STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0014
A12-2028

State of Minnesota,
Respondent,

vs.

Marc Joseph Arens,
Appellant.

Filed July 29, 2013
Affirmed
Chutich, Judge

Ramsey County District Court
File No. 62-CR-10-6728

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

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

Mark Joseph Arens, St. Paul, Minnesota (pro se appellant)

Considered and decided by Smith, Presiding Judge; Peterson, Judge; and Chutich, Judge.

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

CHUTICH, Judge

Appellant Marc Joseph Arens appeals his conviction of possession of shoplifting gear and the district court's order denying his petition for postconviction relief. Arens

argues that the district court erred by refusing to grant an evidentiary hearing on his claim of ineffective assistance of counsel and by admitting physical evidence and his statements to the arresting officer. Arens asserts pro se arguments as well. Because the district court properly denied Arens's request for an evidentiary hearing and properly admitted the evidence and statement, and because we find Arens's pro se contentions to be without merit, we affirm.

FACTS

On July 30, 2010, St. Anthony Police Officer James South responded to a call about a possible theft in progress at the St. Anthony Village Liquor Store. When he entered the store, Officer South made eye contact with the manager, who pointed out the suspect. Officer South decided to wait outside for the suspect to leave.

When the suspect emerged from the store, Officer South stopped him and identified him as appellant Marc Joseph Arens. Officer South asked Arens if he could search him and Arens said yes. Officer South patted him down and then searched a brown paper bag and a backpack that Arens was carrying. In the brown paper bag, Officer South found a six-pack of beer and, in the backpack, he saw two items wrapped in aluminum foil.

After he searched Arens, Officer South told Arens that he was not under arrest but that he was being detained for further investigation. Officer South asked Arens to wait in the squad car and the officer left the car door open while he went to speak with the liquor store manager. The store manager told him that Arens had paid for the beer. Officer South returned to the squad car and searched Arens's backpack a second time,

unwrapping the items in aluminum foil to reveal DVDs and finding several other sheets of aluminum foil in a manila envelope.

Based on his experience, Officer South knew that wrapping DVDs in aluminum foil was a means of transporting them past store security systems. Officer South asked Arens where he got the DVDs, and Arens responded that he brought them from home. After Officer South asked again, Arens admitted that he had taken the DVDs from a nearby Wal-Mart.

Officer South then told Arens that he was under arrest, locked him in the back of his squad car, and drove to the nearby Wal-Mart. After he spoke with Wal-Mart personnel, Officer South returned to the squad car and Arens again admitted that he had stolen the DVDs from the store. Officer South drove Arens to the St. Anthony police department and read him his *Miranda* rights, after which Arens made no more statements.

Ramsey County charged Arens with possession of shoplifting gear. *See* Minn. Stat. § 609.521(b) (2010). Arens filed a motion to suppress all statements and admissions that he made and the physical evidence that Officer South discovered. The district court denied the motion in part, concluding that Arens consented to the search and that he was not in custody when he first admitted to stealing the DVDs. But the district court suppressed Arens's second admission that he had stolen the DVDs after Officer South told him he was arrested.

Arens waived his right to a jury trial and agreed to a stipulated-facts trial under Minnesota Rule of Criminal Procedure 26.01, subdivision 4. The district court convicted him of possession of shoplifting gear.

Arens filed an appeal with this court and then moved to stay that appeal to file a postconviction petition with the district court. This court granted the stay. Arens filed a petition for postconviction relief, asserting that he received ineffective assistance of counsel and requesting an evidentiary hearing. The district court denied his petition. This appeal followed.

D E C I S I O N

I. Ineffective Assistance of Counsel

Arens contends that he received ineffective assistance of counsel at trial and that the district court erred by not granting an evidentiary hearing on these grounds. The district court "may dismiss a petition for postconviction relief without conducting an evidentiary hearing if the petition, files, and record 'conclusively show that the petitioner is entitled to no relief.'" *Zenanko v. State*, 587 N.W.2d 642, 644 (Minn. 1998) (quoting Minn. Stat. § 590.04, subd. 1 (2010)). We review the denial of a postconviction evidentiary hearing for an abuse of discretion. *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002).

To succeed on an ineffective-assistance-of-counsel claim, Arens must show that his trial counsel's representation "fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001) (quotation

omitted). "To act within an objective standard of reasonableness, an attorney must provide his or her client with the representation that an attorney exercising the customary skills and diligence . . . [of a] reasonably competent attorney would perform under similar circumstances." *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (quotation omitted). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation omitted). On appeal, we do not review matters of trial strategy. *State v. Vick*, 632 N.W.2d 676, 688 (Minn. 2001).

Cross-Examination

Arens first contends that his trial counsel was ineffective because she failed to fully cross-examine Officer South about inconsistencies in his testimony and his police report. In his police report, Officer South stated that he told Arens that he was going to be searched:

> The suspect walked to the side of the doors where I was standing and I asked him if [he] had anything on him and he said he did not. [I then] told him I was going to search his person and articles he was carrying to make sure he did not have any merchandise or weapons on him.

Then, at the suppression hearing, Officer South testified that he asked Arens if he could search him, and Arens consented. Officer South testified that he then proceeded to search his person, the brown paper bag that Arens was carrying, and Arens's backpack. Arens's counsel cross-examined Officer South but did not question him about this inconsistency.

Generally, Minnesota courts have found that the scope of cross-examination is a matter of trial strategy. *See, e.g.*, *Vick*, 632 N.W.2d at 689 (declining to review

appellant's claim that trial counsel was ineffective for failing to "vigorously cross-examine" a witness). "Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts." *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Accordingly, Arens's claim of ineffective assistance of counsel based on the scope of cross-examination fails.

Scope of Consent

Arens additionally argues that his trial counsel was ineffective because she failed to argue that the officer's second search of Arens's backpack exceeded the scope of his consent. Arens cites no evidence in the record to support this argument or to demonstrate that he objected to the search of his backpack. *See State v. Powell*, 357 N.W.2d 146, 149 (Minn. App. 1984) (finding that continued voluntary cooperation is consent), *review denied* (Minn. Jan. 15, 1985). Arens's trial counsel was not required to present an argument that was unsupported by the evidence in the record. *State v. Dickerson*, 777 N.W.2d 529, 535 (Minn. App. 2010) ("An attorney's failure to raise meritless claims does not constitute deficient performance and cannot provide the basis for a claim of ineffective assistance."), *review denied* (Minn. Mar. 30, 2010).

At the suppression hearing, Arens's counsel argued that the initial search of his backpack exceeded the scope of the *Terry* stop. Counsel's decision to not present another argument is a matter of trial strategy to which we defer. *See State v. Lahue*, 585 N.W.2d 785, 789–90 (Minn. 1998) (holding that "[p]articular deference is given to the decisions of counsel regarding trial strategy"). Accordingly, Arens's claim of ineffective assistance of counsel fails.

Because Arens's petition and the record conclusively show that Arens is not entitled to relief on his claim of ineffective assistance of counsel, the district court did not abuse its discretion by denying him an evidentiary hearing.

II. Suppression of Statements

Arens next contends that the district court erred by not suppressing his first statement to Officer South because the officer did not read him his *Miranda* rights. "A *Miranda* warning is required when a police officer conducts a custodial interrogation of a suspect." *State v. Hince*, 540 N.W.2d 820, 823 (Minn. 1995). A person is in custody when the circumstances lead a reasonable person to believe that her liberty has been restrained to the degree commonly associated with a formal arrest. *State v. Staats*, 658 N.W.2d 207, 211 (Minn. 2003). Whether a defendant was in custody at the time of a statement is a mixed question of law and fact. *State v. Wiernasz*, 584 N.W.2d 1, 3 (Minn. 1998). We review a district court's findings of fact for clear error, and we review de novo the district court's determination as to whether the defendant was in custody. *State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998).

The district court found that Arens was sitting in the back of Officer South's unlocked squad car when he first told Officer South that he had stolen the DVDs. Officer South's testimony supports this finding. Officer South testified that when he first asked Arens where the DVDs came from, Arens was sitting in the back of his squad car with the door open. He further testified that, at this point, he had told Arens that Arens was not under arrest and that he had not handcuffed Arens. Only after Arens admitted that he had taken the DVDs from the nearby Wal-Mart did Officer South tell him that he was

under arrest and lock him in the back of the car. Based on these findings, the district court concluded that Arens was not in custody when he first admitted that he had stolen the DVDs.

Arens asserts that he was in custody because Officer South's detention exceeded the scope of a *Terry* stop, and therefore, the stop had converted into a de facto arrest. We find this argument unpersuasive.

Under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968), the police may stop a person for questioning if a reasonable suspicion exists that the person is engaged in criminal activity. "The permissible scope of such an intrusion depends on the circumstances which justified it in the first place." *State v. McKissic*, 415 N.W.2d 341, 344 (Minn. App. 1987). *Terry* stops are not subject to rigid time limits; the primary concern is "whether the police diligently pursued a means of investigation likely to confirm or dispel their suspicions quickly." *Id*. Therefore, any "detention is limited to that time necessary for the police officers to confirm or ease their suspicions, after which the individual must be released unless probable cause to arrest appears." *Id.* at 345.

After Arens consented to a search, Officer South had reasonable suspicion of two separate criminal acts: theft from the liquor store and theft of the DVDs. The officer took reasonable steps to investigate each by speaking to the manager of the liquor store and asking Arens about the DVDs. Because Officer South was conducting a limited investigation based on his reasonable suspicion, Arens's detention had not exceeded the scope of a *Terry* stop when he first admitted to stealing the DVDs.

Moreover, we conclude that the overall circumstances of Officer South's questioning support the district court's conclusion that it was not a custodial interrogation. The supreme court has identified several factors that may show that a suspect is in custody, including: "police interviewing the suspect at the police station; the officer telling the individual that he or she is the prime suspect; officers restraining the suspect's freedom; the suspect making a significantly incriminating statement; the presence of multiple officers (six); and a gun pointing at the suspect." *Staats*, 658 N.W.2d at 211. Conversely, other factors support a conclusion that a suspect is not in custody. These factors include: "questioning taking place in the suspect's home; police expressly informing the suspect that he or she is not under arrest; the suspect leaving the police station at the close of the interview without hindrance; the brevity of questioning . . . , the suspect's freedom to leave at any time; [and] a nonthreatening environment. *Id.* at 212.

Here, the totality of the circumstances shows that a reasonable person in Arens's position would not have believed that he was in police custody to the degree associated with a formal arrest. Arens was sitting in the back of an unlocked police car and was not handcuffed. *See State v. Moffatt*, 450 N.W.2d 116, 118–20 (Minn. 1990) (concluding that placing a suspect in a squad car for temporary detention as a way to "freeze the situation" is not necessarily an arrest). In addition, Officer South, the only officer present, specifically told Arens that he was not under arrest. Because Arens was not under arrest at the time he gave the statements, a *Miranda* warning was unnecessary.

Accordingly, the district court did not err by admitting Arens's first statement that he stole the DVDs.

III. Arens's Pro Se Arguments

Ineffective Assistance of Trial Counsel

Arens argues in his pro se brief that his trial counsel was ineffective because she failed to provide him with police reports, disregarded his handwritten notes during the suppression hearing, discouraged him from testifying at the hearing, and failed to subpoena the manager of the liquor store.

None of the grounds that Arens raises show ineffective performance of counsel. On appeal, we will not second-guess counsel's decisions regarding trial preparation. Choosing a defense to present, determining whether to call a witness, determining what objections to make, and determining how to cross-examine witnesses are matters of trial strategy. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) ("What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence."); *Lahue*, 585 N.W.2d at 789–90 (accord). In sum, Arens's claim of ineffective assistance of counsel is without merit because he cannot demonstrate that his trial counsel's performance fell below an objective standard of reasonableness.

Ineffective Assistance of Appellate Counsel

Arens next contends that his appellate counsel was ineffective because he refused to argue that Arens's trial counsel was ineffective for failing to provide him with a police

report and advising him not to testify at the suppression hearing. Arens also argues that his appellate counsel was ineffective because he refused to include appellant's affidavit, did not help Arens arrange polygraph evidence, and failed to use an expert attorney affidavit on appeal.

We conclude that this argument is also without merit. "The right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal that the trial record supports." *Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986). In addition, appellate counsel is not required to raise on appeal every possible claim of ineffective assistance of trial counsel if appellate counsel could reasonably conclude that the claim would lack merit. *Reed v. State*, 793 N.W.2d 725, 736 (Minn. 2010). Here, Arens presents no evidence that his appellate counsel's judgments were incorrect or that counsel specifically failed to raise any reasonable argument that could have affected the outcome of his appeal.

Affirmed.