STATE OF MINNESOTA
IN COURT OF APPEALS
A15-0855

State of Minnesota,
Respondent,

vs.

Terry Lee Olson,
Appellant.

Filed April 24, 2017
Affirmed
Halbrooks, Judge

Yellow Medicine County District Court
File No. 87-CR-14-283

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

Keith Helgeson, Yellow Medicine County Attorney, Granite Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jenna Yauch-Erickson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of violation of a harassment restraining order (HRO) under Minn. Stat. § 609.748, subd. 6(d)(1) (2012), arguing that the postconviction

court abused its discretion when it denied his request for a new trial due to ineffective assistance of counsel and failed to conduct an evidentiary hearing. We affirm.

FACTS

On July 11, 2014, the district court issued an HRO prohibiting appellant Terry Lee Olson from having any contact with L.T., including by electronic means, and from being within 300 feet of L.T.'s home. Following service of the HRO on Olson, L.T. received four text messages from Olson between July 11 and July 16, 2014, that read "(1/1)." On July 16, 2014, L.T. saw Olson drive a truck within 300 feet of her home and contacted the police. The state charged Olson with five counts of violating an HRO.

Olson waived his right to a jury trial, and the case proceeded with a bench trial on November 20, 2016. After the state rested, Olson's attorney informed the district court that Olson had a potential alibi defense and an exhibit that he intended to offer in support of the defense through the testimony of S.F., Olson's employer at the time of the offense. The prosecutor objected on the ground that the defense did not provide notice of the alibi defense as required by Minn. R. Crim. P. 9.02, subd. 1(7). There was also no written notice filed with the district court.

When permitted by the district court to make an offer of proof, Olson's attorney stated that he expected S.F. to testify that Olson's timecard for July 16, 2014, would indicate that Olson was at work when L.T. claimed to have seen him drive by her home. Olson's attorney argued that the district court should permit the testimony because he had only discovered the night before trial that Olson was employed at the time of the offenses and had not spoken with S.F. until the morning of trial. The district court ruled that Olson

was prohibited from calling S.F. or presenting the alibi defense because he did not provide proper notice to the state. Olson's attorney did not request a continuance. The district court subsequently found Olson guilty of violating the HRO by driving within 300 feet of L.T.'s home but not guilty of the four counts related to the text messages.

Olson appealed his conviction, and this court stayed the appeal and remanded for postconviction proceedings. In his petition for postconviction relief, Olson requested an evidentiary hearing. The district court denied the petition for postconviction relief without an evidentiary hearing. This appeal follows.

D E C I S I O N

I.

Olson contends that the postconviction court erred when it denied his request for a new trial, arguing that he received ineffective assistance of counsel because his trial attorney failed to request a continuance after the district court prohibited S.F.'s testimony.

"We review the denial of a petition for postconviction relief for an abuse of discretion." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We review the denial of postconviction relief based on a claim of ineffective assistance of counsel de novo because such a claim involves a mixed question of law and fact." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013). The defendant bears the burden of proving that he received ineffective assistance from counsel. *State v. Heinkel*, 322 N.W.2d 322, 326 (Minn. 1982).

"The Sixth Amendment to the U.S. Constitution guarantees the right to reasonably effective assistance of counsel." *State v. Whitson*, 876 N.W.2d 297, 305 (Minn. 2016). To satisfy a claim of ineffective assistance of counsel, the defendant must prove "that

counsel's representation fell below an objective standard of reasonableness" and that "there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *State v. Taylor*, 869 N.W.2d 1, 21 (Minn. 2015). "We need not address both the performance and prejudice prongs if one is determinative." *Patterson v. State*, 670 N.W.2d 439, 442 (Minn. 2003). While the district court determined that Olson's claim of ineffective assistance failed on both prongs, in the interest of judicial economy, we only address the prejudice prong.

Prejudice exists if there is a reasonable probability that, absent counsel's errors, the result of trial would have been different. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). A reasonable probability of prejudice is a "probability sufficient to undermine confidence in the outcome." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). The supreme court has stated that "under the prejudice prong, a defendant must show that counsel's errors actually had an adverse effect in that but for the errors the result of the proceeding probably would have been different." *Rhodes*, 657 N.W.2d at 842 (quotations omitted). We examine the totality of the evidence when determining whether there was prejudice. *State v. Lahue*, 585 N.W.2d 785, 790 (Minn. 1998).

Olson argues that his trial attorney's assistance was ineffective because he failed to request a continuance so that S.F. could testify. Olson contends that this failure was prejudicial because, had S.F. testified, there would have been a reasonable possibility of a different verdict. Olson asserts that S.F. would have testified that his timecard system is accurate and that it indicated that Olson was at work at the time that L.T. alleged that Olson drove past her home.

Had Olson's trial attorney requested a continuance, it is not likely that it would have been granted. In its order convicting Olson of violating the HRO, the district court stated that it, sua sponte, considered granting a continuance to allow the state to investigate the facts surrounding the alibi defense. But the district court noted that no written notice of the defense was provided and that the oral notice was untimely. In addition, the district court stated that, based on the offer of proof, there was no indication that being at work prohibited Olson from driving by L.T.'s home. For these reasons, the district court decided against granting a continuance and denied Olson the opportunity to call S.F. and submit evidence of the timecard. Because the district court sua sponte considered the value in granting a continuance and determined that it would not make a difference, it is not likely that it would have granted a continuance had Olson's trial attorney requested one.

We agree with the district court that had the continuance been granted, it is not probable that S.F.'s testimony would have affected the verdict. In S.F.'s affidavit, which Olson submitted with his petition for postconviction relief, S.F. stated that he "believed Olson was at work" and that the timecard was accurate. But S.F. also stated that he "was not on-site with Olson's crew that day," and therefore, he "could not personally account for Olson's whereabouts the entire day" and could not "provide Olson with an alibi for the entire day."

Additionally, the postconviction court[1] stated that granting the continuance may have been prejudicial to Olson's case. The district court found Olson not guilty of four of

[1] The same judge presided over the court trial and postconviction proceedings.

the five HRO violations. The four counts were based on text messages, each of which contained a padlock symbol and read "(1/1)." Because the state presented no evidence that explained what the padlock symbols or text messages meant, the district court determined that the state had not proved beyond a reasonable doubt that violations of the HRO occurred. The postconviction court noted that, had Olson been granted a continuance, the state may well have gathered more evidence to support convictions on those four charges. Had that been the outcome at trial, Olson would have faced a significantly longer prison sentence.

For the reasons stated above, we conclude that Olson failed to establish that the result of trial probably would have been different had his trial attorney requested a continuance, and thus Olson is not entitled to a new trial.

II.

Olson also contends that the postconviction court erred when it denied his petition for postconviction relief without conducting an evidentiary hearing because a hearing was necessary to develop his ineffective-assistance-of-counsel claim. "We review a postconviction court's decision to deny a petition, including its decision to deny the petition without granting an evidentiary hearing, for an abuse of discretion." *Whitson*, 876 N.W.2d at 303. "[W]e review the postconviction court's underlying factual findings for clear error and its legal conclusions de novo." *Williams v. State*, 869 N.W.2d 316, 318 (Minn. 2015).

"A postconviction court may deny a petition without a hearing only if the record, the facts alleged by the petitioner, and the parties' arguments conclusively show the petitioner is not entitled to relief." *Whitson*, 876 N.W.2d at 303; *see* Minn. Stat. § 590.04,

subd. 1 (2014). This "require[s] the petitioner to allege facts that, if proven, would entitle him to the requested relief." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). "In making this determination, the postconviction court must consider the alleged facts in the light most favorable to the petitioner. However, a petitioner's allegations must be more than argumentative assertions without factual support." *Whitson*, 876 N.W.2d at 303 (citation omitted). But a court must grant an evidentiary hearing when there is a dispute of material facts that "must be resolved in order to determine the issues raised on the merits." *Opsahl*, 677 N.W.2d at 423 (quotation omitted). "If the postconviction court harbors any doubts as to whether to conduct an evidentiary hearing, it should resolve those in favor of granting the hearing." *Id*.

Olson provided three affidavits in support of his petition for postconviction relief that he asserts alleged facts that entitle him to an evidentiary hearing to establish his claim of ineffective assistance of counsel. In his affidavit, Olson alleged that he was at work when he was accused of driving by L.T.'s home. At trial, Olson denied that he drove by L.T.'s home. The district court found Olson's testimony not credible based on his strong interest in the outcome, his insincere manner, and his two prior felony convictions within the preceding ten years. In contrast, the district court found L.T.'s testimony that Olson drove by her home to be credible. Because we defer to the district court's credibility determinations, Olson's allegation that he was at work does not necessitate an evidentiary hearing. *See State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003), *review denied* (Minn. July 15, 2003).

Olson also provided an affidavit of S.F., in which S.F. stated that he believed Olson to be at work but that he was not certain because he was not at the job site that day. S.F.'s affidavit also stated that the timecard was accurate. As previously discussed, this testimony, even if credible, does not establish the prejudice prong of Olson's claim of ineffective assistance of counsel. S.F.'s belief that Olson was at work does not establish that he was actually at work. And S.F.'s statement that the timecard was accurate does not establish that Olson remained at work after punching in and was therefore unable to drive past L.T.'s home.

Olson also provided an affidavit of M.H., a former coworker. But Olson's postconviction petition is based on his assertion that his trial attorney provided him ineffective assistance when he failed to request a continuance to allow S.F. to testify. The record does not indicate any discussion of calling M.H. as a trial witness. As a result, M.H.'s potential testimony has no bearing on whether Olson suffered prejudice as a result of his trial attorney's failure to request a continuance.

Because the facts that Olson alleged in his petition for postconviction relief do not entitle him to relief, we conclude that the postconviction court acted within its discretion by denying Olson's petition for postconviction relief without conducting an evidentiary hearing.

Affirmed.