STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0991

Scott Arlen Lange, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 19, 2021
Affirmed
Connolly, Judge

Isanti County District Court
File No. 30-CR-17-708

Cathryn Middlebrook, Chief Appellate Public Defender, Sean M. McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Jeffrey R. Edblad, Isanti County Attorney, Joel B. Whitlock, Assistant County Attorney, Cambridge, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Appellant challenges the denial of his postconviction petition, arguing that he was denied effective assistance of counsel. Because appellant failed to prove that his trial

counsel was ineffective, he could not show that he was damaged by any deficiencies in his postconviction counsel's performance, and because there was no abuse of discretion in the district court's denial of appellant's postconviction petition, we affirm.

FACTS

Appellant Scott Lange, while represented by counsel D.M. and B.N., pleaded guilty to a variety of offenses committed in 2016 and 2017 and was sentenced to 72 months in prison. Acting pro se, he filed a postconviction petition in which he claimed ineffective assistance of trial counsel, abuses of the district court's discretion, and misconduct by state agents.[1]

Appellant's postconviction counsel, M.S., represented him at the February 18, 2020, evidentiary hearing on his ineffective-assistance claim. M.S. clarified the claim to allege that D.M. and B.N.: (1) did not discuss defenses such as entrapment; (2) acted improperly in having appellant's wife persuade him to plead guilty; and (3) did not properly explain the plea agreement to appellant. D.M., B.N., appellant, and his wife testified.

At the end of the hearing, M.S. agreed to submit a brief on March 31, 2020. On March 31, 2020, M.S. requested and was granted an extension for two more weeks, until April 14, 2020; on that date, he asked for and was granted another extension for two more days, until April 16, 2020. No brief was ever submitted. Respondent State of Minnesota submitted a brief on May 1, 2020, addressing only whether D.M. and B.N. had properly explained the plea agreement to appellant.

[1] The district court inferred these claims from appellant's petition.

The district court denied appellant's petition for postconviction relief, and appellant challenges the denial, arguing that M.S. provided ineffective assistance.

DECISION

"In reviewing a postconviction proceeding, we determine whether there is sufficient evidence to sustain the postconviction court's findings, and a postconviction court's decision will not be disturbed absent an abuse of discretion. We review a postconviction court's determinations of legal issues de novo." *Schleicher v. State*, 718 N.W.2d 440, 444-45 (Minn. 2006) (quotations and citations omitted). "To show that [postconviction] counsel's performance was deficient, [a petitioner] must first prove ineffective assistance of trial counsel." *Id*. at 449 (noting that "[postconviction] counsel's failure to raise meritless claims does not constitute deficient performance").

When an ineffective-assistance-of-counsel claim is properly raised in a direct appeal, "we examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984)." *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). The two prongs of the *Strickland* test are (1) appellant's postconviction 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." *Lussier v. State*, 853 N.W.2d 149, 154 (Minn. 2014). If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

The postconviction court made two findings that support its conclusion that the performance of B.N. and D.M. did not fall below an objective standard of reasonableness. First, it addressed their dealings with appellant.

> At the evidentiary hearing, appellant and his spouse offered testimony that explained how [he] was misled and induced into accepting the global resolution [i.e., the guilty plea] based upon [his] belief that he could only receive a certain amount of prison time. However, the Court finds the testimony of [appellant] and his spouse to be self-serving and not credible. The Court finds greater credibility within the testimony offered by [appellant's] trial counsel [i.e., D.M. and B.N.]. The testimony by [appellant's] trial counsel shows that they met the objective standard of reasonableness, because they exercised the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. Both attorneys testified they presented [appellant] with various options for resolution during the plea negotiation process, went over the various consequences that [he] could face, and even allowed [him] to consult with his wife before entering his final plea of guilty.

The transcript of the evidentiary hearings supports the findings that the testimony of appellant and his wife was not credible and the testimony of the attorneys was credible. Appellant's wife was questioned by the state's attorney:

> Q: Did you yourself have numerous phone numbers assigned to you?
> . . . .
> A: No.
> Q: You did not have various – numerous numbers assigned to you for different phones?
> A: I had one phone number. I had one phone that I used.
> Q: And you are testifying to that despite the fact that your husband [i.e., appellant] plead[ed] guilty to violating at least five Domestic Abuse No Contact Orders where he contacted you at numerous different numbers?
> A: The attorneys told us to plead guilty.
> Q: They actually didn't tell you to plead guilty, correct?

> A: No. Well, I—I think as my husband [appellant] and I are together when they asked me to tell my husband to plead guilty I think that's – I don't know.

Appellant was questioned about his attorneys.

> Q: After the sentencing, did you talk with [B.N.] about the results of your case?
> A: Both [B.N. and D.M.] acted shocked that I got the sentence that I did. . . . [B.N.] in front of [D.M.] said, you need to file an appeal on this, and you can use me for ineffective assistance of counsel because I dropped the ball, I didn't. . . represent you like I should have. You got an unfair . . .
> THE COURT: Why isn't this hearsay . . . ? . . . I mean, he's literally telling me that [B.N.] admitted to him that he was ineffective and you're offering that, I assume, for the truth of the matter asserted, are you not?
> . . . .
> APPELLANT'S ATTORNEY: . . . .[W]e're not trying to prove the truth of whether or not [B.N.] was ineffective, in fact –
> THE COURT: We're literally here on the issue of whether or not [D.N.] was effective . . . I'm concerned that we're running way outside the rules of evidence here . . . .

Appellant's attorneys' testimony contradicted this testimony. B.N. was questioned:

> Q: Did you at any point express to [appellant] that your representation was in any way inadequate?
> A: No.
> Q: So you did not ask or suggest to [appellant] that he file post-conviction relief based on ineffective assistance . . . of counsel?
> A: I've done [that] one time [when] I actually felt I was ineffective with a different client. I have never said that to another client, no. It definitely was not ineffective in this case. It was very effective.

D.M. was also questioned:

> Q: Did you or [B.N.] advise [appellant] to file a postconviction petition?

> A: No. We did discuss that if he wished he could always appeal his sentence and that we would get him information to contact the state public defender's office for that purpose if he wanted to do that.
> Q: Did you or [B.N.] discuss with [appellant] the possibility that that plea could – or that petition could be based on ineffective assistance of counsel?
> A: I don't believe we ever discussed ineffective assistance of counsel.
> Q: . . . Did [B.N.] at any point while you were involved in conversations with him and [appellant] express that he had not done a good job for [appellant] or in any other way not represented [appellant] as best as he possibly could?
> A: [B.N.] and I never discussed him doing other than a good job for [appellant].
> Q: . . . [B]ut in conversations between you, [appellant and B.N.], did [B.N.] ever express that he had not done a good job for [appellant] or otherwise represent[] that sentiment?
> A: No.

Thus, the findings regarding the credibility of appellant, his wife, and the attorneys are supported by the transcript.

The district court also addressed appellant's claim that his attorneys had not explained the guilty plea to him.

> At the November 6, 2017, plea hearing, [appellant] stated on the record that he understood the possibilities that could flow from his guilty plea. Now approximately two years later, [he] has filed a post-conviction petition which alleges the contrary. [A p]etitioner has the burden to provide facts or evidence which demonstrate, by a fair preponderance of the evidence, that he is entitled to post-conviction relief. The self-serving testimony offered by [appellant] and his spouse fail[s] to show, by a preponderance of the evidence, how his trial counsel's conduct fell below an objective standard of reasonableness. Thus, [his] claim fails.

The transcript of the November 6, 2017, plea hearing supports this conclusion. Appellant answered, "Yes" when the district court asked him: (1) if he understood that the agreement

covered all ten of appellant's files in Isanti County, that there was a cap of 96 months on his commitment to the Commissioner of Corrections, and that he was free to argue for a departure; (2) if he had enough time to talk to his attorneys about the charges; (3) if it was true that the district court had signed an order, at appellant's request, allowing appellant's wife to have a no-contact visit with him; and (4) if appellant desired to waive his rights and enter a plea of guilty.

Thus, the transcripts provide sufficient evidence to sustain the postconviction court's conclusion that D.M. and B.N.'s representation of appellant did not fall below an objective standard of reasonableness, and the first *Strickland* prong is not met. *See Lussier*, 853 N.W.2d at 154. Because appellant's ineffective-assistance claim did not meet the first *Strickland* prong, the district court did not abuse its discretion by not considering the second *Strickland* prong. *See Mosley*, 895 N.W.2d at 591.

Absent proof of the ineffective assistance of trial counsel, appellant cannot show ineffective assistance of postconviction counsel: since the ineffective-assistance-of-trial-counsel claim lacked merit, postconviction counsel's failure to argue it was not ineffective assistance. "[Postconviction] counsel's failure to raise meritless claims does not constitute deficient performance." *Schleicher*, 718 N.W.2d at 449.

While it is undisputed that the failure of M.S. to file a brief was misconduct, *see, e.g.*, *In re Disciplinary Action Against Pierce*, 706 N.W.2d 749, 755 (Minn. 2005), appellant has not shown that he was prejudiced by it. It has been shown that his ineffective-assistance claim concerning B.N. and D.M. would have failed; therefore, M.S.'s failure to file a brief on that claim did not damage appellant. The postconviction court also concluded

that appellant had not established either the alleged district-court abuses of discretion or the alleged misconduct by state agents by a preponderance of the evidence, so evidentiary hearings would not have been appropriate on those claims. "[A] postconviction evidentiary hearing is not required when the petitioner alleges facts that, if true, are legally insufficient to grant the requested relief." *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (citations omitted).

The postconviction court did not abuse its discretion, and there is no basis for disturbing its decision. *See Schleicher*, 718 N.W.2d at 444-45.

Affirmed.