STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0848

State of Minnesota,
Respondent,

vs.

Brandon Jerome Doby,
Appellant.

Filed December 10, 2018
Reversed and remanded
Randall, Judge[*]

Hennepin County District Court
File No. 27-CR-16-14024

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Randall, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

RANDALL, Judge

Appellant Brandon Jerome Doby argues he received ineffective assistance of counsel. Appellant argues that his counsel was constitutionally deficient for (1) failing to file a meritorious motion to suppress evidence; (2) failing to object to the admission of prejudicial evidence of prior domestic abuse; and (3) questioning appellant on direct examination about prior convictions after telling appellant that he should testify or else the state would bring out his criminal history. Appellant contends that the postconviction court improperly denied his petition for postconviction relief without an evidentiary hearing. He argues the record did not conclusively show that he was not entitled to relief. We reverse and remand to the district court for an evidentiary hearing on whether defense counsel's legal advice constituted ineffective assistance of counsel.

FACTS

In February 2016, State Trooper Shaune Misgen stopped appellant for a MnPass violation. Trooper Misgen asked appellant for his driver's license and proof of insurance, but appellant only provided a picture ID. Appellant looked "all over the vehicle," including on the visor and in the armrest for proof of insurance, but avoided the glove box. Trooper Misgen reached through the open passenger window to try and open the glove box, but it was locked. Trooper Misgen then asked appellant numerous times to unlock the glove box with the car keys, which he repeatedly refused to do before she took his keys.

After taking the keys, Trooper Misgen went back to her car where she learned that appellant's girlfriend owned the car and appellant's driver's license was revoked. Trooper

Misgen then impounded the car and conducted an inventory search. When she opened the glove box, Trooper Misgen immediately saw a handgun which turned out to be "a loaded Smith & Wesson .40-caliber handgun that had a round in the chamber and seven rounds in the [magazine]." Trooper Misgen seized the gun as evidence. The state conducted DNA testing on the gun, and appellant's DNA profile could not be excluded from the profiles detected. After the state received the DNA test results, appellant was charged under Minn. Stat. § 624.713, subd. 1(2) (Supp. 2015), as an ineligible person possessing a firearm.

At trial, appellant testified on his own behalf. Appellant stipulated beforehand to being prohibited from possessing a firearm. The state then agreed it would not exercise its right to bring out appellant's lengthy criminal history to be presented to the jury. One exception,[1] which was permitted by the district court, was that the state intended to introduce evidence of appellant's conviction for lying to a police officer. *See* Minn. R. Evid. 609(a). Otherwise, the state, by its agreement, did not file any motions seeking to introduce convictions covered by the stipulation. In a postconviction affidavit, appellant said that defense counsel "told me that he would ask me about my prior convictions and criminal history during my testimony because the prosecutor was going to ask me about them anyway."

Despite having stipulated to his client being a prohibited person from possessing a firearm to prevent the state from introducing his lengthy criminal history, defense counsel

[1] The state also moved, and the court permitted, to introduce evidence of domestic violence by appellant for the limited purpose of impeaching testimony by appellant's girlfriend.

then questioned appellant about his criminal history. Defense counsel's direct examination of appellant produced this stunningly prejudicial exchange:

> Q: But let's start a little bit with your background. You are a prohibited person from owning a firearm; is that correct?
> A. I am.
> Q. And that relates to what?
> A. A 2004 conviction for aggravated robbery, first degree, and a kidnapping.
> Q. And that was with a firearm, correct?
> A. Yes, it was.
> Q. And the details are, just in a real quick summary?
> A. The situation was I was selling drugs at the time. I got into a situation where I was robbed and I retaliated by doing the same thing and was charged with the crime.
> Q. And you were actually guilty of that crime . . . [?]
> A. Yes, I was.

Throughout the rest of the defense counsel's direct examination of appellant, defense counsel repeatedly referenced appellant "selling drugs" and his past criminal history. Defense counsel also questioned appellant about his "anger problem of sorts," and how it had led to additional criminal and domestic abuse charges. In his closing argument to the jury, defense counsel stressed that appellant had been upfront about his criminal history and emotional problems and that he had not touched a gun since his release.

The jury convicted appellant and he was sentenced to the mandatory minimum of 60 months in prison. Appellant filed a direct appeal with this court, but moved to stay the appeal to pursue postconviction relief. We granted the stay. Appellant then filed a petition for postconviction relief, arguing that his defense counsel was constitutionally deficient because he failed to move to suppress evidence resulting from the traffic stop, failed to object to evidence of domestic violence, and elicited testimony about appellant's criminal

history and prior convictions. In his postconviction petition, appellant provided an affidavit stating that his defense counsel misinformed him of the state's intention to impeach him with his criminal past if he testified at trial. The postconviction court refused to hold an evidentiary hearing and denied appellant's petition for postconviction relief. Appellant moved this court to reinstate his direct appeal. We permitted appellant to raise issues from judgment as well as from the postconviction proceeding.

D E C I S I O N

Appellant alleges three instances of ineffective assistance of counsel for which he claims denial of an evidentiary hearing was error. We need only to address the issue of trial testimony and defense counsel's "trial strategy" to determine, conclusively, that appellant is entitled to an evidentiary hearing.

Appellant argues that the postconviction court improperly denied his postconviction petition without holding an evidentiary petition. We agree. There is no way that appellant's evidence failed to show the need for an evidentiary hearing. Appellant contends that defense counsel was ineffective for eliciting testimony about his criminal history, despite having stipulated that appellant was prohibited from possessing a firearm. Given the previous stipulation between defense counsel and the state that appellant's criminal history would not come out, we cannot discern a legitimate "strategic reason" for defense counsel to introduce evidence about appellant's criminal past. Importantly, appellant points out that defense counsel misinformed him by telling him "that [defense counsel] would ask [appellant] about [his] prior convictions and criminal history . . . because the prosecutor was going to ask [appellant] about them anyway."

Upon receiving a postconviction petition, a postconviction court must hold an evidentiary hearing "[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). "[T]o receive an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a defendant is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland v. Washington.*" *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013) (quotation omitted). Appellant must show that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for his counsel's errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984).

The law is clear. "[T]he postconviction court must consider the alleged facts in the light most favorable to the petitioner." ***State v. Whitson***, 876 N.W.2d 297, 303 (Minn. 2016) (citation omitted). The burden for a petitioner to receive an evidentiary hearing is lower than what is required to obtain a new trial. *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004).

The postconviction court determined that it was trial strategy for defense counsel to have appellant take the stand and admit to his criminal history. The postconviction court concluded that appellant's defense counsel was "entitled to deference in exercising discretion and professional judgement in trial tactic[s]." In a brief analysis of why a defense counsel might directly question a defendant on their criminal past, the postconviction court noted that it was not an uncommon defense strategy for a defense counsel to question their

client directly about their criminal history to "demonstrat[e] that the defendant has changed his ways and to show credibility." The state now similarly argues that defense counsel's conduct constituted "trial strategy." We are not convinced. With the pretrial stipulation that appellant's criminal history would not come out, it is incongruous to argue that appellant had to admit his criminal history to show "credibility."

It should be noted that the record reflects that on January 9, 2017, a "Stipulation for Trial" was filed with the district court. The stipulation states, "The parties agree and stipulate that the defendant, Brandon Jerome Doby, was prohibited from possessing a firearm on February 1, 2016. The defendant has been prohibited from possessing a firearm since 2004." The stipulation was signed by appellant, appellant's attorney, Terry Watkins, and the attorney for the state, Sarah Hilleren.

In the context of guilty pleas, courts have held that affirmatively misinforming a client about the consequences of their decisions can constitute ineffective assistance of counsel. *See Padilla v. Kentucky*, 559 U.S. 356, 375-76, 130 S. Ct. 1473, 1487 (2010), (Alito, J., concurring); *Leake v. State*, 737 N.W.2d 531, 540-42 (Minn. 2007); *State v. Ellis-Strong*, 899 N.W.2d 531, 539-41 (Minn. App. 2017); *cf. Taylor v. State*, 887 N.W.2d 821, 826 (Minn. 2016) (holding that failure to advise client about predatory-offender-registration requirements "does not violate a defendant's rights to the effective assistance of counsel" because it is non-punitive). Going to prison for 60 months (five years) is punitive.

At appellant's trial, with the exception of one conviction, the state had not moved to introduce evidence of appellant's criminal history because of the previous stipulation.

That contradicts defense counsel's statement to appellant that if he didn't go into his criminal history, the state would.

As a result of that misinformation, appellant took the stand and testified about his extensive contacts with the law. Had appellant not been so misinformed, the jury would not have learned of his previous convictions for robbery and kidnapping. We are not convinced that, after stipulating that appellant was prohibited from possessing a firearm, defense counsel misinforming appellant that the state would impeach him with evidence of his criminal history constitutes "customary skill and diligence."

The district court, in addressing appellant's ineffective-assistance-of-counsel claim, only made the cursory conclusion that even if defense counsel's performance was unreasonable "it would not amount to a level of prejudice, such that the outcome could have been different." At trial the state presented DNA evidence and trooper testimony that implicated appellant to physical possession of the gun. Appellant's defense consisted of his girlfriend claiming ownership of the gun and his own testimony refuting possession of the gun, which meant appellant's credibility was crucial to this defense. As a result of defense counsel misinforming appellant, the jury learned that appellant "had been a drug dealer, used a firearm to commit crimes, had been in prison for years, and had been convicted of aggravated robbery, kidnapping, assault, domestic abuse, burglary and harassment." To say the least, appellant admitting to that litany of serious crimes would not do much to bolster his "credibility." Appellant's defense counsel's strategy, an unforced error in tennis terms, may have caused the jury to not believe appellant's claims at all.

We determine that appellant is entitled to an evidentiary hearing on his ineffective-assistance-of-counsel claim. The state and defense counsel will have their opportunity to come in to court at the evidentiary hearing and explain the "trial strategy" of defense counsel misinforming his client that if he did not take the stand and admit to his checkered past, the state would do it for him.

Reversed and remanded.