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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2038
A18-2039**

Brittany Ann Vacko, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent (A18-2038),

Eric Joseph Vacko, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent (A18-2039).

**Filed August 12, 2019
Affirmed
Johnson, Judge**

Ramsey County District Court
File Nos. 62-CR-15-2233, 62-CR-15-2230

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellants)

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

John Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

In February 2016, Brittany Ann Vacko and Eric Joseph Vacko pleaded guilty to numerous charges of wrongfully obtaining public assistance, theft by swindle, forgery, and perjury. At sentencing, the district court ordered them to pay approximately \$150,000 in restitution. In March 2018, the Vackos jointly petitioned for post-conviction relief on the ground that they received ineffective assistance of counsel because their attorney did not challenge the amounts of the restitution awards after their sentencing hearings by requesting additional hearings on the issue of restitution. The post-conviction court held an evidentiary hearing and found that neither Brittany nor Eric asked their attorney to challenge the restitution orders after the sentencing hearings. Accordingly, the post-conviction court determined that the attorney's representation did not fall below an objective standard of reasonableness, and the post-conviction court denied their joint petition. We conclude that the post-conviction court did not err in its findings of fact or conclusions of law and, therefore, affirm.

FACTS

In March 2015, the state charged the Vackos in separate complaints with multiple offenses, alleging that, between May 2011 and March 2015, they wrongfully sought and obtained more than \$100,000 in public-assistance benefits for themselves and their child by misrepresenting their income, assets, and place of residence and by forging signatures. In June 2015, the state filed amended complaints with additional charges. The complaint in Brittany's case alleged six offenses: two counts of wrongfully obtaining assistance, in

violation of Minn. Stat. § 256.98, subd. 1(1) (2010); two counts of theft by swindle, in violation of Minn. Stat. § 609.52, subd. 2(4) (2010); one count of perjury, in violation of Minn. Stat. § 256.984, subd. 2 (2010); and one count of forgery, in violation of Minn. Stat. § 609.63, subd. 1 (2010). The complaint in Eric's case alleged eleven offenses: two counts of wrongfully obtaining assistance, in violation of Minn. Stat. § 256.98, subd. 1(1); one count of theft by swindle, in violation of Minn. Stat. § 609.52, subd. 2(4); one count of perjury, in violation of Minn. Stat. § 256.984, subd. 2; and seven counts of forgery, in violation of Minn. Stat. § 609.63, subd. 1.

The Vackos retained a private attorney to represent both of them and waived any conflicts of interest. In February 2016, Brittany and the state entered into a plea agreement in which she agreed to plead guilty to all charges and the parties agreed on a sentence of 180 days in jail and an unspecified amount of restitution. Brittany pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). Three days later, Eric and the state entered into an identical plea agreement. Eric also pleaded guilty pursuant to *Alford*. At their respective plea hearings, Brittany and Eric expressed their disagreement with the state's evidence of the amount of overpaid benefits.

In March 2016, the district court held sentencing hearings for Brittany and Eric on the same day. The district court imposed stayed prison sentences on each of them, ordered each of them to serve 180 days in jail, placed them on probation, and ordered them to pay restitution of \$125,301 to the Ramsey County Community Human Services Department and \$11,965 to the United States Social Security Administration, for which they would be jointly and severally liable. The district court also ordered Brittany to pay an additional

\$9,419 in restitution to the Minnesota Office of Higher Education, for which she would be solely responsible, and ordered Eric to pay an additional \$4,294 in restitution to the same office, for which he would be solely responsible. Neither party thereafter challenged the district court's restitution orders by requesting additional hearings on restitution within the 30-day period permitted by statute. *See* Minn. Stat. § 611A.045, subd. 3(b) (2010). Both Brittany and Eric filed notices of appeal in June 2016, but both voluntarily dismissed their appeals three months later.

In March 2018, with the assistance of a different attorney, the Vackos jointly petitioned for post-conviction relief. They alleged that they received ineffective assistance of counsel because their former attorney did not challenge the restitution orders after the sentencing hearings. Both Brittany and Eric submitted affidavits in which they stated that they asked their former attorney to challenge the restitution orders after the sentencing hearings because they believed that the amount of restitution was incorrect. The state opposed the post-conviction petition and asked the post-conviction court to conduct an evidentiary hearing on the question whether the performance of the Vackos' former attorney fell below an objective standard of reasonableness.

The post-conviction court held such a hearing in July 2018. Both Brittany and Eric testified in support of their joint petition, and their former attorney testified for the state. In October 2018, the post-conviction court filed an order in which it found that neither Brittany nor Eric asked their former attorney to challenge the restitution orders after the sentencing hearings. Accordingly, the post-conviction court denied the petition. Both Brittany and Eric appeal. This court consolidated the appeals.

DECISION

Brittany and Eric argue that the post-conviction court erred by denying their joint petition for post-conviction relief.

“In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. This right is the “right to the effective assistance of counsel.” *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quotation omitted). The Sixth Amendment right to counsel applies throughout the sentencing phase of a case, including proceedings related to restitution. *See Gardner v. Florida*, 430 U.S. 349, 358, 97 S. Ct. 1197, 1205 (1977); *State v. Maddox*, 825 N.W.2d 140, 144-46 (Minn. App. 2013).

To prevail on an ineffective-assistance-of-counsel claim, a defendant must satisfy two requirements:

First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland, 466 U.S. at 687, 104 S. Ct. at 2064; *see also State v. Cram*, 718 N.W.2d 898, 906-07 (Minn. 2006). If one of the *Strickland* requirements is not satisfied, a court need not consider the other requirement. *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). In reviewing a post-conviction court’s denial of a claim of ineffective assistance of counsel, this court applies a clear-error standard of review to the post-conviction court’s factual

findings, a *de novo* standard of review to the post-conviction court's legal conclusions, and an abuse-of-discretion standard of review to the post-conviction court's ultimate decision to deny relief. *Sanchez v. State*, 890 N.W.2d 716, 719-20 (Minn. 2017).

In this case, the post-conviction court considered only the first requirement of the two-part *Strickland* test. The first requirement of *Strickland* is concerned with whether an attorney's performance fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 687-88, 104 S. Ct. at 2064; *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014). The objective standard is defined as “representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quoting *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993)).

The post-conviction court determined that the performance of the Vackos' former attorney was not deficient because neither Brittany nor Eric asked the attorney to challenge the restitution orders after the sentencing hearings. The post-conviction court found that the Vackos were aware of their right to request a restitution hearing. The post-conviction court noted the Vackos' evidence that they asked their former attorney to challenge the restitution orders. But the post-conviction court found the Vackos' evidence to be not credible. Accordingly, the post-conviction court found that the Vackos did not “establish by a preponderance of the evidence that they directed or retained [their former attorney] to request a restitution hearing and challenge restitution.” The post-conviction court concluded, “Because the Defendants did not ask [their former attorney] to challenge restitution, their petitions for post-conviction relief fail under the first prong of the

Strickland analysis: [their former attorney's] representation did not fall below an objective standard of reasonableness.”

On appeal, the Vackos challenge the post-conviction court's factual finding that they did not ask their former attorney to challenge the restitution orders after the sentencing hearings. They rely on their own evidence, such as their affidavits, which state that they spoke with the attorney after their sentencing hearings and asked the attorney to request a restitution hearing and, furthermore, state that Eric later sent text messages to the attorney inquiring about a restitution hearing. They argue that their evidence is credible and that their former attorney's testimony is not credible. But the post-conviction court found the Vackos' evidence to be not credible. It is well-established that appellate courts almost always defer to a post-conviction court's credibility determination. *See, e.g., Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013); *Hooper v. State*, 838 N.W.2d 775, 784 (Minn. 2013); *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006). The Vackos do not contend with particularity why the post-conviction court erred in its credibility determinations in this particular case. We see no reason to second-guess the post-conviction court's credibility determinations, which are, as a practical matter, determinative in light of the issues presented.

Thus, the post-conviction court did not clearly err by finding that the Vackos did not ask their former attorney to request a restitution hearing or to otherwise challenge the restitution orders after the sentencing hearings. Accordingly, the post-conviction court did not err by denying the Vackos' joint petition for post-conviction relief.

Affirmed.