STATE OF MINNESOTA
IN COURT OF APPEALS
A10-792

State of Minnesota,
Respondent,

vs.

Danny Kwami Barnes,
Appellant.

Filed March 12, 2012
Affirmed
Johnson, Chief Judge

Big Stone County District Court
File No. 06-CR-09-184

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, St. Paul, Minnesota; and

William J. Watson, Big Stone County Attorney, Ortonville, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Johnson, Chief Judge; and Toussaint, Judge.*

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

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

Danny Kwami Barnes and several other men broke into a home and beat and kidnapped a person who was residing in the home. Barnes was convicted of kidnapping, burglary, and assault and was sentenced to 138 months of imprisonment. On appeal, Barnes argues that a jailhouse identification procedure was unnecessarily suggestive, that he did not validly waive his right to a jury trial on facts relevant to his sentence, and that his trial counsel provided him with ineffective assistance of counsel by failing to advise him of the potential severity of his sentence. We affirm.

FACTS

In June 2009, Barnes was the pastor of Thy Kingdom Come church in the city of Wheaton. He was concerned at that time about a member of the church, M.B., who had strayed from the church's teachings by using drugs and alcohol and by leaving his wife and child, who remained with the congregation, and moving into a home with people who were not members of the congregation.

On the evening of June 22, 2009, Barnes led a group of six or more parishioners on an expedition to capture M.B. from the home where he recently had been staying and to take him to the home of the man's father, C.B., who was an assistant pastor of the church. The group entered the home at approximately 11:00 p.m. by smashing a glass door. They found M.B. hiding under a bed, beat him, dragged him down a flight of stairs, beat him again, placed him in a vehicle, and drove him to C.B.'s home. Barnes's party also threatened the other four residents of the home and physically assaulted one of

them. The details of the home invasion were described extensively at trial but need not be repeated here. Several persons reported the incident to law-enforcement officials by telephone. Big Stone County and Traverse County sheriffs' deputies arrested Barnes that night at C.B.'s home and detained him at the Traverse County jail.

Two days after the incident, the state filed a complaint that charged Barnes with four offenses. The state later amended the complaint to allege 14 offenses, including kidnapping, burglary, assault with a dangerous weapon, criminal damage to property, false imprisonment, terroristic threats, and simple assault. On July 13, 2009, the state served Barnes with notice of its intention to seek an aggravated sentence due to (1) the commission of the crime by a party of three or more, (2) the multiple victims, and (3) the use of a firearm during commission of the crime.

Barnes initially represented himself. On July 22, 2009, a public defender was appointed to represent him. On October 27, 2009, Barnes discharged the public defender and hired two private attorneys, Jerome Lewis and Mitchell Robinson.

The case went to trial on January 11, 2010. On the morning of trial, Barnes waived his right to a jury trial, both for the guilt phase and for the determination of aggravating sentencing factors. The trial lasted two days. The state called 20 witnesses. Barnes did not present any evidence.

On January 19, 2010, the district court issued a 21-page order in which it found Barnes guilty of five offenses: (1) kidnapping, a violation of Minn. Stat. §§ 609.25, subd. 1(3), .11, subd. 5(a) (2008); (2) first-degree burglary with a dangerous weapon, a violation of Minn. Stat. § 609.582, subd. 1(b) (2008); (3) second-degree assault with a

dangerous weapon, a violation of Minn. Stat. § 609.222, subd. 1 (2008); (4) fifth-degree assault, a violation of Minn. Stat. § 609.224, subd. 1(1) (2008); and (5) aiding and abetting fifth-degree assault, a violation of Minn. Stat. §§ 609.224, subd. 1(2), .05, subd. 1 (2008).

In February 2010, the district court conducted a sentencing hearing and issued its sentencing orders. The district court found one aggravating factor for first-degree burglary with a dangerous weapon, namely, that Barnes had actively engaged in the crime with three or more people. Accordingly, the district court departed upward from the guidelines range of 50 to 69 months and sentenced Barnes to 138 months of imprisonment on the conviction of first-degree burglary with a dangerous weapon. The district court also imposed two concurrent sentences of 36 months and two concurrent sentences of 90 days on the other four convictions. Barnes timely filed a notice of appeal from the convictions and sentences.

In October 2010, Barnes moved to stay his direct appeal to pursue postconviction relief, and this court granted the motion. In November 2010, with the assistance of his present counsel, Barnes filed a petition for postconviction relief, alleging that his trial attorneys did not adequately advise him of his potential sentence. The district court conducted an evidentiary hearing in March 2011, and issued a 21-page order in April 2011, in which it denied the petition. This court granted Barnes's motion to reinstate his appeal in May 2011. Barnes now appeals from his convictions and from the denial of his petition for postconviction relief.

D E C I S I O N

I. Evidence of Identification

Barnes argues that the district court erred by denying his motion to suppress evidence that an eyewitness identified him after a one-person show-up procedure at the Traverse County jail. Barnes challenges the identification by only one witness, T.P.

T.P. testified at the suppression hearing that he was in the home he shared with M.B. when Barnes and his cohorts conducted the raid. T.P. had been sleeping upstairs. When he heard commotion, he grabbed a knife, stepped into the hallway, and turned on the hallway light. Barnes approached T.P. with a pistol and shouted, "stand down or I'll shoot," which prompted T.P. to drop the knife. T.P. was trapped in the hallway as the group searched M.B.'s bedroom.

After Barnes was arrested and detained, a Big Stone County sheriff's deputy escorted T.P. to the Traverse County jail. At 2:23 a.m. that night, a deputy brought T.P. to the window of a holding cell where Barnes sat alone. T.P. identified Barnes as the man who was in the hallway with a gun. T.P. told the deputy that he felt "one-hundred percent that's the guy with a pistol right up in my face." T.P. identified Barnes as the armed intruder again at the omnibus hearing. T.P. did not previously know Barnes, but he described him as an older black male with a gray beard.

We apply a two-step test to determine whether pre-trial eyewitness identification evidence is admissible. *State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995). At the first step, the "inquiry focuses on whether the procedure was unnecessarily suggestive." *Id.* "Whether a pretrial identification procedure is unnecessarily suggestive turns on whether

the defendant was unfairly singled out for identification." *Id.* "[T]he concern is whether the procedure used by the police influenced the witness identification of the defendant." *State v. Taylor*, 594 N.W.2d 158, 161 (Minn. 1999). If the show-up is unnecessarily suggestive, the second step of the inquiry becomes relevant. *Id.* At the second step, "the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable." *Ostrem*, 535 N.W.2d at 921. The question at the second step is whether the identification created "a very substantial likelihood of irreparable misidentification." *Taylor*, 594 N.W.2d at 161 (quotation omitted). "If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure." *Ostrem*, 535 N.W.2d at 921.

In this case, we need not decide whether the identification procedure used at the Traverse County jail was unnecessarily suggestive because, even if it was, evidence of T.P.'s identification of Barnes nonetheless is admissible because "the totality of the circumstances establishes that the evidence was reliable." *Id.* We evaluate the totality of the circumstances with a five-factor test:

> 1. The opportunity of the witness to view the criminal at the time of the crime;
>
> 2. The witness' degree of attention;
>
> 3. The accuracy of the witness' prior description of the criminal;
>
> 4. The level of certainty demonstrated by the witness at the photo display; [and]

5. The time between the crime and the confrontation.

Id.

Our application of these five factors leads to the conclusion that T.P.'s identification of Barnes is reliable. First, T.P. had a good opportunity to view Barnes during the home invasion because the two men stood only two feet apart, face-to-face, in a well-lit hallway. Second, T.P. likely was focused on Barnes, rather than the other intruders, who were in M.B.'s bedroom. Despite T.P.'s statement at the Traverse County jail, T.P.'s testimony at the suppression hearing does not support the conclusion that T.P. was so focused on the gun that it would have distracted him from perceiving the features of the person holding the gun. *Cf. State v. Gluff*, 285 Minn. 148, 151, 172 N.W.2d 63, 65 (1969). Third, T.P. accurately described Barnes as a black male with a gray beard. Fourth, when T.P. identified Barnes during the show-up, he explained that he was certain that Barnes was the person who had accosted him with a pistol. And fifth, the show-up occurred within four hours of the crime. The totality of the circumstances demonstrates that T.P.'s identification of Barnes did not create "a very substantial likelihood of irreparable misidentification." *Taylor*, 594 N.W.2d at 161 (quotation omitted).

Thus, the district court did not err by denying Barnes's motion to suppress the evidence of T.P.'s identification of Barnes.

II. Waiver of Right to Sentencing Jury

Barnes also argues that the postconviction court erred by denying his petition because his waiver of his right to a jury trial on sentencing issues was invalid.

A defendant's waiver of the right to a jury to determine sentence-enhancement factors must be knowing, voluntary, and intelligent. *State v. Thompson*, 720 N.W.2d 820, 827 (Minn. 2006). "A waiver made in compliance with Rule 26.01, subdivision 1(2)(a), meets the knowing, voluntary, and intelligent requirement." *Id.* That rule provided that a criminal defendant, "with the approval of the court may waive jury trial provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a) (2006).[1] We apply a clearly erroneous standard of review to a district court's determination that a waiver was knowing, voluntary, and intelligent. *State v. Camacho*, 561 N.W.2d 160, 168-69 (Minn. 1997).

The district court conducted a lengthy colloquy with Barnes on the morning of trial before accepting his waiver of his right to a jury trial on sentencing issues. The district court's colloquy included questions specifically relating to his right to a jury trial on sentencing issues:

> THE COURT: [T]he State has made a motion for the fact finder to determine an aggravating factor under the sentencing guidelines. You understand that.
>
> THE DEFENDANT: Your Honor, I do, Your Honor.
>
> THE COURT: And in – in this particular case, I believe the aggravating factor that's been alleged is that three

[1]This rule has since been amended to specifically provide for waiver of the right to a jury trial to determine the facts necessary to support an aggravated sentence, but the substance of the new rule is identical to the old. *See* Minn. R. Crim. P. 26.01, subd. 1(2)(b).

or more persons participated in this alleged event. You understand you have the right to have a jury determine that beyond a reasonable doubt.

THE DEFENDANT: Your Honor, I do, Your Honor.

THE COURT: And after talking with your lawyer, do you now wish to give up your right to a jury trial and have the matter tried to the Court?

THE DEFENDANT: Your Honor, I do, Your Honor.

THE COURT: Okay. And that would also include waiving your right to a jury with respect to this aggravating factor and submit that to the Court as well.

THE DEFENDANT: I've just been informed of that, Your Honor.

THE COURT: And is that something you're willing to agree with?

THE DEFENDANT: Surely, Your Honor.

THE COURT: I'm sorry, I didn't hear you.

THE DEFENDANT: Yes, Your Honor, I am.

THE COURT: Okay. You understand that the Court still has to utilize the same factors that a jury would utilize, that is proof beyond a reasonable doubt in order to find you guilty. Do you understand that?

THE DEFENDANT: Yes, Your Honor, I do, Your Honor.

THE COURT: All right. Then the Court finds the defendant has knowingly and voluntarily and on advice of counsel waived his right to a jury trial including his right to a jury trial on *Blakely* issues.

In rejecting Barnes's postconviction claim that his waiver is invalid, the postconviction court noted that Robinson met with Barnes before trial and advised Barnes on this issue. Specifically, the postconviction court found that Robinson informed Barnes that a jury typically decides whether the state has proved the existence of aggravating sentencing factors but that the district court would do so if Barnes were to waive his right to a jury trial. The postconviction court concluded that Barnes's "waiver of his right to a jury trial on the *Blakely* issue was knowing and voluntary and given after he had the opportunity to consult with counsel."

In *Thompson*, the supreme court approved the defendant's jury waiver for sentencing factors because the defendant orally waived her rights after an extensive on-the-record colloquy. 720 N.W.2d at 827-28. Our case presents very similar facts: Barnes first told the court that he understood he had a right to a jury determination of the aggravating factors beyond a reasonable doubt, and then he waived that right. *See id.* Based on the above record, we conclude that Barnes's waiver of the right to a jury trial on sentencing enhancement factors complied with rule 26.01, subdivision 1(2)(b), and was therefore knowing, voluntary, and intelligent. *See id.* Furthermore, Barnes's claim is undermined by the transcript of a January 3, 2010 telephone conversation between Barnes and Lewis in which they discussed waiving the jury for the guilt phase as a matter of strategy, and Barnes has failed to explain why he would have waived his right to a jury trial on the issue of guilt but retained his right to a jury trial for sentencing issues.

Thus, the postconviction court did not err by finding that Barnes failed to prove that his waiver of his right to a jury trial on sentencing issues was invalid and by denying relief on that claim.

III. Effectiveness of Counsel

Barnes also argues that the postconviction court erred by denying his claim of ineffective assistance of counsel. Specifically, Barnes argues that his trial counsel were ineffective because they did not properly advise him of the potential severity of his sentence and, thus, did not sufficiently advise him of the benefits of accepting the state's plea offer of 36 months.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence." U.S. Const. amend. VI. The right to the assistance of counsel includes the right to the *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). To prevail on a claim of ineffective assistance of counsel, a postconviction petitioner "must demonstrate that (1) counsel's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (citing *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064-65). The right to the effective assistance of counsel applies at the time of a decision to reject a plea bargain. *Leake v. State*, 737 N.W.2d 531, 540-41 (Minn. 2007); *see also Hill v. Lockhart*, 474 U.S. 52, 57-59, 106 S. Ct. 366, 369-70 (1985). In that context, "an attorney's advice falls below objectively reasonable standards . . . when the attorney's inaccurate or misleading factual

statements tend to affect a defendant's decision to reject a plea bargain and proceed to trial." *Leake*, 737 N.W.2d at 540.

Barnes's claim of ineffective assistance of counsel is based on his allegation that Lewis and Robinson did not inform him that he might receive a sentence as high as 138 months. Barnes alleges that Lewis and Robinson informed him that the applicable sentencing guidelines range was 36 to 46 months and that they never informed him of the possibility of an upward departure. In support of his postconviction claim, Barnes introduced transcripts of telephone conversations between his trial counsel and himself while he was detained in the Big Stone County jail pending trial. These transcripts provide substantial support for his claims. The district court, however, found that Barnes's trial counsel were not ineffective.

An appellate court need not analyze both prongs of the *Strickland* test if an analysis of either prong is determinative. *See, e.g.*, *Leake*, 767 N.W.2d at 10; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). In this case, Barnes cannot succeed on his ineffectiveness claim because, at the least, he cannot establish the second prong of the *Strickland* test. In the context of alleged misadvice in connection with a plea offer, "a defendant is prejudiced by . . . ineffective assistance if there is a reasonable likelihood the plea bargain would have been accepted had the defendant been properly advised." *Leake*, 737 N.W.2d at 540. The district court concluded that Barnes failed to prove that he would have accepted the plea offer even if Lewis and Robinson had fully informed him of the possibility of an upward departure and a resulting sentence of 138 months. We

review that finding to determine whether there is sufficient evidence to support it and whether the postconviction court abused its discretion. *Leake*, 767 N.W.2d at 9-10.

In its order denying Barnes's ineffectiveness claim, the postconviction court made numerous findings of particular historical facts and an ultimate finding that Barnes had failed to prove the second prong of the *Strickland* test. In its ultimate finding, the postconviction court stated:

> [Barnes] has failed in his burden of proof to establish the "but for" causal link that if it were not for Mr. Robinson's inaccurate advice, he would have accepted the plea offer. The testimony of both Mr. Hamrum and Mr. Robinson, plus the content of some of the recorded telephone conversations, makes it clear that the reason Mr. Barnes did not accept the 36-month plea offer was because he could not get favorable treatment for co-defendant [C.B.] The Court finds Mr. Barnes's testimony to the contrary to lack credibility based upon his demeanor during testimony, the scattered, disjointed and inconsistent manner in which he testified and the reasonableness of the testimony of the other witnesses when compared with the unreasonableness of his testimony in light of contents of the recorded telephone conversations.

The district court's ultimate finding is based on a few significant predicate findings. First, the postconviction court found that Barnes was aware of the potential length of his sentence based on his own assessment of the charges. For this finding, the postconviction court relied on a video-recording of a sermon Barnes delivered four days after being charged (and released on bail), in which Barnes stated: "I'm looking at 24 years in prison for that act. If I get a sentence of 24 years, it'll be worth it, to me." The record supports the postconviction court's finding that Barnes was aware of the possibility of a sentence longer than he actually received.

Second, the postconviction court found that Barnes was made more aware of the potential sentence because his public defender had advised him of the possibility of a long prison sentence and had done so in connection with the state's plea offer of 36 months. The record supports these findings of the postconviction court. The postconviction court relied on the testimony of the public defender, whose recollection was clearer than that of Barnes, according to the postconviction court. We will not second-guess the postconviction court's credibility determinations. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006).

Third, and most importantly, the postconviction court found that Barnes was interested in pleading guilty only in exchange for the state's lenient treatment of co-defendant C.B. The postconviction court found that Barnes expressed his interest in securing leniency for co-defendants between July and October 2009. The postconviction court also found that when Barnes met with Lewis and Robinson in late October or early November of 2009, "Barnes made it clear from the outset that he wanted to go to trial and was not interested in a plea agreement, particularly if co-defendant [C.B.] was not going to receive favorable treatment in his case." The postconviction court further found that, on January 3, 2010, Robinson made a counter-offer to the prosecutor for Barnes to plead guilty, with an agreed-upon 36-month sentence, so long as the charges against C.B. were dismissed with prejudice. The postconviction court further found that Robinson informed Barnes on January 4, 2010, that the prosecutor had rejected that counter-offer but had indicated a willingness to allow C.B. to plead guilty to a felony with a stay of imposition, which would allow C.B. to avoid incarceration. The transcripts of Barnes's telephone

communications reveal that Barnes left a voice-mail message for Robinson later that same day in which he stated that C.B. "said that he cannot have any felonies on his record at all so we're going forward with trial unless you come up with something else but we'll go to trial and win." Based on this voice-mail message, the postconviction court found that Barnes would not have accepted the state's 36-month plea offer unless C.B. received appropriately favorable treatment and, thus, that Barnes's decision to not plead guilty was not determined by the potential sentence. The record supports each of these findings.

Thus, the postconviction court found that, throughout the period between the filing of the complaint and the trial, Barnes was aware of the possibility of a long prison sentence but was not dissuaded from going to trial unless his guilty plea would allow his co-defendant to avoid prosecution. Given the evidence in the record and the postconviction court's predicate findings, we conclude that the postconviction court did not abuse its discretion by finding that Barnes did not prove the second prong of the *Strickland* test. *See Leake*, 767 N.W.2d at 9-10. Accordingly, the postconviction court did not err by denying postconviction relief on Barnes's claim of ineffective assistance of counsel.

Affirmed.