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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-2342**

Nancy Rae Dittel, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed January 22, 2013  
Affirmed  
Collins, Judge\***

Hennepin County District Court  
File No. 27-CR-09-47571

Frank A. Schulte, St. Paul, Minnesota (for appellant)

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

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

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and  
Collins, Judge.

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\* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

## UNPUBLISHED OPINION

**COLLINS**, Judge

Appellant Nancy Dittel petitioned for postconviction relief based on ineffective assistance of trial counsel, which the district court denied. Because the district court correctly determined that Dittel's assertions are conclusory and lack factual support, we affirm.

### DECISION

We review a postconviction proceeding to determine whether the evidence is sufficient to sustain the findings of the postconviction court. *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn. 1992). Absent an abuse of discretion, a postconviction court's decision will not be disturbed on appeal. *McMaster v. State*, 551 N.W.2d 218, 218 (Minn. 1996). 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).

To prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate that his or her counsel's performance fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984). The defendant must overcome the "strong presumption that counsel's performance fell within a wide range of reasonable assistance." *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007). Matters of trial strategy presumptively fall within the discretion of trial counsel and will not be second-guessed

on appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). To overcome these presumptions, allegations for postconviction relief must be “more than argumentative assertions without factual support.” *Boitnott v. State*, 631 N.W.2d 362, 370-71 (Minn. 2001).

Dittel first argues that she received ineffective assistance when her trial counsel recommended proceeding with a stipulated-facts trial without first challenging the admissibility of the evidence. But Dittel validly voluntarily waived her right to a jury trial and, in return for agreeing to a trial on stipulated facts, received a negotiated sentencing benefit “limiting the duration and type of potential incarceration should she be found guilty.” A tactical decision to not pursue a particular theory of defense does not constitute ineffective assistance. *State v. Grover*, 402 N.W.2d 163, 166 (Minn. App. 1987). Despite assertions that proceeding differently may have been advantageous, we are not persuaded that the chosen path was objectively unreasonable and will not second-guess the tactical decision to accept a negotiated benefit.

There is no merit in Dittel’s next argument, that her trial counsel was ineffective in his representation regarding the district court’s calculation of restitution. The premise of this contention is that “nothing in the record [exists] to suggest that the defense ever offered any responsive memorandum” on the issue of restitution. But this simply is incorrect. The record shows that Dittel’s trial counsel made oral arguments to the district court addressing restitution on both October 1 and December 29, 2010. In addition, her counsel timely filed a memorandum entitled “Defendant’s Reply to State’s Request for Restitution Beyond Amount Stated in Complaint[.]” It is also clear that the district court

considered the arguments and concluded that it “disagreed with Petitioner’s interpretation of the law.”<sup>1</sup>

Lastly, Dittel calls into question her trial counsel’s preparedness to argue the restitution issue. But counsel’s investigation, preparation, and selection of evidence are generally considered matters of trial strategy and not reviewed for competence. *See Sanchez-Diaz v. State*, 758 N.W.2d 843, 848 (Minn. 2008) (stating that trial strategy includes thoroughness of counsel’s investigation).

Because Dittel’s arguments are conclusory and lack factual support, she cannot sustain an argument for ineffective assistance of counsel. *See Boitnott*, 631 N.W.2d at 370-71. We thus conclude that the district court did not abuse its discretion by denying Dittel’s petition for postconviction relief.

**Affirmed.**

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<sup>1</sup> At oral argument, Dittel’s appellate counsel focused attention on the district court’s calculation of restitution. He asserted that he would have timely appealed the restitution order had he represented Dittel at the time it issued, and he emphatically persisted in challenging the calculation. However, the time within which to appeal the amount of restitution has expired. An appealable order is final upon expiration of the time for appeal, even if wrong. *Dieseth v. Calder Mfg. Co.*, 275 Minn. 365, 370, 147 N.W.2d 100, 103 (1966). And we cannot extend the time to appeal. Minn. R. Civ. App. P. 126.02.