STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0239

State of Minnesota,
Respondent,

vs.

Sebastian Phillip Miller,
Appellant.

Filed July 25, 2022
Affirmed
Bryan, Judge

McLeod County District Court
File No. 43-CR-19-2001

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

Michael K. Junge, McLeod County Attorney, Amy E. Olson, Assistant County Attorney, Glencoe, 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 Cochran, Presiding Judge; Bryan, Judge; and Gaïtas, Judge.

NONPRECEDENTIAL OPINION

BRYAN, Judge

Appellant challenges his conviction for possession of pornographic works involving a minor and the denial of his postconviction petition, arguing that his conviction must be vacated because he received ineffective assistance of counsel when his trial counsel failed

to challenge the probation officer's warrantless search of appellant's smartphone. Because the probation officer had the requisite reasonable suspicion to search appellant's phone, trial counsel's assistance was not ineffective. We affirm the conviction and the district court's denial of the postconviction petition.

FACTS

In December 2019, respondent State of Minnesota charged appellant Sebastian Phillip Miller with six counts of possession of pornographic work involving a minor in violation of Minnesota Statutes section 617.247, subdivision 4(b) (2018). Each count was related to a different image depicting an individual under the age of 18 years. The state later dismissed one count. The case proceeded to trial, and the jury found Miller guilty on the five remaining counts. The district court imposed concurrent sentences on four of the convictions, for a total sentence of 103 months in prison. Miller filed a notice of appeal, and this court subsequently stayed the appeal to permit Miller to pursue a claim of ineffective assistance of counsel through a petition for postconviction relief. Miller filed the petition and requested an evidentiary hearing. The postconviction court denied Miller's petition for postconviction relief without an evidentiary hearing. Miller appeals, requesting that this court reverse the denial of his postconviction petition.

Given the issue raised on appeal and the statement of facts in the petition, the parties' arguments are based primarily on the evidence presented at trial. The parties do not dispute that the evidence at trial established the following facts. Miller is a registered predatory offender who had been released from prison in 2018. He was placed on intensive supervised release, and Parole Officer David Barlage was assigned to supervise Miller.

Miller signed an agreement on June 12, 2018, setting forth the conditions of his release. One of the conditions in that agreement stated, "[Miller] must refrain from purchasing, possessing or allowing in his/her residence any sexually explicit materials. [Miller] must refrain from entering/accessing an establishment/website that has sexual entertainment as its primary business as determined by the agent." Another condition stated, "[Miller] must disclose to the agent/designee all computers, internet capable devices, or digital storage devices within [Miller's] possession or control within 24 hours of first possessing or accessing such devices. All devices are subject to searching and monitoring. [Miller] is responsible for any material(s) found on these devices." Another condition stated that "[Miller] must submit to any unannounced visits and/or search of [Miller's] person, residence, possessions, cell phone, vehicle or premises by the agent/designee."

In July 2018, Miller was living in a motel room in Silver Lake, Minnesota. On July 10, 2018, Barlage went to Miller's motel room and knocked on the door. Miller did not immediately answer. Barlage knocked again, and Miller said he was getting dressed. When Miller opened the door approximately three minutes after Barlage first knocked, he was not wearing a shirt and was buttoning his jeans. Miller let Barlage into the room, and Barlage observed Miller's approved computer device connected to a charging cord on the bed. Barlage also observed two other charging cables plugged into an outlet but not connected to any devices. Barlage knew that Miller had only reported the one, approved device and was not allowed to have any other electronic devices pursuant to the conditions of his supervised release. Barlage asked Miller if he had any other devices that he was not supposed to have, and Miller evaded this question by asking why Barlage came to his motel

room. Barlage asked Miller a second time whether Miller had other electronic devices, and Miller stated, "Not that is mine." Miller explained that a woman who lived next door and whose name he could not recall gave him "a box of stuff." Miller was also unable to recall when the woman gave him the box and could not describe its contents. This explanation concerned Barlage because it suggested that Miller had an unapproved device and because Barlage must preapprove any visitors as another term of his supervised release.

Barlage instructed Miller to wait outside and requested assistance from Silver Lake Police Department to search the motel room. Barlage and officers searched the room[1] and found a smartphone on the closet floor underneath a pile of garbage, notebooks, and clothes. Barlage opened the phone and looked through the photo gallery. He observed photographs and videos of what appeared to be child pornography. Miller was arrested, and the police obtained a warrant to conduct a forensic search of the smartphone based on the observations of Barlage. The search revealed the two videos and three pictures corresponding to the five criminal charges selected for prosecution.

Based on this trial evidence, the postconviction court found that Miller was aware of the condition of supervision that required him to be "subject to searches to ensure and verify he refrained from purchasing, possessing, or allowing sexually explicit materials" on devices that access the internet like the smartphone found in Miller's possession. The postconviction court concluded that given these conditions, Barlage could search Miller's

[1] On appeal, Miller does not challenge the search of his motel room or argue that his trial counsel was ineffective for not challenging the search of his motel room. The only issue relates to Barlage's initial, warrantless search of Miller's phone.

smartphone without having any reasonable suspicion. The postconviction court also found that even if reasonable suspicion were required, Barlage had the reasonable suspicion necessary to search Miller's smartphone before he did so. Because it determined that the search was lawful, the postconviction court concluded that Miller's counsel did not provide ineffective assistance in failing to challenge the search.

DECISION

Miller argues that we should reverse the conviction and reverse the denial of his postconviction petition because his trial counsel provided ineffective assistance. Because Barlage had reasonable suspicion to search the smartphone, we conclude that Miller's trial counsel was not ineffective for failing to challenge the search. We accordingly affirm the conviction and the denial of Miller's petition.

The district court may dismiss a postconviction petition without holding an evidentiary hearing if "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 (2020).[2] Generally, we review the district court's ultimate decision to deny a postconviction petition for an abuse of discretion, *Chavez-Nelson v. State*, 948 N.W.2d 665, 671 (Minn. 2020), but

[2] When determining whether to hold an evidentiary hearing, the district court accepts the facts alleged in the petition as true and determines whether these facts are sufficient to grant the requested relief. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016); *see also Thoresen v. State*, 965 N.W.2d 295, 303 (Minn. 2021) (concluding that allegations in the petition "must be more than argumentative assertions without factual support" (citation omitted)). Here, the petition recites the evidence presented at trial and summarized above. The parties agree regarding the relevant facts, but they disagree regarding two other issues: whether any suspicion is required to conduct a warrantless search of a parolee's phone and whether there was reasonable suspicion to search the phone without a warrant.

we review issues of fact for clear error, *Pearson v. State*, 891 N.W.2d 590, 600 (Minn. 2017), and we review any "embedded issues of law" or mixed questions of law and fact under a de novo standard, *Petersen v. State*, 937 N.W.2d 136, 139 (Minn. 2019). We therefore review the district court's decision regarding appellant's ineffective assistance claim de novo.

For a petitioner to be entitled to an evidentiary hearing on an ineffective-assistance-of-trial-counsel postconviction claim, the petitioner "must allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test" articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *Chavez-Nelson*, 948 N.W.2d at 671 (quotation omitted). Under this standard, a petitioner must show that (1) his 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." *Id.* (quotations omitted). If one prong is not satisfied, we may dispose of the claim without considering the other prong. *Peltier v. State*, 946 N.W.2d 369, 372 (Minn. 2020). An attorney's decision declining to make a meritless motion does not fall below an objective standard of care. *See, e.g.*, *State ex rel. Fruhrman v. Tahash*, 146 N.W.2d 174, 176 (Minn. 1966) ("[N]o inadequacy can be attributed to counsel for failing to make a motion which should have been denied had it been made.").

An individual's right to be free from unreasonable searches and seizures is guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution. The Fourth Amendment is a personal right, the

protection of which may be invoked by showing that a person "has an expectation of privacy in the place searched, and that his expectation is reasonable." *Minnesota v. Carter*, 525 U.S. 83, 88, 119 S. Ct. 469, 472 (1998). The Minnesota Supreme Court has held that probationers have a diminished expectation of privacy, and, accordingly, their homes may be searched without a warrant as long as 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). And this court has held that parolees also have a diminished expectation of privacy. *State v. Heaton*, 812 N.W.2d 904, 908 (Minn. App. 2012), *rev. denied* (Minn. July 17, 2012).[3]

In this case, we conclude that Miller did not allege sufficient facts to establish the first prong of *Strickland*. Specifically, because Barlage had reasonable suspicion to search

[3] The state argues that this court should make a precedential holding that the Fourth Amendment does not require any level of suspicion to justify the search of a parolee's phone. For support, the state cites *Samson v. California*, in which the supreme court concluded that "the Fourth Amendment does not prohibit a police officer from conducting a suspicionless search of a parolee." 547 U.S. 843, 857 (2006). The specific probation condition in *Samson* reflected the California statute requiring parolees to agree to a search "at any time" and "with or without cause." *Id.* at 846, 852. *Samson* relied on *United States v. Knights*, 534 U.S. 112, 121 (2001) (holding that law enforcement officers need only reasonable suspicion to conduct a warrantless search of a probationer's residence) and *Morrissey v. Brewer*, 408 U.S. 471, 477 (1972) (characterizing parole as "an established variation on imprisonment of convicted criminals" and setting forth minimal due process requirements for parole revocation proceedings distinct from the due process requirements that apply to criminal prosecutions). This court did not adopt *Samson* and did not permit suspicionless searches of parolees when it decided *Heaton*, however. Instead, the majority in *Heaton* distinguished the California statute from the conditions at issue in *Heaton* and held that "[n]o more than reasonable suspicion is required to search a parolee's home." 812 N.W.2d at 905. Because we conclude that Barlage had reasonable suspicion to conduct the search of Miller's phone, we need not determine whether the state's interpretation of the Fourth Amendment is correct or whether Miller's trial counsel could have reasonably believed that *Samson*, *Knights*, and *Morrissey* rendered frivolous a suppression motion.

Miller's phone, trial counsel's conduct did not fall below an objective standard of reasonableness. 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, and a person's innocent activity can create reasonable suspicion to justify a stop. *State v. Martinson*, 581 N.W.2d 846, 852 (Minn. 1998). "Nervousness alone is not an objective fact, but rather a subjective assessment derived from the officer's perceptions." *State v. Tomaino*, 627 N.W.2d 338, 341 (Minn. App. 2001).

Barlage had reasonable suspicion to search the smartphone given how long it took Miller to answer the door, Miller's appearance when he did answer the door after this delay, Barlage's observations of potential supervised release violations, Miller's statements, and the location of the phone when law enforcement officers recovered it. First, when Barlage knocked on the door, Miller took three minutes to answer. Second, after this delay, Barlage observed the only approved device connected to a charging cord, but he also saw two other charging cables plugged into an outlet. This indicates that Miller had potentially violated the conditions of his intensive supervised release, which prohibited him from being in possession of any electronic devices that had not been approved. Third, Miller's statements regarding the cables further increase the degree of suspicion that a reasonable officer would have. For example, when Barlage first asked Miller about possessing any other electronic

devices, Miller evaded the question and asked why Barlage came to his motel room. When Barlage asked Miller a second time, Miller responded by acknowledging that there might be unapproved devices in the motel room but denied ownership. When pressed further, Miller provided a circuitous explanation, stating that a female neighbor (whose name he did not know) gave him "a box of stuff," but Miller could not recall when she did so and did not explain what was in the box, or why if there was a prohibited electronic device, he didn't alert Barlage right away. This explanation also concerned Barlage because it suggested that Miller had access to an unapproved electronic device and violated the condition of intensive supervised release prohibiting unapproved visitors. Finally, the phone itself was located under a pile of garbage, notebooks, and clothes on the closet floor. A reasonable officer could conclude Miller attempted to conceal the device in this location during the time that lapsed after Barlage first knocked on the door.

These facts create more than a mere unarticulated hunch that Barlage was in violation of his conditions of release and that the devices contained evidence of criminal activity. Therefore, trial counsel's failure to make a motion to suppress the results of Barlage's initial, warrantless search of Miller's phone did not fall below an objective standard of reasonableness.[4] We affirm the conviction and the denial of Miller's postconviction petition.

Affirmed.

[4] As noted above, in light of our decision regarding the first *Strickland* prong, we need not address the prejudice prong of *Strickland*. *See Peltier*, 946 N.W.2d at 372 (noting that appellate courts need not consider both prongs, when one prong is not satisfied).