STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2106

Alan Eligha Carter, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 15, 2009
Affirmed in part, reversed in part, and remanded
Hudson, Judge

Benton County District Court
File No. 05-CR-06-3055

Julius A. Nolen, Berndt Law Offices, PLLC, 101 Union Plaza, 333 Washington Avenue North, Minneapolis, Minnesota 55401 (for appellant)

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

Robert J. Raupp, Benton County Attorney, Karl Schmidt, Assistant County Attorney, 615 Highway 23, P.O. Box 189, Foley, Minnesota 56329 (for respondent)

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant Alan Eligha Carter challenges the district court's denial of his postconviction petition seeking relief from his 2007 conviction of first-degree driving

while impaired (DWI). We affirm in part, reverse in part, and remand for an evidentiary hearing on the issue of whether counsel was ineffective for failing to challenge the initial stop of appellant's vehicle.

FACTS

According to the complaint, appellant was stopped on November 5, 2006, because the registration on his vehicle had expired at the end of October 2006. While the officer was speaking with appellant regarding the expired registration plates, he detected a strong odor of alcohol. Appellant failed several field sobriety tests, and a preliminary breath test indicated that he had an alcohol concentration of over 0.08. Subsequent Intoxilyzer test results indicated that appellant had an alcohol concentration of 0.17.

A check of appellant's driving record revealed that his driver's license had been cancelled as inimical to public safety and that he had been previously convicted of criminal vehicular operation. The complaint, filed on November 6, 2006, charged appellant with two counts of first-degree DWI and with driving after cancellation.

On May 14, 2007, appellant pleaded guilty to one count of first-degree DWI, and the other counts were dismissed. The plea petition included an agreement for a 46-month sentence, with an understanding that appellant would request a dispositional departure. During the plea hearing, at which appellant was represented by an assistant public defender, appellant acknowledged that he was waiving his right to have a pretrial evidentiary hearing and that he did not have any questions about that decision. He also acknowledged that he had sufficient time to discuss his case with his attorney and that he did not have any questions about the facts or defenses that he might raise.

In September 2007, appellant retained a private attorney to represent him at sentencing. At the sentencing hearing on November 7, 2007, the state argued against granting appellant a dispositional departure. Appellant's attorney stated that the "main reason we're seeking a departure here is because my client has sole custody of his four minor children." The attorney presented the district court with letters of support from appellant's friends and coworkers. Appellant addressed the district court, taking responsibility for his actions, claiming that he had worked hard on his sobriety, and begging the court to give him another chance by not sending him to prison.

The district court denied appellant's request for a departure, noting that appellant had been given many opportunities in the past and that his "chances have run out." The court imposed a 46-month sentence on appellant, which was the presumptive sentence under the guidelines and was the sentence recommended in the presentence investigation report. The court also imposed a mandatory five-year conditional release period.

In October 2008, appellant filed this postconviction petition seeking to withdraw his guilty plea. His petition alleges that he was denied effective assistance of counsel because his public defender failed to challenge the legality of the stop of appellant's vehicle, failed to file a motion to compel disclosure of the source code, and failed to advise appellant of the mandatory conditional release period. Appellant's petition also alleges that his private attorney was ineffective because she did not object to the conditional release period at the sentencing hearing, did not advise appellant that he could request withdrawal of his plea, did not submit a written motion or memorandum in support of a dispositional departure, did not attempt to present testimony or other

evidence in support of a departure, and did not object to the probation officer's opinion regarding appellant's lack of amenability to probation.

The district court denied appellant's petition for postconviction relief without an evidentiary hearing. This appeal follows.

D E C I S I O N

A petition for postconviction relief is properly dismissed without an evidentiary hearing when the petition and record "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2008). But an evidentiary hearing should be held "whenever material facts are in dispute that . . . must be resolved in order to determine the issues raised on the merits." *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). Thus, a petitioner must allege facts that would, if proven by a preponderance of the evidence, entitle him to relief. *Roby v. State*, 531 N.W.2d 482, 483 (Minn. 1995). "Any doubts as to whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing." *State v. Rhodes*, 627 N.W.2d 74, 86 (Minn. 2001).

"Ineffective assistance of counsel claims require proof of two elements: objective deficiency of counsel and actual prejudice." *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). An attorney's performance is substandard when the attorney does not exercise "the customary skills and diligence that a reasonably competent attorney would [exercise] under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). "A claim of ineffective assistance of counsel may not rest on the

failure of an attorney to make a motion that would have been denied if it had been made." *Johnson*, 673 N.W.2d at 148. In a case involving a guilty plea, a postconviction petitioner must "demonstrate a reasonable probability that, but for counsel's ineffective representation, he would not have entered his plea." *Id.*

A. Challenge to stop of vehicle

Appellant claims that the assistant public defender was ineffective for failing to advise him of a possible challenge to the stop of his vehicle and for failing to challenge the legality of that stop with a motion to suppress. Appellant's postconviction petition alleges that the officer stopped appellant on November 5, 2006, because his vehicle displayed October 2006 license tabs. But the complaint states that the officer stopped appellant after noticing that the "registration" on his vehicle expired at the end of October 2006; there is no reference to expired "tabs."

Police may lawfully stop a person driving a vehicle with expired license plate tabs. *See, e.g., State v. Kittridge*, 613 N.W.2d 771, 773 (Minn. App. 2000) (holding that police had reasonable suspicion of driving violation when defendant was observed driving a vehicle displaying an expired license plate in violation of Minn. Stat. § 169.79), *review denied* (Minn. Sept. 13, 2000). But appellant claims that the stop was not justified because it occurred within the ten-day grace period allowed by Minn. Stat. § 168.09, subd. 4 (2006) ("A vehicle registered under the monthly series system of registration shall display the plates and insignia issued within ten days of the first day of the month which commences the registration period."). Appellant argues that had his attorney

challenged the stop of appellant's vehicle, his suppression motion would have been granted and the charges against him would have been dismissed.

Appellant's claim may have merit. It is unclear whether a stop within the first ten days of a month, based solely on expired license tabs, can provide police with "reasonable suspicion" of criminal activity. But a stop based on some knowledge on the part of the officer that the vehicle's registration was expired could arguably supply the requisite articulable suspicion for a valid stop. Without more information, we cannot determine whether a suppression motion would have been successful if it had been made. Because material facts are in dispute that must be resolved in order to determine this issue on the merits, the district court should have held an evidentiary hearing on appellant's claim that his attorney was ineffective for failing to challenge the initial stop of appellant's vehicle. We therefore reverse and remand for an evidentiary hearing on this issue.

B. Source code challenge

Appellant also claims that the assistant public defender was ineffective because he failed to discuss a possible "source code" challenge with appellant. Appellant asserts that it was unreasonable for his attorney to fail to file a source code motion and to not discuss with appellant the possible impact such a motion could have on his case.

But, as the district court noted in denying appellant postconviction relief, appellant "made no argument of any evidence that would demonstrate that the source code would affect his guilt or innocence." And appellant acknowledges that "[d]uring the time that appellant's case was pending in district court, source code litigation was an unsettled and

thriving part of criminal court practice" and that some judges were ordering sanctions that included suppression of Intoxilyzer results.[1] The fact that some judges were ordering relief or that some attorneys were making these motions for discovery of the source code, however, does not necessarily mean that appellant's attorney was ineffective in November 2006 for failing to identify a source code challenge as a viable defense strategy. Thus, appellant has failed to demonstrate that he is entitled to postconviction relief on this issue.

C. Conditional release period

Appellant claims that his assistant public defender was ineffective for failing to advise appellant that he would be subject to a mandatory five-year period of conditional release. But appellant was personally put on notice of the mandatory conditional release period. The written plea petition referred to a mandatory conditional release period, although the line on the petition to indicate the number of years of conditional release was left blank. The sentencing worksheet specifically referred to a five-year conditional release period. And, at sentencing, the five-year conditional release period was requested by the prosecutor and ordered by the district court.

Despite these repeated references to the conditional release period, appellant did not object or otherwise claim that his attorney failed to advise him of the imposition of this mandatory condition. Like the defendant in *State v. Rhodes*, 675 N.W.2d 323, 327

[1] Since the briefs were filed in this case, the supreme court has issued its decision in *State v. Underdahl*, 767 N.W.2d 677 (Minn. 2009). In that decision, the supreme court concluded that the source code was not subject to disclosure to a defendant who failed to demonstrate how it could be related to his defense or why it was reasonably likely to contain information related to the case. *Id*. at 685–86.

(Minn. 2004), appellant was on notice that the conditional release term was mandatory and could not be waived by the district court. *See also Oldenburg v. State*, 763 N.W.2d 655, 659–60 (Minn. App. 2009) (holding that addition of conditional release term to felony DWI sentence did not violate plea agreement when agreement did not include guaranteed durational time limit on prison time and defendant had notice of term at the time of the plea). Appellant has failed to establish that he is entitled to postconviction relief on this issue.

D. Sentencing issues

Appellant argues that the private attorney he retained to represent him at sentencing was ineffective because she failed to (1) object to imposition of the conditional release period; (2) advise appellant that he could request withdrawal of his plea; (3) file a written argument in support of a motion for dispositional departure; (4) attempt to present testimony and other evidence in support of a departure; and (5) object to the probation officer's opinion in the presentence investigation report regarding appellant's lack of amenability to probation. Appellant asserts that he pleaded guilty with the understanding that his attorney would seek a dispositional departure and advocate on his behalf. He insists that he "deserves a formal sentencing hearing and an opportunity for resentencing."

Appellant must show that his attorney's performance was deficient and that, but for her errors, the outcome of the proceedings would have been different. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). A reading of the transcript of the sentencing hearing, however, establishes that appellant's attorney provided the district court with

letters of support and that she argued for a dispositional departure. Even if the attorney's performance was objectively unreasonable, the outcome of the proceedings would not have been different: appellant was given an opportunity to address the court at sentencing, during which he expressed remorse and spoke of his addictions and post-traumatic stress syndrome.

In denying appellant's request for a dispositional departure and imposing the recommended 46-month sentence, the district court stated that it had "a lot of experience" with appellant and that it had previously given him the benefit of stayed sentences on several felony convictions. But the court indicated that it had "reluctantly come to the conclusion that [appellant's] chances have run out" and that it was going to sentence him in accordance with the plea agreement. Thus, it is unlikely that the result of the proceedings would have been different had appellant's attorney been a more forceful advocate on his behalf.

We therefore affirm in part, reverse in part, and remand for an evidentiary hearing on the issue of whether appellant's attorney was ineffective for failing to challenge the initial stop of his vehicle.

Affirmed in part, reversed in part, and remanded.