STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0817

State of Minnesota,
Respondent,

vs.

Michael Jay Flavin,
Appellant.

Filed January 28, 2019
Affirmed
Hooten, Judge

Stearns County District Court
File No. 73-CR-16-9955

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Hooten, Judge; and Stauber, 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

HOOTEN, Judge

Appellant challenges his conviction for robbery and theft. He argues that he received ineffective assistance of counsel which caused him to go to trial and receive a 37-month sentence rather than accept a plea agreement for a 23-month sentence. We affirm.

FACTS

On October 31, 2016, appellant Michael Flavin approached M.H., who was wearing a red bandana, and told her she should not be wearing it. After M.H. refused to remove the bandana, Flavin attempted to take it off of her, resulting in a struggle for possession of the bandana. Flavin purportedly threatened to punch the woman if she did not let go of it. After wresting the bandana from M.H., Flavin walked away and eventually threw it into the back of a parked pickup truck. Police arrested Flavin shortly after the incident.

Stearns County initially charged Flavin with one count of theft under Minn. Stat. § 609.52, subd. 2(a)(1) (2016) on November 1. There was a settlement conference on December 15, at which time it was explained that the state had offered Flavin a plea agreement wherein he would plead guilty to the theft charge and the state would recommend a 23-month bottom-of-the-box sentence. The state informed Flavin that if he rejected the plea agreement and chose to go to trial, it would be filing an amended complaint charging him with simple robbery in addition to the current theft charge. Flavin declined the offer, and the state filed the amended complaint on December 19, the day before trial, adding the charge of simple robbery under Minn. Stat. § 609.24 (2016).

At trial, the prosecutor requested an addition to the ordinary jury instructions for theft. The county had charged Flavin for theft under Minn. Stat. § 609.52, subd. 2(a)(1), which requires the accused to have had the "intent to deprive the owner *permanently* of possession of the property." (emphasis added). But the state wished to add language indicating that the jury could find Flavin guilty if they found that he had taken "the bandana with intent to exercise *temporary control* only" and it was shown "that he was indifferent to the rights of the owner or the restoration of the bandana to the owner." (emphasis added). This language and the idea of temporary control being sufficient for theft comes from a different part of the theft statute. *See* Minn. Stat. § 609.52, subd. 2(a)(5)(i) (2016). The prosecutor explained that the state could charge Flavin under both subdivision 2(a)(1) (permanent deprivation) and 2(a)(5)(i) (temporary deprivation) but felt that it made more sense to simply include both the temporary- and permanent-deprivation language in the jury instructions.

Flavin's trial attorney, J.F., argued against the addition of the temporary-deprivation language. When initially asked to address the prosecutor's request—before the start of trial and just after receiving notice of the proposed addition— J.F. said that he would "need some time to both look at the language of the prepared [jury instruction] as well as consider the reasoning a little further." He also noted that "the legislature drafted it such that the words of permanent deprivation or permanent taking are in the statute. There's nothing about a temporary taking in the statute itself." The prosecutor then immediately informed both J.F. and the district court that, "It is. It's a specific subdivision of the theft statute." Later, during a lunch recess, J.F. more directly objected to the proposed jury instruction.

He argued that "the statutory language itself . . . speaks of permanent deprivation" and that adding the jury instructions would "expand the definition beyond the intent of the legislature and the [Minnesota] Supreme Court" and would "serve to simply confuse the jury and in worse case give them license to expand the statutory definition as well as the Supreme Court understanding inappropriately." He also argued that "temporary taking is really somewhat irrelevant, too, because there's nothing here to suggest that Mr. Flavin . . . was going to give [the bandana] back." The district court allowed the use of temporary-deprivation language in the jury instruction.

Flavin was convicted of both robbery and theft after a jury trial. He was sentenced to 37 months in prison. This was 14 months longer than the sentence proposed in the plea agreement. Flavin appealed his conviction. He then filed a motion asking this court to stay his appeal and remand for postconviction proceedings. We granted that motion. Flavin then petitioned for postconviction relief, alleging that he had received ineffective assistance of trial counsel. Flavin alleged that J.F.'s performance was deficient as a result of not informing him of the temporary-deprivation language and that the ultimate outcome would have been different had he been so informed because he would have accepted the plea agreement with the 23-month sentence instead of going to trial.

The postconviction court held an evidentiary hearing on January 4, 2018, at which time it took testimony from J.F. and Flavin. Flavin testified to the following. Both the original complaint and the amended complaint contained the permanent-deprivation language but not the temporary-deprivation language. He told J.F. that he wanted to go to trial because he did not believe that the state could prove that he intended to permanently

deprive M.H. of the bandana. When the prosecutor asked him on cross-examination, "You said word-for-word I did not intend to permanently deprive?" he answered, "Yes." When he rejected the plea agreement, he did not believe that the state could prove the robbery charge. J.F. never told him about the temporary-deprivation language. Once the prosecutor argued to add the temporary-deprivation language to the jury instructions, J.F. "leaned over to me and told me he should have explained that to me." Flavin also had the following exchange with his postconviction counsel:

> **Q**: Now, if [J.F.] had explained the idea of temporary control, would you have accepted the State's plea offer in this case?
>
> **A**: Absolutely.
>
> **Q**: Why do you think you would have accepted that plea offer?
>
> **A**: Because with temporary control, given the evidence, there was five witnesses, a video camera, it kind of was self-explanatory that it's not really too much of an argument there. I took the bandana off. Even if I gave it right back to her, as far as temporary control, it's clean cut. I probably wouldn't have risked that in trial.
>
> **Q**: And you would have wanted the benefit of a lower sentence?
>
> **A**: Absolutely.

J.F. testified to the following.

> **Q**: [D]id [Flavin] discuss the aspect of intent to permanently deprive with you?
>
> **A**: As to that, I really don't have any specific recollection, no.
>
> . . . .
>
> **Q**: Did he explain to you why he did not want to take the offer?

A: He said that he did not think he would be convicted and wanted to go to trial.

Q: Did he specify why he did not think he would be convicted?

A: No.

Q: He just simply said I'm not guilty?

A: Right.

. . . .

Q: At any point did he ever ask you questions about temporary taking?

A: Not that I recall.

Q: At any point did he ask you questions about the intent to permanently deprive as it relates to either the theft charge or the robbery charge?

A: Not that I recall . . . . As to the permanency versus the temporary, I don't know if we talked about that or not, to be quite honest.

. . . .

Q: But with respect to intent to keep the property or intent to permanently deprive the victim of the property, you do not recall ever discussing that with Mr. Flavin?

A: I don't.

Q: And you do not recall him even asking you any questions about that part, specifically?

A: I do not.

When asked by Flavin's attorney if he was aware of the temporary-deprivation provision in the theft statute, J.F. said "I don't remember."

The postconviction court denied Flavin's petition. This reinstated appeal follows.

D E C I S I O N

Flavin argues that he received ineffective assistance of counsel from J.F. Flavin asserts that J.F.'s representation was deficient because he did not know about the temporary-deprivation intent element and did not advise Flavin about it. And Flavin claims that J.F.'s deficient performance affected the outcome in this case because he would have accepted the plea agreement offered to him by the state.

"When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court's decisions using the same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). "To prove ineffective assistance of counsel, a petitioner 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 errors, the result of the proceeding would have been different." *Swaney v. State*, 882 N.W.2d 207, 217 (Minn. 2016). There is a strong presumption that the counsel's performance was reasonable. *Id.* And if the claim fails one of the prongs of this test, the other need not be considered. *Id.*

i. Prong One – Deficient Representation

Flavin argues that he has met the first prong of the ineffective-assistance-of-counsel test. To do so, he must show that J.F.'s representation fell below an objective standard of reasonableness. *Id.* This prong is met when an "attorney does not exercise the customary skills and diligence that a reasonably competent attorney would" exercise under the circumstances. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted).

Flavin argues that J.F.'s representation fell below this objective standard of reasonableness because "he did not know a fundamental point of law that was central to this case." Flavin bases his argument on two cases. First, he points to *Hinton v. Alabama*, which states that "[a]n attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*." 571 U.S. 263, 274, 134 S. Ct. 1081, 1089 (2014). And second, he points to *Leake* for the proposition that an attorney's representation falls below objectively reasonable standards "when the attorney's inaccurate or misleading factual statements tend to affect a defendant's decision to reject a plea bargain and proceed to trial." 737 N.W.2d at 540. Flavin concludes that J.F. did not know about the temporary-deprivation language and that he therefore "could not effectively advise Flavin about the plea offer."

The postconviction court found that Flavin did not establish J.F.'s lack of knowledge on this point. It explained that J.F.'s testimony that he could not remember whether he had discussed temporary deprivation with Flavin did not establish his lack of knowledge about temporary deprivation as an element of theft. It also did not accept Flavin's claim that J.F.'s arguments about the proposed jury instructions established his lack of knowledge. And the postconviction court agreed with J.F. that the use of the temporary-deprivation language was irrelevant because there was no evidence that Flavin "ever intended to return the bandana to M.H."

Flavin argues that the postconviction court clearly erred in finding that J.F.'s argument about the jury instructions did not indicate a lack of knowledge about the theft

statute. We do not agree. The parties argued about the jury instructions on two occasions, once before trial and once during a recess in the middle of trial. When the parties argued prior to trial, the state clarified that the temporary-deprivation language came from a different part of the theft statute. If J.F. was not already aware of it, he then became aware that temporary taking was a part of the theft statute. From that we can conclude that when J.F. reiterated his arguments against including the temporary-deprivation language during the recess, those arguments did not reflect a lack of knowledge about the statute but rather zealous advocacy in attempting to exclude the temporary-deprivation language from the jury instructions. Moreover, the subsection of the theft statute that Flavin was charged under did not include the temporary-deprivation language, so it made sense for J.F. to attempt to convince the district court to exclude the temporary-deprivation language by relying on the statutory language found in the complaint.

But even if we found that the postconviction court had erred in this finding, this error would not be dispositive in deciding whether J.F.'s representation fell below an objective standard. Ultimately, what would make J.F.'s representation inadequate is not his knowledge (or lack thereof) about the temporary-deprivation language. Rather, his representation would be inadequate if he did not provide his client with information that an objectively reasonable attorney would provide to his client. In other words, rather than J.F.'s knowledge or lack thereof being dispositive on prong one, Flavin must establish that an objectively reasonable attorney would have both known the relevant information and would have communicated that information to him.

The dispositive question is thus: did Flavin tell J.F. or indicate to J.F. in some way that the permanent-deprivation language in the complaint led him to believe that he would not be convicted? If the answer is yes, then an objectively reasonable attorney would have explained the temporary-deprivation language. If the answer is no, then no explanation was necessary.

Flavin testified that he told J.F. that he did not believe he could be convicted because he did not intend to permanently deprive M.H. of the bandana. J.F. explained that he did not remember all the specifics of his conversations with Flavin. But when asked if Flavin had specified why he did not think he could be convicted, J.F. answered, "No" and that Flavin had simply indicated that he was not guilty. The postconviction court made credibility determinations about some of J.F. and Flavin's testimony. It found Flavin's assertion that "he said he wanted to proceed to trial because he did not intend to permanently deprive" to not be credible. And it consistently found J.F. credible.

To conclude that Flavin and J.F. had a conversation about the permanent-deprivation language would require us to disregard the postconviction court's credibility determinations. But "[b]ecause the postconviction court is in the best position to evaluate witness credibility, we review its credibility determinations under the clearly erroneous standard." *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015) (citation and quotation omitted). The postconviction court explained that it found Flavin to not be credible because of: (1) "the incredible nature of some of the allegations made by" Flavin; (2) "his body language during the hearing"; (3) "the tone and tenor of [Flavin's] voice while on the stand; and (4) "the shifting stories presented by" Flavin. The postconviction court's credibility

determinations were based in large part on things that it was able to observe as finder of fact at trial and which we cannot assess on appeal. Given our deference to the fact finder's credibility determinations, we do not conclude that the postconviction court's credibility determinations were clearly erroneous.

We are left to conclude that Flavin only generally told J.F. that he thought he could not be convicted. Under the objectively reasonable standard, there was no reason for J.F. to discuss or explain the distinction between permanent deprivation and temporary deprivation. Moreover, J.F. advised Flavin that he should accept the plea agreement. We conclude that J.F. exercised the skill and diligence of a reasonably competent attorney, so his representation of Flavin did not fall below the objective standard of reasonableness.

ii. Prong Two – Impact on Outcome

Even if we were to find that J.F.'s representation fell below the objective standard of reasonableness, Flavin's argument would still fail under prong two of the ineffective-assistance-of-counsel test. Flavin argues that this prong was met because he would have accepted the state's plea agreement if J.F. had properly counseled him. Under the second prong, Flavin has to show that but for J.F.'s error, the result of the proceeding would have been different. *Swaney*, 882 N.W.2d at 217. And deciding not to accept a proposed plea agreement can be an example of this. *Leake*, 737 N.W.2d at 540–41.

Flavin testified at the postconviction evidentiary hearing that he would have accepted the plea agreement if J.F. had explained temporary deprivation to him. The postconviction court found this assertion to not be credible. The postconviction court explained that the finding that Flavin is not credible "is based not only on the incredible

nature of some of the allegations made by [Flavin], but his body language during the hearing, the tone and tenor of [Flavin's] voice while on the stand, and the shifting stories presented by [Flavin]."

Flavin argues that the postconviction court clearly erred in making this credibility determination. First, he argues that the postconviction court was logically inconsistent because it found one part of his testimony to be very credible. The postconviction court found Flavin to be credible when he explained why he did not think he could be convicted of robbery. Since people can tell the truth about one thing and lie about another, we do not see how the postconviction court's credibility findings are logically inconsistent with one another. Second, Flavin says that the postconviction court found him to not be credible because the jury found him guilty. This is a misrepresentation of what the postconviction court actually said. The postconviction court did not rely on the jury's credibility determination. It merely noted that its determination was the same as the jury's. Third, Flavin disputes the postconviction court's reliance on his "shifting stories," claiming that his testimony has been consistent. It is not clear from the order what exactly the postconviction court was referring to when it said "shifting stories." And fourth, Flavin takes issue with the postconviction court's use of a hypothetical to illustrate why it did not believe that Flavin would have accepted a plea agreement even if he had understood the temporary-deprivation language. The postconviction court used the hypothetical to explain that because Flavin did not believe he could be convicted of robbery, he was willing to try and "beat" the theft charge, even if he only had a small chance to do so. We see no problem with this kind of explanation.

As we previously stated, credibility determinations are reviewed for clear error since "the postconviction court is in the best position to evaluate witness credibility." *Bobo*, 860 N.W.2d at 684 (quotation omitted). While the postconviction court's comment about "shifting stories" was not well explained, its other bases for finding Flavin to not be credible are logical. Moreover, the postconviction court considered Flavin's body language and tone of voice when making its credibility determinations, and those are things that we cannot assess ourselves from a transcript. We find no clear error. And we conclude that Flavin is also unable to meet the second prong of the ineffective-assistance-of-counsel test. Therefore, we reject Flavin's ineffective-assistance-of-counsel claim and affirm his convictions for robbery and theft.

Affirmed.