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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1714**

State of Minnesota,
Respondent,

vs.

John Willard Greywind, Jr.,
Appellant.

**Filed March 4, 2019
Reversed and remanded
Reyes, Judge**

Becker County District Court
File No. 03-CR-17-335

Keith Ellison, Minnesota Attorney General, St. Paul, Minnesota; and

Brian W. McDonald, Becker County Attorney, Rose A. Hanson, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

REYES, Judge

Appellant challenges the postconviction court's summary denial of his petition for postconviction relief requesting to withdraw his plea due to ineffective assistance of

counsel, arguing that his counsel failed to advise him of the defense of voluntary intoxication. In the alternative, appellant argues that he is entitled to withdraw his plea because he did not enter it intelligently. Appellant also requests that this court remand the case for an evidentiary hearing to develop facts related to his claim of ineffective assistance of counsel. We reverse and remand.

FACTS

In February 2017, law enforcement responded to a report of a robbery at a gas station in Audubon, Minnesota. The officers interviewed the gas-station clerk, who reported that two men entered the store wearing bandanas over their faces and displaying knives. The men took cigarettes and money from the cash register. The clerk provided officers a physical description of the robbers, as well as a description of their clothing and the vehicle in which they drove away.

Later that day, another officer stopped a vehicle matching that description, with appellant John Willard Greywind as one of the occupants. The officer observed two knives in plain view on the rear seat of the vehicle, and a pat-down of appellant revealed two bandanas. A search of the vehicle pursuant to a search warrant led to the stolen cigarettes and money from the gas station.

The state charged appellant with first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2016). At the plea hearing, appellant entered a *Norgaard* guilty plea.¹ Appellant agreed that, if all the evidence came into trial, he would likely be

¹ A *Norgaard* plea is a guilty plea where the defendant asserts an absence of memory of the essential elements of the offense and reasonably believes that the state has sufficient

convicted of the charged offense. He testified that in the days leading up to the robbery, he had been using a lot of alcohol and drugs and that at the time of the robbery he was intoxicated to the point that he could not remember what had occurred. The district court accepted appellant's plea and sentenced him to 58 months in prison.

Appellant filed a direct appeal, followed by a motion asking this court to stay his appeal and remand so that he could file a petition for postconviction relief in district court. We granted appellant's motion. Appellant filed a petition for postconviction relief in the form of a plea withdrawal based on ineffective assistance of counsel. The petition alleged that he did not intelligently enter a *Norgaard* plea because his counsel failed to advise him that he could present the defense of voluntary intoxication at trial. Appellant's petition requested an evidentiary hearing "for the purpose of supplementing the record with additional evidence in support of his request for relief."

The postconviction court denied appellant's petition in an order without an evidentiary hearing, holding that failing to inform appellant of the availability of the voluntary-intoxication defense did not constitute ineffective assistance of counsel. This court granted appellant's motion to dissolve the stay and reinstate his appeal.

D E C I S I O N

Appellant argues that (1) the postconviction court abused its discretion by denying his petition to withdraw his *Norgaard* plea because his trial counsel failed to advise him about the defense of voluntary intoxication; (2) because counsel failed to advise him that

evidence to obtain a conviction. *State ex rel. Norgaard v. Tahash*, 110 N.W.2d 867 (Minn. 1961).

he could present the defense at trial, he did not intelligently enter his *Norgaard* plea; and (3) if we determine that the postconviction court failed to reach or decide the factual issue of whether appellant's counsel did not advise him of the voluntary-intoxication defense, this court should remand the matter for an evidentiary hearing to develop the facts necessary for that analysis. Appellant's last argument has merit.

We review a denial of a petition for postconviction relief without an evidentiary hearing for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). A postconviction court abuses its discretion if its decision relies upon an erroneous view of the law or is contrary to logic and the facts in the record. *Id.*

Under Minn. Stat. § 590.04, subd. 1 (2018), a postconviction court must hold an evidentiary hearing for a petition for postconviction relief, *unless the petition, the files, and the records* of the proceedings resulting in conviction *conclusively show* that petitioner is not entitled to relief. Therefore, postconviction courts have limited discretion to determine whether an evidentiary hearing is necessary. *See Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017) (stating postconviction courts determine whether evidentiary hearing is required by considering facts alleged in petition as true and construing them in light most favorable to petitioner). Any doubts as to whether to hold an evidentiary hearing should be resolved in favor of the petitioner. *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012).

Petitions for postconviction relief based on ineffective assistance of counsel must allege facts that, if true, would satisfy, by a preponderance of the evidence, the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). *Nicks*, 831 N.W.2d at 504. Under *Strickland's* first prong, petitioner must show

that counsel's performance "fell below an objective standard of reasonableness." *Sames v. State*, 805 N.W.2d 565, 567 (Minn. App. 2011) (quoting *Staunton v. State*, 784 N.W.2d 289, 300 (Minn. 2010)) (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064). An "objective standard of reasonableness" is defined as the level of customary skill and diligence that a reasonably competent attorney would employ in representation under similar circumstances. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009). On review, we presume that counsel provided reasonable performance. *Id.* Under *Strickland's* second prong, petitioner must demonstrate prejudice as a result of counsel's deficient performance by establishing that "a reasonable probability exists that, but for counsel's errors, the outcome would have been different." *Sames*, 805 N.W.2d at 567 (quoting *Staunton*, 784 N.W.2d at 300).

Here, the postconviction court denied appellant's petition, without holding an evidentiary hearing, because (1) any answer as to whether or why appellant's counsel failed to inform him of an available defense constitutes trial strategy which courts are hesitant to review; (2) the facts appellant admitted to at the plea hearing for the purpose of entering his *Norgaard* plea demonstrated the specific intent necessary to support his conviction; and (3) a jury would have likely rejected the voluntary-intoxication defense as negating specific intent.

The standard for evidentiary hearings set out in Minn. Stat. § 590.04, subd. 1, supports the conclusion that the postconviction court should have held an evidentiary hearing because the record does not conclusively show that appellant is *not* entitled to relief under the *Strickland* test. The record establishes that the state charged appellant with first-

degree aggravated robbery, a specific-intent crime; at the time of the robbery he was intoxicated to the point that he could not remember what had occurred; he proffered a *Norgaard* plea, under Minn. Stat. § 609.075 (2016); there exists the defense of voluntary intoxication for specific-intent crimes; and appellant alleged that his counsel failed to advise him of this defense before proffering his *Norgaard* plea. In appellant's affidavit in support of his petition, he stated that, if counsel had advised him about the voluntary-intoxication defense, "[he] would not have told the judge at [his] plea hearing that [he] believed the state had enough evidence to prove [his guilt]," and that, had counsel advised him of the defense, "[he] would not have agreed to the plea bargain or to enter a *Norgaard* plea . . . [he] would have instead decided to go to trial."

A *Norgaard* plea is closely related to a voluntary-intoxication defense as they both rely on a defendant's intoxication. *Norgaard* pleas offer intoxication as a reason for a defendant's inability to recall the events of a crime. A voluntary-intoxication defense offers intoxication as an explanation for a defendant's actions. A voluntary-intoxication defense might affect a jury's determination of whether a defendant possessed the necessary specific-intent for a particular crime. Both applied to appellant's offense. Even if appellant's counsel started and then later abandoned his investigation into potential defenses, such a decision may constitute adequate assistance if it was reasonable under the circumstances. *Swaney v. State*, 882 N.W.2d 207, 218 (Minn. 2016). However, if appellant's counsel failed to investigate potential defenses due to inattention or neglect, rather than a considered choice, this may constitute ineffective assistance. *Id.*

A postconviction court may deny an evidentiary hearing only if the record conclusively shows that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd.1. Here, the record is substantially less developed than most postconviction cases claiming ineffective assistance of counsel. Therefore, the postconviction court did not have sufficient facts to determine whether appellant's allegations of ineffective counsel, if true, would have satisfied the *Strickland* test by a preponderance of the evidence.

Absent a plea record that definitively shows whether or why appellant's counsel failed to advise him of the availability of a voluntary-intoxication defense, any decision by this court regarding appellant's first and second arguments would be pure speculation. The postconviction court should have held an evidentiary hearing to obtain additional facts to explain appellant's counsel's decisions before ruling on appellant's postconviction claim. Therefore, because the record is not sufficiently developed, we decline to address appellant's first and second arguments, and we reverse and remand for an evidentiary hearing.

Reversed and remanded.