STATE OF MINNESOTA
IN COURT OF APPEALS
A09-983

Gregory Alexander Welch,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 9, 2010
Affirmed
Worke, Judge

Washington County District Court
File No. 82-KX-03-001719

Marie L. Wolf, Interim Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Douglas H. Johnson, Washington County Attorney, Karin L. McCarthy, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Shumaker, Judge; and Worke, Judge.

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

WORKE, Judge

In this postconviction appeal challenging his 2004 terroristic-threats conviction, appellant argues that because his attorney failed to inform him of the "transitory-anger"

defense, he was denied effective assistance of counsel and is entitled to withdraw his guilty plea. We affirm.

D E C I S I O N

Appellant Gregory Alexander Welch argues that the district court should have granted his petition for postconviction relief and allowed him to withdraw his guilty plea because he was denied the effective assistance of counsel. A petitioner seeking postconviction relief must prove the facts in a petition by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2008). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004).

This court reviews a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). The court reviews findings of fact to determine whether the evidence is sufficient to sustain the findings, and reviews legal issues and mixed questions of fact and law, including claims of ineffective assistance of counsel, de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004); *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

Withdrawal of Guilty Plea

Appellant requested to withdraw his guilty plea, claiming that he received ineffective assistance of counsel. To be valid, a guilty plea must be "accurate, voluntary, and intelligent." *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A guilty plea may be rendered invalid by the ineffective assistance of counsel. *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). A plea is not voluntary if it is premised on counsel's failure to

give advice and assistance on critical issues that counsel is obligated to give under the standard of ordinary skill and competence. *Id.* It is manifestly unjust for the court to accept an involuntary guilty plea. *Perkins*, 559 N.W.2d at 688. If a guilty plea creates a manifest injustice, the defendant is entitled to withdraw it. Minn. R. Crim. P. 15.05, subd. 1. Thus, if appellant received ineffective assistance of counsel, his plea was invalid and the district court should have allowed him to withdraw his plea; therefore, we must determine if appellant received ineffective assistance of counsel.

Ineffective Assistance of Counsel

A party alleging ineffective assistance of counsel must show that 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 result of the proceeding would have been different.'" *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, 2064, 2068 (1984)). Both *Strickland* factors need not be analyzed if a claim fails under either one. *State v. Blom*, 682 N.W.2d 578, 624 (Minn. 2004).

Appellant argues that his attorney's representation fell below an objective standard of reasonableness because he failed to discuss with appellant that transitory anger was a defense to his terroristic-threats charge. Appellant claims that he would not have pleaded guilty if his attorney had discussed this defense with him. An objective standard of reasonableness is the exercise of "customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quoting *White v. State*, 309 Minn. 476, 481, 248 N.W.2d

281, 285 (1976)). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted). To be effective, an attorney need not "advance every conceivable argument." *Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986). And it is not appropriate for a district or appellate court to second-guess, in hindsight, an attorney's strategy and tactics. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003). But if an attorney's strategy implicates fundamental rights, it is imperative for courts to scrutinize it to determine whether it reasonably protects those rights. *See Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (observing that a defendant has a fundamental right to decide whether to plead guilty). We must, therefore, determine whether appellant's attorney's decision not to discuss a transitory-anger defense with appellant falls within the wide range of reasonable professional assistance.

Transitory-Anger Defense

In 2003, appellant was charged with terroristic threats after he sent letters to the prosecutor involved in the appeal of his convictions in 2000 of first-degree attempted criminal sexual conduct and kidnapping. A person who "threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror" is guilty of making terroristic threats. Minn. Stat. § 609.713, subd. 1 (2002). The state must prove that the defendant (1) threatened to commit a crime of violence; and (2) made that threat with either (a) specific intent to cause extreme fear in another, or (b) reckless disregard of the risk that it would have such effect. 10 *Minnesota Practice*, CRIMJIG 13.107 (2006). The phrase "transitory anger"

is not included in the language of section 609.713. *See* Minn. Stat. § 609.713. This phrase is included in the commentary to the section of the Model Penal Code on which the statute is modeled. *State v. Taylor*, 264 N.W.2d 157, 160 (Minn. 1978) (Sheran, C.J., dissenting). The statute is not intended to apply to "the kind of verbal threat which expresses transitory anger rather than [the] settled purpose to carry out the threat or to terrorize the other person." *Id.* (emphasis omitted) (quotation omitted). In *Taylor*, the dissent noted that the legislature did not "contemplate that [the terroristic-threats statute] would be utilized to punish behavior that might consist of nothing more serious than a flippant remark or an outright joke." *Id.*

Minnesota courts have considered and rejected the transitory-anger defense. *State v. Dick*, 638 N.W.2d 486, 489, 493 (Minn. App. 2002) (holding that the district court did not commit reversible error by refusing to instruct the jury on transitory-anger defense in a case involving an intoxicated defendant who threatened to find out where arresting officers lived and kill them), *review denied* (Minn. Apr. 16, 2002); *State v. Begbie*, 415 N.W.2d 103, 105 (Minn. App. 1987) (rejecting transitory-anger defense to show that defendant did not have intent to terrorize the victims because the evidence showed that he planned to murder the victims six months before he communicated the threat), *review denied* (Minn. Jan. 20, 1988).

In *State v. Jones*, the inmate appellant told one corrections counselor that when he was released in approximately three months he was going to find him and cut his throat. 451 N.W.2d 55, 57 (Minn. App. 1990), *review denied* (Minn. Feb. 21, 1990). Later that day, he told the same counselor that "when he got out he was going to find [him] and

f**k [him] up, and he was going to find [his] family and f**k [his] family up." *Id.* When the appellant saw another counselor he stated: "You dirty a** maggot mother f****r, you're dead meat. I get out of here in three months and you're dead. You're the first one on my list." *Id.* Approximately one month later, the appellant told another individual that he was going to kill her when he got out. *Id.* The next night he told the same individual:

> I have 79 days left before I get out of here. And when I do, I'm going to come and find you and I'm going to f**k you up big time. I'm going to come and find you and I'm going to rape you. . . . I'm going to take a sawed off baseball bat and I'm going to f**k you up the a** because I got 79 days left, you f*****g b***h.

Id. This court held that the appellant was not expressing transitory anger, but intended to terrorize when he threatened the correctional counselors. *Id.* at 63.

Even if transitory anger were a defense in Minnesota, it was not applicable here. In 2000, a district court found appellant guilty of kidnapping and attempted criminal sexual conduct. *See State v. Welch*, No. C9-01-1095, 2002 WL 1013152, *1 (Minn. App. May 21, 2002), *aff'd in part, rev'd in part*, 675 N.W.2d 615 (Minn. Feb. 5, 2004). The district court sentenced appellant to 45 months in prison for the kidnapping conviction and 150 months in prison for the attempted-criminal-sexual-assault conviction. *Id.* The district court also found that appellant was a patterned sex offender and a dangerous offender. *Id.* This court affirmed appellant's convictions, but reversed and remanded his sentences; the supreme court granted review. *See Welch*, 675 N.W.2d 615. In its opinion, the supreme court described the underlying facts related to appellant's

convictions and referenced evidence admitted during appellant's trial, including three similar incidents, two of which resulted in appellant pleading guilty to false-imprisonment charges. *Id.* at 617-18.

In January 2001, the prosecutor submitted her response to appellant's appellate brief and mailed a copy to appellant's attorney. On February 6, 2001, the prosecutor received a letter postmarked from appellant at the Minnesota Correctional Facility at Oak Park Heights. In the letter, appellant told the prosecutor that she was "as evil as the devil." She felt threatened by the letter because of appellant's criminal history. The prosecutor received a second letter the next year after she submitted her response to the supreme court. A portion of the letter read:

> Dear Lawyer B***h, If my conviction is not overturned next year I'm going to kill you with my bare hands. As a matter of fact, I'm going to rape and kill your white a** just for the f**k of it, if I get out next year or not, because you deserve to become a victim.

The letters were tested at the crime lab, which found appellant's fingerprints on the letters.

Appellant did not just verbally attack the prosecuting attorney, but he took the time to write and send her two threatening letters. Further, the content of the letters does not consist of "flippant remark[s] or an outright joke." *See Taylor*, 264 N.W.2d at 160. The threats appellant made are very similar to the threats made in *Jones*, 451 N.W.2d at 57. Appellant threatened that if his conviction was not overturned he was going to "kill [her] with [his] bare hands." If that statement was not threatening enough, appellant then increased the severity of the threat by stating that he was going "to rape and kill [her]

white a** just for the f**k of it." Appellant then indicated that the threat did not have an expiration date, because he was going to rape and kill her regardless if he got out of prison "next year or not, because [she] deserve[d] to become a victim." Appellant threatened to commit crimes of violence, and he made the threats with either a specific intent to cause extreme fear in the prosecutor, or with reckless disregard of the risk that it would have that effect. *See* Minn. Stat. § 609.713, subd. 1.

Appellant's attorney was not required to discuss transitory anger with appellant. *See Garasha*, 393 N.W.2d at 22 (stating that to be effective, an attorney need not "advance every conceivable argument"). Therefore, appellant's counsel's performance was reasonable, and we do not reach the second *Strickland* factor. *See Blom*, 682 N.W.2d at 624. Because appellant was not denied effective assistance of counsel, his guilty plea was valid and the district court did not abuse its discretion by denying his petition for postconviction relief.

Affirmed.