STATE OF MINNESOTA
IN COURT OF APPEALS
A10-931

State of Minnesota,
Respondent,

vs.

Mowalid Muse Hirsi,
Appellant.

Filed April 5, 2011
Affirmed
Stauber, Judge

Kandiyohi County District Court
File No. 34CR091413C

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

Boyd Beccue, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Marie Wolf, Interim Chief Public Defender, Jenny Chaplinski, Special Assistant Public Defender, St. Cloud, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Stauber, Judge; and Crippen, 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

STAUBER, Judge

On appeal from his conviction of aggravated robbery, appellant argues that he was denied the effective assistance of counsel because his attorney waived the omnibus hearing and failed to challenge the inventory search of his vehicle that resulted in the discovery of a weapon. We affirm.

FACTS

In November 2009, W.G. walked a few blocks from his home to a local VFW where he sat by himself at the bar. Later, appellant Mowalid Hirsi sat down next to W.G. at the bar. The two men made small-talk until the bar closed a half-hour later. When the bar closed, appellant insisted on giving W.G. a ride home, and W.G. accepted.

But, appellant instead drove to a dark area about two miles from W.G.'s home where he pulled over and demanded W.G.'s money. W.G. did not immediately comply, prompting appellant to threaten him with a knife. W.G. then gave appellant all of his money, which W.G. estimated to be about $102.

After handing over his money, W.G. grabbed some papers from the car's dashboard and fled to a very dark area. Appellant initially pursed W.G., but soon gave up. W.G. waited for appellant to leave and then called the police. W.G. told the responding officers that he had been robbed by a man with a knife. W.G. also gave the officers the papers he took from the car, which included the owner's manual for a 1995 Dodge Neon, as well as insurance papers for the car. The paperwork contained a vehicle identification number (VIN) which identified the vehicle as a dark green Dodge Neon.

While the officers were questioning W.G., one of the officers noticed a dark green Dodge Neon that had just stopped at a nearby stop sign. The vehicle stopped for about five-to-ten seconds, and then turned. When asked, W.G. agreed that the vehicle looked like the vehicle driven by the perpetrator. One of the officers then jumped into the squad car and proceeded to initiate a traffic stop of the Dodge Neon.

Appellant and a passenger were occupants of the vehicle, but neither was registered as the car's owner. The officer also observed that appellant, the driver of the vehicle, appeared to be intoxicated. W.G. was taken to the scene of the traffic stop where he identified appellant as the perpetrator.

After W.G. identified appellant, officers discovered $93 in cash on appellant's person. Officers also searched the Dodge Neon and discovered a knife with a four-inch stainless-steel blade in the center console. Appellant was charged with one count of aggravated first-degree robbery.

Appellant's counsel waived an omnibus hearing and a jury trial was conducted. A jury found appellant guilty of the charged offense and appellant was sentenced to the presumptive sentence of 48 months. This appeal followed.

D E C I S I O N

The United States and Minnesota constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Inventory searches are a "well-defined exception to the warrant requirement of the Fourth Amendment." *Colorado v. Bertine*, 479 U.S. 367, 371, 107 S. Ct. 738, 741 (1987). The inventory-search exception allows police to search a vehicle being impounded if they search

according to standard procedures and at least in part for the purpose of obtaining an inventory of the vehicle's contents. *State v. Ture*, 632 N.W.2d 621, 628 (Minn. 2001). By contrast, a search conducted "in bad faith or for the sole purpose of investigation" is not a valid inventory search. *State v. Holmes*, 569 N.W.2d 181, 188 (Minn. 1997) (quotation omitted).

Appellant argues that he was denied the effective assistance of counsel because his attorney failed to challenge the inventory search of his vehicle that resulted in the discovery of the knife. To prevail on an ineffective-assistance-of-counsel claim, "[t]he defendant 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) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). A court "need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

Under the first prong, "an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotation omitted). "There is a strong presumption that an attorney acted competently." *Id.* Trial counsel's failure to raise a particular issue is not considered ineffective

assistance of counsel if the attorney could have legitimately concluded that he would not prevail on the claim. *Schneider v. State*, 725 N.W.2d 516, 522–23 (Minn. 2007).

Ordinarily, an ineffective-assistance-of-counsel claim should be raised in a postconviction petition for relief, rather than on direct appeal because "[a] postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *State v. Gustafason*, 610 N.W.2d 314, 321 (Minn. 2000) (quotation omitted). When this court lacks a sufficient record upon which to determine whether trial counsel was effective, this court may decline to reach the merits of the issue and direct the affected party to seek postconviction relief. *State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006).

Here, appellant raised his ineffective-assistance-of-counsel claim for the first time on appeal. Thus, there is no factual record to determine the basis for the officer's inventory search of the vehicle. A factual record regarding appellant's claim was necessary to provide information regarding (1) the basis for the search of the vehicle; (2) the applicable inventory procedure followed by the law enforcement agency; and (3) appellant's trial counsel's reasoning for not challenging the search. Because the record is not sufficiently developed to review appellant's inventory search claim, we decline to reach the merits of the inventory search issue.

We note, however, that the record is sufficient to review appellant's ineffective-assistance-of-counsel claim under the automobile exception to the warrant requirement. Under this exception, a police officer may search a car without a warrant if they have probable cause to believe the car contains contraband. *Maryland v. Dyson*, 527 U.S. 465,

467, 119 S. Ct. 2013, 2014 (1999); *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007). Probable cause to search exists when, under the totality of the circumstances, "there is a fair probability that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (quotation omitted).

Here, the record reflects that when police were questioning W.G., they spotted a dark green Dodge Neon lurking nearby. The vehicle was the same color, make, and model as the vehicle identified in the paperwork that W.G. grabbed from the vehicle that his robber was driving. W.G. identified the vehicle as similar to the vehicle that the perpetrator had been driving, and after the vehicle was stopped, W.G. identified appellant as the perpetrator. Under these facts, there was a "fair probability" that the knife would be found in the vehicle. Therefore, the search of the vehicle was valid under the automobile exception to the warrant requirement.

Because the search of the vehicle was valid under the automobile exception to the warrant requirement, the search of appellant's vehicle was lawful even if the officers believed their search was conducted under the inventory search exception. *See State v. Perkins*, 582 N.W.2d 876, 878 (Minn. 1998) (stating that a reviewing court applies an "objective standard" in determining the lawfulness of a search by considering the totality of the circumstances, and if the objective standard is met, the court will not suppress evidence even if the officer conducting the search based his or her action on the wrong ground or had an improper motive). Moreover, the lawfulness of the search demonstrates that appellant's trial counsel acted reasonably by deciding not to challenge the search of appellant's vehicle. *See Schneider*, 725 N.W.2d at 522–23 (stating that trial counsel's

failure to raise a particular issue is not considered ineffective assistance of counsel if the attorney could have legitimately concluded that he would not prevail on the claim). On these facts, appellant cannot establish that he was denied the effective assistance of counsel.

Affirmed.