STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1233

State of Minnesota,
Respondent,

vs.

Francisco Vincent Vargas,
Appellant.

Filed October 1, 2012
Affirmed
Stauber, Judge

Redwood County District Court
File No. 64CR09142

Lori Swanson, Attorney General, John B. Galus, Assistant Attorney General, St. Paul, Minnesota; and

Steve Collins, Redwood County Attorney, Redwood Falls, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Stauber, Judge; and Collins, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

STAUBER, Judge

On appeal from his conviction of conspiracy to commit first-degree possession of a controlled substance and from the order denying his petition for postconviction relief, appellant argues that the state failed to prove beyond a reasonable doubt that a conspiratorial agreement existed between appellant and another person and that the postconviction court erred by denying his petition when he received ineffective assistance of counsel. Because the record contains sufficient circumstantial evidence to support the jury's verdict and the postconviction court's factual findings are supported by the record, we affirm.

FACTS

After the Bureau of Alcohol, Tobacco, and Firearms (ATF) conducted a raid on his home in early 2008, S.R. began working with police as a cooperating individual in conducting controlled buys of controlled substances. In July 2008, S.R. told ATF Special Agent Calvin Meyer that Dennis Pendleton, Jr. planned to drive to the Twin Cities area, purchase cocaine, and bring the cocaine back to the Redwood Falls area. According to S.R., Pendleton was going to have S.R. drive him to the Twin Cities in order to purchase the cocaine, so the police wired S.R.'s vehicle for audio recording and installed a GPS tracker.

S.R. met Pendleton on July 15 to travel to the Twin Cities to purchase the cocaine. The two of them met with two other individuals in Redwood Falls and ate dinner at a restaurant. While at the restaurant, Pendleton received a telephone call and he and S.R.

then drove to Pendleton's mother's house at the Lower Sioux Reservation. Pendleton went into his mother's house and came out with a stack of money. The two of them left the reservation and drove to a gas station in Redwood Falls.

Shortly after arriving at the gas station, appellant Francisco Vincent Vargas and another individual arrived. There was "some discussion" about appellant taking S.R.'s vehicle. S.R. contacted ATF to inform them of the change in plans and that appellant would be traveling to the Twin Cities instead of S.R. and Pendleton. Pendleton put the money in the center console while appellant was sitting in the driver's seat of S.R.'s vehicle. S.R. and Pendleton got out of the vehicle, and the man with whom appellant had arrived gave them a ride to Pendleton's mother's house. S.R. observed appellant drive south in his vehicle.

Police conducted surveillance on S.R.'s vehicle (being driven by appellant) as it left the gas station. Appellant drove to a bar in the Eden Prairie area, and then to an apartment in Vadnais Heights. Shortly after midnight, appellant drove to a restaurant in Maplewood, followed by another vehicle. Appellant met a group of people at the restaurant and left approximately one hour later. Police officers observed the trunk of one of the vehicles being opened in the restaurant parking lot but did not see anyone put anything into or take anything out of the trunk.

After leaving the restaurant, both vehicles drove to a nearby bar. Appellant and the people he was with went inside for approximately 30 minutes, then drove back to the apartment in Vadnais Heights. Sometime after 2:00 a.m., S.R. called appellant on a cell phone he had given him. Appellant stated that "everything was good, it was weighed out

and he'd be back in the morning." S.R. took this statement to mean that appellant had purchased the cocaine and would return to the Redwood Falls area in the morning.

Around 1:30 p.m., appellant and his girlfriend left the apartment in Vadnais Heights. Agent Meyer contacted the St. Paul Police Department and requested that a marked squad car initiate a stop of the vehicle. St. Paul Police initiated a traffic stop and conducted a dog sniff. The dog alerted to the passenger seat and center console, and Agent Meyer discovered a clear baggie, about the size of a racquetball, containing white powder in the vehicle. No money was found in the vehicle or on appellant. Testing revealed that the white powder contained cocaine and weighed 52.6 grams.

Appellant was charged with first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(1) (2006). The state later amended the complaint, adding a charge of conspiracy to commit first-degree possession of a controlled substance in violation of Minn. Stat. § 152.096, subd. 1 (2006). The matter was tried to a jury in March 2010. On the first day of trial, the state dismissed the first-degree possession charge.

After the state's case-in-chief, appellant moved to dismiss, arguing that "there is no testimony, there is no evidence, there's been nothing introduced that "Pendleton" conspired with [appellant]." The district court denied the motion, finding that there was sufficient evidence to submit the case to the jury. After the motion was denied, appellant's brother testified for the defense. Following closing arguments, the jury found appellant guilty on the conspiracy charge.

At the sentencing hearing, the state argued for a top-of-the-box, 175-month sentence. Defense counsel argued that appellant should only be sentenced to one-half of the presumptive sentence for first-degree controlled substance crime, relying on the general conspiracy statute. *Compare* Minn. Stat. § 152.096, subd. 1 (providing that a drug-crime conspirator "may be imprisoned . . . up to the maximum amount authorized by law for the act the [conspirator] conspired to commit") *with* Minn. Stat. § 609.175, subd. 2(3) (2006) (providing that a district court cannot sentence a conspirator to "more than one-half the imprisonment" of the underlying felony). The district court concluded that section 152.096 controlled, and imposed a presumptive 146-month sentence.

Appellant filed a direct appeal, but this court stayed the appeal to allow appellant to file a petition for postconviction relief. Appellant filed the petition in April 2011, alleging that he received ineffective assistance of counsel as his attorney had not properly advised him of the presumptive sentence he faced on the conspiracy charge. According to the petition, appellant's attorney had informed him that his maximum sentencing exposure for conspiracy to commit first-degree possession of a controlled substance would be only one-half of the presumptive sentence for the underlying felony. Appellant argued that, but for this advice, he would have accepted the state's plea offer of 84 months. Following an evidentiary hearing, the postconviction court found that appellant had not met his burden on either prong of his ineffective-assistance-of-counsel claim and denied the petition. We dissolved the stay, and appellant now challenges his conviction and the district court's denial of his petition for postconviction relief.

D E C I S I O N

I.

To support a conviction for the crime of conspiracy to possess a controlled substance, the state must prove beyond a reasonable doubt the existence of (1) an agreement between two or more people, including the defendant, to commit a crime; and (2) an overt act in furtherance of the conspiracy. *See* Minn. Stat. §§ 152.096, subd. 1 (prohibiting conspiracy to commit controlled-substance crimes), 609.175, subd. 2 (identifying elements of conspiracy crime) (2006); *see also State v. Kuhnau*, 622 N.W.2d 552, 556 (Minn. 2001) (discussing essential elements of controlled-substance conspiracy crime). Appellant does not challenge the evidence regarding the overt-act requirement, but rather asserts that the evidence of an agreement between him and at least one other person to commit first-degree possession of a controlled substance is insufficient to sustain the conviction.

When considering a claim of insufficient evidence, an appellate court's review is "limited to a painstaking analysis of the record to determine whether the evidence, when viewed in [the] light most favorable to the conviction, [is] sufficient" to sustain the jury's verdict. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). An appellate court "must determine whether, under the facts in the record and any legitimate inferences that can be drawn from them, a jury could reasonably conclude the defendant was guilty of the offense charged." *State v. Bias*, 419 N.W.2d 480, 484 (Minn. 1988). A reviewing court must assume "the jury believed the state's witnesses and disbelieved any evidence to the contrary." *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). A verdict will not be

disturbed on appeal if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004).

"[A] conspiracy to commit a crime is a separate, substantive offense from the crime which is the object of the conspiracy . . . ." *State v. Burns*, 215 Minn. 182, 186, 9 N.W.2d 518, 520 (1943). A conspiracy requires a "common object" to commit the crime that is the object of the conspiracy, "which each member of the [alleged conspiracy] intends shall be accomplished by the concerted action of all." *Id.* A person cannot be found guilty of conspiracy unless it is shown that he or she and the alleged co-conspirators had a "common purpose" to commit the crime at the heart of the conspiracy and that "each of them understood that the others had such purpose." *Id.* at 189, 9 N.W.2d at 521. As such, the state's evidence must "objectively indicate[] an agreement." *State v. Hatfield*, 639 N.W.2d 372, 376 (Minn. 2002).

But direct evidence of a formal agreement to commit the crime is not necessary to secure a conspiracy conviction. *Burns*, 215 Minn. at 189, 9 N.W.2d at 521. A reasonable inference of an agreement may arise when evidence demonstrates "a common plan, concerted conduct, or prior involvement" among the conspirators. *Hatfield*, 639 N.W.2d at 377 (rejecting reasonable inference of agreement when the record lacked evidence of a common plan, concerted conduct, or prior involvement). The state acknowledges that the record does not include direct evidence of an agreement between appellant and anyone

else to possess a controlled substance and that the objective indication of an agreement is therefore based on circumstantial evidence.

"Convictions based on circumstantial evidence alone may be upheld, . . . [but] convictions based on circumstantial evidence warrant particular scrutiny." *State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998) (quotation and citation omitted).

> [O]n appeal, a conviction based on circumstantial evidence may stand only where the facts and circumstances disclosed by the circumstantial evidence form a complete chain which, in light of the evidence as a whole, leads so directly to the guilt of the accused as to exclude, beyond a reasonable doubt, any reasonable inference other than that of guilty.

State v. Jones, 516 N.W.2d 545, 549 (Minn. 1994) (quotation omitted). A successful challenge to a conspiracy conviction based on circumstantial evidence "must establish that the evidence in the record and the reasonable inferences that could be drawn therefrom are consistent with a rational hypothesis other than just the defendant's guilt." *Hatfield*, 639 N.W.2d at 376 (citing *State v. Steinbuch*¸514 N.W.2d 793, 798-99 (Minn. 1994)). On appeal, an appellate court gives "no deference to the fact finder's choice between reasonable inferences." *State v. Anderson*, 784 N.W.2d 320, 329-30 (Minn. 2010) (quotation omitted).

Here, the record shows that Pendleton and S.R. planned to drive to the Twin Cities area to purchase cocaine. On the day the trip was planned, S.R. met appellant and there was "some discussion" about appellant taking S.R.'s vehicle to the Twin Cities. While appellant was sitting in the driver's seat of the vehicle, Pendleton placed the money he had retrieved from his mother's house in the vehicle's center console. Appellant then

drove the vehicle to the Twin Cities. When S.R. called appellant later that night, appellant told S.R. "it was weighed out." Appellant drove back toward the Redwood Falls area the next day. A search of the vehicle uncovered a bag of cocaine, and no cash was found in the vehicle or on appellant's person. The record also contains a telephone call that appellant made from jail following his arrest, in which he states that the cocaine "wasn't found on me" and "my fingerprint wasn't on it cause I know I wiped them off."

While circumstantial, this evidence is sufficient to form a complete chain that, when viewed as a whole, excludes beyond a reasonable doubt any inference inconsistent with appellant having agreed to commit the crime of first-degree controlled-substance possession. *See Jones*, 516 N.W.2d at 549 (explaining when conviction based on circumstantial evidence may be upheld). On this record, the evidence is therefore sufficient to sustain appellant's conviction for conspiracy to commit first-degree possession of a controlled substance.

II.

Appellant also challenges the postconviction court's denial of his petition for postconviction relief based on alleged ineffective assistance of counsel regarding a plea agreement and sentencing. A postconviction decision regarding 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 establish that he received ineffective assistance of counsel, appellant "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) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2064 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). With regard to an ineffective-assistance-of-counsel claim relating to a guilty plea, "a defendant meets the prejudice prong of the *Gates* test by establishing a reasonable probability that, but for counsel's errors, he would not have pleaded guilty, but rather would have proceeded to trial." *Berkow v. State*, 573 N.W.2d 91, 96 (Minn. App. 1997), *aff'd*, 583 N.W.2d 562 (Minn. 1998).

Here, the state offered a plea agreement, under which appellant would plead guilty to second-degree sale of a controlled substance and, in exchange, the state would recommend an 84-month sentence. Appellant argues that he was told by his attorney that his maximum exposure if he were convicted on the conspiracy charge at trial was "80-something" months, and as a result of this advice, he declined to accept the plea agreement. The postconviction court found that any such advice was inaccurate and therefore would constitute ineffective assistance of counsel. *See* Minn. Stat. § 152.096, subd. 1 (providing that a drug-crime conspirator "may be imprisoned . . . up to the maximum amount authorized by law for the act the [conspirator] conspired to commit"); *Leake v. State*, 737 N.W.2d 531, 539-41 (Minn. 2007) (holding that inaccurate advice leading a criminal defendant to reject a plea bargain and proceed to trial constitutes ineffective assistance of counsel).

But the postconviction court rejected appellant's argument that, had he received proper advice on his maximum sentencing exposure if convicted, he would have accepted the state's plea offer. Specifically, the court found that appellant "has consistently maintained his factual innocence, during pre-trial proceedings, at trial, and during the presentence investigation." The postconviction court also noted that during appellant's testimony at the postconviction hearing, he testified that he is factually innocent of the charge. And at trial, the record indicated that appellant was not willing to accept criminal responsibility.

The postconviction court's factual findings are supported by the record. Appellant therefore failed to establish a reasonable probability that, but for the alleged error, he would have pleaded guilty. *See Leake v. State*, 767 N.W.2d 5, 11 (Minn. 2009) (reaching similar conclusion on similar facts). As such, appellant failed to meet his burden on the second prong of the *Strickland* test, and the postconviction court therefore did not err by denying his petition for relief. *See State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (stating that a reviewing court need not analyze both prongs of the *Strickland* test if either one is determinative).

Affirmed.