previous day's in-chambers meeting. The second time the juror expressed concern, the district court again conducted an on-the-record examination in chambers. The district court invited Schwich's agreement to the procedure, stating, "again, like I told you before, you have that right to a public trial, and if you ask me to have this conducted out in open court, I would do that. Are you okay with me doing it in chambers?" Schwich answered, "Yes." The district court ultimately dismissed the juror.

This claim fails for three reasons. First, Schwich's allegations, if proved, would not establish that "his attorney's representation fell below an objective standard of reasonableness." *Id.* (quotation omitted). Schwich does not explain why it was disadvantageous for the district court to question the juror in chambers instead of in public. Second, Schwich's allegations, if proved, would not establish that "but for [trial counsel's] errors, the result would have been different." *Id.* (quotation omitted). Third, Schwich personally waived the right to a public trial with respect to the in-chambers proceeding. Thus, the district court did not err by denying the postconviction petition with respect to this issue.

E. Failure to Object to Sentencing Jury Instructions

Schwich argues that his trial counsel was constitutionally ineffective because he did not object to the district court's jury instructions concerning the aggravating factor of particular vulnerability. The district court instructed the jury as follows: "You must determine whether the following aggravating factor exists: [the victim] was particularly vulnerable due to age, infirmity or reduced physical or mental capacity which was known or should have been known to defendant." Schwich now argues that his trial counsel should have requested that the instruction state that the victim's vulnerability "must have been exploited by the defendant."

Schwich's allegations, if proved, would not establish the first part of the *Strickland* test, that "his attorney's representation fell below an objective standard of reasonableness." *Id.* (quotation omitted). The instructions are nearly identical to the language used in the sentencing guidelines. *See* Minn. Sent. Guidelines II.D.2.b.(1).

Schwich has cited no caselaw requiring an instruction of the type that he contends should have been requested. Thus, the district court did not err by denying the postconviction petition with respect to this issue.

F. Failure to Defend Against Upward Departure

Schwich argues that his trial counsel was constitutionally ineffective because he did not challenge what Schwich alleges to be improper fact-finding at sentencing. Schwich contends that the district court found that the case was “more serious than the typical case, even though the jury never made such a finding.”

At the sentencing trial, the state argued that the victim was particularly vulnerable because she was intoxicated due to her consumption of alcohol and methamphetamine and that Schwich exploited her intoxication. The sentencing jury found that the victim was “particularly vulnerable due to age, infirmity, reduced physical capacity or reduced mental capacity” and that Schwich “kn[e]w or should . . . have known that [the victim] was particularly vulnerable.” At sentencing, the district court stated that it agreed with the sentencing jury’s findings and that the finding of particular vulnerability supported an upward departure. The caselaw shows that intoxication may render a victim particularly vulnerable. *Ture v. State*, 353 N.W.2d 518, 522 (Minn. 1984). The caselaw does not make an exception for cases in which the defendant provided the drugs or alcohol that led to intoxication. *State v. Gettel*, 404 N.W.2d 902, 906 (Minn. App. 1987), *review denied* (Minn. June 26, 1987). Thus, particular vulnerability was an appropriate ground for an upward departure. On direct appeal, Schwich challenged the upward departure based on

the victim's particular vulnerability, and this court affirmed. *Schwich*, 2007 WL 1815686, at *7.

Schwich has failed to allege facts that, if proved, would establish either that “his attorney’s representation fell below an objective standard of reasonableness” or that, “but for [trial counsel’s] errors, the result would have been different.” *Leake*, 737 N.W.2d at 536 (quotation omitted). This claim appears to be an attempt to relitigate an issue that was unsuccessful on direct appeal by recasting it as an ineffective-assistance-of-counsel claim. *See Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997). Thus, the district court did not err by denying the postconviction petition with respect to this issue.

Affirmed in part, reversed in part, and remanded.