STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1187

State of Minnesota,
Respondent,

vs.

Eugene Nason,
Appellant.

Filed February 3, 2009
Affirmed
Huspeni, Judge[*]

Itasca County District Court
File No. 31-CR-07-1043

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

John J. Muhar, Itasca County Attorney, Todd S. Webb, Assistant County Attorney, Itasca County Courthouse, 123 Northeast Fourth Street, Grand Rapids, MN 55744 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Davi E. Axelson, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Schellhas, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant challenges his conviction of fifth-degree possession of a controlled substance, arguing that his trial counsel was ineffective and the evidence was insufficient to establish he possessed methamphetamine. Because he fails to show his counsel was ineffective and because the evidence was sufficient to support his conviction, we affirm.

FACTS

During a late afternoon blizzard in March 2007, Leech Lake Police Sergeant Jeff Carlson drove his squad car through the city of Ball Club and saw two vehicles, a Chevy Nova and a pickup, parked in the middle of a dirt road. Considering the poor weather, he initially thought that someone was having car trouble and needed assistance, but, as he approached, he noticed Anthony Bebeau, Mark Allen, and appellant Eugene Nason standing beside the pickup, exchanging something in their hands, and suspected they were engaged in a drug deal. As Sergeant Carlson pulled up, Bebeau noticed him and quickly began walking toward the Nova. Appellant and Allen attempted to get into the passenger side of the pickup. At that time, Sergeant Carlson became concerned that the men may be entering the pickup to get a weapon, so he drew his gun and ordered the men to stop and exit the pickup. While appellant was doing so, Sergeant Carlson saw him raise his arm and throw a baggie over the passenger door of the pickup.

Sergeant Carlson directed the men and a fourth individual found in the pickup, Nicole Gustafson, to his squad car. He radioed for backup and handcuffed Allen and

appellant. Several deputies arrived at the scene, and appellant was searched and placed in the back of a squad car. He was found to have $160 cash in his front pocket and $100 in his wallet. Additional searches of the suspects and the pickup revealed a total of $1,144.53, a methamphetamine smoking pipe, and a scale. Sergeant Carlson located the baggie thrown by appellant, and testing revealed that it contained methamphetamine.

In a recorded statement, appellant conceded that a drug deal was taking place between Bebeau and Allen but claimed that he was not a party to the sale. Appellant stated that Allen encouraged him to throw the drugs out of the pickup, and appellant admitted that he did throw the baggie. As for the $260 in cash found in his pockets, appellant claimed that he intended to use it to pay utility bills. At appellant's trial, Allen testified that the group was engaged in a drug sale and that, because there was a concern over the weight of the drugs, he, appellant, and Gustafson used the scale to weigh the baggie of methamphetamine. Allen testified that, when Sergeant Carlson arrived, either appellant or Gustafson got rid of the drugs by throwing them, but he could not see who threw the baggie. Gustafson testified as well and claimed that Allen threw the drugs at appellant and told him to get rid of the drugs, and the drugs merely deflected off appellant's hand into a snow bank. Gustafson said that, except in this brief deflection, appellant never touched the drugs.

After closing arguments, the district court instructed the jury regarding the elements of the possession charge and explained that appellant would be guilty of the offense if he either committed it or was an accomplice to anyone who committed it.

Appellant was convicted of fifth degree possession of a controlled substance under Minn. Stat. § 152.025, subd. 2(1) (2006).

In a postconviction petition, appellant asserted that his counsel was ineffective because she failed to request an omnibus hearing to challenge his seizure and failed to request a jury instruction on the issue of "fleeting possession." The petition was reviewed by the judge who presided over appellant's trial. The judge denied the petition, concluding that the seizure was reasonable, that Sergeant Carlson's decision to draw his weapon did not convert the stop into an arrest, that a motion by appellant challenging the stop would have been denied, that appellant's personal possession of methamphetamine was not necessary to his conviction because he was charged both as a principal and as an accomplice for the crime of possession, that the evidence at trial was sufficient for the jury to conclude that the defendant was an accomplice, and that appellant was not entitled to a jury instruction regarding "fleeting possession" because Minnesota has not recognized it as a defense to possession crimes.

Appellant now renews his claims of ineffective assistance of counsel and also claims there was insufficient evidence to establish possession within the meaning of the possession statute.

D E C I S I O N

I.

We first address the issue of whether appellant received ineffective assistance of counsel. The right to effective assistance of counsel forms a part of the Sixth

Amendment right to a fair trial under the United States Constitution. U.S. Const. amend. VI; *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2002). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "[Appellant] must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "The reviewing court considers the totality of the evidence . . . in making this determination . . . [and] need not address both performance and prejudice prongs if one is determinative." *Rhodes*, 657 N.W.2d at 842 (citation omitted). A strong presumption exists "that a counsel's performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). In hindsight, reviewing courts may not review counsel's tactical decisions involving trial strategy. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003).

A. Failure to challenge Sergeant Carlson's seizure of appellant.

Appellant argues that his counsel should have challenged the constitutionality of his seizure and that, if she had, the district court would have suppressed the state's evidence. Evidence obtained by unconstitutional means is generally inadmissible. *State*

v. Bergerson, 659 N.W.2d 791, 797 (Minn. App. 2003). For a finding of ineffective assistance of counsel, however, we would need to conclude that suppression of the state's evidence was reasonably probable.

Due to the weather and his public safety concerns, Sergeant Carlson would have been justified in engaging in a brief encounter with appellant's group. Also, because appellant and the other individuals were stopped in a lane of traffic in violation of Minn. Stat. § 169.32(a) (2006), which prohibits stopping a vehicle upon the main travelled part of the highway, Sergeant Carlson had reasonable, articulable suspicion that justified a traffic stop. *State v. Waddell*, 655 N.W.2d 803, 809 (Minn. 2003) ("A brief investigatory stop requires only reasonable suspicion of criminal activity, a lesser quantum of proof than probable cause."). As Sergeant Carlson approached the men, he saw them standing in the blizzard and gesturing with their hands in a manner that led him to believe that they were engaged in a drug sale, and this further justified the stop.

When the men appeared to flee to their vehicles upon seeing him, Sergeant Carlson became concerned that they were seeking a weapon, and, only after he became concerned for his safety, he drew his gun and ordered the men from the pickup. *State v. Ailport*, 413 N.W.2d 140, 144 (Minn. App. 1987) (holding that officers are permitted to draw their weapon if they have a reasonable belief that a weapon is present and that such conduct does not automatically transform a stop into an arrest), *review denied* (Minn. Nov. 18, 1987). Sergeant Carlson then observed appellant throw a baggie from the pickup, and this observation led him to believe more confidently that he was

encountering a drug sale. This was when Sergeant Carlson directed appellant and the others to his squad car, called for backup, and handcuffed appellant. Meanwhile, the baggie of methamphetamine remained on the ground, abandoned by appellant when he threw it there. *See Abel v. United States*, 362 U.S. 217, 241, 80 S. Ct. 683, 698 (1960) (holding that an unlawful seizure does not occur when an officer appropriates abandoned property). We agree with the district court's conclusion that a motion to suppress would have been denied. Thus, we find no prejudice.

It is also unlikely that appellant's counsel's performance "fell below an objective standard of reasonableness." Not only would a suppression motion have failed, effective assistance "does not require an attorney to advance every conceivable argument." *See Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986) (applying to effectiveness of counsel). Furthermore, a reviewing court cannot review counsel's tactical decisions involving trial strategy. *Miller*, 666 N.W.2d at 717. Here, appellant's attorney reviewed the available discovery and determined that no omnibus issues existed. Appellant fails to show that his attorney's tactical decision to not seek suppression of the evidence was unreasonable. Accordingly, we conclude that appellant's argument that he received ineffective assistance of counsel is without merit.

B. Failure to request a "fleeting control" instruction.

Appellant also argues that his trial counsel was ineffective because she failed to request an instruction regarding fleeting control when the facts supported such an instruction. His argument is premised on this court's statements in *State v. Houston*, 654

N.W.2d 727, 735 (Minn. App. 2003), *review denied* (Minn. Mar. 26, 2003), and the proposition that Minnesota courts recognize the fleeting control defense in possession cases.[1] In *Houston*, this court reviewed a gun possession case and affirmed the district court's rejection of the defense attorney's request for a "fleeting control" instruction but stated that "an instruction on 'fleeting control' may have been appropriate." *Id*. at 735. Respondent counters by noting that *Houston* itself expressly states that "a 'fleeting control' exception has not been recognized in Minnesota." *Id*. at 734. We agree. Further, we have refused to recognize a fleeting control jury instruction on more recent occasions. *See In re the Welfare of S.J.J.*, 755 N.W.2d 316, 318-19 (Minn. App. 2008) (reaffirming that Minnesota does not recognize a fleeting control exception to possession of a firearm).

Because the fleeting control exception is not recognized in Minnesota, we cannot hold that appellant was prejudiced by his attorney's failure to request an instruction on it; it is likely that, if the request had been made, it would have been rejected by the district

[1] The parties in this action refer to the term "fleeting possession"; however, we prefer "fleeting control," the term used in *Houston*. The concept of "fleeting control" has been developed by courts in other jurisdictions. *See, e.g.*, *United States v. Landry*, 257 F.2d 425, 431 (7th Cir. 1958) (stating that possession is "actual control, care and management of, and not a passing control, fleeting and shadowy in its nature" (citation omitted)); *Jordan v. State*, 819 P.2d 39, 43 (Alaska Ct. App. 1991) (holding that a jury instruction including "passing control" was necessary under the circumstances); *People v. Martin*, 25 Cal. 4th 1180, 108 Cal. Rptr. 2d 599, 25 P.3d 1081, 1084 (2001) (holding transitory possession applied only to momentary or transitory possession of contraband for the purpose of disposal); *see also* Model Penal Code § 5.07 (1985) (stating "[i]t is a defense under this Section for the defendant to prove by a preponderance of evidence . . . that he possessed it briefly in consequence of having found it or taken it from an aggressor, or under circumstances similarly negativing any purpose or likelihood that the weapon would be used unlawfully").

court. Moreover, the lack of the instruction did not prevent appellant's attorney from arguing that appellant did not possess or knowingly possess the drugs. In *Houston*, we emphasized that, even without an explicit "fleeting control" instruction, a defense attorney may argue that a conviction for possession requires proof of *knowing* possession. *Houston*, 654 N.W.2d at 735. We note that appellant's attorney took advantage of the opportunity to so argue. Lastly, because appellant was charged as a principal actor and as an accomplice, appellant could have been convicted under an accomplice rationale even if the jury found that he personally did not possess the drugs. Consequently, appellant has failed to show that there is a "reasonable probability" that requesting a fleeting control instruction would have resulted in a better trial outcome for him.

As for the reasonableness of not requesting the instruction, we note that counsel readily admitted at the postconviction hearing that she had never heard of "fleeting control" but stated that, at trial, she raised an argument regarding lack of possession or knowing possession and that this amounted to a similar argument. Because "fleeting control" is a not a defense in Minnesota and because appellant's attorney otherwise vigorously argued that appellant did not knowingly possess the drugs, appellant is unable to show that his attorney's failure to request the instruction was unreasonable.

II.

Appellant next argues that there was not sufficient evidence to support his conviction of possession of a controlled substance. In claims of insufficient evidence to support a jury verdict, this court's review is limited to a "painstaking analysis of the

record to determine whether the evidence, when viewed in a light most favorable to the conviction, [is] sufficient to allow the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court must assume that the jury believed the state's witnesses and disbelieved any contrary evidence, *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989), especially if resolution of the matter depends mainly on conflicting testimony, *State v. Pieschke*, 295 N.W.2d 580, 584 (Minn. 1980). This court "will not disturb the verdict if the jury, acting with due regard for the presumption of innocence" and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004). We examine the "facts in the record and the legitimate inferences that can be drawn from those facts" to determine if a jury could have reasonably found the defendant guilty. *State v. Merrill*, 274 N.W.2d 99, 111 (Minn. 1978).

Appellant was convicted under Minn. Stat. § 152.025, subd. 2(1), which provides that a person is guilty if he or she "unlawfully possesses one or more mixtures containing an [applicable] controlled substance . . . ." Appellant is only challenging whether there was sufficient evidence of "possession" to support his conviction. Appellant also was charged as an accomplice to this offense, and the accomplice statute states that "[a] person is criminally liable for a crime committed by another if the person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2006).

Appellant argues that the evidence shows only that he had momentary control of the drugs when he threw the baggie and that it is "absurd and unreasonable" to criminalize "such innocent behavior." He cites no Minnesota statute or caselaw, however, that recognizes the sort of "fleeting control" exception in possession cases that he seeks. Indeed, there is nothing in the statutory language of section 152.025, subdivision 2(1), indicating possession of the drugs must be more than "brief" or "temporary." The statute unambiguously states that a person is guilty if "the person unlawfully possesses one or more mixtures containing [an applicable] controlled substance . . . ." When a statute's language is unambiguous, the court must apply the statute's plain meaning. *State v. Smoot*, 737 N.W.2d 849, 853 (Minn. App. 2007), *review denied* (Minn. Nov. 21, 2007). Moreover, as previously discussed, Minnesota has opted not to recognize a "fleeting control" exception for the purpose of criminal statutes. *See Houston*, 654 N.W.2d at 734.

Here, Sergeant Carlson testified that appellant possessed the drugs when he observed him raise his left arm over the pickup door and throw the baggie into the snow. Allen testified that appellant participated in weighing the baggie and that either appellant or Gustafson threw the baggie out of the vehicle when Sergeant Carlson arrived. Gustafson testified that appellant was the last person to touch the baggie before it fell out of the pickup, though she minimized his involvement by stating that he merely deflected the baggie out of the pickup. The combination of this testimony supports a finding that appellant directly possessed the baggie, which contained 1.3 grams of methamphetamine.

Without even speculating on whether the jury found appellant guilty as an accomplice to Allen, the jury could have reasonably concluded that appellant actually did possess the methamphetamine, for however short of a time, as required by the statute. There was sufficient evidence to support appellant's conviction.

Affirmed.