STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1709

State of Minnesota,
Respondent,

vs.

David Earl Schiller,
Appellant.

Filed December 22, 2009
Affirmed in part, reversed in part, and remanded
Stauber, Judge

St. Louis County District Court
File No. 69DUCR075159

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

Melanie S. Ford, St. Louis County Attorney, Mark S. Rubin, Assistant County Attorney, Suite 501, 100 North Fifth Avenue West, Duluth, MN 55802-1298 (for respondent)

Steven J. Meshbesher, Kevin M. Gregorius, Meshbesher & Associates, P.A., 225 Lumber Exchange Building, 10 South Fifth Street, Minneapolis, MN 55402 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Judge; and Stauber, Judge.

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

STAUBER, Judge

On direct appeal from his convictions of first-degree burglary and kidnapping and from the district court's summary denial of his petition for postconviction relief,

appellant argues that his trial counsel was ineffective and that some items of the restitution award were not warranted. Because appellant has not shown that his trial counsel's performance was objectively deficient, we affirm the district court's denial of his petition for postconviction relief on the issue of ineffective assistance. But because appellant timely challenged the restitution order, we reverse the district court on the issue of restitution and remand for a hearing.

FACTS

Appellant David Earl Schiller was charged with one count of first-degree burglary and two counts of kidnapping, arising from an armed home invasion that occurred in August 2007. At a hearing on October 1, 2007, appellant's trial counsel made a general request for a contested omnibus hearing. Appellant's trial counsel stated that she would notify the district court and the state of the specific issues to be addressed once she had received and reviewed all of the discovery.

In October 2007, January 2008, and February 2008, the state provided appellant with additional discovery. The discovery included a police report that described a tape-recorded interview, in which appellant admitted his participation in the home invasion. According to appellant, he forcibly entered the basement door of the victims' residence and cut his hand in the process. He went to the bedroom of one of the victims and pointed the laser sight of his firearm at her while she was lying in bed. Appellant ordered the victim to show him where the household safe was. He also bound her wrists with plastic ties. The victim's minor son was similarly bound by one of appellant's co-

defendants and brought before his mother at gunpoint. Upon realizing that there was no money in the safe, appellant and the co-defendant fled the residence.

According to a forensic report, the blood from the female victim's pajamas matched appellant's DNA profile, as did the DNA from one of the ties used to bind her wrists.

The discovery also revealed that police had found a sketch of the victims' residence during a search of appellant's personal effects kept at his mother's residence. The sketch showed the floor plan of the victims' residence, the names and ages of the occupants of each bedroom, and the location of the safe.

The state moved the district court to order appellant and his two co-defendants[1] to provide handwriting samples. At the motion hearing, appellant's trial counsel did not oppose the state's request. The district court ruled that handwriting samples would be taken from all three defendants.

In March 2008, appellant's trial counsel notified the district court that appellant would be waiving "any potential omnibus issues."

In May 2008, the prosecutor made a written plea offer to appellant. Appellant would plead guilty to the three counts and concede that grounds existed for an upward durational departure. In exchange, the state would seek one sentence for the first kidnapping charge and the burglary charge and a separate, consecutive sentence for the

[1] The non-participating defendant was the "inside man," who drew the sketch based on his having been a guest in the victims' residence.

second kidnapping charge. The state would also ask for a maximum of 66 months for each of the kidnapping counts.

On June 9, 2008, appellant pleaded guilty to all three counts on the terms outlined in the plea offer. On June 10, 2008, the state moved for an upward durational departure based on aggravated circumstances. On July 9, 2008, the district court convicted appellant of the three counts and imposed combined consecutive sentences of 114 months but rejected the prosecutor's request for an upward durational departure. The district court also ordered appellant to pay restitution in the amount of $22,124.06.

On July 15, 2008, appellant's trial counsel wrote to the district court, challenging five of the items of restitution. She stated: "I am not asking for a restitution hearing in this matter, but I would request that you reconsider the actual amount ordered."

Appellant, represented by his appellate counsel, filed a notice of appeal on October 1, 2008. This court stayed appellant's direct appeal pending the postconviction proceedings in district court.

In December 2008, appellant moved the district court to vacate the restitution order. The district court denied appellant's motion on the ground that his challenge to the restitution order was untimely. The district court order did not address the July 15, 2008 reconsideration letter from appellant's trial counsel.

Appellant filed a petition for postconviction relief. Appellant requested, among other things, that he be allowed to withdraw his guilty pleas and that he be granted an evidentiary hearing on the issues of ineffective assistance of trial counsel and restitution. The district court denied appellant's petition without an evidentiary hearing, finding that

appellant's arguments "essentially turn on attacks regarding trial strategy," that his guilty pleas were entered knowingly and intelligently, and that he received effective representation. The district court found that the female victim's restitution request, combined with her testimony at sentencing, adequately described the reasoning behind many of the items of restitution, making an evidentiary hearing unnecessary. The district court also stated that appellant's restitution challenge was proper only as an ineffective-assistance claim because the time to challenge the restitution order had passed.

After the district court's denial of appellant's postconviction petition, this court reinstated appellant's direct appeal.

D E C I S I O N

I.

Appellant argues that his guilty pleas were not made knowingly and intelligently because his trial counsel provided ineffective assistance. We disagree.

We review a summary denial of a postconviction petition for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). An evidentiary hearing must be held 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 (2006).

Claims of ineffective assistance require proof of two elements: "objective deficiency of counsel and actual prejudice." *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). Appellant must therefore show that his trial counsel's performance was

deficient and that, but for her errors, he would not have entered his plea. *See id.*; *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). In making this determination, we consider the totality of the evidence and are not required to address both the performance and prejudice prongs of the analysis if one prong is determinative. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). An appellate court does not review counsel's tactical decisions involving trial strategy. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003). But we will examine trial strategy "when it implicates fundamental rights," such as whether to plead guilty. *Sanchez-Dias v. State*, 758 N.W.2d 843, 848 (Minn. 2008).

A. Handwriting sample

Appellant argues that his trial counsel should have objected to the state's request for a handwriting sample. Appellant contends that his trial counsel's failure to object shows her "disregard for protecting [his] interests" because she permitted him to produce potentially incriminating evidence. We disagree.

The decision not to contest the state's request for a handwriting sample was a strategic one. Appellant had already confessed; the strategy of appellant's trial counsel focused on persuading the district court that a lenient sentence was appropriate. She advised appellant to plead guilty, and she argued to the district court that appellant had cooperated with law enforcement. She cited appellant's acquiescence to the handwriting-sample request as an example of his cooperation. This strategy appears to have been successful. The district court, after finding the presence of aggravating factors, stated:

> On the other hand, the defense urges the Court . . . to take the following things into account, number one, that from the very outset, [appellant] cooperated with police . . . .

> Number two, that he showed remorse. . . . So I think those are things that the Court needs to look at in terms of mitigating the aggravating factors in this situation.
>
> . . . .
>
> And so weighing all of those things, I can't justify the sentences that have been sought by [the prosecutor] in this case. But, by the same token, the case does cry out for prison time. . . . There were two separate victims, there were aggravating circumstances, again, mitigated by [appellant]'s remorse, by his actions after the fact, by the fact that he didn't pull the trigger on the gun. Those are things that the Court does consider. . . .

The district court sentenced appellant to 114 months instead of the 132 months sought by the state. The performance of appellant's trial counsel clearly was not objectively deficient.

B. Contested omnibus hearing

Appellant argues that his trial counsel's failure to demand a contested omnibus hearing shows a lack of care for his interests. We again disagree.

Appellant cites no statute or caselaw that requires an attorney to demand a contested omnibus hearing. Appellant does not argue with specificity what evidence his trial counsel should have challenged and on what grounds; he merely argues that his trial counsel should have challenged the "incriminating" evidence. But this is not sufficient for appellant's postconviction petition to succeed, especially in light of the strategy employed by his trial counsel. *See Williams v. State*, 764 N.W.2d 21, 27 (Minn. 2009) (stating that allegations in a postconviction petition "must be more than argumentative assertions without factual support").

Appellant also argues that his trial counsel failed to advise him "of the procedural vehicle of an evidentiary hearing at which he could challenge the admissibility of statements and physical evidence." But at his plea hearing, appellant stated that he understood he was waiving his right to have his trial counsel cross-examine witnesses and challenge evidence. He also stated that he was satisfied with his trial counsel and that she had provided him with the information and advice he needed.

The performance of appellant's trial counsel was not objectively deficient.

C. Advice to plead guilty

Appellant argues that his trial counsel "continually advocated for [him] to plead his guilt . . . and to simply make an argument at sentencing for a departure." While the decision to admit guilt belongs to the defendant, *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991), appellant does not appear to argue that his trial counsel failed to advise him of his right to a jury trial or that she forced him to plead guilty. In response to questioning at his plea hearing, appellant clearly stated that he understood there would be no jury trial, that no one was forcing or threatening him to plead guilty, that he had received ample time to review the facts and circumstances with his trial counsel, and that he believed that his trial counsel had represented him admirably and had given him all the information and advice he needed.

Instead, appellant's argument appears to be that his trial counsel's advice to plead guilty shows a "lack of care" for his interests. We disagree. Appellant's trial counsel clearly explained to appellant several times, personally and by letter, why, in her opinion, a trial was not in his best interests: (1) it did not appear that any plea offers would be

made, and (2) the state had filed notice of intent to seek an upward durational departure based on aggravating factors.[2] Her strategy—pleading guilty, cooperating with authorities, and arguing for leniency—succeeded in obtaining a lesser sentence for appellant than had been aggressively sought by the state. There is nothing in the record to indicate that her advice to plead guilty was deficient.

Appellant admitted at oral argument that his burden in attempting to prove ineffective assistance of trial counsel is a heavy one, particularly when his trial counsel employed a clearly effective strategy, given the state's strong case. Because appellant has not shown that he is entitled to relief on this issue, we hold that the district court did not abuse its discretion by denying his postconviction petition with regard to appellant's ineffective-assistance claim.

II.

Appellant makes several restitution-related arguments, including that he is entitled to a hearing on the issue of restitution because his trial counsel properly challenged the restitution order within 30 days after sentencing.

The district court has broad discretion to order restitution, but this court reviews as a question of law whether a particular item fits within the statutory definition of expenses eligible for restitution. *In re Welfare of M.R.H.*, 716 N.W.2d 349, 351 (Minn. App. 2006), *review denied* (Minn. Aug. 15, 2006). Minnesota law provides that a victim of a

[2] We note that appellant's trial counsel pursued—and obtained—a plea offer after being told that no such offer would be made. This further undercuts appellant's argument that his trial counsel did not have his best interests in mind. And we note that the overwhelming evidence against appellant played a role in his counsel's opinion that trial was not in his best interests.

crime may request restitution from a defendant if the defendant is convicted. Minn. Stat. § 611A.04, subd. 1 (2006). "The primary purpose of the [restitution] statute is to restore crime victims to the same financial position they were in before the crime." *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). In determining whether to order restitution and the amount of restitution, the district court considers "the amount of economic loss sustained by the victim as a result of the offense" and the "income, resources, and obligations of the defendant." Minn. Stat. § 611A.045, subd. 1 (2006). "An offender may challenge restitution, but must do so by requesting a hearing within 30 days of receiving written notification of the amount of restitution requested, or within 30 days of sentencing, whichever is later." *Id.*, subd. 3(b) (2006). "A defendant may not challenge restitution after the 30-day time period has passed." *Id.*

The state concedes that, in the interests of justice, the July 15, 2008 letter from appellant's trial counsel constitutes a timely request for a restitution hearing.[3] We therefore reverse the district court's denial of appellant's request for a restitution hearing and remand for further proceedings.

Affirmed in part, reversed in part, and remanded.

[3] The state does not concede the substance of appellant's other restitution arguments.