STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1640

State of Minnesota,
Respondent,

vs.

Fabrizio Montermini,
Appellant.

Filed May 19, 2009
Reversed and remanded
Shumaker, Judge

Ramsey County District Court
File No. K1-06-280

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

Susan E. Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 W. Kellogg Boulevard, Suite 315, St. Paul, MN 55102-1657 (for respondent)

Earl P. Gray, Mark D. Nyvold, 332 Minnesota Street, Suite W-1610, St. Paul, MN 55101 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Poritsky, 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

SHUMAKER, Judge

In this appeal from the district court's denial of appellant's postconviction petition to withdraw his pleas of guilty to kidnapping charges, appellant contends that his defense counsel failed to investigate a meritorious mental-illness defense, failed to object to a sentencing error, and failed to object to the district court's alleged bias. Because defense counsel's assistance was ineffective under the *Strickland* test, we reverse and remand.

FACTS

Appellant Fabrizio Montermini pleaded guilty to one count of criminal vehicular homicide, one count of criminal vehicular injury, and three counts of kidnapping. Through his petition for postconviction relief, Montermini sought to withdraw his plea to the kidnapping charges, alleging that his pleas were the product of the ineffective assistance of his defense attorney and that the district court committed certain sentencing errors. After an evidentiary hearing, the district court denied Montermini's request to withdraw his guilty pleas but modified his sentence. Montermini appeals from the court's denial of his petition to withdraw his pleas.

The case arises from a hit-and-run automobile accident that occurred around 9:30 p.m. on January 13, 2006. While impaired from drinking alcohol, Montermini drove his car at high rates of speed and collided with another vehicle. His three passengers were injured and were knocked unconscious by the impact. One passenger later died about a month later from head and chest injuries he suffered in the collision.

Immediately after the collision, Montermini got out of his car and walked down a hill and urinated. A witness told him not to leave the scene but he got back into his car and drove off with his unconscious passengers. He reached speeds of over 80 miles an hour and struck two parked cars as he fled the scene.

He eventually reached a church parking lot. There he pulled his passengers from the car and, although they were not adequately dressed to be outside in subfreezing weather, Montermini left them in the parking lot and drove off with their cell phones in his car.

At about 11:00 p.m., a state trooper stopped Montermini's car because it had been speeding and weaving. The trooper noted extensive damage to the passenger side of the car and asked Montermini about it. Montermini said that he had had an accident a few days earlier. The trooper also noticed blood on Montermini's hands which Montermini claimed was from that accident. The trooper arrested him for driving while impaired. A blood test administered at 12:46 a.m. on January 14 after the accident showed his alcohol concentration to be .15.

By an amended complaint, the state charged Montermini with seven offenses. In what the court characterized as "straight pleas," Montermini pleaded guilty to five of the offenses and the state dismissed the other two.

Throughout all proceedings following the charges, Montermini was represented by counsel. At the plea hearing, Montermini told the district court that he was pleading guilty voluntarily; that his attorney had explained the consequences of the pleas; and that he and his family had met with defense counsel several times and they felt that the

attorney had taken the time to understand the case and had given sound advice. He also acknowledged that, by pleading guilty, he was giving up the right to present intoxication as a defense to the kidnapping charges.

Montermini then admitted that he had driven negligently; caused an accident; fled the scene, taking his injured passengers away from the scene without their knowledge or consent; and left his passengers in a parking lot. He admitted that taking his passengers with him as he fled the scene of the collision facilitated his flight, as charged in the kidnapping counts.

The district court accepted Montermini's pleas and, after receiving a presentence investigation report and holding a sentencing hearing, imposed sentence. In doing so, the district court sentenced the crimes in the order that it believed them to have been committed, sentencing the kidnapping crimes first and the vehicular crimes second.

In his petition for postconviction relief, Montermini sought to withdraw his pleas to the kidnapping charges, or, in the alternative, to be resentenced. As to the kidnapping pleas, he contended that he had not received effective assistance of defense counsel because his attorney failed to investigate the alleged viable defense of dissociative amnesia. As to the sentencing, he alleged that his attorney was ineffective by failing to object to erroneous statements in the presentence-investigation report; that the district court relied on the erroneous statements in sentencing; that the district court erred by refusing to consider certain information at sentencing favorable to him; and that some of the district court's statements at sentencing evinced judicial bias.

The district court held an evidentiary hearing and granted his petition, in part, by making certain sentencing modifications but denied his motion to withdraw his pleas to kidnapping. This appeal followed.

D E C I S I O N

A person convicted of a crime may petition for postconviction relief "to vacate and set aside the judgment . . . or grant a new trial . . . or make other disposition as may be appropriate." Minn. Stat. § 590.01, subd. 1 (2006). 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 (2006); *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004). Furthermore, if the facts alleged in the petition would entitle the petitioner to relief if proved, the district court must hold an evidentiary hearing. *Spann v. State*, 740 N.W.2d 570, 572 (Minn. 2007). The district court here granted Montermini's request for an evidentiary hearing.

Montermini's claim that he is entitled to withdraw his pleas of guilty to the kidnapping charges is premised on his allegation of ineffective assistance of counsel in three respects. First, he contends that his defense attorney should have investigated the viability of a mental-illness defense. Second, counsel should have objected to errors in the presentence-investigation report on which the district court relied in sentencing. Third, his attorney should have objected to the sentencing judge's alleged bias and should have sought her recusal or removal.

The right to effective assistance of counsel is integral to the Sixth Amendment right to a fair trial under the Constitution of the United States. U.S. Const. amend. VI;

State v. Rhodes, 657 N.W.2d 823, 842 (Minn. 2003). Claims of ineffective assistance of counsel are analyzed under the test set forth in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Rhodes*, 657 N.W.2d at 842. A party who alleges ineffective assistance of counsel must show that the attorney's "performance 'fell below an objective standard of reasonableness and that a reasonable probability exists that the outcome would have been different but for counsel's errors.'" *Id.* (quoting *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998)). "[A]n attorney acts within the objective standard of reasonableness when 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) (quoting *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993)).

Mental-illness Defense

The state charged Montermini with three counts of kidnapping to "facilitate flight" after an offense. He pleaded guilty to those charges, and the factual bases elicited for the pleas related to Montermini's conduct after the accident in which his passengers became unconscious. Montermini contends that his attorney should have investigated the possibility that he had a viable legal defense to the kidnapping charges based on his lack of cognition or awareness of his conduct, making that conduct legally involuntary. *See* Minn. Stat. § 611.026 (2004) (providing that a person may be excused from criminal responsibility if by reason of a defect in reasoning from a mental illness he did not know the nature of the act charged as a crime).

At the postconviction evidentiary hearing, Montermini called as witnesses David Roston, his defense attorney; Peter Meyers, Ph.D., a licensed clinical psychologist and a mental health court examiner for Ramsey County; and Joseph Friedberg, an attorney offered as an expert witness.

Roston testified that Montermini told him that he "had only the vaguest of recollections" of what occurred after the accident. Although he did remember phone calls to a friend and to his mother, as Roston argued during the sentencing, Montermini was "in total shock" and aimlessly drove around "for two hours after the accident." Roston acknowledged that being in a state of shock can possibly diminish criminal responsibility, and he testified that, at the time he represented Montermini, he was aware of "dissociative disorder," a condition that can produce a state similar to amnesia. He further noted that it would be a very weak defense to relate Montermini's memory loss to alcohol consumption. He testified that he was aware that immediately after the accident Montermini got out of his car, walked down an embankment to urinate, returned to his car, and drove around aimlessly on a cold January night with the car windows having been smashed out in the accident. He was aware that Montermini told the officer who stopped him that the damage to the car was the result of an accident a few days earlier.

Although Roston was aware of these facts regarding Montermini's alleged memory loss and his contradictory and sometimes irrational behavior, Roston also testified that he knew of phone calls Montermini made after the accident and of a tape-recording of implied-consent procedure. In those calls and on that recording, Roston noted, Montermini appeared not to have cognitive difficulties.

Roston concluded that Montermini did not have a viable mental-illness defense and that it was not necessary to consult with an expert in psychology or psychiatry to confirm that impression. Roston told Montermini about the possibility of an insanity defense but indicated that "juries don't buy it." Roston did not pursue this issue further.

Dr. Meyers testified that he reviewed the records in the case and interviewed Montermini about the accident and its aftermath. Montermini told him that he could not account for a period of approximately two hours after the accident and had no recollection of what happened during that time. Montermini indicated that he "start[ed] to regain "some form of consciousness on [his] way to the jail." Dr. Meyers also conducted various psychological tests on Montermini.

Dr. Meyers stated his opinion that Montermini suffers from a "major mental illness" known as dissociative amnesia. He described the characteristics of that disorder, indicating that the onset is "a cataclysmic trauma," such as the accident in this case. The onset is followed by a loss of memory and the obliteration of "rational, conscious thought" because the neocortex, or the "frontal executive functions, of the brain "are turned off," and that "obliterates the body or the mind's ability to take in, process information." To confirm his opinion, Dr. Meyers performed a "floating-finger technique," which shows whether an individual is easily hypnotized. He testified that the literature in the field indicates that people with dissociative amnesia "have a higher rate of hypnotizability." He noted that Montermini "was easily hypnotized." Dr. Meyers testified that he had no doubt that Montermini suffers from dissociative amnesia, and he

offered his opinion that Montermini "did not know the nature of his wrong" during the period following the accident when he fled from the scene.

Joseph Friedberg, an attorney whose law practice is 85% defense of serious felonies, testified that he has had experience with asserting the defense of insanity at trial, having done so ten times and having been successful four or five times. He also testified that he has given notice of mental-illness defenses about 100 times. He testified that he had reviewed various reports and documents in this case, including Dr. Meyers's report, and that he listened to Roston's postconviction testimony.

Friedberg stated his opinion that Roston did not exercise the skill required of an attorney to satisfy the standard of objective reasonableness. He explained that, when a client denies a memory of criminal conduct, that denial often is a lie and that the attorney must attempt to ascertain whether the client is being untruthful. After doing so, if the client persists in claiming a lack of memory, "[i]t's per se negligent at that point to not have [the client] examined . . . ." He noted that, although amnesia in itself is not a defense to a crime, an examination can show, as it did here, that a "particular illness . . . that impacts the ability to think, your cognition and your volition, during the lost period of time." Friedberg indicated that "[b]ased on Dr. Meyers's report, [Montermini] would have had a defense," and that it was objectively unreasonable for Roston not to have had him examined. Friedberg stated his opinion that "[i]f that defense . . . was not discussed with Mr. Montermini and there wasn't a knowledgeable agreement by Mr. Montermini to not raise it, then the function of counsel wasn't fulfilled."

In its very thorough and thoughtful analysis of this and the other issues raised in the postconviction proceeding, the district court correctly noted that the *Strickland* test has a "performance" prong and a "prejudice" prong. *See Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (recognizing two-prong test laid out in *Strickland*). The district court also properly pointed out that "[t]here is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotation omitted). Furthermore, to be effective, an attorney need not "advance every conceivable argument." *Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986). Nor is it appropriate for the district court, or an appellate court, simply to second-guess, in hindsight, a lawyer's strategy and tactics. *State v. Miller*, 666 N.W.2d 703, 717 (Minn. 2003). The nature and scope of the investigation of a case is a component of strategy. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). But if that strategy implicates fundamental rights, it is imperative that courts scrutinize it to determine whether it reasonably serves to protect those rights. *See Erickson v. State*, 725 N.W.2d 532, 536 (Minn. 2007) (observing that 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.'" (quoting *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983))). When a criminal defendant elects to plead guilty to a crime, he must do so knowingly, intelligently, and voluntarily. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). A plea is not voluntary if it is premised on counsel's failure to give the advice and assistance on critical issues that counsel is obligated to give under the standard of ordinary skill and competence. *Id.* at 718. It is manifestly unjust for the court

to accept an involuntary plea of guilty to a crime. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). If a plea of guilty creates a manifest injustice, the defendant is entitled to withdraw it. Minn. R. Crim. P. 15.05, subd. 1.

The district court ruled that Montermini failed to satisfy the "performance" prong of *Strickland* because he failed to overcome the presumption that Roston's decision not to have him examined by an expert was a matter of strategy within the wide range of reasonable professional conduct. The court noted that even attorney Friedberg agreed that lawyers must choose strategies in their cases and that "[a]lmost universally . . . counsel decides which defenses to present."

We do not disagree that, ordinarily, counsel chooses the strategy in a case that he, in the sound exercise of his professional judgment, believes will best serve the client's interests. That is often so, even if the client himself feels otherwise. But counsel cannot properly decide on a strategy that best serves his client's interests without first gaining information necessary to make an informed choice of strategy. Additionally, if a plea of guilty is contemplated, counsel must ensure that his client's plea will be voluntary. If a defense is possible under the facts of the case, the client will necessarily have to acknowledge the defense, acknowledge that counsel has fully advised him as to the defense, and then affirmatively waive it. The omission of any of these three essentials can raise the question of whether the plea was voluntary. *See generally* Minn. R. Crim. P. 15.01, subd. 1.

Roston's strategy regarding a possible mental-illness defense was his belief that juries do not accept that defense and that cases asserting the defense are "dead losers" for

the defendant. He based his conclusion on many years of experience as a criminal defense attorney. But general experience, albeit invaluable, is not alone sufficient to allow counsel reasonably to forgo the investigation of the plausibility of a defense when the facts of the case at the very least compel further inquiry. Roston was familiar with dissociative amnesia when he accepted the case. Presumably then he was familiar with the facts that the disorder is a major mental illness, the onset of which is a significant physical or emotional trauma, and that the condition can cause the sufferer to neither understand the nature of his conduct nor appreciate that it is wrong. The facts of this case, as they existed when Montermini entered his pleas to the kidnapping charges, pointed clearly to a possible mental-illness defense. It was thus incumbent on Roston to further explore the possibility of that defense through additional research, investigation, or consultation with an expert, and to fully discuss the defense with his client. Roston relied solely on his general experience and only perfunctorily discussed the possibility of the defense of mental illness with Montermini. By pleading guilty, Montermini waived all defenses to the kidnapping charges. But having no adequate information about the possibility of a mental-illness defense, his plea was involuntary, and Roston's conduct fell below the objective standard of reasonable professional representation required to satisfy the "performance" prong of *Strickland*.

The district court also ruled that Montermini failed to satisfy the "prejudice" prong of *Strickland*. The district court held that Montermini's burden was to "show that he would not have pleaded guilty if Roston [had] investigated adequately the defense of 'dissociative amnesia.'" The district court held that Montermini failed to meet his burden

because he did not testify at the postconviction hearing and thus there was no evidence in the record to show that he would not have pleaded guilty anyway.

The district court also held that Montermini was required to show "that the defense of 'dissociative amnesia' had a realistic chance of success at trial," and that he was not able to do so. In reaching this conclusion, the district court referred to Roston's opinion "that such defenses are generally losers," and that "a jury was unlikely to accept a mental illness defense." The district court also pointed to attorney Friedberg's testimony that he had "rarely succeeded" in cases in which he has raised a mental-illness defense. The district court further cited evidence that Montermini wanted to plead guilty from the first day he met with Roston but that Roston advised against a hasty decision. The district court stated: "Pleading guilty was never in question. [Montermini] would have pleaded guilty anyway." Finally, although the district court indicated that Dr. Meyers's "testimony appeared credible, there are significant problems with his report," and that the "report cannot be accepted as neutral and objective." Additionally, the district court questioned Dr. Meyers's experience with dissociative amnesia.

Although the district court is correct that the evidence shows that Montermini was eager to plead guilty to all charges almost immediately after retaining Roston, that fact does not support the district court's ultimate conclusion that Montermini would have pleaded guilty no matter what an investigation of a possible defense might have disclosed. Rather it begs the question by assuming that adequate information that possibly would relieve Montermini of culpability for some of the criminal conduct would not have been significant to him. Furthermore, in drawing that conclusion, the district

court overlooked Montermini's right to enter a voluntary plea, one characterized by an understanding of the nature of any possible defense and an express waiver of such defense. Montermini was not given the opportunity to meaningfully waive a mental-illness defense because he was never adequately informed about it. Specifically, he was never told that the facts of the case, facts that are not disputed on this record, could support a theory that when he drove away from the accident scene he was suffering from a major mental illness which, if established at trial, would negate three counts of kidnapping.

It is difficult for us to believe that such information would have made no difference whatsoever either to Montermini or even Roston in how the case might be approached. At the very least, we can safely assume that Roston, an experienced and successful criminal lawyer, might have used the information as a plea-bargaining tool and perhaps could have succeeded in fashioning an outcome more favorable than that which followed what the court characterized as "straight pleas."

And although "strategy" is almost always selected by counsel, no client is bound by the attorney's selection. A client can instruct the attorney to try a particular defense despite the attorney's contrary advice, sound or not. The ultimate control over whether to plead guilty or go to trial and whether to present or forgo a defense that has a basis in fact rests with the client.

We reject the district court's conclusion that the mental-illness defense here was meritless. The record shows otherwise. We conclude that, in failing to further investigate the possibility of a mental-illness defense, and in failing to advise Montermini

that the facts of the case appeared to support that defense so as to allow Montermini to exercise a knowing and voluntary choice to plead guilty, Roston's assistance was ineffective and failed to satisfy the *Strickland* test in all respects.

The district court erred in denying Montermini's postconviction petition to be permitted to withdraw his pleas of guilty to the kidnapping charges, and the matter must be remanded to allow such withdrawal and for trial on those charges or for other appropriate proceedings consistent with our holding.

Finally, it is not the intent of our holding to create a new rule or to expand any existing rule or principle regarding the ineffective assistance of counsel. Nor do we intend to suggest that even with a remote possibility of a medical defense counsel must always consult with an expert. Rather, our decision is confined to the facts of this case which show that counsel took a generic approach to this aspect of the case and, in so doing, failed to provide the particular analytical basis for this client's informed choice.

Remaining Issues

Because our holding on the mental-illness defense is dispositive, we need not discuss at length the other two claims of ineffective assistance of counsel that Montermini asserts. Brief comments will suffice.

The first claim relates to the sentencing. Montermini was charged with kidnapping after the accident *in order to facilitate his flight from the scene*. The presentence-investigation report erroneously stated that the kidnapping occurred before the accident and the district court, in apparent reliance on that report, sentenced the kidnappings first, in the order in which the district court believed the crimes occurred.

Roston knew of the error in the presentence-investigation report, knew that his client was not charged with kidnapping before the accident, and yet failed, as a matter of strategy, to call the error to the district court's attention. The result was that Montermini was sentenced for crimes never charged. Although Roston offered a strategy explanation for his omission, we hold that his strategy produced fundamental error and was also violative of *Strickland*.

Montermini's final claim is that the district court showed bias in its comments at sentencing and in its refusal to consider evidence favorable to him and that Roston provided ineffective assistance of counsel by failing to object or to take any corrective action. We have reviewed the claim and the district court's postconviction discussion of the claim. We conclude that the claim is without merit. Strong, but not necessarily inappropriate, statements by a sentencing judge reflecting an acknowledgment of the gravity and lasting effects of egregious criminal behavior are not per se indicative of bias. Montermini's criminal conduct was egregious, leaving permanent consequences to the victims of his crimes. The district court's comments did not reveal bias. Furthermore, the district court listened to all evidence presented in Montermini's favor at sentencing and gave it proper attention and weight.

We find no ineffective assistance of counsel respecting the issue of judicial bias.

Reversed and remanded.