STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1194
A16-1196

State of Minnesota,
Respondent,

vs.

Andre Jones,
Appellant.

Filed December 26, 2017
Affirmed
Reilly, Judge

Hennepin County District Court
File Nos. 27-CR-13-10691, 27-CR-15-31468

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Rodenberg, Judge; and Reilly, Judge.

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

REILLY, Judge

Appellant Andre Jones challenges the postconviction court's denial of his petition for relief, arguing that he received ineffective assistance of counsel and that the

postconviction court abused its discretion by denying his petition without an evidentiary hearing. We affirm.

D E C I S I O N

I.

A person convicted of a crime may petition the district court for relief from his conviction or sentence based on a claim that "the conviction obtained or the sentence . . . violated the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1) (2016). We review the denial of postconviction relief for abuse of discretion. *Gulbertson v. State*, 843 N.W.2d 240, 244 (Minn. 2014). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotations omitted). In reviewing a postconviction court's decision to deny relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

A defendant has the right to effective assistance of counsel. *State v. Bobo*, 770 N.W.2d 129, 137 (Minn. 2009). To prevail on an ineffective-assistance-of-counsel claim, a defendant must show "(1) that his counsel's representation 'fell below an objective standard of reasonableness'; and (2) 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence

that a reasonably competent attorney would perform under similar circumstances." *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). Trial counsel's performance is presumed reasonable, *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007), and appellant bears the burden of proving both prongs of the *Strickland* test, *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

Here, appellant was convicted of first-degree burglary stemming from an incident when he broke into an occupied home and stole an Xbox game console. One of the occupants of the home, A.T., woke up during the burglary and confronted appellant. A.T. described appellant as a "black male wearing a red and black baseball cap [and] black clothing." Police officers found appellant within a few blocks of the home and discovered the Xbox leaning against a nearby house. Appellant was wearing a red and black baseball hat, a black hooded sweatshirt, black denim pants, and a black tee shirt. The officers handcuffed appellant and placed him in the backseat of the police car. The officers brought A.T. to their squad car and asked her to participate in an identification process. The officers asked appellant to get out of the squad car and asked A.T., "Was it him?" A.T. responded: "Yes." Following conviction and sentencing, appellant sought postconviction relief, arguing that he was deprived of effective assistance of counsel because his attorney failed to challenge the identification procedure.

Courts apply a two-part test to determine whether an identification procedure must be suppressed for violating a defendant's due-process rights. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). We first look to whether the identification procedure was "unnecessarily suggestive" in that the defendant "was unfairly singled out for

identification." *Id*. (citation omitted). "However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable." *Id*. (citations omitted). A totality-of-the-circumstances analysis considers (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the degree of attention paid to the criminal; (3) the accuracy of the prior description of the criminal; (4) the level of certainty demonstrated by the witness during the identification; and (5) the time between the crime and the confrontation. *Id*.

We determine that the identification procedure was reliable under the totality of the circumstances, even if the show-up identification procedure used by the police officers was unnecessarily suggestive. *See State v. Young*, 710 N.W.2d 272, 282 (Minn. 2006) (stating that identification evidence may be admissible if totality of circumstances establishes reliability of evidence, even if identification procedure was unnecessarily suggestive). First, A.T. had the opportunity to view and interact with appellant at the time of the crime. A.T. walked into her living room and saw appellant holding her Xbox. A.T. asked, "[W]hat are you doing? Who are you?" Appellant pushed A.T. and ran out of the house. Second, A.T. paid a high degree of attention to appellant. She saw appellant standing in her living room, and asked what he was doing in the house. A.T. was standing close enough to appellant to briefly grab him as he ran out of the house. A.T. was also able to describe his physical appearance as a "black male wearing a red and black baseball cap [and] black clothing." Third, A.T.'s description of appellant was accurate. A.T. described what appellant was wearing, and police officers noted that appellant was wearing a red and black

baseball hat, a black hooded sweatshirt, black denim pants, and a black tee shirt. Fourth, A.T. displayed a high degree of certainty during the identification. Police officers asked A.T. if appellant was the man she saw in her living room, and A.T. responded, "Yes." The identification occurred during the daytime, and A.T. was standing 30 to 50 feet away from appellant when she identified him. Fifth, very little time passed between the crime and the identification.

Taken as a whole, the identification was reliable under the totality of the circumstances, even if the show-up identification procedure was impermissibly suggestive. Because the identification evidence would not have been suppressed at trial, the trial result would not have been different and trial counsel's representation did not fall below an objective standard of reasonableness.

Because appellant's identification-procedure claim lacks merit, appellant's trial counsel did not act unreasonably by declining to raise the argument at trial. We ordinarily "give trial counsel wide latitude to determine the best strategy for the client." *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013); *see also Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (stating "[w]e will generally not review an ineffective-assistance-of-counsel claim that is based on trial strategy" and that "[t]he extent of trial counsel's investigation is considered part of trial strategy"). Here, appellant cannot satisfy the two-part *Ostrem* test regarding the identification procedure. And trial counsel "does not act unreasonably by not asserting claims that counsel could have legitimately concluded would not prevail." *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009). Thus, appellant's counsel did not act unreasonably by declining to present appellant's identification-procedure challenge at trial.

See Case v. State, 364 N.W.2d 797, 800 (Minn. 1985) (stating that "counsel has no duty to include claims which would detract from other more meritorious issues"). The postconviction court acted within its discretion in denying appellant's ineffective-assistance-of-counsel claim.

On this record, we determine that appellant failed to satisfy the first prong of *Strickland* because he did not demonstrate that his trial counsel's performance fell below an objective standard of reasonableness. And, because a reviewing court need not address both prongs of the *Strickland* test if one is dispositive, *Hawes v. State*, 826 N.W.2d 775, 783 (Minn. 2013), we need not reach the second prong.

II.

A postconviction court is required to hold an evidentiary hearing on a petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief. . . ." Minn. Stat. § 590.04, subd. 1 (2016); *Erickson v. State*, 842 N.W.2d 314, 318 (Minn. 2014). Thus, a hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him to the relief requested. *Davis v. State*, 784 N.W.2d 387, 392 (Minn. 2010). "Any doubts about whether to conduct an evidentiary hearing should be resolved in favor of the defendant seeking relief." *Nicks*, 831 N.W.2d at 504. We review the postconviction court's decision on whether to hold an evidentiary hearing for an abuse of discretion. *Riley*, 819 N.W.2d at 167. Here, the postconviction court determined that appellant was not entitled to a hearing because his claims were "without merit" and "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." We agree with the district

court, and determine that appellant is not entitled to an evidentiary hearing where the crux of the dispute centers on unreviewable trial strategy. Accordingly, the postconviction court did not abuse its discretion by denying appellant's request for an evidentiary hearing.[1]

Affirmed.

[1] Appellant argues that if his conviction is reversed, he is also entitled to an order vacating two related probation revocations that were based solely on the commission of this offense. Because appellant is not entitled to reversal, we do not reach this argument.