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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2205
A11-1302

State of Minnesota,
Respondent,

vs.

Jennifer Lynn Smith,
Appellant.

Filed April 2, 2012
Affirmed
Ross, Judge

Ramsey County District Court
File No. 62-K7-05-004467

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Ross, Judge.

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

ROSS, Judge

After a series of drunk driving offenses, Jennifer Smith was again arrested for drunk driving in December 2005 and refused to submit to alcohol testing. She pleaded guilty and received a lengthy prison sentence, which the district court stayed on several conditions, including abstinence from alcohol. Five years later her probation officer found that she had been drinking and the district court revoked her probation and executed her 42-month prison sentence. In this combined direct and postconviction appeal, Smith seeks relief from the execution of her sentence for her 2005 first-degree DWI test refusal conviction. She argues that her attorney was ineffective at her 2010 probation-violation hearing for failing to give the district court favorable information about her treatment history and success on probation. Because Smith fails to establish that her counsel's performance was constitutionally deficient, we affirm.

FACTS

In December 2005 police arrested Jennifer Smith for drunk driving. She refused chemical testing, and the state charged her with one count of first-degree DWI test refusal because she had three prior DWI convictions within the previous ten years. *See* Minn. Stat. § 169A.24, subd. 1(1) (2004). Smith pleaded guilty, and the district court sentenced her to a 42-month prison term, which it then stayed under a seven-year probation period. As conditions of probation, the district court ordered Smith to abstain from alcohol, complete a chemical health assessment and treatment program, and follow the recommendations of the program. The district court warned Smith, "I want you to get the

message very clearly that if you come back in front of me with a probation violation, that is you're drinking, that I will be forced to send you to prison and I don't want you to be surprised by that."

Smith's probation began well. In September 2006 Smith entered an alcohol and drug abuse program at Regions hospital. She completed the two-month program and was discharged in November.

But Smith's early probation success did not last. In March 2010 a probation officer conducted an unannounced visit to Smith's home and found that she had consumed alcohol. The district court conducted a probation-violation hearing. Smith admitted the violation and waived her right to a contested hearing. The district court continued her probation and ordered her to serve 120 days in the workhouse, with the first 20 days in custody. While Smith was at the workhouse, she completed a chemical assessment, which recommended that she attend support-group meetings, establish a sober support network, and maintain contact with the probation officer.

In September 2010 a probation officer conducted another unannounced visit to Smith's home and again found that she had consumed alcohol. A second probation-violation hearing was held on September 17, 2010. Smith again admitted her violation. This time, the district court revoked her probation and executed the 42-month prison sentence.

Smith appealed the revocation to this court. In May 2011 we stayed that appeal so Smith could seek postconviction relief. Smith argued in her postconviction petition that she was entitled to an evidentiary hearing so she could prove she was denied effective

assistance of counsel at her second probation-violation hearing. The district court denied Smith's petition. Smith appealed the postconviction court's ruling, and this court consolidated her two appeals, both of which rest on her claim of ineffective probation counsel.

D E C I S I O N

Smith contends that she was denied effective assistance of counsel because her attorney at the second probation-violation hearing failed to inform the district court of favorable information about her treatment history and success on probation. If the district court had known of her success, she argues, it would have imposed a more lenient penalty or continued her on probation.

We ordinarily review a district court's decision to deny a petition for postconviction relief for an abuse of discretion. *Francis v. State*, 781 N.W.2d 892, 896 (Minn. 2010). But when an appellant first files a direct appeal, which is stayed to allow her to file a subsequent petition for postconviction relief, we will apply the standard of review for direct appeals. *See Santiago v. State*, 644 N.W.2d 425, 439 (Minn. 2002). Smith argues that her counsel was ineffective, and ineffective assistance of counsel claims involve mixed questions of law and fact, which we review de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003).

An ineffective assistance of counsel claim essentially alleges a violation of the Sixth Amendment right to reasonably effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684–85, 104 S. Ct. 2052, 2063, 2064 (1984). Smith's claim faces the strong presumption that her counsel's performance "fell within a wide range of

reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). To prevail on an ineffective-assistance claim, Smith must show that her counsel's performance fell below an objective standard of reasonableness and that without the substandard performance the outcome would likely have been different. *See Strickland*, 466 U.S. at 687–88, 691, 104 S. Ct. at 2064, 2066. We may address the two elements in any order and dispose of the claim if either fails. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006). We reach only the first issue here.

Smith argues that her attorney's representation fell below an objective standard of reasonableness on three grounds: he failed to prepare and become familiar enough with her case to accurately detail her treatment history; he failed to inform the district court what she told him during the hearing; and he failed to give her an opportunity to speak at the hearing. None persuades us.

An attorney's failure to be prepared for a hearing may demonstrate ineffective assistance. *In re Welfare of T.D.F.*, 258 N.W.2d 774, 775 (Minn. 1977). But Smith offers no evidence that her attorney was insufficiently prepared for the hearing besides her personal affidavit asserting that he spoke with her before the hearing for only five minutes. The record indicates that Smith's attorney was adequately prepared. He generally described Smith's treatment history. He disputed the probation officer's claim that she had refused chemical dependency treatment altogether. When the district court questioned whether Smith had completed the treatment ordered in 2006, he explained that "either she completed it or she was never required to do it" because she had never been charged with failing to complete treatment. He later clarified that she had completed

treatment in 2006. And he urged leniency because the violation was only Smith's second in four years.

Smith argues that because of her attorney's deficient performance the district court still believed that she had never completed treatment when it sentenced her. After hearing the arguments of counsel and just before announcing Smith's sentence, the district court stated that Smith had "been offered probation services since she's been on probation and has not done anything, so she's not been able to deal with treatment in a community setting." This statement does not reflect that the district court thought that Smith had never completed treatment. It shows instead that the district court found that probation was not effective for Smith because, despite treatment, she continued to indulge. The arguments of counsel might not have precisely detailed her treatment history by highlighting her brief success on probation, but that is no constitutional-level failure.

Smith also alleges that her attorney was ineffective because he failed to inform the district court what she told him or to provide her the opportunity to speak at the hearing. Smith does not provide the substance of the allegedly omitted information, so we cannot consider the criticism further; we do not address allegations not supported by legal analysis and citation. *State v. Ahmed*, 708 N.W.2d 574, 585 (Minn. App. 2006). Smith's affidavit states that "probation made misstatements about [her] case. . . . [t]hat [she] refused to complete treatment during [her] most recent visit to the workhouse. When [she] asked [counsel] to respond to this inaccurate information, he told [her] to be quiet and that [she] would have an opportunity to respond." Again, Smith's counsel corrected the probation officer's inaccurate allegation and explained to the district court that Smith

had not refused to complete treatment after her first probation-violation hearing. Smith fails to show that her counsel's performance was constitutionally deficient, so her ineffective assistance of counsel claim fails.

Affirmed.