STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1362

State of Minnesota,
Respondent,

vs.

Nicholas Alonzo Jefferson,
Appellant.

Filed October 5, 2010
Affirmed
Toussaint, Chief Judge

Hennepin County District Court
File No. 27-CR-08-36867

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Davi E. Axelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Wright, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

TOUSSAINT, Chief Judge

Appellant Nicholas Alonzo Jefferson appeals from his conviction of second-degree assault and the denial of his petition for postconviction relief, arguing that his trial counsel was ineffective for failing to learn that two witnesses had partially recanted their original reports to the police and that appellant was prejudiced because he would have pursued a jury trial had he known this information. Because the record does not reflect what appellant knew and was advised of at the time he decided to waive his right to a jury trial, and because the appellant did not request an evidentiary hearing to develop these facts, we affirm.

D E C I S I O N

A postconviction decision on a claim of ineffective assistance of counsel involves mixed questions of fact and law, which we review de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). "The defendant 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 result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotation omitted) (recognizing test established in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). The petitioner has the burden of establishing the allegations of the petition by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2008); *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004).

An attorney's performance is not deficient if he "provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999) (quotation omitted). "A strong presumption exists that counsel's performance fell within a wide range of reasonable assistance." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). Courts generally do not review ineffective assistance-of-counsel claims based on matters of trial strategy. *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008). Trial strategy includes what evidence to present to the jury, including which witnesses to call. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). It also includes the extent of counsel's investigation. *Sanchez-Diaz*, 758 N.W.2d at 848. But courts will review trial strategy when it implicates fundamental rights. *Id.* A defendant has a fundamental right to decide "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983)).

Appellant argues that his trial counsel was ineffective because he failed to follow up with his investigator prior to counseling appellant on waiving many of his trial rights and proceeding to trial on stipulated-facts. Appellant was charged with second-degree assault for stabbing S.T. S.T. was with two friends, A.H. and D.C., on the night of the fight and all three gave detailed statements to the police incriminating appellant. The state and appellant reached an agreement in which appellant would proceed to trial on stipulated-facts and the state would agree to a 49-month sentence to run concurrently

with the 98-month sentence appellant was already serving for aggravated robbery. On April 27, 2009, appellant waived many of his trial rights, and the district court admitted three exhibits that established the stipulated facts, including S.T.'s, A.H.'s and D.C.'s statements to the police.

On Thursday, April 23, a defense investigator sent an e-mail to a legal secretary stating that the investigator spoke with A.H. and D.C. on April 23 and both people changed their statements so as not to directly incriminate appellant in S.T.'s stabbing. The secretary forwarded the e-mail to trial counsel the morning of Monday, April 27 while trial counsel was in court with appellant. When trial counsel received the e-mail, he immediately moved to withdraw appellant's waivers of his trial rights and requested a hearing on the motion. At the hearing, appellant stated that he would not have waived his right to a jury trial if he had known about the recantations. The district court denied the motion to withdraw appellant's waivers but reopened the record to admit the e-mail from the defense. The district court found appellant guilty of second-degree assault and sentenced him consistent with the agreement he reached with the state.

Although trial counsel's approach to investigation may be characterized as trial strategy, because appellant waived his right to a jury trial we therefore review whether appellant's waiver of many of his trial rights were based on objectively unreasonable advice. We agree with appellant that negotiating a favorable arrangement with the state does not bar a finding of ineffective assistance of counsel. The decision to waive the right to a jury trial is committed to the defendant, and the waiver must be voluntary based on accurate information and advice from counsel. *See* Minn. R. Crim. P. 26.01 (requiring

defendant's personal waiver for bench trial, stipulated-facts trial); Minn. R. Prof. Conduct 1.2 (discussing allocation of authority between client and lawyer); *State v. Ecker*, 524 N.W.2d 712, 718 (Minn. 1994) ("the voluntariness of the plea depends on whether counsel's advice was within the range of competence demanded by an attorney in criminal cases"); *Anderson v. State*, 746 N.W.2d 901, 911 (Minn. App. 2008) (finding ineffective assistance of counsel when decision to move to withdraw plea was based on inaccurate advice).

But the record is insufficiently developed to allow us to assess whether appellant waived his right to a jury along with other trial rights based on inaccurate or incomplete advice from his trial counsel. Trial counsel's failure to contact the investigator before advising appellant on waiving his rights does not necessarily constitute unreasonable performance. It would be within the standard of reasonableness to advise appellant that the results of the investigation were still unknown and at best would indicate that A.H. and D.C. would recant their statements to police in their testimony if appellant went to a full jury trial; that they could be impeached with their previous statements; and that the credibility of the testimony may be challenged in light of the relationships between appellant and the witnesses. The record indicates that appellant stated that he would have pursued a jury trial if he had known about A.H's and D.C.'s partial recantations. But the record is silent on what appellant knew when he reached the agreement with the state and proceeded on a stipulated-facts trial.

Appellant requested an evidentiary hearing only if the state challenged the facts set out in his petition. The state did not challenge these facts, and appellant did not request a

hearing to show that the advice he received from counsel was inaccurate or misleading. Based on the record on appeal, appellant failed to prove that trial counsel's representation was unreasonable.

Although our conclusion that appellant did not establish that his trial counsel's performance was deficient is dispositive, we also consider his argument that he satisfied the prejudice prong to prevail on his ineffective-assistance-of-counsel claim. *See Doppler*, 590 N.W.2d at 633 (quoting *Strickland* and stating that court need not address both prongs of test if defendant makes insufficient showing on one of them). Appellant argues that showing that he would not have waived his right to a jury trial is sufficient to show prejudice. The state argues that appellant must show that the outcome at trial would have been different but for counsel's errors.

Minnesota courts have not established what standard a defendant must meet to show prejudice in the context of the decision to proceed to a trial on stipulated facts based on unreasonable representation. Although reviewing courts have recognized prejudice when a defendant's decision to plead guilty or move to withdraw a plea was based on unreasonable representation, proceeding to a trial on stipulated facts is not the equivalent of deciding whether or not to concede guilt. *See Ecker*, 524 N.W.2d at 718 (stating prejudice can be shown if, but for counsel's errors, defendant would not have pleaded guilty); *Anderson*, 746 N.W.2d at 911 (recognizing prejudice in decision to move to withdraw plea). A defendant may have strategic reasons to agree to a stipulated-facts trial, and a defendant does not concede guilt in a stipulated-facts trial. As such, it is not clear that the standard to show prejudice in the context of pleading guilty applies to the

decision to proceed on stipulated facts.

We need not resolve what standard for prejudice applies to the decision to pursue a stipulated-facts trial because the record does not show what appellant considered when he agreed to the stipulated-facts trial. The record reflects only that appellant would not have proceeded to trial on stipulated facts had he known that two witnesses changed their statements. For the same reason that the record is inadequate to prove deficient performance by counsel, it is inadequate to prove prejudice even under the less demanding standard appellant advances. Because the record is insufficient to show deficient performance or prejudice and appellant did not request an evidentiary hearing to develop these facts, the district court did not err in denying appellant's petition for postconviction relief asserting ineffective assistance of counsel.

Affirmed.