STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1382
A09-1579

State of Minnesota,
Respondent (A09-1382),
Appellant (A09-1579),

vs.

James Joseph Bookwalter,
Appellant (A09-1382),
Respondent (A09-1579).

Filed July 6, 2010
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Anoka County District Court
File No. 02-K6-06-6060

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

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka, Minnesota (for respondent (A09-1382); appellant (A09-1579))

David W. Merchant, Chief Appellate Public Defender, Jodie L. Carlson, Assistant Public Defender, St. Paul, Minnesota (for appellant (A09-1382); respondent (A09-1579))

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

SCHELLHAS, Judge

In these consolidated appeals, James Joseph Bookwalter challenges the district court's postconviction order, arguing that the court erred by not ordering specific performance of a plea offer that he rejected before trial. By separate notice of appeal, the State of Minnesota challenges the district court's amended postconviction order, which modified Bookwalter's sentence. We affirm in part, reverse in part, and remand for further proceedings.

FACTS

Bookwalter, Theodore Haste, and the victim, M.F.M., spent a night together at a trailer park in Anoka. The following morning, Haste discovered that his wallet and about $600 were missing. Bookwalter and Haste accused M.F.M. of taking the wallet and money. Over the course of an hour to an hour and a half, they pushed M.F.M. to the ground, punched and kicked her in the back, buttocks, legs, hips, and face, and knocked out two of her front teeth. Bookwalter stuck a gun in M.F.M.'s mouth, screamed at her, and hit her in the head with the butt of the gun. When M.F.M tried to crawl out the front door of the trailer, Bookwalter stepped on her hand, preventing her from leaving. Bookwalter and Haste used a two-bladed knife to cut off M.F.M.'s clothes, and Haste inserted his hand in M.F.M.'s vagina, purportedly to look for the missing money. Bookwalter poured a bottle of Bacardi Rum over a bleeding cut on M.F.M.'s head.

The state charged Bookwalter with aiding and abetting Haste in the commission of first- and second-degree assault, first-degree criminal sexual conduct, and kidnapping.

The state also prosecuted Haste, who pleaded guilty to first-degree assault, pursuant to a plea agreement, and received a sentence of 74 months' imprisonment. Bookwalter rejected the state's plea offer, waived his right to a jury trial, and proceeded to a court trial. Following trial, the district court found Bookwalter guilty of all counts and sentenced him to 110 months for his first-degree assault conviction, 144 months consecutively for his first-degree criminal sexual conduct conviction, and 86 months concurrently for his kidnapping conviction. The district court dismissed Bookwalter's conviction of second-degree assault as a lesser-included offense of first-degree assault.

On direct appeal, Bookwalter challenged his conviction of kidnapping and sentences on the grounds that (1) the conduct underlying his kidnapping conviction was "merely incidental" to the conduct relied upon by the district court to support the first-degree assault conviction, and (2) he received ineffective assistance of counsel because his trial counsel did not advise him that he could receive consecutive sentences if convicted. This court affirmed Bookwalter's conviction but declined to consider his ineffective-assistance-of-counsel claim on the basis that the appropriate forum to raise the claim was a postconviction petition in district court. *State v. Bookwalter*, A07-0791, 2008 WL 2246073, at *2, 3 (Minn. App. June 3, 2008) (*Bookwalter I*), *review denied* (Minn. Aug. 19, 2008).

Following this court's affirmance, Bookwalter sought postconviction relief, seeking specific performance of the plea offer he rejected prior to trial and arguing that he received ineffective assistance of trial counsel. The district court rejected Bookwalter's request for specific performance of the plea offer, but modified his

sentence so that all three prison terms run concurrently. The district court included the following findings in its order:

> 7. At trial the Defendant was represented by Bryan Leary, an attorney duly admitted to practice law before the Courts of the State of Minnesota.
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> 8. Before trial, the State offered to allow the Defendant to plead guilty to Assault in the First Degree with a sentence at the low end of the sentencing range under the Minnesota Sentencing Guidelines. The remaining counts would be dismissed.
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> 9. Attorney Leary communicated the offer to the Defendant. There was disagreement between the State and the Defendant as to his criminal history score. The State believed the score to be 3 and the Defendant believed the score to be 2. With a score of three, the plea offer would have been a commit for 104 months. With a score of two, the commit would have been for 94 months.
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> 10. Attorney Leary advised Defendant that his maximum exposure would be 144 months, the presumptive commit if the Defendant was convicted of the count of criminal sexual conduct. Attorney [Leary] did not advise the Defendant, or discuss with him, the potential for consecutive sentences. It was the belief of Attorney Leary that consecutive sentencing was neither probable nor possible. Attorney Leary was aware of Minn. Stat. Sec. 609.035.
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> 11. Defendant could not assess the risks and benefits of the plea offer without accurate advice as to the potential consequences of going to trial. The performance of Attorney Leary in not advising the Defendant as to the potential consequences of trial fell below the objective standard of reasonableness.

12. Pursuant to a plea agreement, Theodore Haste had pled guilty to assault in the third degree and received a sentence of a commit of 74 months. Defendant was willing to plead guilty if his criminal history score was set at 2 and he received a sentence comparable to Haste.

13. Defendant rejected the plea offer believing that his exposure was the difference between 144 months and either 94 or 104 months. He was not advised that the potential exposure was a commit of 254 months.

14. There is a reasonable probability that but for the error of Attorney Leary, the outcome would have been different and defendant would have accepted the plea agreement.

15. It would not be equitable to give the Defendant the benefit of the plea agreement which he rejected. It is equitable to sentence the Defendant commensurate with his understanding of his maximum exposure.

Appeals by Bookwalter and the state follow.

D E C I S I O N

On appeal from a district court's postconviction order, "we review questions of law de novo and findings of fact for an abuse of discretion." *Francis v. State*, 781 N.W.2d 892, 896 (Minn. 2010).

I

We first address the state's argument that the district court erred by determining that Bookwalter established an ineffective-assistance-of-counsel claim.

A person who is convicted of a crime may file a petition for postconviction relief if "the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1) (2008).

> The petitioner must prove the facts alleged in the petition by a fair preponderance of the evidence. The postconviction court must hold an evidentiary hearing unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief. An evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him to the relief requested. Any doubts as to whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing.

Francis, 781 N.W.2d at 896 (quotations and citations omitted).

The Sixth Amendment provides that in criminal trials "the accused shall enjoy the right . . . to have the assistance of counsel for his defense." The Sixth Amendment's right to counsel has been construed to mean "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (citing *McMann v. Richardson*, 397 U.S. 759, 771 n.14, 90 S. Ct. 1441, 1449 n.14 (1970)). "To assert a claim of ineffective assistance of counsel, a defendant must prove that counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Francis*, 781 N.W.2d at 898 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052 (1984)). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Id*. (quotations omitted). "We generally do not review ineffective assistance of counsel claims based on trial strategy." *Id.*

Here, the district court found that, by "not advising [Bookwalter] as to the potential consequences of trial," the performance of Bookwalter's counsel "fell below the objective standard of reasonableness." Although the state concedes that the district court

correctly found that counsel's performance was deficient, the state argues that the court abused its discretion when it determined that "there is a *reasonable probability* that but for the error of [Bookwalter's counsel] the outcome would have been different and [Bookwalter] would have accepted the plea agreement." (Emphasis added.) The state argues that the evidence shows that Bookwalter primarily rejected the plea offer because of uncertainty about whether his criminal history score was two or three, not because of trial counsel's failure to advise him about the possibility of consecutive sentences.

A "reasonable probability" that the outcome would have been different but for counsel's errors "means a probability sufficient to undermine confidence in the outcome." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008). Based on our careful review of the record, we conclude that the district court did not abuse its discretion by determining that there is a reasonable probability that, but for counsel's error, the outcome would have been different, and that Bookwalter was therefore prejudiced by the deficient performance.

II

We next address the argument, presented by both Bookwalter and the state, that the district court erred by modifying Bookwalter's sentence. Bookwalter seeks specific performance of the rejected plea offer, and the state seeks a remand for further proceedings, if this court affirms the district court's determination that Bookwalter is entitled to postconviction relief. Citing *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007) (*Leake II*)), Bookwalter argues that the only remedy that the district court could impose was specific performance of the original plea offer or a new trial.

In *Leake II*, the supreme court addressed for the first time whether the Sixth Amendment right to effective assistance of counsel is implicated when a defendant rejects an offer by the state to plead guilty in reliance on incorrect advice from defense counsel." 737 N.W.2d at 540. The *Leake II* court accepted the approach taken by courts from other jurisdiction that "have held that the Sixth Amendment right to effective assistance of counsel is implicated by the decision to reject a plea bargain," *id.*, and concluded:

> On the unique circumstances of this case, we hold that if the postconviction court determines that Leake is entitled to relief on this ineffective assistance of appellate counsel claim, Leake may accept the original plea agreement offered by the state and be resentenced in accord with its terms. *If, however, the state, based on valid reasons, objects to specific performance of the original plea offer* or the district court, having finally had an opportunity to consider the plea agreement and the plea, rejects the plea, *Leake shall be entitled to withdraw his plea and receive a new trial*.

Id. at 542 (emphasis added).

The parties agree that *Leake II* is controlling. But Bookwalter argues that the district court must order specific performance of the rejected plea offer because the state waived its right to object to specific performance and to ask for a new trial. The state argues that it did not waive its right to object to specific performance of the plea offer, that it does object, that the district court's postconviction order reflects that the court rejected specific enforcement of the plea offer, and that therefore "the case should be remanded so the court and the State can squarely address the remedy issue." As noted

above, under *Leake II*, if the district court rejects the plea, the defendant is entitled to withdraw his plea and receive a new trial.

Because the district court did not order specific performance of the plea offer, and because the state did not clearly waive its right to object to the court's chosen remedy, this court must reverse the district court's sentence modification and remand for further proceedings consistent with *Leake II*. On remand, if the district court rejects specific performance of the plea agreement, Bookwalter is entitled to a new trial.

Affirmed in part, reversed in part and remanded.