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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-873

Robert David Storberg, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 9, 2012
Affirmed
Ross, Judge

Anoka County District Court
File No. 02-T7-97-23537

Robert D. Storberg, Arden Hills, Minnesota (pro se appellant)

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

Patrick J. Sweeney, Joseph J. Murphy, Sweeney, Borer and Sweeney, Little Canada, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and Ross, Judge.

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

ROSS, Judge

Robert Storberg sought relief from his 1997 domestic-assault conviction, and the district court denied his postconviction petition as untimely. We affirm.

FACTS

Robert Storberg pleaded guilty to domestic assault on November 5, 1997, after the state charged him for choking and hitting his wife. The district court sentenced Storberg to 90 days in jail and a $210 fine, but it stayed the sentence conditioned on probationary terms, including Storberg's attending anger-management classes. Storberg failed to attend the classes, so the district court revoked his probation and executed the sentence.

Since Storberg's September 1998 release, he has twice petitioned the district court for expungement and to withdraw his guilty plea, and the court denied his petitions. Storberg filed a similar petition in February 2010, but he withdrew it and filed the petition for postconviction relief that is the subject of this appeal. That petition contended that his 1997 conviction must be vacated on four grounds: the lack of physical evidence; the involuntariness of his plea; his substandard legal representation; and his uncovering of new evidence. The district court deemed the petition untimely under the statutory two-year limit. Storberg appeals.

D E C I S I O N

We review a summary denial of postconviction relief for an abuse of discretion and determine whether sufficient evidence supports the district court's findings. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). But we review de novo a postconviction court's legal determinations such as the effectiveness of counsel. *Schneider v. State*, 725 N.W.2d 516, 520 (Minn. 2007).

Storberg challenges the district court's decision that his postconviction petition was untimely. A convicted person generally has only two years "after the later of . . . the

entry of judgment of conviction or sentence if no direct appeal is filed" to file a petition for postconviction relief. Minn. Stat. § 590.01, subd. 4(a) (2010). Storberg filed his petition more than 13 years after his conviction and sentence. The statute provides for several exceptions to the deadline, including the discovery of new evidence and establishing to the district court's satisfaction that the petition is "not frivolous and is in the interests of justice." *Id.*, subd. 4(b). Storberg maintains that his petition meets these two exceptions and should have been considered by the district court.

Storberg's contention that he meets the newly-discovered-evidence exception is not persuasive. His purported "newly discovered evidence" is an October 1997 Order for Dismissal in which the district court ordered, "[b]ased on failure of burden of proof, . . . that the Petition of [Storberg's wife for an order for protection against Storberg] be . . . denied and dismissed." The supposed "newly discovered" order bears the name of "Robert Storberg" as a party who appeared at the hearing, however, and he acknowledges that he was aware of it at the time he pleaded guilty to domestic assault the next month. Because Storberg attended the hearing, was aware of the outcome, and discussed the outcome with his criminal attorney before he pleaded guilty, his new-evidence argument fails. Storberg seeks to avoid the effect of his contemporaneous knowledge of this document by asserting that his newly discovered "evidence" includes his "recent" awareness, based "upon review by an independent attorney," that "if a claim of abuse cannot be sustained in a family court case, the same would never survive a criminal trial." New or not, the attorney-generated revelation is an argument about evidence; it is not itself evidence.

Storberg attempts to argue around this problem; he asserts that the order did not actually constitute "evidence" *to him* until he recently learned of its relevance *as evidence*. In other words, a thing is evidence not because of its objective probative value but because a petitioner *perceives it* as having probative value. As Storberg puts it, once he "became aware of its relevance, [it] thereby bec[ame] 'newly discovered' to him." Under his reasoning, presumably, a petitioner could render any object evidence, then not evidence, then evidence again, at each moment he changes his mind about its probative nature. This might go on endlessly if, for example, he is particularly philosophical. The state pans Storberg's novel reasoning as "absurd and . . . [rendering] the two-year time limitation . . . meaningless." We reach the same conclusion but more mildly describe our holding with Storberg's own admission: "There is no caselaw or precedent to support this argument."

Storberg next contends that the district court failed to consider two of his claims that would have excepted his petition from the statutory time-limit breach: that he was denied effective assistance of counsel and that he brings his petition in the interests of justice. He is correct that the district court failed to consider these two claims, but he is not correct that this failure constitutes an abuse of discretion.

Storberg's ineffective-assistance-of-counsel argument is implicitly premised on the notion that the petition survives the time limit because Storberg did not discover his lawyer's ineffectiveness until recently, within the past two years. The state does not challenge that premise, and we may easily address the argument on substance without considering whether it also fails the statutory deadline.

The argument arises from the Sixth Amendment guarantee to each defendant of the right to reasonably effective assistance of trial counsel. To prevail, a challenger ordinarily must show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that it is reasonably probable that, but for his counsel's poor performance, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999). In the context of a convicted person who, like Storberg, claims that his counsel's errors led him to plead guilty, he establishes that he received constitutionally ineffective assistance of counsel by showing that his counsel's performance fell below an objective standard of reasonableness and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 370 (1985).

Although Storberg was found guilty by his own admission and guilty plea rather than by a trial, he fails to assert or argue that, but for his counsel's errors, he would not have pleaded guilty. Instead, he implies that his attorney's pretrial performance was as "a mere spectator" who made "no comment at all at the resentencing hearing," such that he need not now prove prejudice at all. He relies on a line of factually and procedurally distinguishable cases in which attorneys were deemed ineffective without the need to prove prejudice based on egregious nonparticipation, such as their sleeping during trial or their failing at trial to subject the prosecution's case to any meaningful challenge. *See U.S. v. Cronic*, 466 U.S. 648, 659–60, 104 S.Ct. 2039, 2047 (1984) (holding that if

counsel entirely fails to subject the prosecution's case to meaningful adversarial testing there has been a denial of Sixth Amendment rights and no specific showing of prejudice is required to prove that counsel was ineffective). Our review of the record indicates that Storberg's attorney was in fact engaged in the guilty-plea proceedings – not asleep or failing to participate. Because Storberg does not point to any evidence or argument to the district court tending to prove prejudice, the district court had no basis on which to grant postconviction relief based on ineffective assistance of counsel.

Storberg does add vaguely that "the outcome would have been extremely different" if his attorney had "acted on behalf of [Storberg]." But he does not explain what outcome he refers to or *how* or *why* the outcome would have been different. Even if we were to read between the lines of his brief and speculate that he is implying that he would not have pleaded guilty but for the alleged errors, still the district court rightly rejected his petition because the alleged errors are not constitutional deficiencies.

The alleged errors that Storberg identifies are his attorney's failure to introduce into the sentencing hearing the October 1997 civil order that we have previously addressed, and his attorney's failure to move the court to exclude his wife's testimony against Storberg based on marital privilege. Neither warrants postconviction relief.

Storberg fails to inform this court how the 1997 civil order would have changed the result of his criminal proceeding generally or been relevant to the plea hearing specifically. He offers no evidence supporting his contention that the failure to meet the burden of proof in the civil order-for-protection matter equates to the failure to meet the burden in the criminal domestic-abuse matter; more to the point, he does not explain why

his wife's lack of proof in prosecuting *her* petition for an order for protection has any relevance whatsoever to *the state's* ability to meet *its* burden of proof in the criminal proceeding. Storberg might have considered using the October 1997 order as a basis to impeach his wife's credibility if she testified against him at trial, but the availability of an impeachment tool certainly does not equate to the decimation of the state's case. It is not at all uncommon for the state to secure a domestic-abuse conviction after the initially cooperative victim of the abuse has second thoughts and later recants her allegations.

We also see nothing in Storberg's contention that, without his wife's testimony (that he argues would have been excluded by marital privilege) he could never have been convicted. The argument overlooks the fact that he pleaded guilty and that his guilty plea relied on his own admission. The argument also fails on the statutory exception to marital testimonial privilege: a spouse may testify in "a criminal action or proceeding for a crime committed by one [spouse] against the other." Minn. Stat. § 595.02, subd. 1(a) (2010). Storberg's legal representation did not fall below the objective standard of reasonableness.

Storberg also argues that the district court improperly declined to consider the interests-of-justice exception to the two-year deadline. But Storberg has made no arguments in addition to the unpersuasive ones we have just rejected. We are confident that the district court did not overlook any injustice when it dismissed Storberg's postconviction petition.

Affirmed.