This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0816

State of Minnesota,
Respondent,

vs.

Somboun Kounlabout,
Appellant.

Filed June 20, 2022
Affirmed
Worke, Judge

Nobles County District Court
File No. 53-CR-19-975

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

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

WORKE, Judge

In this direct appeal stayed for postconviction proceedings, appellant challenges the district court's denial of his ineffective-assistance-of-counsel claim. We affirm.

FACTS

On September 27, 2019, a patrol officer with the Worthington police department was assisting another officer with two individuals, V.C. and R.R. R.R. was running in the road, appeared to be under the influence of methamphetamine, and admitted to recently smoking methamphetamine. The patrol officer knew that the individuals had "associations" with T.V.'s house nearby and that T.V. was participating in drug court as part of her probation. So, the patrol officer went to T.V.'s home to conduct a drug-court check to investigate if any drug activity had occurred there.

When the patrol officer arrived at the house, accompanied by a police sergeant, he spoke with T.V.'s grandmother, who lived at the house and did not speak English. Body-camera footage shows the patrol officer pointing toward the back of the house, pulling the front door slightly open, and then motioning toward the interior of the house. The grandmother turned and walked back into the house, and the two officers entered the home. T.V. met the officers outside of her bedroom. The officers asked if V.C. and R.R. had been there, which T.V. denied. T.V. stated that the only person with her was her boyfriend, later identified as appellant Somboun Kounlabout.

The patrol officer asked to "step in quick" to T.V.'s bedroom. T.V. opened the door and led him into her bedroom. Kounlabout was sleeping in T.V.'s bed when the officer entered. The officer told T.V. that "he hate[d] to flex this on [her]" but "obviously" because T.V. was participating in drug court, she was "subject to checks like this." The officer saw

a propane torch[1] in plain view on the floor near the bed. Based on his training and experience, he searched the bedroom because propane torches are commonly used with illegal controlled substances. Kounlabout identified one of the backpacks as his, and he granted permission for the officer to search the bag. Inside, the officer found a 9-mm handgun and a magazine containing seven bullets. Respondent State of Minnesota charged Kounlabout with being a felon in possession of a firearm or ammunition, under Minn. Stat. § 609.165, subd. 1b(a) (2018).[2]

In November 2019, Kounlabout's counsel waived the omnibus hearing, stating that he reviewed the evidence and there were no omnibus issues. In December, Kounlabout moved to discharge his counsel and proceed pro se. The district court granted the motion, and Kounlabout represented himself at trial. During the trial, Kounlabout tried to argue that the evidence against him had been obtained through an unlawful search, but the district court repeatedly rejected his attempts to raise the issue because it had been waived by Kounlabout's counsel.

The jury found Kounlabout guilty, and the court sentenced Kounlabout to 60 months in prison. Kounlabout appealed the judgment of conviction, and we granted his motion to stay the appeal to pursue postconviction relief. The postconviction court held an evidentiary hearing and denied Kounlabout's petition. We reinstated the appeal and

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[1] This torch is referred to in the record as both a propane torch and a butane torch. Body-camera footage shows that the item is a handheld propane-powered torch with a nozzle attached.

[2] Kounlabout has a 1999 conviction for felony assault and a 2012 felony drug-possession conviction.

permitted Kounlabout to raise issues appropriate to be raised in direct appeal, as well as issues decided in the postconviction proceedings.

DECISION

Kounlabout argues that counsel provided ineffective assistance by failing to challenge the constitutionality of the search of his backpack. The district court determined that counsel's review of the record was reasonable and denied his petition.

"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). We review a postconviction court's denial of ineffective-assistance-of-counsel claims by considering the factual findings supported by the record and by conducting "de novo review of the legal implication of those facts on the ineffective assistance claim." *State v. Nicks*, 831 N.W.2d 493, 503-04 (Minn. 2013).

Ineffective-assistance-of-counsel claims must meet the two-prong *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020) (applying the *Strickland* test to a postconviction petition seeking relief for an ineffective-assistance-of-counsel claim). To meet this test, a petitioner must show that (1) their counsel's representation "fell below an objective standard of reasonableness," and (2) "there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different." *Peltier*, 946 N.W.2d at 372 (quotations omitted). If one prong is not satisfied, we may dispose of the claim without considering the other prong. *Id.* We apply a strong presumption that an attorney's "performance falls within the

wide range of reasonable professional assistance." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation marks omitted).

General assertions of error without evidentiary support are inadequate to establish ineffective assistance of counsel. *See State v. Miller*, 666 N.W.2d 703, 717-18 (Minn. 2003) (rejecting an ineffective-assistance-of-counsel claim because it was not supported by evidence). Generally, appellate courts will not review attacks on counsel's trial strategy. *Nicks*, 831 N.W.2d at 506. A decision about whether to seek an omnibus hearing is a matter of trial strategy. *State v. Rainer*, 502 N.W.2d 784, 789 (Minn. 1993).

Here, Kounlabout argues that his attorney's performance fell below an objective level of competence by failing to challenge the search. However, a claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made. *Id.* Therefore, whether the challenge succeeds depends on whether the officer had reasonable suspicion to conduct the search.

The Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution both guarantee an individual's right to be free from unreasonable searches and seizures. The Fourth Amendment may be invoked by showing that a person "has an expectation of privacy in the place searched, and that [this] expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88 (1998).

The Minnesota Supreme Court has held that probationers have a diminished expectation of privacy, and therefore their homes may be searched without a warrant if a valid condition of probation exists and authorities have reasonable suspicion of criminal conduct. *State v. Anderson*, 733 N.W.2d 128, 139-40 (Minn. 2007). Here, T.V. agreed as

a condition of drug-court probation that she would be "subject, at any time, to a [warrantless] search relating to [her] compliance with the terms of" her probation. Therefore, Kounlabout must show that the officer did not have reasonable suspicion to initiate the search that revealed the firearm.[3]

The district court denied Kounlabout's petition for postconviction relief after concluding that Kounlabout's Fourth Amendment claim was not meritorious. The district court analyzed three steps in the encounter that led to the discovery of the gun in Kounlabout's bag: the officer's entry into the house, the officer's entry into T.V.'s bedroom, and the officer's search of the bags inside T.V.'s bedroom. It concluded that the patrol officer's entry into the house did not require reasonable suspicion because T.V.'s grandmother consented to his entry when she let him in. The district court also concluded that the patrol officer had T.V.'s consent to enter her bedroom because she did not hesitate before opening the door and allowing both officers into the room. Finally, the district court determined that when the patrol officer saw the propane torch in T.V.'s bedroom, he had reasonable suspicion to search the room for evidence of illegal controlled substances.[4] Kounlabout only challenges this last step in the analysis. We review this conclusion of law de novo. *Nicks*, 831 N.W.2d at 503-04.

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[3] Kounlabout argued extensively that the standard set forth in *State v. Heaton* should be the standard that applies to the search. 812 N.W.2d 904, 909 (Minn. App. 2012). However, the facts in *Heaton* are distinguishable from those here because *Heaton* involved a parolee, not a probationer participating in drug court. *Id.* Additionally, *Heaton* held that the search of a parolee's home requires reasonable suspicion, the standard that we apply here as well. *Id.* This argument appears to be a distinction without a difference.

[4] Kounlabout consented to the search of his bag and does not challenge that consent on appeal.

Kounlabout argues that the presence of a propane-powered torch does not establish reasonable suspicion of criminal conduct justifying a warrantless search. Reasonable suspicion requires specific, articulable facts that, taken together with rational inferences from the facts, reasonably warrant the intrusion at issue. *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007). The showing required is not high, but it requires "more than an unarticulated hunch" and the ability of an officer "to point to something that objectively supports the suspicion at issue." *Id.* (quotation omitted). In determining whether reasonable suspicion exists, this court weighs the totality of the circumstances, which may include otherwise-innocent factors. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). Under the reasonable suspicion standard, "trained police officers may draw inferences and deductions that might well elude an untrained person." *State v. Taylor*, 965 N.W.2d 747, 752 (Minn. 2021) (quotation omitted).

Kounlabout argues that the presence of the propane torch alone is not enough to give reasonable suspicion for the search. But there were additional factors that gave the patrol officer reasonable suspicion. The officer knew that T.V. had a history of drug use and that she was currently participating in drug-court probation. He knew that two blocks away, an individual with associations to T.V. had recently admitted to using methamphetamine. And, when T.V. consented to the officer's entry of her bedroom, he observed the propane torch in plain view.

Kounlabout argues that the fact that T.V. was on drug-court probation cannot support the district court's determination of reasonable suspicion. Kounlabout cites *Diede* and *Carter* to support his argument. In *Diede*, the supreme court held that an officer's

assertion that they had probable cause to arrest a passenger in the defendant's vehicle for previous drug sales was not enough to give reasonable suspicion that the defendant was carrying drugs at the time. *State v. Diede* 795 N.W.2d 836, 844 (Minn. 2011). In *Carter*, the supreme court found that involvement in an investigation into suspected drug dealing and firearms possession by individuals with convictions and arrests for drug and firearm offenses was not enough to give police reasonable suspicion to conduct a warrantless dog-sniff search of a storage facility. *State v. Carter*, 697 N.W.2d 199, 212 (Minn. 2005).

The state argues that these cases are distinguishable because they do not draw as direct a line between past drug use and potential current drug use as T.V.'s probation drug-court status. Instead, the state argues that *Lugo* is more on point. In *Lugo*, several factors, including the defendant's recent arrest for fleeing an officer and drug possession, led the supreme court to conclude that officers had reasonable suspicion to expand a traffic stop with a dog sniff. *State v. Lugo*, 887 N.W.2d 476, 487 (Minn. 2016).

These cases fall on a spectrum, with Kounlabout's facts somewhere in the middle. T.V. was on probation for a drug offense and participating in drug court—more than the officer's observations of past drug sales in *Diede* and likely more recent than the three-, five-, and seven-year-old convictions in *Carter*, though the date of T.V.'s conviction is not in the record. However, the reasonable suspicion in *Lugo* came from more than just Lugo's recent arrest. Among other factors, Lugo told officers: "Man just take me to jail, please," suggesting that he knew that he had committed a crime. 887 N.W.2d at 488. So, if a recent arrest for a drug crime can give reasonable suspicion, then a recent conviction for a drug crime and participation in drug court can contribute toward reasonable suspicion as well.

Furthermore, drug-court probation status alone is not what gave the officer reasonable suspicion to search T.V.'s bedroom. The officer had conducted curfew checks on T.V. before as part of her drug-court probation and knew of her past drug conviction. The officer testified that, in his experience, he has often found torches in the bedrooms of drug users, and they are not regularly found in the bedrooms of nondrug users. He testified that the presence of a propane torch appears often in conjunction with methamphetamine use and its paraphernalia. *See Taylor*, 965 N.W.2d at 752. Therefore, the presence of the torch combined with the officer's knowledge that T.V. had a drug-related conviction amounts to more than a hunch that a search would reveal controlled substances.

Because the officer had reasonable suspicion to search T.V.'s room, Kounlabout's counsel did not forfeit a meritorious claim by failing to challenge the search. Given the strong presumption that counsel acted reasonably, and because the search was supported by reasonable suspicion, Kounlabout has not shown that he received ineffective assistance of counsel. Because failure to meet one *Strickland* prong is dispositive, Kounlabout's ineffective-assistance-of-counsel claim fails. *Peltier*, 946 N.W.2d at 372.

Affirmed.