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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0517
A13-0761**

State of Minnesota,
Respondent (A12-0517),

vs.

Aden Abdulhamid Farah,
Appellant (A12-0517),
and
Aden Abdulhamid Farah, petitioner,
Appellant (A13-0761),

vs.

State of Minnesota,
Respondent (A13-0761).

**Filed March 17, 2014
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CR119160

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

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

Cathryn Middlebrook, Chief Appellate Public Defender, Drake D. Metzger, Special Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

In this consolidation of a direct appeal and an appeal from the denial of a petition for postconviction relief, appellant argues that he is entitled to reversal of his conviction of being a prohibited person in possession of a firearm because the district court erred by denying his motion to suppress his admission and the postconviction court abused its discretion by denying relief based on appellant's claim of ineffective assistance of counsel. Because the district court did not err by denying appellant's motion to suppress and because appellant failed to establish that ineffective assistance of counsel affected his conviction, we affirm.

FACTS

Minneapolis police officers arrested appellant Aden Abdulhamid Farah after he was identified as the person who had threatened another man with a gun inside of an apartment located at 2212 10th Avenue South. Farah was detained on the porch of the residence, and officers searched the apartment, looking for other victims and/or suspects. One of the officers found a firearm in the apartment and notified the officer who was standing with Farah on the porch that a gun had been found. Farah, who had not been given a *Miranda* warning but was voluntarily speaking to the officer, volunteered that he had handled the gun earlier in the day. Farah was subsequently charged with being a prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subs. 1(2), 2(b) (2010).

Farah retained private counsel, S.L., to represent him. S.L. moved to suppress (1) evidence of the gun as obtained during an illegal search and (2) Farah's statement admitting to possession of the gun as the product of an illegal arrest and unwarned-custodial interrogation.

At the suppression hearing, officers testified that they entered the apartment at the invitation of one of the renters. The officer who had Farah in custody on the porch testified that Farah was not given a *Miranda* warning and was not questioned. The officer testified that Farah spoke voluntarily, stating that the person who identified him was lying, that he was not the one who pointed a gun at that person, and that the person who had pointed the gun fled out the back door. The officer testified that when another officer came out of the apartment and said that a gun had been found, Farah said that he "wanted to be honest" with the officer and said that he had been handling the gun earlier in the day. Farah testified that he did not make such a statement and that he had not handled any gun, did not own a gun, and was unaware that there was a gun in the residence.

At the conclusion of the hearing, the district court, at S.L.'s request, granted S.L. two weeks to submit a written memorandum in support of the suppression motion. S.L. failed to submit a memorandum. The district court denied the motion, concluding that (1) Farah lacked standing to challenge the legality of the search of the apartment, which was justified, in any event, by the emergency situation; (2) Farah stated that he had handled the gun; and (3) that Farah's statement was not the product of an illegal arrest or custodial interrogation.

Prior to trial, S.L. disclosed that he intended to call three witnesses, all of whom were going to testify that Farah was not aware of a gun and did not assault the alleged victim, who was under the influence of alcohol and drugs at the time of the alleged assault. At trial, the state relied almost exclusively on the testimony of the officers who testified that they heard Farah's unsolicited admission that he had handled the gun earlier in the day of the incident. After the state rested, S.L. notified the district court that he had subpoenaed only one of the three witnesses he anticipated calling, but that witness had not appeared. The district court refused to issue a warrant, noting that the subpoena served on the defense witness was for an appearance one month after the trial date. The district court granted S.L. time to attempt to locate a defense witness, but he was unable to do so. Farah then testified, and his testimony was impeached with multiple prior convictions of giving a false name to police. A jury found Farah guilty as charged, and he was subsequently sentenced to 60 months in prison.

Approximately nine months after Farah was found guilty and three months after he was sentenced, attorney S.L. was disbarred for multiple acts of attorney misconduct, none of which involved his representation of Farah. *In re Disciplinary Action against [S.L.]*, 811 N.W.2d 602, 609 (Minn. 2012). Farah petitioned for post-conviction relief, seeking a new trial and requesting an evidentiary hearing to develop the record to support his assertion of ineffective assistance of counsel. The court granted Farah an evidentiary hearing, but ultimately denied Farah's petition. The district court concluded that Farah failed to show that "counsel's representation fell below an objective standard of reasonableness and failed to demonstrate actual prejudice." Farah filed a direct appeal of

his conviction and an appeal of the denial of his petition for postconviction relief. The appeals were consolidated by order of this court.

D E C I S I O N

I. The district court did not err by denying Farah’s motion to suppress his spontaneous admission that he had handled the gun that was found in the apartment.

On appeal, Farah no longer argues that his statement was the product of an illegal arrest, but continues to assert that the statement about handling the gun was made in response to the functional equivalent of a custodial interrogation. We disagree.

“When reviewing a district court’s pretrial order on a motion to suppress evidence, ‘we review the district court’s factual findings under a clearly erroneous standard and the district court’s legal determinations de novo.’” *State v. Gauster*, 752 N.W.2d 496, 502 (Minn. 2008) (quoting *State v. Jordan*, 742 N.W.2d 149, 152 (Minn. 2007)).

A criminal suspect has the right to consult with counsel and have counsel present during all custodial interrogations. *Miranda v. Arizona*, 384 U.S. 436, 471-76, 86 S. Ct. 1602, 1626-28 (1966); *State v. Miller*, 573 N.W.2d 661, 671 (Minn. 1998). For the purposes of the Fifth Amendment, an interrogation “refers to not only express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S. Ct. 1682, 1689-90 (1980) (footnote omitted). In determining whether police tactics were likely to elicit an incriminating response, the focus of the inquiry is on the suspect’s perceptions, rather than the intent of police, and the totality of

the circumstances surrounding custody of the suspect must be considered. *Id.* at 301, 100 S. Ct. at 1690; *State v. Tibiatowski*, 590 N.W.2d 305, 309-10 (Minn. 1999).

Farah asserts that by reporting the discovery of the gun in his presence, the officers intended to elicit an incriminating statement from him. But no evidence or logical inference from the evidence in the record supports this assertion. The officers testified that although Farah was in custody, he was not questioned, but he made spontaneous statements in the officers' presence, including the statement that he had handled the gun earlier in the day. The district court found the officers' testimony credible and concluded that the incriminating statement was not a product of police interrogation or tactics. The district court did not err in denying Farah's motion to suppress his spontaneous statement that he had handled the gun. *See Innis*, 446 U.S. at 303, 100 S. Ct. at 1691 (rejecting the claim that a conversation between officers in the presence of an arrestee, expressing fear that a child would find a loaded weapon and be harmed, amounted to a tactic designed to elicit an incriminating response).

II. Farah failed to establish that counsel's conduct, even if it fell below acceptable standards, affected the outcome of the suppression motion or the trial.

"We review the denial of postconviction relief based on a claim of ineffective assistance of counsel *de novo* because such a claim involves a mixed question of law and fact." *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013).

"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. 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)).

A. Failure to submit memorandum on suppression issue

Farah argues that his counsel’s failure to submit a written memorandum supporting the suppression motion amounted to ineffective assistance of counsel. But, as the postconviction court noted, even if failure to submit a written memorandum fell below an objective standard of reasonableness, the district court’s findings and conclusions concerning the suppression motions are supported by the record and relevant case law such that Farah cannot establish that the absence of a written memorandum affected the outcome of the suppression hearing.

B. Failure to adequately subpoena witnesses

Farah also argues that subpoenaing only one of three witnesses and putting the wrong date on that subpoena constitutes ineffective assistance of counsel. Farah argues that counsel’s ineffective assistance forced him to testify in his own defense, resulting in impeachment of his testimony with prior convictions and affecting the outcome of his trial. But, even if counsel’s conduct fell below an objective standard of reasonableness, Farah failed to establish that, had the proposed witnesses been properly subpoenaed, the outcome of the trial would have been different.

As the postconviction court found, even if properly subpoenaed, the expected testimony of each witness would have been inadmissible speculation about what Farah

knew about the gun on the day of the incident and such testimony, even if admitted, “would fail to meet the State’s primary evidence wherein [Farah] voluntarily admitted that he had handled the gun that day.” Farah claims that he would not have taken the stand if counsel had properly subpoenaed the witnesses. But, given the probability that the witnesses would not have been permitted to testify as Farah proposed, and the certainty that only Farah was competent to testify about his knowledge or lack of knowledge about the gun, Farah would have had to make the same decision about whether to testify on his own behalf even if the witnesses had appeared at trial. The postconviction court did not err by concluding that Farah failed to establish that the outcome of the trial would have been different had the witnesses been properly subpoenaed, and the district court did not abuse its discretion by concluding that Farah failed to establish that he is entitled to a new trial based on his claim of ineffective assistance of counsel.

Affirmed.