STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1603

William Masieniec, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 20, 2010
Affirmed
Hudson, Judge

St. Louis County District Court
File No. 69HI-CR-07-443

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Melanie S. Ford, St. Louis County Attorney, Brian D. Simonson, Assistant County Attorney, Hibbing, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

HUDSON, Judge

On appeal from his convictions of fifth-degree controlled substance crime and felon in possession of a firearm, appellant argues that the postconviction court erred in determining that he did not receive ineffective assistance of counsel. We affirm.

FACTS

On September 19, 2006, two police officers arrived outside appellant William Masieniec's home in Balkan Township, north of Chisholm. The officers were investigating an unrelated drug case and were looking for information regarding appellant's son AM. One of the officers had received information from two sources that AM, who was on parole at the time, was selling large amounts of methamphetamine.

At appellant's residence, one of the officers noticed a man walking into the trailer house on the property and a woman pulling weeds from the flower bed in front of the trailer house. The officers drove an unmarked car and were dressed in plain clothes. The officers approached the woman and asked her if AM was inside. The woman stated that she did "not believe so." The woman, who did not live at appellant's residence, later testified that she was waiting outside while appellant retrieved a sweatshirt from inside the trailer. One of the officers asked the woman if appellant was inside the trailer and the woman replied "[y]eah go ahead and go inside," or "knock on the door and find out." The officers then opened the door, entered the trailer, and called for appellant. The woman followed the officers into the trailer and stated that appellant "should be in here." The woman knocked on the bedroom door and one of the officers heard a female voice

ask who was outside. The officers then disclosed that they were "the police." The officers then heard movement and muffled voices in the bedroom before AM emerged from the bedroom, closing the door behind him. AM told the first officer that his girlfriend was still in the bedroom. While the first officer was confirming that AM was on parole and subject to searches, AM was texting someone. The officer believed that AM was sending a text to his girlfriend in the bedroom telling her to conceal or destroy evidence. The second officer went to the bedroom to find AM's girlfriend.

The first officer spoke with appellant, who stated that he suspected that AM was dealing drugs. The officer then questioned AM about the text message he sent and asked if he could look at the last message sent on the phone. AM gave the officer his permission to look at the message. The message concerned moving a backpack and was sent just a few moments earlier. Another officer arrived and took AM to Hibbing for drug testing. Meanwhile, the first officer secured the residence and left to prepare a search warrant application. After the warrant was signed by a judge, the officer returned to the residence and discovered a backpack containing 15 grams of methamphetamine in the bedroom where AM had been. During the search, officers also discovered a marijuana grow operation with eight plants, a shotgun, and two BB guns.

Appellant later admitted to the officers that the marijuana plants were his and that he had been tending them for the past couple of months. He also admitted possession of the shotgun and BB guns. Appellant had two prior felony convictions that disqualified him from possessing firearms. Appellant was charged on April 25, 2007, with one count of possession of a firearm by a felon in violation of Minn. Stat. § 624.713, subd. 1(b)

(2006), and one count of fifth-degree controlled substance possession in violation of Minn. Stat. § 152.025, subd. 1(1) (2006).

Meanwhile, on October 31, 2006, a contested omnibus hearing was held in AM's case. AM challenged the search of the trailer as unconstitutional. The district court denied AM's motion and upheld the search and seizure. On February 23, 2007, AM moved the district court to reverse its order and for the judge to recuse himself for a reason unrelated to the omnibus order. The judge denied the motion to reverse the omnibus ruling but did recuse himself. AM's case was then assigned to another judge. The second judge allowed the defense to reopen the omnibus hearing and retry the issue of whether the search of the trailer was constitutional. After a hearing on June 25, 2007, the second judge also denied AM's suppression motion. AM then went forward with a rule 26 proceeding,[1] and the district court found him guilty of second-degree methamphetamine possession.

Appellant's case proceeded concurrently with AM's case. Appellant had eight omnibus hearing dates set, all of which were continued at appellant's request. Appellant's attorney was aware of the challenge to the search being made in AM's case and was waiting to find out how the district court would rule. After the second district court judge denied AM's suppression motion, appellant did not challenge the search of the trailer and focused on obtaining a favorable plea agreement. On February 15, 2008, appellant entered a guilty plea to the felon-in-possession-of-a-firearm charge. The state agreed to dismiss the cultivation-of-marijuana charge and also agreed to a downward

[1] The parties refer to the rule 26 proceeding as a *Lothenbach* trial.

durational departure to 24 months. Appellant was represented during the plea by a public defender with over ten years of experience.

AM, meanwhile, had appealed his conviction to this court. This court issued a decision on December 23, 2008, ten months after appellant's plea hearing, reversing AM's conviction after finding that the officers violated the Fourth Amendment when they initially entered appellant's residence on September 19, 2006. *See State v. Masieniec*, A07-2390 (Minn. App. Dec. 23, 2008).

Appellant then petitioned the district court for postconviction relief in his case, claiming that he received ineffective assistance of counsel. He alleged that his attorney was ineffective because she did not challenge the search of the trailer and did not inform appellant that he had the option of challenging the search, losing the challenge and appealing. Instead, appellant's trial attorney told him that such a challenge would likely fail based on the denial of AM's suppression motions, and she recommended that appellant agree to the plea deal instead of proceeding to trial.

An evidentiary hearing was held on July 9, 2009. Appellant's trial counsel testified and filed two affidavits. Appellant also submitted an affidavit. Appellant's trial counsel testified that she was aware of the issues being contested in AM's case and that they were the same issues that could be raised in appellant's case. She also testified that she was aware that AM had raised the suppression motion before two judges who had both denied the motion. She testified that she believed that raising the issue would therefore be futile and that the most appropriate strategy would be to pursue a plea agreement. Appellant's trial counsel also testified that appellant made the ultimate

decision to accept the plea, that appellant acknowledged that there was evidence obtained from a search, and that he knew that he was waiving any challenge to the evidence by entering a plea. Appellant's trial counsel told appellant that she did not think pursuing a suppression motion would be successful, but she did not explain that appellant could appeal the motion even if he lost and that the possibility of a reversal by the appellate courts existed. She also stated that the omnibus hearing was not waived until appellant decided to accept the plea offer.

The postconviction court found that appellant's trial counsel was not ineffective and issued an order denying appellant relief. This appeal follows.

D E C I S I O N

Appellant argues that the postconviction court erred in determining that he did not receive ineffective 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). A postconviction court's decision regarding a claim of ineffective assistance of counsel is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

The United States Constitution and the Minnesota Constitution guarantee criminal defendants the right to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The right to counsel includes the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To prevail

on a claim of ineffective assistance of counsel, an appellant must "affirmatively prove that his 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) (quotation omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. This court may address the two prongs in any order and may dispose of the claim on one prong without analyzing the other. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

The reasonableness of counsel's performance is measured by the objective standard of "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Id.* (quotation omitted). The reasonableness of counsel's performance is viewed in light of the facts available to counsel at the time of the challenged conduct. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2052; *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). There is a strong presumption that counsel's performance falls within "the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

A reviewing court generally defers to counsel's trial strategy because trial strategy is within the discretion of trial counsel. *See e.g.*, *Opsahl*, 677 N.W.2d at 421; *Schleicher*, 718 N.W.2d at 447. Failure to raise a particular claim is not considered ineffective assistance of counsel if the attorney could have legitimately concluded that she would not prevail on the claim. *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007).

Claim of failure to inform of alternatives to plea

Appellant argues that it was objectively unreasonable for his trial counsel to pursue a plea agreement without informing appellant that he could also try to challenge the search and preserve the suppression issue for appeal through a rule 26 proceeding. Appellant states that his trial counsel only informed him that he could plead guilty or proceed to trial. Appellant argues that, had he been aware of the option to challenge the search and preserve the issue for appeal, he would have done so. Appellant claims that because he was unaware of all of the options available to him, there was insufficient consultation between attorney and client and his counsel was ineffective.

An attorney need not "advance every conceivable argument" to be effective. *Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986). It is also inappropriate for the district court, or an appellate court, to second-guess 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, courts should scrutinize it to determine whether it reasonably serves to protect those rights. *See Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (noting that a defendant has a fundamental right to decide "'whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal'" (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983))).

Here, appellant was aware that the suppression motion had failed in his son's case and that the option of making a suppression motion existed. Appellant's trial counsel informed appellant that the suppression motion had failed twice earlier, explained the plea to appellant, and informed him of his choice between accepting the plea or

proceeding to trial, which would have included an omnibus hearing. Although appellant stated in his affidavit that he was unaware that he could challenge the search and that he would have challenged the search had he known of that option, the evidence also shows that appellant knew that a challenge was possible but agreed instead to plead guilty in return for a lesser sentence. Moreover, appellant did not waive any omnibus issues until the plea hearing, and his trial counsel stated that appellant was aware of the option to pursue a contested omnibus hearing, although counsel also told appellant that she thought pursuing the suppression issue would be futile.

Appellant's trial counsel acknowledged that she did not discuss the possibility of a rule 26 proceeding with appellant or discuss the possibility of appealing an issue later. Given that the suppression motion had been denied twice in the companion case and appellant had admitted to possession of the gun and drugs, trial counsel testified that, instead, she "felt the most appropriate strategy was to seek a favorable plea offer." It is advisable for attorneys to inform their clients that certain issues may be appealable only if preserved through an appropriate motion or another procedure. But we need not determine whether failure to do so here constituted deficient performance because appellant cannot show that there is a reasonable probability that, but for his attorney's errors, the result of the proceeding would have been different. *Gates*, 398 N.W.2d at 561. That probability must be sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Here, appellant is required to show that there is a reasonable probability that if he had been aware that he could challenge the search of the trailer through a rule 26

proceeding and preserve that issue for appeal, he would have pursued that option. Appellant states in an affidavit that he would have not accepted the plea agreement if he had been aware that he could pursue a rule 26 proceeding. But this self-serving statement was made after AM had successfully challenged the search on appeal. Appellant's counsel argues that the district court adopted the statement made in appellant's affidavit and found that appellant would have pursued a rule 26 proceeding if he had been made aware of it. But the district court found only that appellant "*stated* that had he known of the *Lothenbach* option, he would have chosen it" (emphasis added). Furthermore, the state must agree to pursue the case through a rule 26 proceeding. *See* Minn. R. Crim. P. 26.01, subd. 4. There is no indication in this record that the state would have agreed to so proceed. Therefore, trial counsel's failure to inform appellant of a specific trial procedure as a way to preserve an issue for appeal did not constitute ineffective assistance of counsel.

Claim of failure to raise suppression motion

Appellant also argues that his counsel was ineffective for failing to file a suppression motion. Because his son filed a motion to suppress, which was eventually successful on appeal, appellant argues that he would have achieved a similar result had a motion to suppress been filed on his behalf. But "[e]ffective assistance of counsel, as mandated by the Constitution, is not violated merely when trial tactics that are providential for one defendant prove to be unfortunate for another." *Rhodes*, 657 N.W.2d at 845.

Here, two other district court judges heard and denied suppression motions relating to the search in question. At the time of trial counsel's decision not to pursue a suppression motion, there was no reason to believe that such a motion would be successful. Instead of pursuing a motion thought to be fruitless, trial counsel focused on securing a favorable plea and did so. This court generally defers to an attorney's trial strategy. *Miller*, 666 N.W.2d at 717. Even though, in hindsight, it appears that a suppression motion may have ultimately been successful on appeal, an attorney's conduct must be judged based on the information available to her at the time. *See Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066. When viewed in light of the facts known to the attorney at the time, this course of action was not unreasonable. *See Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) (stating that a claim of ineffective counsel may not rest on the failure to make a motion that would have been denied had it been made). Therefore, the failure to raise a suppression motion in this case was not ineffective assistance of counsel.

Affirmed.