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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0352**

State of Minnesota,
Respondent,

vs.

Daniel Negase Asefaw,
Appellant.

**Filed March 30, 2020
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-16-8324

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Florey, Judge; and Smith,

John P., Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that he received ineffective assistance of counsel due to his attorney's failure to secure a witness's testimony. We affirm.

FACTS

On March 23, 2016, detectives seized a suspicious parcel addressed to "Ali Khalifa" at a hotel near the Mall of America. They obtained a warrant and searched the parcel. Inside the parcel was a pair of shoes with approximately 50 blank credit cards hidden in the insoles. Detectives obtained a copy of the hotel guest list. Khalifa was a registered guest, who was staying with several other men. Detectives thought that the individuals were involved in a theft ring because a "lot of theft rings . . . come from out of state . . . to participate in transaction fraud at the Mall of America." A male, identifying himself as Ali Khalifa, was arrested after he requested the parcel at the reception desk. Khalifa's actual name is Hassan Khan. Detectives then made contact with the five men who remained in the hotel room, among them, appellant Daniel Negase Asefaw.

In executing a search at the hotel room, detectives observed a large quantity of new clothing and merchandise, and recovered a laptop, a scanner that allows an individual to load information onto the magnetic strip of a card, an embossing machine used to make the raised letters and numbers on a credit card, and cards that had been embossed with 12 digits, even though most credit cards have 16 digits. The embossing was "shoddy"; letters were missing, there were multiple press marks for each letter, and melt marks were left on the back of the cards. Cards with four different names were found, including "[a] stack of

cards . . . in the name of Daniel Asefaw.” In total, officers found 117 cards. Asefaw and the five other men were charged with aiding and abetting in the identity theft of at least 84 individuals.

Asefaw’s court trial began on August 16, 2017. Detectives testified regarding the investigation. Detective Barland testified that he analyzed the devices that were found in the hotel room. Detective Barland testified that the card reader and writer can be plugged into a computer and allows software to read the magnetic data on the back of a card, edit it, and write “whatever information [a person] wanted on that magnetic strip on the back [of a card].” Detective Barland testified that a user of the laptop visited websites on the “Dark Web”¹ on March 22, 2016, that allow an individual to enter information to be placed on the magnetic strip of a credit card. A user visited a website where an individual can purchase stolen credit-card information, and a user searched for cities that do not have the credit cards with the added chip security. Detective Barland found additional visits to websites on March 21 that sell stolen credit-card information. And he discovered that the user was in the process of making a purchase. Detective Barland also discovered that a user visited a website that sells magnetic card readers.

The matter was fully submitted to the district court on August 22, 2017, and the district court announced that it would deliver its verdict on August 29. On August 29, before the district court read its verdict, Asefaw’s attorney stated that a codefendant, Khan,

¹ The “Dark Web” is part of the internet made up of websites not accessible by common internet search engines. It is designed to ensure difficulty in tracing users, which makes it a host for marketplaces advertising criminal activity such as identity theft.

was in the courtroom and “inten[ded], potentially, to testify on [Asefaw]’s behalf, to testify that he was not a participant in the crime.” Asefaw’s attorney noted that Khan was represented by counsel, but that Khan had been unable to contact his attorney. The district court asked Asefaw’s attorney if the court needed to “intervene in this with [Khan’s attorney].” Asefaw’s attorney requested a recess to attempt to contact Khan’s attorney.

When Asefaw’s attorney was unable to contact Khan’s attorney, she moved for a mistrial, stating: “I’m assuming Mr. Khan is coming to say that Mr. Asefaw had no knowledge or intent to participate in the criminal activity that’s alleged, that . . . would have a very strong bearing on this case.” In denying the motion, the district court stated:

I don’t know what the gist of this purported testimony might be and, in point of fact, none of us know whether [Khan’s attorney] would, in fact, counsel [Khan] to give such testimony and, beyond that, it’s unclear to me that such testimony would alter, in any meaningful way, the [c]ourt’s understanding of the case and the verdict in this case.

The district court found Asefaw guilty of aiding and abetting identity theft. On October 4, 2017, the district court held a sentencing hearing. The district court noted that Khan was in the courtroom and stated:

[Khan] has pleaded guilty before this [c]ourt and has a sentencing hearing . . . in approximately six weeks. [Khan] is represented by an attorney who is not present today. Under the rules of professional ethics for lawyers, neither [counsel] are allowed to speak with [Khan] when his attorney is not present.

Because I’m going to be sentencing [Khan], his case is still pending, I’m not going to speak with [Khan] . . . without his attorney present. . . . We are not going to be able to proceed today with this hearing. We will come back . . . and the only way . . . I would take any information or input from [Khan] would be if it came through his attorney

The district court concluded:

Mr. Khan is set for sentencing . . . on December 1 . . . , and I'm going to continue Mr. Asefaw's sentencing to that date. Mr. Asefaw will be present with his attorney for sentencing, Mr. Khan will be present with his attorney for sentencing, and that way everyone will be here, and if anyone wishes to speak on anyone else's behalf on that day, everyone's attorney will be here to give them advice and the [c]ourt will be able to make a decision.

On December 1, 2017, neither Khan nor his attorney appeared at the sentencing. The district court sentenced Asefaw to the presumptive sentence of 68 months in prison and ordered him to pay \$83,000 in restitution. Asefaw filed notice of appeal, and this court stayed the appeal and remanded to the district court for postconviction proceedings. On September 24, 2018, Asefaw filed a petition for postconviction relief, arguing that his attorney was ineffective for failing to secure Khan as a witness.

On April 22, 2019, the district court held a postconviction hearing. Asefaw's attorney testified that when Asefaw told her that Khan wanted to testify, she made numerous attempts by various means to reach Khan's attorney. Asefaw's attorney testified that she did not subpoena Khan's attorney or request a continuance on the record. But she testified that she thought that she requested the district court to inquire of Khan about his Fifth Amendment privilege and the district court would not do anything without talking to Khan's attorney. Asefaw's attorney testified that she did not know what Khan's testimony would entail because what she relayed to the district court about Khan's potential testimony was based on what Asefaw told her. Asefaw's attorney testified that, because she did not know what Khan's testimony would be, it could have been helpful or harmful.

On September 18, 2019, the district court denied Asefaw's petition for postconviction relief. The district court found that Asefaw's attorney "spent significantly more time working on [his] matter than a typical trial case." The district court found that because Khan was represented, Asefaw's attorney "could not speak with him pursuant to the Rules of Professional Conduct," and she "did not, and does not, know what Khan would have testified to and whether that testimony would have been helpful . . . to Asefaw." The district court concluded that Asefaw's attorney took the necessary steps a reasonable attorney would have taken to secure Khan's testimony at trial. The district court also concluded that Asefaw failed to demonstrate a reasonable probability that, but for counsel's alleged error, the result would have been different. This appeal followed.

D E C I S I O N

Asefaw argues that the district court abused its discretion by denying his petition for postconviction relief because his trial counsel was ineffective for failing to take the necessary steps to secure Khan's testimony at trial.

This court reviews a denial of postconviction relief for an abuse of discretion. *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). In doing so, this court reviews the district court's legal determinations de novo and its factual findings for clear error. *Brown v. State*, 895 N.W.2d 612, 617 (Minn. 2017). A district court's conclusion that a petitioner received effective assistance of counsel involves a mixed question of law and fact that is reviewed de novo. *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013).

A criminal defendant is guaranteed the right to effective assistance of counsel. *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019). Ineffective-assistance-of-counsel claims

are generally analyzed under the two-prong test set out in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Dereje*, 837 N.W.2d at 721. To succeed on an ineffective-assistance-of-counsel claim, a “defendant must show that counsel’s representation fell below an objective standard of reasonableness” and “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068. An objective standard of reasonableness is the level of customary skill and diligence that a reasonably competent attorney would employ in representation under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

In reviewing the first *Strickland* prong, a “strong presumption” exists that an attorney provided reasonable assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). In reviewing the second prong, a “defendant must show that counsel’s errors *actually* had an adverse effect,” and that without the errors, “the result of the proceeding probably would have been different.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (emphasis added) (quotation omitted). The reviewing court considers the totality of the evidence presented to the court in determining if the result probably would have been different. *Id.*

Under the first *Strickland* prong—counsel’s representation—the record shows that Asefaw’s counsel’s performance was reasonable. Asefaw’s attorney’s defense for his trial was that, although some individuals in the hotel room were involved in the theft ring, Asefaw was merely present in the room and was not involved in the criminal activity. She attempted to undermine the state’s evidence by showing that the devices that were analyzed

could not be connected to any particular individual. This is a reasonable defense when there were several codefendants and the evidence could not be attached to anyone.

Asefaw claims that a reasonable attorney under the same circumstance would have taken steps to secure Khan's testimony. But Asefaw's attorney stated that she could not speak to Khan, who was represented by counsel and who had a pending matter. The district court also would not talk to Khan without Khan first having advice from his attorney. It was reasonable, in fact ethical, for Asefaw's attorney to not talk to Khan when he was represented.

Asefaw's attorney stated that she attempted to contact Khan's attorney several times by way of several different means and was unsuccessful. The district court attempted to remedy the lack of communication by scheduling Asefaw's and Khan's sentencings for the same day, but Khan and his attorney both failed to appear for sentencing.

Asefaw's attorney also stated that she did not know that Khan's attorney would advise Khan to testify, and if he did counsel him to testify, what Khan's testimony would entail. When she presented that Khan would testify that Asefaw was not involved in the criminal activity, Asefaw's attorney stated that this was based off of Asefaw's representation of what Khan would state. Asefaw's attorney had nothing else to rely on other than Asefaw's assertion that Khan would testify in a way to benefit his case. Asefaw's attorney also stated that because she was unaware of the nature of Khan's testimony, she did not know if it would be helpful or harmful to Asefaw's defense. Thus,

the record shows that Asefaw's attorney's representation was reasonable under the circumstances.²

Under the second *Strickland* prong—prejudice—Asefaw fails to show that any possible error had an actual adverse effect leading to the probability of a different result. Asefaw had a court trial, and the district court, after hearing that Khan had “an intent, potentially, to testify . . . that [Asefaw] was not a participant in the crime,” stated: “[I]t's unclear to me that such testimony would alter, in any meaningful way, the [c]ourt's understanding of the case and the verdict in this case.”

Further, the evidence presented in Asefaw's trial supports the district court's verdict. A detective testified that theft rings come to Bloomington to engage in identity theft. A detective testified that Asefaw is from out of state and did not appear to have any reason to be in Minnesota. Asefaw was found in the hotel room where all of the devices utilized in the identity thefts were located. Credit cards found in the room had Asefaw's name embossed on them. Even if Asefaw's attorney had been able to contact Khan's attorney, Khan's attorney had advised Khan to testify, and Khan testified that Asefaw had not been involved in the crime, this testimony would have contradicted all of the evidence establishing that Asefaw was involved in aiding and abetting identity theft. The district court found the state's evidence credible and found Khan less credible based on the district court's statement that Khan's potential testimony would not alter the district court's understanding of the case or its verdict. *See State v. Poganski*, 257 N.W.2d 578, 581 (Minn.

² Asefaw's attorney also moved for a mistrial when Khan was present at the verdict hearing. The district court denied that motion, but that decision has not been challenged on appeal.

1977) (stating that fact-finder is the sole judge of credibility). Because Asefaw received effective assistance of counsel, the district court did not abuse its discretion by denying Asefaw's petition for postconviction relief.

Affirmed.