STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2266

State of Minnesota,
Respondent,

vs.

David Ford McMurray,
Appellant.

Filed September 16, 2013
Affirmed
Stauber, Judge

McLeod County District Court
File No. 43CR12200

Lori Swanson, Minnesota Attorney General, St. Paul, Minnesota; and

Michael K. Junge, McLeod County Attorney, Glencoe, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Hooten, Judge; and Halbrooks, Judge.

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

STAUBER, Judge

On appeal from his conviction of third-degree possession of a controlled substance, appellant argues that (1) the search warrant authorizing a search of his home was unsupported by probable cause because the only evidence supporting it was

recovered during an unconstitutional warrantless search of his garbage; (2) he was denied the effective assistance of counsel; and (3) his stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, was outside the scope of the rules of criminal procedure and failed to satisfy his constitutional right to an adversarial trial. We affirm.

FACTS

In January 2012, local law enforcement received a tip regarding the use of controlled substances at appellant David McMurray's house. In response to the tip, Officer Andrew Erlandson conducted a search of the garbage sitting on the curb in front of appellant's house. During the search, Officer Erlandson discovered plastic baggies with white residue that tested positive for methamphetamine, drug pipes, and documents for appellant and his wife.

Officer Erlandson then sought and obtained a search warrant for appellant's residence. Upon execution of the warrant, law enforcement found appellant, his step-son, and a third individual upstairs in the master bedroom. Also discovered in the bedroom were 3.3 grams of methamphetamine and other drug paraphernalia.

Appellant was charged with second-degree possession of a controlled substance. The charge was later amended to third-degree possession of a controlled substance. Appellant subsequently moved to suppress the evidence on the basis that the warrant authorizing the search was supported only by the fruits of an unconstitutional search of his trash. Following a contested omnibus hearing, the district court denied appellant's motion.

Appellant agreed to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3. The district court found appellant guilty of third-degree possession of a controlled substance and sentenced appellant to 24 months, a downward-durational departure. This appeal followed.

D E C I S I O N

I.

Appellant argues that the search of his trash was illegal, thus claiming that the search warrant issued based on evidence obtained from his trash was invalid and the fruits of the executed search warrant should have been suppressed.

On appeal from a pretrial order on a motion to suppress evidence, this court independently reviews the facts and determines, as a matter of law, whether the district court erred in its ruling. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006). "The district court's factual findings are reviewed under the clearly erroneous standard, but we review the district court's legal determinations de novo." *Id.*

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Generally, an unlawful search or seizure under the Fourth Amendment to the United States Constitution occurs when an individual's reasonable expectation of privacy is invaded. *Katz v. United States*, 389 U.S. 347, 353, 88 S. Ct. 507, 512 (1967). And generally, evidence unconstitutionally seized must be suppressed. *State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007).

"Contraband seized from a garbage search can provide an independent and substantial basis for a probable-cause determination." *State v. McGrath*, 706 N.W.2d

532, 543 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). "[A]n examination of garbage by the police is a search and is therefore subject to the constraints imposed by the Fourth Amendment." *State v. Oquist*, 327 N.W.2d 587, 590 (Minn. 1982). Thus, the Minnesota Supreme Court has recognized that "a householder may ordinarily have some expectation of privacy in the items he places in his garbage can." *Id.* at 591.

However, "[i]t is, as the United States Supreme Court points out, 'common knowledge' that plastic garbage bags left on or beside a public street are vulnerable to any number of invasions, whether from animals or members of the public." *State v. Goebel*, 654 N.W.2d 700, 703-04 (Minn. App. 2002) (quoting *California v. Greenwood*, 486 U.S. 35, 40,108 S. Ct. 1625, 1628-29 (1988)). As a result, the expectation of privacy in garbage placed at curbside for normal pickup is eroded. *Id.* at 704. Following United States Supreme Court precedent, Minnesota courts have consistently held that garbage left on a curb or adjacent to an alley that is seized in a routine curbside pickup does not constitute an illegal search. *See, e.g., State v. Krech*, 403 N.W.2d 634, 636-37 (Minn. 1987) (holding no Fourth Amendment violation where garbage was left a few feet from an alley and seized and searched by police); *State v. Dreyer*, 345 N.W.2d 249, 250 (Minn. 1984) (holding police did not violate defendant's Fourth Amendment rights by seizing and searching garbage left at curb); *Oquist*, 327 N.W.2d at 591 (holding no Fourth Amendment violation where deputies picked up plastic garbage bags near public alley while not leaving paved portion of alley to reach the bags); *Goebel*, 654 N.W.2d at 703-04 (holding no Fourth Amendment violation where garbage bags left for collection on curb at end of driveway).

Appellant concedes that he has "no valid Fourth Amendment claim regarding the search of his garbage." But appellant contends that "no Minnesota appellate court has thoroughly considered whether an individual has, under the Minnesota Constitution, a reasonable expectation of privacy in the contents of his or her garbage bags." Appellant argues that because the Minnesota Constitution provides "broader protections" than the federal constitution, this court should hold that appellant has a reasonable expectation of privacy in the contents of his garbage.

We acknowledge that appellant presents a compelling argument in support of his position. And his position is supported by caselaw from several states that have recognized, under their respective state constitutions, that individuals have a reasonable expectation of privacy in the contents of garbage bags left for pickup. *See, e.g., State v. Goss*, 834 A.2d 316, 319 (N.H. 2003) (holding that under the New Hampshire Constitution, a defendant had a reasonable expectation of privacy in trash that he placed in black plastic bags on driveway); *State v. Morris*, 680 A.2d 90, 100 (Vt. 1996) (concluding that under the Vermont Constitution, persons have objectively reasonable privacy interest in contents of opaque trash bags left at curbside for garbage collection); *State v. Hempele*, 576 A.2d 793, 810 (N.J. 1990) (holding that an individual has a reasonable expectation of privacy that is protected by the New Jersey Constitution in garbage left at curbside); *State v. Boland*, 800 P.2d 1112, 1116-17 (Wash. 1990) (holding that defendant's private affairs were unreasonably intruded upon by law-enforcement officers under the Washington Constitution when they removed and searched garbage from his trash can that was sitting on the curbside).

But, as appellant recognizes, this court has concluded that the Minnesota Constitution does not provide people with a reasonable expectation of privacy in the contents of their garbage bags. For example, in *Goebel*, this court held that garbage left on the street at the end of a private driveway for routine collection is not within the curtilage of the home and is not protected by the warrant requirement of Article I, section 10 of the Minnesota Constitution. 654 N.W.2d at 701. And more recently, in *McGrath*, this court declined to hold that "garbage searches are per se unreasonable under Minnesota law." 706 N.W.2d at 545.

Here, it is undisputed that appellant placed his garbage at the curb for pickup. Under well-established caselaw from this court, appellant had no expectation of privacy with respect to this garbage under the Minnesota Constitution. *See McGrath*, 706 N.W.2d at 545; *see also Goebel*, 654 N.W.2d at 701. Accordingly, the district court did not err by denying appellant's motion to suppress.

II.

Appellant next contends that he was denied the effective assistance of counsel. This court reviews a claim of ineffective assistance of counsel de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

To establish ineffective assistance of counsel, a defendant "must show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that the outcome would have been different but for counsel's errors." *State v. Caldwell*, 803 N.W.2d 373, 386 (Minn. 2011). An attorney acts within an objective standard of reasonableness by exercising the customary skills and

diligence of a reasonably competent attorney under similar circumstances. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009). There is a strong presumption that counsel's representation was reasonable. *State v. Pearson*, 775 N.W.2d 155, 165 (Minn. 2009).

Typically, ineffective-assistance-of-counsel claims are analyzed as trial errors under the standard developed in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011). Under certain circumstances, however, a counsel's ineffective assistance may amount to structural error, which does not require any showing of prejudice. *Id.* A "structural error affects the framework within which the trial proceeds, rather than simply an error in the trial process itself and calls into question the reliability and fairness of the trial." *Id.* (quotation omitted). The United States Supreme Court has outlined three categories in which counsel-related errors would be considered structural error: (1) when "the accused is denied counsel at a critical stage of his trial," (2) when "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and (3) when circumstances show that the probability that a fully competent lawyer "could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *United States v. Cronic*, 466 U.S. 648, 659-60, 104 S. Ct. 2039, 2047 (1984). This narrow exception to the *Strickland* standard "must involve a 'complete' failure by counsel and does not apply to counsel's failure to oppose the State's case 'at specific points' in the proceeding." *Dalbec*, 800 N.W.2d at 628 (quoting *Bell v. Cone*, 535 U.S. 685, 697, 122 S. Ct. 1843, 1851 (2002)). The burden rests on the accused to show that the facts of the case warrant inclusion as a structural error. *Id.*

Appellant argues that his trial counsel was ineffective because counsel "did not meaningfully challenge the state's case at trial." Specifically, appellant argues that his trial counsel could have argued that the drugs found in the room with appellant were not his because there were two other people in the room at the time the drugs were discovered. Appellant argues that by stipulating that the drugs were "found in an area under [appellant's] dominion and control and constitutes constructive possession," his counsel left appellant with no defense. Thus, appellant argues that his trial counsel was so ineffective that it constituted structural error.

To support his claim, appellant cites *Dereje v. State*, in which the parties agreed to a stipulated-facts trial and submitted a body of evidence in which facts material to the elements of the charged offenses were disputed. 812 N.W.2d 205, 208-10 (Minn. App. 2012), *review granted* (Minn. June 27, 2012). On appeal, this court concluded that "there was a complete failure of meaningful adversarial testing: trial counsel made no attempt to draw the court's attention to the disputed factual evidence in a case that hinged on credibility." *Id.* at 211. Thus, this court held that under the "limited facts" of the case, "counsel-related error of a structural nature occurred." *Id.*

We conclude that this case is distinguishable from *Dereje* because unlike *Dereje*, any error was likely not structural. *Dereje* states that in order for there to be structural error, trial counsel must "entirely" fail to subject the state's case to "meaningful adversarial testing." *Id.* And our supreme court has stated that a finding of the narrow structural error standard must involve a "complete" failure by counsel to challenge the state's case, and does not apply to counsel's failure to oppose the state's case at only

"specific points" in the proceeding. *Dalbec*, 800 N.W.2d at 628. Further, a "proceeding" does not consist solely of the trial, but refers to "the multiple, progressive hearings within a particular action at law or case in litigation." *State v. Hohenwald*, 815 N.W.2d 823, 830 (Minn. 2012) (quotation omitted).

Here, appellant's trial counsel moved to suppress the evidence seized as a result of the search of appellant's residence, as well as to suppress statements appellant made to law enforcement following the search. In fact, the record reflects that the district court granted appellant's motion to suppress the statements he made to police. Consequently, appellant's claim that trial counsel's ineffectiveness constitutes structural error fails because there was not a "complete" failure to challenge the state's case throughout the course of the proceedings. *See Dalbec*, 800 N.W.2d at 628.

Because trial counsel's alleged ineffectiveness is not structural error, we analyze appellant's claim under the two-pronged *Strickland* standard. *See Caldwell*, 803 N.W.2d at 386 (stating that to establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) prejudice). But decisions on "what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client." *See State v. Rosillo*, 281 N.W.2d 877, 879 (Minn. 1979) (quotation omitted). And the supreme court has stated, "[i]t is not the [district court's] function to explore with the defendant an evaluation of the merits of his case; matters of trial strategy and tactics should be left to the defendant and his counsel." *State v. Ross*, 472 N.W.2d 651, 654 (Minn. 1991).

Here, appellant's contention that his trial counsel was ineffective is premised on the decision to stipulate that appellant constructively possessed the drugs. But the record indicates that appellant agreed to the stipulation as a strategy to avoid having his step-son testify. Such a decision falls into the category of strategic decisions made by appellant and his counsel, which are not reviewable. *See Rosillo*, 281 N.W.2d at 879. The record reflects that appellant voluntarily waived his right to a jury trial and elected to proceed with a stipulated-facts trial. In doing so, appellant acknowledged that he was proceeding with a stipulated-facts trial so that he could appeal the evidentiary ruling. He further acknowledged that under the stipulated facts, he would likely be found guilty. Accordingly, appellant cannot establish that his trial counsel's performance fell below an objective standard of reasonableness.

III.

Appellant argues that his trial under Minn. R. Crim. P. 26.01, subd. 3, was "outside the scope" of the rules of criminal procedure and failed to satisfy his constitutional right to an adversarial trial. The construction of a rule of criminal procedure is a question of law subject to de novo review. *State v. Nerz*, 587 N.W.2d 23, 24-25 (Minn. 1998).

Rule 26.01 permits the district court to make a decision regarding a defendant's guilt based on stipulated facts:

> The defendant and the prosecutor may agree that a determination of defendant's guilt . . . may be submitted to and tried by the court based on stipulated facts. Before proceeding, the defendant must acknowledge and personally waive the rights to:

> (1) testify at trial;
> (2) have the prosecution witnesses testify in open court in the defendant's presence;
> (3) question those prosecution witnesses; and
> (4) require any favorable witnesses to testify for the defense in court.

Minn. R. Crim. P. 26.01, subd. 3(a). "If the court finds the defendant guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal as from any trial to the court." *Id.*, subd. 3(e).

Here, there is no dispute that appellant followed the procedures outlined by rule 26.01, subdivision 3. But appellant claims that there was no argument by his trial counsel that appellant was not guilty, and that counsel instead essentially agreed that the prosecution's evidence satisfied each of the elements of the charged offense. Appellant contends that the proceeding was actually a guilty plea without the procedural safeguards outlined by Minn. R. Crim. P. 15.01. Thus, appellant argues that because the proceeding was outside the scope of the rules of criminal procedure, his conviction must be reversed.

We disagree. Appellant agreed to proceed with a stipulated-facts trial pursuant to Minn. R. Crim. P. 26.01, subd. 3, rather than a *Lothenbach* proceeding as outlined by Minn. R. Crim. P. 26.01, subd. 4. The record reflects, and appellant appears to concede, that the procedures outlined by rule 26.01, subdivision 3 were followed; he waived his right to (1) testify at trial; (2) have the state's witnesses testify in appellant's presence; (3) question the state's witnesses; and (4) require any favorable witnesses to testify for the defense in court. Moreover, unlike in *Dereje*, appellant actually stipulated to facts, rather than a "body of evidence." 812 N.W.2d at 209-10. The facts to which appellant

stipulated satisfied the elements of the charged offense, which appellant acknowledged on the record. And the fact that appellant stipulated to facts that satisfied the elements of the charged offense does not invalidate appellant's stipulated-facts trial. The record further indicates that appellant wanted to stipulate to certain facts to avoid having his step-son involved in further proceedings. Therefore, appellant cannot establish that his trial failed to comply with the rules of criminal procedure.

Appellant further argues that the procedure used to resolve the case deprived him of his right to an adversarial proceeding. But appellant moved to suppress the contraband discovered during the search of his residence, as well as statements he made to police following the search of his home. The motions made by appellant demonstrate that appellant was not deprived of his right to an adversarial proceeding.

Affirmed.