STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1415

State of Minnesota,
Respondent,

vs.

Robert Allen Olson,
Appellant.

Filed September 23, 2008
Affirmed
Minge, Judge

Dakota County District Court
File No. K1-06-1572

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

James C. Backstrom, Dakota County Attorney, Vance B. Grannis, III, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael F. Cromett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Johnson, Judge.

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

MINGE, Judge

Appellant challenges his conviction for possession of a controlled substance, arguing that the state failed to establish a valid chain of custody for evidence, that the evidence was insufficient to support his conviction, and that he was denied a fair trial because of ineffective assistance of counsel. We affirm.

FACTS

On May 8, 2008, a person telephoned the Inver Grove Heights Police Department stating that appellant Robert Olson, who the caller suspected to be suicidal, was in its city. The caller identified the car in which Olson was riding and its approximate location. Several officers responded to the call and approached the vehicle. One of the officers observed Olson look back at him and drop an object over his shoulder into the back seat. The officer approached the vehicle, talked to Olson and identified the object as a black rectangular pouch that was partially unzipped. The pouch contained two baggies of a white substance and a syringe. The white substance was later identified to be just over 10 grams of amphetamine and methamphetamine.

Olson was charged with possession of a controlled substance in the second degree. In the first trial, the jury was deadlocked and a mistrial was declared. At retrial, the prosecution determined that it would not submit the controlled substance as physical evidence because of problems in establishing a complete chain of custody for the drugs up to the date of trial. The district court ruled that the prosecution could establish the contents of the black pouch by introducing test results and establishing a valid chain of

custody for the substance from the point of seizure up until the time that it was tested. The district court stated that because the chain of custody for the drugs themselves could not be established up to the time of trial, the actual drugs would be excluded from evidence.

During the retrial, defense counsel objected several times to the adequacy of proof of the chain of custody. The objections were overruled. The general argument of defense counsel was that, because the drugs were not in evidence and several of the technicians could not recall the particular drugs at issue, there was no proper authentication of the drugs Olson was charged with possessing, and the test results were not admissible. The district court determined that the chain-of-custody evidence was sufficient, and Olson was convicted by the second jury. This appeal follows.

D E C I S I O N

I.

The first issue is whether the test results were admissible as evidence at trial. Olson argues that the test results were inadmissible evidence because the chain of custody for their admission was not properly established.

The district court has broad discretion when determining the sufficiency of the foundation for the admission of evidence. *State v. Winston*, 300 Minn. 314, 316-17, 219 N.W.2d 617, 619 (1974). "If, upon consideration of the evidence as a whole, the court determines that the evidence is sufficient to support a finding by a reasonable juror that the matter in question is what its proponent claims, the evidence will be admitted." *State v. Hager*, 325 N.W.2d 43, 44 (Minn. 1982) (quotation omitted).

A. Admissibility of the Chemical Evaluation of the Evidence Based on Chain-of-Custody Authentication Through the Time of Testing

Authentication is a condition precedent to admissibility and is established by evidence sufficient to support a finding that the matter in question is what its proponent claims. Minn. R. Evid. 901(a). When evidence is not unique or readily identifiable, the integrity or control of evidence must be authenticated by establishing the chain of custody. *Hager*, 325 N.W.2d at 44. "Chain-of-custody authentication requires testimony of continuous possession by each individual having possession, together with testimony by each that the object remained in substantially the same condition during its presence in his possession." *Id.* (quotation omitted). The *Hager* court considered an issue similar to the issue presented here:

> In this case the defendant contends only that the chain of possession was inadequate following the chemist's analysis of the substance bought from defendant. Thus, the issue is not whether it was error to admit the chemist's testimony identifying the substance sold as marijuana. Rather, the issue is whether the [district] court erred in admitting the marijuana for the jury to see. No useful purpose would be served by detailing the evidence establishing the lack of tampering following the analysis. It is sufficient to say that our examination of the record on appeal satisfies us that the [district] court properly concluded that the state adequately authenticated the evidence.

Id. at 45. This language recognizes that authentication through the time of testing is adequate to allow for the admission of a lab report identifying the substance at issue. Thus, the chemist's analysis of the substance found in the back seat of Olson's car was properly admitted as evidence if the state established valid chain-of-custody authentication through the time that the substance was tested.

B. Establishment of a Valid Chain of Custody Through the Time of Testing

In order to establish a valid chain of custody, the prosecution must reasonably demonstrate that the evidence offered is the same as that seized and it is in substantially the same condition at the time of trial as it was at the time of seizure. *State v. Johnson*, 307 Minn. 501, 504, 239 N.W.2d 239, 242 (1976).

> Admissibility should not depend on the prosecution negativing all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur. Contrary speculation may well affect the weight of the evidence accorded it by the factfinder but does not affect its admissibility.

Id. at 505, 239 N.W.2d at 242. Identifying marks or labels are a permissible method employed by police officers to provide for chain-of-custody authentication. *Hager*, 325 N.W.2d at 44.

Here, Officer Terry Kelley, who initially noticed the black pouch in the back seat, testified that he handed the pouch to Officer Adam Wiederhoeft, who was also at the scene and was handling the case. Officer Wiederhoeft took the pouch with its contents to the police station, marked them for identification, and placed them in a secure evidence locker. Only an evidence officer has access to an item that is placed into a secure evidence locker. Officer Cory Thomas is responsible for operation of the evidence room in Inver Grove Heights. He removed the evidence from the locker and turned it over to Officer Patrick Gast, a member of the Dakota County Drug Task Force. Officer Gast transferred them to Officer Joseph Gelhay, who did a preliminary screening test and

returned them to a secure evidence locker.[1] Officer Rebecca Sherman, who also serves as an evidence room officer, removed them from the same locker and delivered them once again to Officer Gast, who turned them over to a chemist Kimberly Meline. Meline referred to her report and testified that she tested the evidence and that by chemical testing she determined the substances were amphetamine and methamphetamine. Her report was offered and received as evidence.

Several witnesses relied on their reports in order to recall information about the evidence, including the identification number given the evidence; the weight; and the general description of the evidence at issue. At least one witness testified that she had no independent recollection of the items at issue because she handled so many similar items on a daily basis. Each witness outlined the protection procedures that he/she followed at each step, verified the continuity of the identification numbers and the appropriate secure location that corresponded with the preceding officers' testimony, and confirmed that unless indicated in a log book, no one else was allowed access to the contents of the locker. The chemical report therefore had a proper foundation for admission and a reasonable juror could conclude that the substance tested was the substance in the leather pouch seized from the car in which Olson was riding. There is no need for a witness to have an independent recollection of the evidence at issue when the witness testified that regular protective procedures are followed. These procedures included use of a locked evidence box or a locked evidence room to which limited people have access and

[1] Although many officers can place evidence into an evidence locker, the keys are locked inside with the evidence. Only a few individuals can remove items from the evidence locker.

personal delivery to the laboratory for analysis. Such procedures establish a valid chain of custody. Based on the references by witnesses to regularly generated reports and despite the intermittent lapse of an independent recollection of the evidence at issue, the district court had an adequate basis for concluding that the chain of custody was properly established by the state.

Based on this record, we conclude that the district court did not abuse its discretion by determining that the evidence was properly authenticated.

II.

The second issue is whether the evidence is sufficient to support Olson's conviction for possession of a controlled substance. On a sufficiency-of-the-evidence claim, the reviewing court examines the record to determine whether a fact-finder could reasonably conclude that the defendant was guilty of the offense charged. *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). The determination must be made under the assumption that the fact-finder believed the state's witnesses and disbelieved any contrary evidence, and must be made in the light most favorable to conviction. *Id.* Despite the foregoing, the fact-finder must have acted with due regard for the presumption of innocence and the necessity of overcoming that presumption by proof beyond a reasonable doubt. *State v. Combs*, 292 Minn. 317, 320, 195 N.W.2d 176, 178 (1972).

When reviewing circumstantial evidence, this court applies a more stringent standard. Under this standard, "evidence is entitled to the same weight as any evidence so long as the circumstances proved are consistent with the hypothesis that the accused is

guilty and inconsistent with any rational hypothesis except that of guilt." *Bias*, 419 N.W.2d at 484. The circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989).

A person is guilty of possessing a controlled substance in the second degree if "the person unlawfully possesses one or more mixtures of a total weight of six grams or more containing . . . methamphetamine." Minn. Stat. § 152.022, subd. 2(1) (2006).

> [T]he elements of a crime of possession are: (1) knowledge; (2) possession of the requisite weight and substance; and (3) the act took place at the time and place set forth in the complaint. All three elements must be proven beyond a reasonable doubt for a defendant to be found guilty.

State v. Papadakis, 643 N.W.2d 349, 354 (Minn. App. 2002). A person may constructively possess drugs jointly with another person, and the totality of the circumstances must be assessed in determining whether the state has proved constructive possession. *State v. Barnes*, 618 N.W.2d 805, 812 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001).

Here, an officer testified that upon approaching Olson, he observed Olson drop something over his shoulder into the back seat of the car. In examining the item, the officer found that it contained two baggies of a white powdered substance. The substance was later weighed and chemically tested, and was determined to contain just over 10 ounces of methamphetamine. This evidence provided an adequate basis for a

jury to conclude that Olson was guilty beyond a reasonable doubt of illegally possessing more than six grams of methamphetamine, a controlled substance.

III.

The third issue is whether Olson was denied effective assistance of counsel. Such claims are mixed questions of fact and law and are reviewed de novo. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Effective assistance of counsel forms a part of the Sixth Amendment right to a fair trial under the United States Constitution. *Id*.; *see also Strickland v. Washington*, 466 U.S. 668, 684-86, 104 S. Ct. 2052, 2063-64 (1984). A defendant must show that his counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

"To act within an objective standard of reasonableness, an attorney must provide his or her client with the representation that an attorney exercising the customary skills and diligence . . . [that a] reasonably competent attorney would perform under similar circumstances." *State v. Gustafson*, 610 N.W.2d 314, 320 (Minn. 2000) (quotation omitted). We consider the totality of the evidence to determine whether counsel was ineffective. *Rhodes*, 657 N.W.2d at 842. We do not review matters of trial strategy. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999); *see Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (discussing the reluctance of appellate courts to second-guess trial strategy, including what investigation to undertake). 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 his pro-se supplemental brief, Olson generally appears to claim that (1) because his attorney never inquired about the caller who reported that Olson might be suicidal, there was no way to show whether the welfare check on him was permissible; (2) his attorney never inquired regarding the defendant's competency to stand trial; (3) his attorney never took certain investigatory measures that Olson considered advantageous; and (4) his attorney never filed a motion for a contested omnibus hearing.

A. Caller

Olson's argument appears to be that, had his attorney made further inquiry into the 911 caller's identity, it would have become apparent that the tip was unreliable and that his subsequent search as a result of the welfare check was therefore impermissible. However, officers are entitled to take information received from citizen calls as reliable for the purposes of making a stop or investigation. *Marben v. State, Dep't of Pub. Safety*, 294 N.W.2d 697, 699 (Minn. 1980). Therefore, even if the caller had a criminal history, as is suggested by Olson, the officers were entitled to rely on information provided by the caller to make a welfare check and the failure of Olson's attorney to investigate the identity of the caller did not constitute a lack of reasonable professional assistance.

B. Inquiry Regarding Competence

In raising this point, Olson apparently assumes that he was not competent to stand trial and that, had his attorney inquired as to whether he could stand trial, the district court would have discovered his incompetency. Olson argues that the police call indicating he may commit suicide should have prompted his attorney to inquire into his competency. But Olson appears on the record throughout these proceedings, and was

plainly able to consult with his defense attorney and understand the court proceedings. *See* Minn. R. Crim. P. 20.01, subd. 1 (giving standard for competency). Neither the district court nor the prosecution raised any questions about Olson's competency, though they share a responsibility to do so. *Id.*, subd. 2. Furthermore, potential for suicidal behavior is not necessarily indicative of incompetence. *State v. Hulin*, 412 N.W.2d 333, 338-39 (Minn. App. 1987) (affirming district court's finding of competency, even though the appellant had attempted suicide after trial and suffered brain damage, because evidence showed that he still had ability to understand and participate in proceedings), *review denied* (Minn. Nov. 13, 1987).

Additionally, there is nothing in the record to suggest that Olson was not competent to stand trial: there is no affidavit by Olson stating that this is the case; there are no medical records indicating that Olson is not competent; and based on the transcribed testimony, Olson appears to have understood the proceedings and to have reasonably responded to the court proceedings he was participating in. Under these circumstances, his attorney's failure to inquire further into his competency to stand trial did not fall below an objective standard of reasonableness.

C. Investigatory Measures

Olson claims that he did not receive competent legal representation because his attorney failed to undertake certain investigatory measures, including finding the actual tape of the call, finding a video recording the police seizure of him in the parking lot where his arrest took place, or taking pictures of the back of his car to establish the limited view officers had of his actions while the officers approached him. Appellate

courts do not second-guess trial strategy, including what investigation to undertake. *Opsahl*, 677 N.W.2d at 421; *Jones*, 392 N.W.2d at 236 ("Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel."). Because there is no indication why failure to pursue the investigatory avenues identified constitutes a failure to provide competent legal representation, we conclude the lack of the complained-about investigation did not deprive Olson of adequate representation.

D. Contested Omnibus Hearing

Olson argues that his attorney's representation of him fell below an objective standard of reasonableness when she failed to make a motion for a contested omnibus hearing. The district court held a contested omnibus hearing at Olson's request, but his attorney was not present because he had fired her. Olson therefore asked for a continuance and reappointment of his attorney. Although he indicated that he wanted to challenge probable cause, Olson failed to provide written notice of any particular challenge and did not inform his attorney that he wished to have a second omnibus hearing until the morning of trial. Because discharging his attorney was a decision made by Olson and explains her absence and because he waited until the day of trial to mention his desire for a new contested omnibus hearing, this particular claim of ineffective assistance of counsel is without merit.

Affirmed.

Dated: