STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1113

State of Minnesota,
Respondent,
vs.

Eddie Delk,
Appellant.

Filed August 12, 2008
Affirmed
Stoneburner, Judge

Stearns County District Court
File No. K9065610

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

Janelle Kendall, Stearns County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303-4773 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Bridget Kearns Sabo, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Lansing, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of first-degree controlled-substance crime, arguing ineffective assistance of counsel due to counsel's concession that appellant was

present at five out of the six controlled-substance sales that made up the charge against him. Because the record demonstrates that appellant explicitly consented to counsel's strategy of conceding appellant's presence at sales in which the total amount of controlled substance sold did not meet the elements of a first-degree offense, and acquiesced in continuation of that strategy after the district court granted the state's request to instruct the jury on the lesser-included offense of second-degree controlled-substance crime, we affirm.

FACTS

Appellant Eddie Delk was charged with first-degree controlled-substance crime for allegedly selling 10 or more grams of a substance containing cocaine (cocaine) within a 90-day period in violation of Minn. Stat. § 152.021, subd. 1(1) (2006). Specifically, Delk was alleged to have sold 13.7 grams of cocaine in six police-controlled buys between September 7, 2006 and November 15, 2006. The sale that occurred on September 13 was alleged to have involved 5.1 grams. Prior to trial, Delk stipulated to the accuracy of the Bureau of Criminal Apprehension (BCA) reports regarding the weight of the drugs recovered after each controlled buy.

At Delk's trial, the confidential informant (CI) testified that Delk was the person who sold him the crack cocaine at each of the controlled buys. Delk's primary defense was that he was not the person who sold the 5.1 grams of cocaine on September 13, and therefore could not be guilty of first-degree controlled-substance crime. During the trial, the state requested that the district court instruct the jury on the lesser-included offense of second-degree controlled-substance crime, defined as the sale of three or more grams of a

substance containing cocaine in a 90-day period. Minn. Stat. § 152.022, subd. 1(1) (2006).

Delk's attorney strongly objected to the second-degree instruction, calling it an attempt by the state to "amend the complaint" and arguing that the instruction would be prejudicial to Delk given the defense strategy of challenging only one of the sales. Delk's attorney stated that he "would have come to this trial with a whole different strategy and theory had [the state] added this charge prior to [trial]." The district court agreed to give the instruction based upon its conclusion that second-degree controlled-substance crime is a lesser-included offense of first-degree controlled-substance crime and that the instruction was supported by the evidence.

The jury found Delk guilty of both first- and second-degree controlled-substance crime. The district court convicted Delk of first-degree controlled-substance crime and sentenced him to 110 months. This appeal followed.

D E C I S I O N

Delk argues that he was deprived of effective assistance of counsel because his trial attorney conceded Delk's guilt on five of the six alleged drug sales without informing him about the effect of this strategy and without getting his consent. Delk did not raise this issue in a postconviction motion and asks this court to make a determination on direct appeal. An ineffective-assistance-of-counsel claim should generally be raised in a postconviction motion, rather than on direct appeal, because the reviewing court does not "have the benefit of all the facts concerning why defense counsel did or did not do certain things." *Roby v. State*, 531 N.W.2d 482, 484 n.1 (Minn. 1995) (quotation

omitted). This court may, however, hear such a claim when requested to do so. *Id.* Appellant bears the burden of proof. *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). If the record is not sufficient to allow review of the ineffective-assistance-of-counsel claim, a postconviction hearing is necessary.[1] *Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001).

To succeed on a claim of ineffective assistance of counsel, a criminal defendant must show both that "'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.'" *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "There is a strong presumption 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) (quotation marks omitted). However, the supreme court has held that "when counsel for a defendant admits a defendant's guilt without the defendant's consent, the counsel's performance is deficient and prejudice is presumed." *State v. Jorgensen*, 660 N.W.2d 127, 132 (Minn. 2003) (citing *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001); *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984)).

[1] But notably, when a claim of ineffective assistance of trial counsel can be adjudicated solely on the record, it must be brought on direct appeal or it will be barred in any subsequent postconviction proceeding. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

I. Delk consented to his attorney's trial strategy in defending the first-degree charge.

Delk's attorney made the following comments in his opening statement to the jury:

> Ladies and gentlemen, good morning. Again, [the state] didn't state anything incorrect. I just want you to focus on only really one date, and that would be September 13, 2006. That will be the date where they allege that [Delk] sold 5.1 grams of crack cocaine to [the CI].
>
> Now, when you've heard all the - - heard everyone's testimony and heard all the evidence, you will get to judge whether or not that actually took place. If that one sale did not take place as [the CI or state] are trying to allege that it occurred, you subtract 5.1 from 13.1, you get eight. That's the only math you have to do today or tomorrow. And if there's only eight grams' worth of sales, [Delk is] not guilty of first-degree controlled substance crime.
>
> So I'm not going to be here to dispute any of the - - any other facts that are known or try to trick you in any way. I'm just going to lay out what the facts are and only tell you what [Delk] is guilty of. That's not first-degree controlled substance.

On the record outside the presence of the jury, the state expressed its concern that, from defense counsel's opening statement, the jury could infer that Delk's attorney was conceding Delk's guilt of five of the six alleged sales. The state asked that the record show that "[Delk's attorney] has discussed [the strategy] with [Delk] and that [Delk] is in support of it." The district court then requested that Delk's attorney question Delk about his consent to the strategy on the record. The following exchange occurred:

> DEFENSE COUNSEL: Mr. Delk, you and I have had conversations prior to today as far as what our strategy would be as far as today's trial, correct?
> DELK: Yes.

> DEFENSE COUNSEL: And as far as our strategy goes, the State has to prove that ten grams or more were sold of cocaine over a 90-day period, but - - and what they have or what they're charging you with is alleged amount of 13.1 grams; is that correct?
> DELK: Yes.
> DEFENSE COUNSEL: And you and I talked about that, you not being present on the 13th and even possibly on the 26th, that if those - - if the jury did not find beyond a reasonable doubt that you were present and that you sold crack cocaine on those dates, that it would be under the ten grams that the State has to - - has to prove, correct?
> DELK: Yes.
> DEFENSE COUNSEL: And therefore, they wouldn't be able to prove a first-degree controlled substance crime had been committed, correct?
> DELK: Yes.
> DEFENSE COUNSEL: And you understand you and I talked about that. We would not be trying to argue to the jury that you weren't present at all of these, that this was just some other person at all of these events, the September 7th, the September 12th, September 20th, and the November 15th, the ones that took place at other different locations, but that we would just be arguing that you weren't present on those other two occasions, correct?
> DELK: Yes.

Plainly, Delk consented to the concession that he was present at most of the sales, and there is no merit to his argument that his attorney made concessions without his consent as part of the strategy in defending against the first-degree controlled-substance charge, of which Delk was ultimately convicted. The record demonstrates, however, that Delk's attorney apparently did not anticipate or explain to Delk the possibility that the state would request an instruction on the lesser-included offense of second-degree controlled-substance crime. Delk does not dispute that second-degree controlled-substance crime is a lesser-included offense of first-degree controlled-substance crime, or

that, in this case, the evidence supported an instruction on second-degree controlled-substance crime. *See State v. Dahlin*, 695 N.W.2d 588, 598 (Minn. 2005) (stating that "trial courts must give a lesser-included offense instruction when . . . the evidence provides a rational basis for convicting the defendant of the lesser-included offense").

Had Delk been acquitted of the first-degree charge, we would need to determine if Delk consented to this trial strategy as it relates to the second-degree charge. *See Wiplinger*, 343 N.W.2d at 860 (stating that "a criminal defense attorney cannot admit his client's guilt to the jury without first obtaining the client's consent to this strategy"). Because Delk was not convicted of the second-degree offense, this issue appears to be moot. But in any event, the record overwhelmingly establishes that Delk acquiesced in the continuation of the strategy even after he was aware of its implications for the second-degree charge. *See Dukes*, 621 N.W.2d at 254 (stating that even if guilt was conceded without consent, "no error will be found if the defendant acquiesced in the strategy") (citing *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992)).

II. Delk acquiesced in continuation of counsel's trial strategy after he was aware of its implications for the lesser-included offense.

A defendant's acquiescence to an attorney's admission of guilt has been found where "counsel used the same strategy throughout trial and the defendant never objected." *Dukes*, 621 N.W.2d at 254. A defendant has also been held to acquiesce where admitting guilt is an "understandable" strategy, the defendant was present at the time the concessions were made, and the defendant acknowledged that he understood his

guilt was being conceded, but did not object. *State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991).

Here, as in *Dukes*, Delk's attorney maintained his strategy throughout the trial. Even in his closing argument, Delk's attorney made references to the fact that if the jury did not believe Delk sold 5.1 grams on September 13, they could not find him guilty of first-degree controlled-substance crime. Additionally, as in *Pilcher*, admitting guilt to the smaller sales here was an "understandable" strategy due to the strength of the state's case. Delk was present throughout trial, acknowledged on the record that he understood that his attorney's strategy included not contesting his presence at the majority of the drug sales—implying a concession of guilt, and Delk did not object or question his attorney's strategy even after it became apparent that the strategy would appear to concede his guilt to the lesser-included offense.

Delk argues that a defendant can only acquiesce if he "understood the implications of the concession," citing *Jorgensen*, 660 N.W.2d at 133. The quoted language does not appear in *Jorgensen*, but the supreme court noted that Jorgensen "knew and understood" the purpose of the strategy used by counsel throughout trial and never objected. *Id.* The supreme court stated that "[o]n that basis, we conclude that Jorgensen acquiesced in the concessions made by his trial counsel." *Id.* Delk also refers to this court's decision in *In re Welfare of B.R.C.*, 675 N.W.2d 348, 352-53 (Minn. App. 2004), where we compared concessions of guilt to guilty pleas and stated that "[w]hile the formalities attendant to a guilty plea may not be necessary, fairness requires that a defendant's consent to a concession of guilt be given voluntarily, knowingly, and only after full appraisal of the

consequences."[2] Delk argues that there is no evidence that he was informed of the consequences of admitting his guilt or that he knowingly and voluntarily agreed to do so.

But the record in this case is clear that Delk understood the strategy, its purpose, and the effect it would have on the lesser-included offense. Delk was specifically made aware of the consequences of the strategy during his attorney's vigorous argument in objection to the lesser-included instruction. Delk was present when his attorney stated that "by allowing an instruction on second-degree controlled substance, [the district court] is basically instructing the jury to find [Delk] guilty because we've conceded to, you know, five out of the six sales." Delk's failure to object to the strategy at that time demonstrates that he knowingly acquiesced in the strategy.

Moreover, Delk's attorney undertook his strategy of conceding guilt to some of the drug sales to defend against the charge of first-degree controlled-substance crime and should have appreciated the risk involved in doing so. Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts. *State v. Doppler*, 590 N.W.2d 627, 633 (Minn. 1999).

Additionally, because Delk was convicted of the first-degree offense after explicitly consenting to counsel's trial strategy regarding that offense, Delk cannot show that but for counsel's failure to anticipate the instruction on the lesser-included offense,

[2] Additionally, in *B.R.C.*, this court's concern regarding the defendant's ability to consent or acquiesce to his attorney's strategy was due to the fact that the defendant was a juvenile. The sentence following the language quoted by Delk is: "Given a juvenile's lack of maturity, we believe that a juvenile defendant's consent should be express and placed on the record before a concession of guilt can be made." *B.R.C.*, 675 N.W.2d at 353. In contrast, Delk is an adult with prior exposure to the criminal justice system.

there is a reasonable likelihood that the outcome in this case would have been different. The state presented a very strong case implicating Delk in repeated sales of cocaine. Delk's attorney ably cross-examined the state's witnesses, attempted to impeach the CI, and presented evidence on the possibility that the CI and the police may have misidentified Delk as the seller at one or more of the sales. Delk has failed to establish that his conviction was the result of ineffective assistance of counsel.

Affirmed.