STATE OF MINNESOTA
IN COURT OF APPEALS
A10-691

Gary Harold Schwich, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 21, 2010
Affirmed
Halbrooks, Judge

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

Robert J. Kolstad, Minneapolis, Minnesota (for appellant)

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

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

HALBROOKS, Judge

Appellant challenges the postconviction court's denial of his petition for postconviction relief following an evidentiary hearing. Because we conclude that appellant failed to demonstrate the prejudice necessary to prove his claim of ineffective assistance of counsel, we affirm.

FACTS

In March 2005, Scott County sheriffs went to appellant Gary H. Schwich's home in response to a report that a female had been found dead in his hot tub. *State v. Schwich*, No. A06-783, 2007 WL 1815686, at *1 (Minn. App. June 26, 2007), *review denied* (Minn. Sept. 18, 2007) (*Schwich I*). An autopsy revealed that the underlying cause of the victim's death was due in part to methamphetamine intoxication. *Id.* During the investigation, Jeanne Stone, who was present on the night the victim died, admitted that appellant had prepared a dose of methamphetamine and that she had injected the drug into the victim. *Id.* Appellant was charged with aiding and abetting third-degree murder, aiding and abetting fifth-degree possession of controlled substances, and aiding and abetting second-degree manslaughter. *Id.*

Before trial, the state moved to present aggravating factors to the jury in support of its motion for an upward sentencing departure, pursuant to Minn. Stat. § 244.10, subd. 5 (Supp. 2005). The state's motion indicated that it was seeking a double durational departure on the grounds that the victim was particularly vulnerable and that the crime was committed in a particularly cruel manner. Appellant opposed the motion and

challenged the constitutionality of Minn. Stat. § 244.10, subd. 5, arguing that the legislature's attempt to regulate the procedures dealing with sentencing enhancements violates the separation-of-powers doctrine. Following trial, appellant was found guilty on all counts, and the district court allowed the jury to hear evidence on the aggravating factor of particular vulnerability. The jury found beyond a reasonable doubt that the victim was particularly vulnerable. *Id.* at *2. Appellant was sentenced to 150 months, an upward departure from the presumptive guidelines sentence of 86 months. *Schwich v. State*, No. A08-1639, 2009 WL 2151171, at *1 (Minn. App. July 21, 2009) (*Schwich II*). Appellant's convictions and his sentence were affirmed on direct appeal. *Schwich I*, 2007 WL 1815686, at *2-9.

In July 2008, appellant petitioned for postconviction relief, alleging that he was denied his right to effective assistance of trial counsel. *Schwich II*, 2009 WL 2151171, at *1. The postconviction court denied appellant's petition without an evidentiary hearing. *Id.* On appeal from that denial, this court affirmed the postconviction court in part, but remanded for an evidentiary hearing on whether appellant's trial counsel was ineffective for failing to advise appellant of the possibility of an upward departure. *Id.* at *3.

At the hearing, appellant testified that the state offered him a 62-month plea bargain before trial began. Appellant stated that when he discussed the possibility of an upward departure with his trial counsel, his attorney told him, "Don't even worry about that, they'll never get [an upward departure]." Appellant also testified that his attorney told appellant that the worst-case scenario should appellant be convicted was the 86-month guidelines sentence. Appellant testified that his attorney's statements affected his

decision about whether to accept the state's plea deal; according to appellant, had he known that an upward departure was possible, he would have accepted the state's 62-month offer. Appellant agreed that he would "have been able to admit the facts that constituted the crime," and plead guilty. On cross-examination, appellant admitted that he was aware that the aggravating factors would be submitted to a jury. The state also elicited testimony that as late as his sentencing hearing, appellant told the district court that he still did not believe that the methamphetamine injection he prepared for the victim actually killed her. Specifically, appellant maintained that the victim's heart "gave out" due to her alcohol consumption, and he did nothing to cause her death.

Appellant's trial counsel also testified at the evidentiary hearing. Regarding the possibility of an upward departure, the attorney testified, "I didn't believe there was any possibility on this earth that they could get an upward departure in this case." He agreed with appellant's testimony that he had informed appellant that the worst-case scenario was an 86-month sentence. And the attorney stated that he told appellant that it would be "crazy" to take the offered 62-month plea deal.

The attorney also testified regarding his knowledge of the relevant upward-departure law at that time. He stated that he was unaware of the 2005 decision, *State v. Shattuck*, 704 N.W.2d 131, 148 (Minn. 2005), which gave the legislature the authority to establish procedures to implement the holdings of *Apprendi* and *Blakely* into the Minnesota sentencing scheme. He also testified that he had "not read any cases on an upward departure that says intoxication in and of itself is enough to double depart anything or do anything in the way of departure."

On cross-examination, appellant's counsel discussed his pretrial motions related to the upward-departure issue. Specifically, he stated that the district court's ruling that an aggravated factor could be sent to the jury for consideration did not concern him as he "didn't believe that whatever [the district court] came up with would be accepted as a proper procedure." He further explained that he did not think the state had a "snowball's chance" at proving the aggravating factor because "nobody is particularly vulnerable when they're asking and you give them drugs." The postconviction court asked the attorney whether his advice regarding the upward departure was based on his "assessment of the case." The attorney responded that he did not think there were any aggravating factors to present to the jury and that there was no procedure in place at the time to consider an aggravating factor; he clarified that his advice to appellant was based on both his assessment of the strength of the state's case regarding the aggravating factor and his understanding of a procedural infirmity regarding the submission of aggravating factors to the jury.

Appellant also called Robert Snider, a veteran criminal defense attorney, to testify at the evidentiary hearing. Snider testified that at the time of appellant's trial, a reasonably effective defense attorney would have known that an upward departure was a possibility in a case with an intoxicated victim. His assessment was based on "long-standing Minnesota Supreme Court cases that talk about an intoxicated victim being a vulnerable victim." Thus, he opined that it would be ineffective assistance to advise one's client that the worst-case scenario in a case such as appellant's would be a guidelines sentence. Snider also testified that a defense attorney should have been aware

that "the Minnesota Supreme Court had told the Minnesota legislature to come up with—with a procedure to deal with the ramifications of that *Blakely* decision."

The state called Neil Nelson, the head of the criminal division for Scott County, who prosecuted appellant at his criminal trial. According to Nelson, after he communicated the 62-month offer to appellant, appellant's attorney rejected the offer stating that appellant could not afford to go to prison because he would lose his business, property, and residence. The attorney presented Nelson with a counteroffer wherein appellant would plead guilty to manslaughter in exchange for one year of local jail time. The state rejected this counteroffer. Cory Tennison, the assistant county attorney who second-chaired appellant's trial, also testified that appellant rejected the state's offer because he "couldn't go to prison, he would lose his business, he would lose his house."

The postconviction court denied appellant's petition. In an attached memorandum, the postconviction court analyzed appellant's claim using *Strickland*'s two-prong test for ineffective assistance of counsel. The postconviction court first concluded that appellant failed to demonstrate that his attorney's representation fell below an objective standard of reasonableness. The postconviction court reasoned that the attorney's statements to appellant regarding an upward departure were based on his assessment of the state's case. "Based on his assessment of the case, [trial counsel] believed that the trial outcome would be more favorable to his client than the outcome of accepting the plea offer." Consequently, the postconviction court concluded that "[appellant]'s decision to reject the plea was a result of [trial counsel]'s advice to reject it

based on [his] assessment of the State's case, not on any 'inaccurate or misleading factual statements' of [trial counsel]."

The postconviction court also analyzed the prejudice prong of the *Strickland* test, finding that appellant knew that the state was seeking a double upward departure and that the issue of aggravating factors would be presented to the jury. Thus, the postconviction court reasoned that appellant's attorney's alleged error was not prejudicial because, despite the attorney's assertion that the state would be unable to prove a departure, appellant knew that a departure was possible. Finally, the postconviction court concluded that appellant would not have accepted the 62-month plea deal even if his attorney had informed him that an upward departure was possible. The postconviction court specifically found that appellant's testimony to the contrary lacked credibility. The postconviction court noted that "[t]here is no persuasive evidence that [appellant] would have accepted the State's 62-month plea offer. Rather, the evidence indicates that [appellant] wanted to go to trial rather than plead guilty." The postconviction court relied on the evidence that appellant's attorney told prosecutors that appellant would not accept the state's offer because appellant could not afford to go to prison and the fact that appellant did not believe that he was guilty of a crime as late in the process as the sentencing hearing. The postconviction court thus concluded that "it is not reasonably likely that [appellant] would have accepted an offer in which he had to plead guilty." Appellant's petition was denied. This appeal follows.

D E C I S I O N

We review a postconviction court's decision for an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). This standard requires us to review the postconviction court's factual findings for sufficiency of the supporting evidence. *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). But the issue of whether those facts support appellant's claim of ineffective assistance of counsel is a legal question, which we review de novo. *State v. Blom*, 682 N.W.2d 578, 623 (Minn. 2004).

The Sixth Amendment guarantees a criminal defendant the right to effective assistance of counsel. U.S. Const. amend. VI; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Claims of ineffective assistance of counsel are analyzed under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Rhodes*, 657 N.W.2d at 842. A party who alleges ineffective assistance of counsel must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that but for counsel's errors, the result would have been different. *Id.* A "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (*Leake III*) (quotation omitted). The failure of either prong of this test is dispositive of a claim, and we need not review both prongs if one is determinative. *Id.*

In order to demonstrate the prejudice required by *Strickland*, appellant had to demonstrate that there is a "reasonable likelihood [that] the plea bargain would have been accepted had [he] been properly advised." *Leake v. State*, 737 N.W.2d 531, 540 (Minn.

2007) (*Leake II*).[1] Appellant "must present some credible, non-conclusory evidence that he would have pled guilty had he been properly advised." *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995).

The postconviction court found that appellant failed to demonstrate prejudice because it was not reasonably likely that he would have accepted the state's 62-month plea offer, regardless of whether he was properly advised about the possibility of a double durational departure. This conclusion was based on the postconviction court's finding that appellant rejected the state's offer because he could not afford to go to prison because he would lose his business and his property and its finding that appellant continued to express his innocence through the sentencing phase of the proceedings. Both findings are supported by the record, and these findings support the postconviction court's legal conclusion that appellant failed to demonstrate prejudice. The only evidence appellant submitted to support his argument that he was prejudiced was his own testimony that he would have pleaded guilty had he known that a double durational departure was possible. But the postconviction court expressly discredited this testimony, and we will not disturb this finding on appeal. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) ("[T]he postconviction court is in a unique position to assess witness credibility, and we must therefore give the postconviction court considerable deference in this regard.").

Because we conclude that appellant failed to demonstrate prejudice as a result of his counsel's alleged ineffective assistance, we decline to address appellant's claim that

[1] *State v. Leake*, 699 N.W.2d 312 (Minn. 2005) (*Leake I*), was Leake's direct appeal.

his counsel's advice regarding the possibility of an upward departure was objectively unreasonable. We affirm the postconviction court's denial of his petition for postconviction relief.

Affirmed.