STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0696

Tescil Romalis Mason-Kimmons, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 28, 2022
Reversed and remanded
Frisch, Judge

Hennepin County District Court
File No. 27-CR-17-30036

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

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Gaïtas, Judge; and Smith, John, Judge.*

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

NONPRECEDENTIAL OPINION

FRISCH, Judge

Following the denial of his motion to withdraw his guilty plea, appellant asserts that a manifest injustice occurred when he received ineffective assistance of counsel. We reverse and remand.

FACTS

On November 29, 2017, respondent State of Minnesota charged appellant Tescil Romalis Mason-Kimmons with second-degree murder, pursuant to Minn. Stat. § 609.19, subd. 1(1) (2016). On March 2, 2018, a grand jury indicted Mason-Kimmons on charges of first-degree murder, pursuant to Minn. Stat. § 609.185(a)(1) (2016), and being a felon in possession of a firearm, pursuant to Minn. Stat. § 624.713, subd. 1(2) (2016). Mason-Kimmons was initially represented by counsel from the public defender's office, but in February 2018, he discharged his public defender and retained private counsel.

Over the objection of new counsel, the district court scheduled Mason-Kimmons's trial for August 13, 2018. Counsel informed the district court that he had five upcoming trials over the summer and his schedule would therefore not afford him sufficient time to prepare for a first-degree murder trial as scheduled.

Counsel thereafter moved to continue the trial date three times; the district court denied each continuance request. Counsel first moved to continue the trial on May 31, 2018, claiming that his schedule impeded his ability to work on the case and that he needed additional time to conduct his own discovery and to review the significant amount of discovery produced by the state. In denying the motion, the district court stated that "[t]he

August 13, 2018 trial setting will remain in place at this time, but the Court will entertain another continuance request if circumstances change."

Counsel submitted a second continuance request on August 6, 2018, a week before trial. Counsel reiterated that his schedule had interfered with his ability to prepare the case and that he needed more time to complete discovery. Three days later, at the pretrial hearing, counsel stated that "[i]f you order us to go to trial next week . . . it's basically tantamount to saying okay, he's going to be found guilty because his lawyer is telling you right here in court that I'm unprepared." The district court again denied the motion, concluding that counsel's private investigator had sufficient time to complete the investigation and that counsel would be able to sufficiently prepare the case before the commencement of trial the following week.

Also at the pretrial hearing, counsel learned that the state had produced supplemental discovery. Counsel collected the new discovery later that day. This discovery consisted of approximately 400 pages, included several witness interviews, and identified witness contact information that was previously unknown to the defense.

Counsel submitted the third continuance request on the day of trial, August 13, 2018. In support of the motion, counsel reiterated the earlier-identified reasons and added that the new discovery he received four days prior contained new information requiring additional investigation. Counsel stated that "I'm not prepared to go to trial. . . . [I]t's not my intention to go to trial." The district court denied the motion.

The district court then proposed that it take a recess before commencing the trial to enable the parties to discuss a potential resolution. During the one-hour-and-forty-minute

recess, the parties agreed, in pertinent part, that Mason-Kimmons would plead guilty to an amended charge of second-degree murder and the remaining charges would be dismissed.

The district court then held a guilty-plea hearing. The district court engaged in the following colloquy with Mason-Kimmons:

> THE COURT: [O]bviously it's a really important decision you made going forward. And it's your decision to make. It's not mine, it's not [counsel's]. I want to make sure that among the options that you have, that this is the option that you want to go forward with.
> MASON-KIMMONS: Correct.
>
> THE COURT: And like I said, it's a big decision and I know there's been some time pressure. I don't want to pressure you into it. And I know it seems like I've been trying to move the case forward. But as I mentioned a couple of times, I recognize this is a big case for you and [counsel]. And I don't want the pressure of the moment to be the only thing that allows you to make your decision. Do you know what I'm saying?
> MASON-KIMMONS: I hear what you're saying, but you didn't give us no time to speak to the other witnesses, though. Yeah.
>
> THE COURT: All right. You understand that you'd be giving up your right to continue to ask for a continuance, as well as to go forward with trial in this case?
> MASON-KIMMONS: Yes, Your Honor.
>
> THE COURT: All right. And knowing the options that you have, is this the option you want to exercise?
> MASON-KIMMONS: Yes, Your Honor.

The district court then received testimony regarding the factual basis for the plea and thereafter accepted Mason-Kimmons's guilty plea.

On October 2, 2018, the district court sentenced Mason-Kimmons to 366 months' imprisonment. At sentencing, Mason-Kimmons stated: "I apologize for taking the plea agreement, but I wasn't going to get a fair trial. . . . [S]o that's why I'm taking this deal."

Mason-Kimmons directly appealed and then moved to stay the appeal and remand for postconviction proceedings. We granted his motion. Mason-Kimmons then filed a petition for postconviction relief, arguing that he was entitled to withdraw his guilty plea because the plea was involuntary for three reasons: his attorney was unprepared due to the district court denying his continuance requests; the district court failed to inquire into the state's leniency promise toward the co-defendant; and counsel provided him with ineffective assistance. The postconviction court denied the petition without holding an evidentiary hearing.

We then reinstated the appeal and issued an opinion on May 18, 2020, where we held that (1) Mason-Kimmons's guilty plea was not involuntary because the district court denied his continuance motions; (2) he was not coerced by an offer of third-party leniency; and (3) his ineffective-assistance-of-counsel claim warranted an evidentiary hearing. *State v. Mason-Kimmons*, No. A18-2145, 2020 WL 2517067, at *1, *4-7 (Minn. App. May 18, 2020) ("Without an evidentiary hearing, we cannot on this record affirm that appellant received effective assistance of counsel during the hastily arranged plea discussions."). We remanded to the postconviction court for an evidentiary hearing. *Id.* at *7.

On September 28, 2020, the postconviction court held an evidentiary hearing on Mason-Kimmons's ineffective-assistance-of-counsel claim. Counsel testified that his and Mason-Kimmons's "intent was to have a trial," but that Mason-Kimmons pleaded guilty

rather than proceeding to trial with an attorney who was not prepared. Counsel also testified that he was unable to review with Mason-Kimmons the supplemental discovery that he received on August 9, stating, "I think it was a hundred pages of narrative, 397 pages total, which obviously even if I could have reviewed all of it, I had not had an opportunity to review it with him." Mason-Kimmons testified that he intended to take his case to trial and that he had "zero doubt" he would have gone to trial had his counsel been prepared. Mason-Kimmons testified that the fact that his attorney was unprepared played a "major role" in his decision to plead guilty; if counsel had been prepared, Mason-Kimmons "wouldn't even been thinking about pleading guilty."

The postconviction court again denied the petition for postconviction relief. Mason-Kimmons appeals.

DECISION

Mason-Kimmons argues that he should be entitled to withdraw his guilty plea because he received ineffective assistance of counsel, constituting a manifest injustice.

The Sixth Amendment of the United States Constitution guarantees the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 684-86 (1984). This right guarantees to a criminal defendant an attorney with "reasonable competence," but not necessarily "perfect advocacy." *Maryland v. Kulbicki*, 577 U.S. 1, 5 (2015) (quotation omitted). The right to effective counsel extends to a defendant's decision to plead guilty. *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010).

A manifest injustice occurs when a guilty plea is not constitutionally valid. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). "To be constitutionally valid, a guilty plea must

be accurate, voluntary, and intelligent." *Id.* Here, Mason-Kimmons asserts that his plea was involuntary. "The voluntariness requirement [e]nsures the defendant is not pleading guilty because of improper pressures." *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994). "A defendant's guilty plea may be constitutionally invalid if the defendant received ineffective assistance of counsel." *Sames v. State*, 805 N.W.2d 565, 567 (Minn. App. 2011), *rev. denied* (Minn. Dec. 21, 2011). "[T]he voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded of attorneys in criminal cases." *Ecker*, 524 N.W.2d at 718 (quotation omitted).

We review ineffective-assistance-of-counsel claims involving mixed questions of law and fact de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying de novo review to postconviction appeal). But we defer to a district court's findings of fact and "will not set them aside" unless they are clearly erroneous. *State v. Anderson*, 784 N.W.2d 320, 334 (Minn. 2010). "The defendant bears the burden of establishing the facts that support his claim that the guilty plea is invalid." *State v. Mikulak*, 903 N.W.2d 600, 603 (Minn. 2017).

We apply the *Strickland* two-part test to determine whether a criminal defendant received ineffective assistance of counsel when entering a guilty plea. *Campos v. State*, 816 N.W.2d 480, 485 (Minn. 2012). To prevail on such an ineffective-assistance claim, Mason-Kimmons must demonstrate (1) that counsel's representation fell below an objective standard of reasonableness and (2) "prejudice" in the form of a "reasonable probability" that, but for counsel's "unprofessional errors," Mason-Kimmons would not

have pleaded guilty. *Strickland*, 466 U.S. at 687-88, 694; *Campos*, 816 N.W.2d at 486. We address the two prongs of the *Strickland* test in turn.

I. Counsel provided Mason-Kimmons with objectively unreasonable advice.

Mason-Kimmons argues that counsel's performance fell below an objective standard of reasonableness when counsel advised Mason-Kimmons to plead guilty because counsel was unprepared for trial.[1] The state concedes that this advice is objectively unreasonable. We agree with the parties that Mason-Kimmons received objectively unreasonable advice when counsel advised him to plead guilty because counsel was unprepared for trial.

The objective standard of reasonableness is measured by "prevailing professional norms." *Strickland*, 466 U.S. at 688. Counsel acts reasonably when "exercis[ing] the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009) (quotation omitted). This reasonableness is assessed "on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland*, 466 U.S. at 690.

While the postconviction court found that "Mason-Kimmons fail[ed] to show that a reasonable attorney would have been more successful in his efforts to locate supposedly key witnesses," the postconviction court did not address whether counsel's specific advice to Mason-Kimmons to plead guilty on the basis of counsel's own lack of preparation fell

[1] Mason-Kimmons advances additional theories as to why counsel provided him with objectively unreasonable advice. We need not address those alternate theories in light of our holding.

below an objective standard of reasonableness. This omission is particularly troubling because the postconviction court explained "that [counsel] advised Mr. Mason-Kimmons to take a guilty plea because he believed his lack of preparation might hurt Mr. Mason-Kimmons at trial" and that "[counsel] believed that his client only pled guilty because he believed [counsel] was not prepared for trial, and that his client would have proceeded to trial if he believed [counsel] was fully prepared." In assessing the first *Strickland* prong, the postconviction court was obligated to assess whether this advice fell below an objective standard of reasonableness, and its failure to do so is error.

We need not remand this issue to the postconviction court because, on our de novo review, we conclude that counsel's advice to a criminal defendant to plead guilty because counsel is unprepared for trial falls below an objective standard of reasonableness. At oral argument, the state agreed that such advice is objectively unreasonable.

The American Bar Association's standards support our conclusion. *See Strickland*, 466 U.S. at 688 ("Prevailing norms of practice as reflected in American Bar Association standards . . . are guides to determining what is reasonable."). The standards specify that: "Defense counsel should not recommend to a defendant acceptance of a plea unless appropriate investigation and study of the case has been completed." Am. Bar. Ass'n, Crim. Just. Standards, Pleas of Guilty, 14-3.2(b) (3d ed. 1999). Federal caselaw further supports this conclusion. *See Via v. Superintendent, Powhatan Corr. Ctr.*, 643 F.2d 167, 175 (4th Cir. 1981) ("Defense counsel who is unprepared to try a case is also inadequately prepared to advise his client intelligently to plead guilty and accept a plea bargain calling for a substantial sentence."); *United States v. Moore*, 599 F.2d 310, 313 (9th Cir. 1979)

("A plea entered because counsel is unprepared for trial is involuntary."), *cert. denied*, 444 U.S. 1024 (1980); *Colson v. Smith*, 438 F.2d 1075, 1080-81 (5th Cir. 1971) (concluding that a "guilty plea was the product of ineffective assistance of counsel" when the attorney was "unprepared to go to trial" and there was "no evidence that counsel's advice to plead guilty was based on any evaluation of petitioner's chances had he gone to trial"). Finally, *Strickland* itself strongly indicates that such advice is unreasonable. *Strickland*, 466 U.S. at 690-91("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation."); *id.* at 686 ("The benchmark for judging any claim of ineffectiveness is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."); *id.* at 696 ("[T]he ultimate focus of [the] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."). Taken together, we are compelled to agree with the parties that the advice of counsel to a criminal defendant to plead guilty because counsel is not prepared for trial falls below an objective standard of reasonableness.

Accordingly, Mason-Kimmons satisfies the first prong of the *Strickland* test because his counsel provided him with objectively unreasonable advice.

II. The postconviction court must determine whether Mason-Kimmons was prejudiced by counsel's objectively unreasonable advice.

Mason-Kimmons next argues that he was prejudiced because he would not have accepted the state's offer to plead guilty but for counsel's objectively unreasonable advice. The state disagrees, contending that the evidence in the record establishes that

Mason-Kimmons pleaded guilty because the state's evidence against him was strong and he received a favorable plea offer.

To establish prejudice, Mason-Kimmons "must demonstrate a reasonable probability that, but for counsel's ineffective representation, he would not have entered his plea." *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

The postconviction court concluded that Mason-Kimmons was not prejudiced by advice of counsel because he "has not proven that the outcome [of the trial] would have been different" in the absence of the unreasonable advice. But the standard for determining prejudice in this context is whether Mason-Kimmons *would have pleaded not guilty* but for counsel's unreasonable advice, not whether the outcome of a trial would have been different had his case actually proceeded to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) ("[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty *and would have insisted on going to trial*." (emphasis added)). The postconviction court therefore erred by applying the incorrect standard to evaluate prejudice.[2]

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[2] In our previous *Mason-Kimmons* opinion, we set forth the proper framework for the postconviction court to consider in analyzing the second *Strickland* prong:

> To our review of the record, appellant made at least a prima facie showing that his lawyer's deficient performance prejudiced him *and that he would not have pleaded guilty but for that deficiency*.

We cannot resolve this issue on appeal, however, because the postconviction court did not make any factual findings as to Mason-Kimmons's articulated rationale for accepting the state's offer and made no credibility findings as to the testimony or other evidence received at the evidentiary hearing. "Trial courts stand in a superior position to appellate courts in assessing the credibility of witnesses." *In re Welfare of A.D.*, 535 N.W.2d 643, 648 (Minn. 1995) (quotation omitted). We do not engage in fact-finding on appeal. *Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 324 (Minn. App. 2004) ("[T]his court cannot serve as the fact-finder." (citing *Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966)), *rev. denied* (Minn. Dec. 14, 2004).

On this record, we cannot determine whether Mason-Kimmons was prejudiced by his counsel's objectively unreasonable advice. The state identifies alternative reasons as to why Mason-Kimmons accepted the state's offer beyond counsel's lack of preparedness, including the strength of the state's case and the favorable terms of the plea agreement. In the absence of findings as to the credited evidence by the postconviction court, we cannot conclude that Mason-Kimmons was prejudiced by counsel's objectively unreasonable advice.

We therefore reverse and remand to the postconviction court to set forth its findings with respect to the credited evidence as to the reasons Mason-Kimmons accepted the state's plea offer, as well as any other relevant findings of fact.[3] We further direct the

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2020 WL 2517067, at *8 (emphasis added).

[3] We express no opinion as to whether the district court should receive additional evidence on remand.

postconviction court to apply the correct prejudice-prong standard to determine whether, but for counsel's unreasonable advice, there is a reasonable probability that Mason-Kimmons would have pleaded not guilty. *See Hill*, 474 U.S. at 59; *Mason-Kimmons*, 2020 WL 2517067, at *8.

Reversed and remanded.