STATE OF MINNESOTA
IN COURT OF APPEALS
A11-365

James Warren Moon, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 17, 2012
Affirmed
Halbrooks, Judge

Crow Wing County District Court
File No. 18-K4-02-000771

James Warren Moon, Jr., Faribault, Minnesota (pro se appellant)

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

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota (for respondent)

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

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

HALBROOKS, Judge

On this court's third review of this matter involving appellant's conviction of second-degree intentional murder, appellant, pro se, challenges the district court's denial

of his postconviction petition. Because we conclude that the postconviction court did not abuse its discretion by denying appellant's petition, we affirm.

FACTS

The underlying facts were thoroughly outlined in appellant James Warren Moon, Jr.'s direct appeal, *State v. Moon*, 717 N.W.2d 429, 435-36 (Minn. App. 2006), *review denied* (Minn. Sept. 19, 2006), and therefore will not be repeated here, except to the extent necessary to resolve the sole issue of whether Moon consented to his attorney's concession during the closing argument of Moon's culpable negligence in the events leading to his brother's death.

At the close of Moon's six-day trial, the district court instructed the jury on first-degree murder, second-degree murder, and second-degree manslaughter. The district court informed the jury that, to convict Moon of second-degree manslaughter, it must find that Moon caused his brother's death by "culpable negligence." During closing argument, Moon's attorney stated:

> If it's not felony murder, then you are dealing with culpable negligence. And I've already conceded to you that bringing a gun loaded into a situation with three people wrestling on the ground, and at some point that gun has the capability of being put in a fire mode and the safety disengaged and it goes off, is culpable negligence.
>
> If you are going to find him guilty, if based on some of those questions that you got during jury selection, where justification was talked about and [the prosecutor] said, well there needs to be some accountability, find my client accountable. Find him guilty of manslaughter in the second degree.

Moon was found not guilty of first-degree murder, but guilty of second-degree murder.

Moon directly appealed his conviction on many grounds, including a claim that three of his attorneys provided him with ineffective assistance. This court affirmed his conviction, but in doing so, expressly stated that Moon's ineffective-assistance claim was "not barred and may be addressed in postconviction proceedings." *Moon*, 717 N.W.2d at 439. Accordingly, Moon petitioned for postconviction relief, asserting 17 claims of ineffective counsel. One of those claims, the only one relevant to this appeal, was that his trial attorney, Charles Halverson, was ineffective because he conceded Moon's guilt in closing argument without Moon's permission. The postconviction court denied the petition, and Moon appealed.

On appeal, this court concluded that it could not discern from the record whether Moon agreed to the concession, and we therefore reversed and remanded to the postconviction court for an evidentiary hearing on that issue. *Moon v. State*, No. A08-1300, 2009 WL 1586990 (Minn. App. June 16, 2009), *review denied* (Minn. Oct. 20, 2009).

The postconviction court held an evidentiary hearing, and subsequently denied Moon's petition. This appeal follows.

D E C I S I O N

Moon raises two issues in his pro se brief. First, without explanation or support in the record, he asserts that the postconviction court erred by addressing issues that were outside the scope of this court's remand. We find no merit in that argument. Second, Moon argues that the district court erred by denying his petition.

We review the decision of the postconviction court under an abuse-of-discretion standard. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). In doing so, we rely on the district court's findings unless they are clearly erroneous. *Id.* "Where there is adequate evidence to sustain findings by a postconviction court on matters of fact . . . and the findings are not manifestly and palpably contrary to the weight of the evidence, we are not inclined to substitute our view of the evidence for that of the postconviction court." *Dobbins v. State*, 788 N.W.2d 719, 725 (Minn. 2010) (quotation omitted).

When we remanded this case, we provided the following guidance to the district court: "[W]e remand to the postconviction court for a hearing to determine whether Halverson had permission to admit that [Moon] caused the death of his brother through culpable negligence." We noted that this issue is critical to Moon's ineffective-assistance claim because, if Halverson conceded to Moon's guilt without consent or acquiescence, his conduct is presumed to be ineffective, necessitating a new trial. *See, e.g.*, *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992); *State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990); *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984). We concluded that Halverson's statement was a concession and that Moon's acquiescence to that concession could not be inferred based on the record before us at the time. *See Moon*, 2009 WL 1586990, at *3.

The district court adhered to our mandate and held an evidentiary hearing at which Moon and Halverson testified. Following the hearing, the district court denied Moon's postconviction petition, finding that "the circumstances surrounding [Moon's] desired defense strategy, which was not before the court of appeals on appeal, tend to indicate

that [Moon] has failed to meet his burden of proving that Halverson did not have permission to concede guilt." We agree with that assessment and conclude, based on the record from both the postconviction hearing and trial, that Moon acquiesced in Halverson's concession of Moon's guilt of second-degree manslaughter.

A defendant's acquiescence can be found in two situations. The first situation is "when defense counsel uses the strategy of conceding the defendant's guilt throughout trial and the defendant fails to object." *State v. Jorgensen*, 660 N.W.2d 127, 132 (Minn. 2003) (citing *Provost*, 490 N.W.2d at 97). And the second situation is "when admitting guilt was an 'understandable' strategy, and the defendant was present at the time the concessions were made and admits that he understood that his guilt was being conceded, but did not object." *Id.* at 133 (citing *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991)). In this case, acquiescence cannot be found by use of a consistent trial strategy. As the district court found, "[Moon] through his testimony changed the entire course of the trial by transmuting the case from one where he was holding the gun when it discharged to one where he was simply present and took no action."

We must therefore address whether acquiescence can be found in the second situation. To do so, we must determine whether the record shows that when Halverson made the concession of guilt (1) Moon was present, (2) he failed to object, (3) the strategy was understandable, and (4) Moon understood that Halverson was conceding his guilty. *Id.*; *see also State v. Prtine*, 799 N.W.2d 594, 598 (Minn. 2011) (breaking the inquiry into four elements). The first two elements are undisputed: Moon was present and he did not object. We are therefore left to determine only whether Halverson's

strategy was understandable and whether Moon understood that his guilt was being conceded.

Understandable Trial Strategy

We review de novo whether the concession of guilt was an understandable trial strategy. *Prtine*, 799 N.W.2d at 599. In doing so, we rely on the postconviction court's factual findings unless they are clearly erroneous. *Id.*

The postconviction court found that Moon's strategy going into the trial was to "present a self-defense claim and at the same time argue manslaughter in the first degree as a fallback plan." But after Moon testified that he was not the one holding the gun, that strategy "became untenable." These findings are supported by the record.

Self-defense requires the intentional commission of an act by the defendant—otherwise there would be no conduct for which the defendant argues self-defense as a complete justification. Likewise, first-degree manslaughter requires, among other things, "intentionally caus[ing] the death of another person." Minn. Stat. § 609.20, subd. 3 (2010). Officer Bruce London testified at trial that Moon told him in the course of the investigation that he had fired the shot that killed his brother. After the state rested, Moon, to Halverson's surprise, opted to testify. In direct contrast to the officer's testimony, Moon testified that he was *not* the shooter. Halverson described his reaction to this change in Moon's account of the incident as follows:

> I felt that it somewhat handcuffed me. It was a different theory than we had kind of been projecting on. My recollection is, is that during that direct examination I stopped or infrequently asked questions . . . . I had some concerns

> that that was a new theory, and I had some concern that it may be perjured testimony.

Once the previously agreed-upon strategy of self-defense with first-degree manslaughter as a fallback was no longer viable, second-degree manslaughter became an alternative. A person is guilty of manslaughter in the second degree if a person causes the death of another by "culpable negligence whereby the person creates an unreasonable risk, and consciously takes chances of causing death or great bodily harm to another." Minn. Stat. § 609.205(1) (2010).

It is clear from this record that Halverson shifted the defense strategy to one of conceding guilt to culpable negligence in an attempt to salvage Moon's defense. The supreme court has repeatedly held that it is objectively reasonable for a defense attorney to concede guilt to a lesser-included charge in the hope of increasing credibility with the jury and obtaining acquittal on the more serious charge. *See Prtine*, 799 N.W.2d at 599 (concluding that "it is an understandable trial strategy to concede an intent to kill in order to try to build credibility with the jury in the hope of avoiding conviction on the first-degree premeditated murder charge"); *Moore*, 458 N.W.2d at 96 (observing that an attorney's attempt to avoid a greater charged offense by admitting element of lesser-included offense "cannot be condemned"); *Wiplinger*, 343 N.W.2d at 861 (noting that it may "make sense" for a defense attorney to admit defendant's guilt on the less serious of two charges in order to obtain an acquittal on the more serious charge). On this record, where Moon's trial testimony eviscerated the theory of defense, Halverson's strategy was objectively reasonable.

Understanding that Guilt was Being Conceded

The district court did not make an express finding that Moon understood that guilt was being conceded. But it did find that Moon "consistently wanted a justification or mitigation strategy utilized throughout trial," and that it "[did] not believe it plausible" that Moon "would not have acquiesced to Halverson conceding or implying guilt to manslaughter in the second degree." A fair reading of the district court's postconviction order is that the district court found that Moon not only understood his attorney's mitigation strategy, but that it is implausible that he would not have supported it.

In reviewing this implied finding of Moon's understanding under a clearly erroneous standard, *see Prtine*, 799 N.W.2d at 599, we must uphold it, as it is supported by the record. Moon admitted during the postconviction hearing that he "understood the words" that his attorney was saying during closing argument. The only reason he did not object to those words, so he claims, is because he did not know he had the ability to object without going through his attorney. At no point does Moon suggest he did not understand.

Because the altered trial strategy was understandable, and because Moon was present, did not object, and understood that he was conceding guilt, Moon's acquiescence to the concession of culpable negligence is supported by this record. *Prtine*, 799 N.W.2d at 598.

We note that Moon also argues that the record does not support the district court's finding that Halverson must have asked for and received express consent. At the evidentiary hearing, Halverson, whose memory of the case was weakened by the six-year

lag between trial and the evidentiary hearing, could not remember whether he received Moon's express consent. The postconviction court reasoned that Halverson would have received it because he knew that he was required to. We agree with Moon that the record does not support a finding of express consent. Halverson stated at the evidentiary hearing that he did not believe that he was conceding Moon's guilt in his closing argument. If he did not believe that he was conceding guilt, it would be illogical for Halverson to have requested and obtained consent. But this erroneous finding does not render infirm the district court's decision to deny the petition based on Moon's acquiescence.

Affirmed.