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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1911**

Esteban Trevino, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 9, 2018
Reversed and remanded
Reilly, Judge**

Kandiyohi County District Court
File No. 34-CR-16-982

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Shane D. Baker, Kandiyohi County Attorney, Aaron P. Welch, Assistant County Attorney, Willmar, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges the summary denial of his petition for postconviction relief, arguing he alleged sufficient facts to receive an evidentiary hearing on his ineffective-

assistance-of-counsel claim. Because appellant alleged facts that, if proved by a fair preponderance of the evidence, would satisfy the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984), we reverse and remand.

FACTS

The state charged appellant Esteban Trevino with two counts of first-degree driving while intoxicated and one count of driving after cancellation after an officer stopped his vehicle for speeding and he provided a breath sample with an alcohol concentration of 0.15.

Two days later, on November 8, 2016, the district court appointed a public defender to appellant's case. A probation officer appeared at appellant's first hearing and explained to the district court that he was assigned to oversee appellant's supervised release from a 2012 test-refusal conviction. The probation officer explained that appellant had been released from prison the previous fall and he "went right to a commitment at Anoka Regional Treatment Center," before the probation officer was assigned to his case in August 2016.

Six weeks later, appellant petitioned to enter a plea of guilty with assistance from his appointed counsel. On the plea petition, appellant acknowledged that he had been a patient in a mental hospital "for an evaluation," but claimed he had "not talked with or been treated by a psychiatrist or other person for a nervous or mental condition," he had "not been ill recently," and he had "not recently been taking pills or other medicines." Appellant's attorney and the district court independently questioned appellant about whether he understood the plea petition and the rights he was waiving; appellant

acknowledged he understood both. Neither the district court nor appellant's attorney questioned appellant on the record about whether he was under the influence of any drugs, had a mental disability, or had been in psychiatric treatment. After a plea colloquy, the district court accepted appellant's guilty plea to one count of first-degree driving while intoxicated, and adjudicated his guilt.

The district court ordered a limited presentence investigation. Appellant's probation officer filed a report, but did not include any of appellant's background or medical history. Appellant was sentenced in accordance with the plea agreement to 65 months' imprisonment with a five-year conditional release term.

Appellant subsequently petitioned for postconviction relief, arguing that his plea was not valid because he was not competent at the time of the plea hearing, and that he was deprived of effective assistance of counsel because his attorney did not investigate his competency or request a competency evaluation prior to his plea. Appellant alleged the following facts in his petition: he was civilly committed in 2011, 2014, and from August 2015 to July 2016; one month before the plea was entered, the probation officer informed appellant's attorney that appellant "is very mentally ill, and has a long record due to his mental illness"; the probation officer also made appellant's mental health records available to appellant's attorney, and told the attorney that appellant was previously civilly committed, had been placed in a group home, and would benefit from adult foster care. Finally, appellant's petition alleged that he exhibited symptoms consistent with mental illness in his communications with his attorney.

Appellant requested an evidentiary hearing and, along with his petition, filed records from the 2015 civil commitment; a February 2017 decision by the department of corrections staying a hearing because appellant exhibited signs of mental illness; and a June 2017 administrative revocation of conditional release wherein appellant was unable to sign a waiver of his rights to a full revocation hearing because of “extreme mental health concerns.” The record from the 2015 civil commitment indicates that appellant suffered from a “major mental illness” manifesting in “severe and persistent delusions” and that he “lack[ed] the capacity to make decisions regarding the administration of neuroleptic medications as demonstrated by his refusal to acknowledge his mental illness.” The record from the February 2017 revocation hearing indicates that appellant continued to suffer from delusions, and therefore a 90-day stay of the proceedings was necessary to assess appellant’s mental competency. In June 2017, the department of corrections administratively revoked appellant’s conditional release without a hearing because appellant suffered from extreme mental health issues and was unstable. The department of corrections determined that was the best course of action for appellant to get services.

The postconviction court denied the petition without an evidentiary hearing. The postconviction court concluded that appellant’s plea was accurate, voluntary, and intelligent, and that the attorney’s representation did not fall below an objective standard of reasonableness.

This appeal followed.

DECISION

Appellant argues the postconviction court committed reversible error when it failed to hold an evidentiary hearing on his ineffective-assistance-of-counsel claim after he alleged that his attorney knew that he had a history of civil commitments and mental illness and failed to further investigate his competency, inform the court of his mental-health history, or request a competency evaluation.

A postconviction court must hold an evidentiary hearing on a petition “[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2016).

To determine whether petitioner is entitled to an evidentiary hearing, the postconviction court must determine whether the competent evidence presented by petitioner considered in the light most favorable to the petition, together with the arguments presented by the parties, conclusively show that the petitioner is not entitled to relief. If so, the court may deny the request for an evidentiary hearing. If the court concludes that material facts are in dispute and that the allegations in the petition, if true, would entitle the petitioner to relief, then the court must schedule an evidentiary hearing.

Martin v. State, 825 N.W.2d 734, 740 (Minn. 2013) (citations omitted). “Any doubts about whether to conduct an evidentiary hearing should be resolved in favor of the defendant seeking relief.” *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013).

To receive an evidentiary hearing on an ineffective-assistance-of-counsel claim, the petitioner “is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland v. Washington*.” *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). The *Strickland* test requires the petitioner to show

(1) that “counsel’s representation ‘fell below an objective standard of reasonableness’; and (2) ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.’” *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068). “Because claims of ineffective assistance of counsel are mixed questions of law and fact, we review the postconviction court’s legal conclusions on such questions de novo.” *Nicks*, 831 N.W.2d at 503. We “consider the court’s factual findings that are supported in the record, conduct a de novo review of the legal implications of those facts on the ineffective assistance claim, and [will] either affirm the [district] court’s decision or conclude that the [district] court abused its discretion because postconviction relief is warranted.” *Id.* at 504.

Appellant argues that his attorney’s failure, in the face of evidence of appellant’s mental illness, to inform the district court of appellant’s mental-health history, investigate appellant’s competency, or move for a competency evaluation under Minn. R. Crim. P. 20.01 fell below an objective standard of reasonableness. He argues he was prejudiced by his attorney’s failure to ensure his competency because he may have pleaded guilty while incompetent, thus depriving him of his right to a fair trial once he regained competency.

“The objective standard of reasonableness is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotations omitted). Trial counsel’s performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007).

“A defendant has a due process right not to be tried or convicted of a criminal charge if he or she is legally incompetent.” *Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011). “A defendant is incompetent and must not plead, be tried, or be sentenced if the defendant lacks ability to: (a) rationally consult with counsel; or (b) understand the proceedings or participate in the defense due to mental illness or deficiency.” Minn. R. Crim. P. 20.01, subd. 2. “If the prosecutor, defense counsel, or the court, at any time, doubts the defendant’s competency, the prosecutor or defense counsel must make a motion challenging competency, or the court on its initiative must raise the issue.” *Id.*, subd. 3. “Evidence of the defendant’s irrational behavior, demeanor at trial, and any prior medical opinion on competence to stand trial are relevant in determining whether there is reason to doubt the defendant’s competence.” *State v. Camacho*, 561 N.W.2d 160, 172 (Minn. 1997). “The failure of trial counsel to request a competency hearing where there was evidence raising a substantial doubt about a petitioner’s competence to stand trial may constitute ineffective assistance of counsel.” *Speedy v. Wyrick*, 702 F.2d 723, 726 (8th Cir. 1983).

In denying relief, the postconviction court stated,

After reviewing the Petitioner’s representation at the Plea Hearing and Sentencing, the Court finds that Petitioner received effective assistance of counsel. The Petitioner’s counsel questioned the Petitioner about his guilty plea and informed the Petitioner of his rights. The record is devoid of any conduct that would amount to ineffective assistance of counsel.

Appellant’s postconviction petition alleges that his attorney was aware, prior to the plea hearing, that appellant had been recently civilly committed and that he had a history

of mental illness. He supported his assertions with evidence of his prior civil commitments, as well as evidence of delusions and incompetence shortly before and after his sentencing hearing in 2017. If appellant's attorney was aware of the prior civil commitment from communications with the probation officer, as alleged, then counsel's inclusion of contradictory information in the plea petition and failure to further investigate or question appellant's mental health and history may have fallen below the objective standard of reasonableness. To be entitled to an evidentiary hearing, appellant is not required to show that his counsel's assistance *actually* fell below an objective standard of reasonableness—he is entitled to an evidentiary hearing if the allegations and the record, viewed in the light most favorable to him, fail to *conclusively* show that appellant is not entitled to relief. *See Nicks*, 831 N.W.2d at 508. Whether the allegations in the petition are actually true is the subject of the evidentiary hearing. *Id.* Here, appellant has alleged sufficient facts to entitle him to an evidentiary hearing under the first prong of *Strickland* because, viewed in the light most favorable to him, the record does not conclusively demonstrate that appellant's attorney exercised the customary diligence that a reasonably competent attorney would if presented with similar circumstances.

We also conclude that appellant alleged sufficient facts under the second prong of the *Strickland* test. In order to prevail under the second prong of *Strickland*, appellant must demonstrate a reasonable probability that the outcome of the proceedings would have been different but for the attorney's error. *Nissalke*, 861 N.W.2d at 94. In light of the evidence that appellant's competency was called into question almost immediately after the sentencing hearing in this case, coupled with the evidence that appellant had been civilly

committed only months before the plea hearing, we conclude that appellant alleged sufficient facts to demonstrate that he may have been incompetent at the time of his guilty plea.

Because appellant alleged sufficient facts to support a claim of ineffective assistance of counsel, the postconviction court erred in denying the petition without an evidentiary hearing.

Reversed and remanded.