

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0457**

State of Minnesota,
Respondent,

vs.

David Edward Campbell,
Appellant.

**Filed April 11, 2022
Affirmed
Gaïtas, Judge**

Hennepin County District Court
File No. 27-CR-17-22942

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bruce Rivers, Rivers Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Gaïtas, Judge; and Klaphake,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this direct appeal from his conviction for third-degree criminal sexual conduct following a stipulated-evidence court trial, appellant David Edward Campbell argues that his trial attorney provided ineffective assistance of counsel. We affirm.

FACTS

Campbell is a former Minneapolis Police Officer. L.M.G. was the teenaged girlfriend of Campbell's son. In early 2017, when L.M.G. was 16 years old, she began staying with Campbell's family. Several months later, L.M.G. reported to a school social worker that Campbell had sexually assaulted her multiple times. She alleged that Campbell initially bought her lingerie and demanded photos of her. Then, according to L.M.G., Campbell began sexually assaulting her in hotels where the family was living and in his squad car. During a subsequent investigation, police found physical evidence corroborating L.M.G.'s allegations, including social media conversations between L.M.G. and Campbell, Campbell's bank statements showing the lingerie purchase, photos of L.M.G. on Campbell's phone, images from Campbell's officer-worn body camera showing L.M.G. in his squad car on the dates of the alleged sexual assaults, and Campbell's squad car records, which correspond with the times and locations of the alleged sexual assaults.

Following the investigation, respondent State of Minnesota charged Campbell with three counts of third-degree criminal sexual conduct, Minn. Stat. § 609.344, subd. 1(c), (e), (f) (2016), two counts of fourth-degree criminal sexual conduct, Minn. Stat. § 609.345, subd. 1(f) (2016), and one count of terroristic threats, Minn. Stat. § 609.713, subd. 1 (2016).

The charges were later amended to include a seventh charge, for engaging in a pattern of stalking conduct, Minn. Stat. § 609.749, subd. 5(a) (2016).

Campbell initially retained a private attorney. But several months later, the private attorney withdrew. In February 2018, a public defender was appointed to represent Campbell. The case was set for trial and continued twice before a jury trial was scheduled for September 24, 2018.

On September 12, 2018, the private attorney filed a letter asking to be reappointed and requesting a continuance of the trial date because Campbell had reengaged his services. Simultaneously, the public defender filed a letter advising the district court that he had no objection to the private attorney taking over the case. The public defender also filed a motion seeking a continuance of the trial to prepare for expert-witness testimony that the state had just disclosed.

At a hearing on September 18, 2018, the district court denied the private attorney's substitution-of-counsel request and the public defender's continuance motion.¹ The public defender then renewed his continuance request, informing the district court that Campbell had repeatedly failed to attend scheduled meetings with him. He acknowledged that he would "be effective in representing him and cross-examining the [s]tate's witnesses." But

¹ Although the public defender asserted that a continuance was necessary due to the state's disclosure of "new" expert-witness evidence, the district court determined that the state's addition of the forensic interviewer's name to its witness list was not new evidence because the witness's identity and the forensic interview had been previously disclosed. The district court accordingly concluded that no continuance was necessary. But the district court stated that it would consider a pretrial motion in limine to bar or restrict the witness's testimony.

because Campbell had refused to meet with him, the attorney relayed that he did not “know Mr. Campbell’s story” or “his defense.” When the district court again declined to continue the trial, the public defender stated, “I believe I would be ineffective, Your Honor, and I would put that on the record at this time and I would move for continuance based on that.” The district court explained that it would not continue the trial because the case had been pending for a year.

On September 24, 2018, the parties appeared for the scheduled trial. At the outset, the district court considered the public defender’s pretrial motions, including motions to challenge L.M.G.’s credibility with evidence from a child-protection file, to admit evidence of L.M.G.’s mental-health diagnoses, and to present the testimony of L.M.G.’s mother that L.M.G. had made prior false sexual abuse allegations and was generally dishonest. The district court denied these motions.

On the second day of trial, before jury selection, the parties informed the district court that they had agreed to have a stipulated-evidence court trial. In exchange for Campbell’s waiver of his jury trial rights and his decision to proceed based on stipulated evidence, the state agreed not to seek an aggravated sentence. The state also agreed to a sentencing cap of 57 months’ imprisonment.

During the waiver of Campbell’s jury trial rights, the public defender addressed the communication problems that had prompted his most recent continuance request. Campbell confirmed that he had multiple opportunities to discuss his case with the public defender following the continuance request. He had met with the public defender, and they had discussed the case in person, on the phone, and via text messaging. Campbell stated

on the record that he felt he had sufficient time to talk with the public defender about the case. And the public defender stated that he was “fully prepared to go forward with what we have at hand and to try the case in an effort to get you found not guilty.”

In lieu of live testimony, the parties stipulated to 52 exhibits introduced by the state. The attorneys submitted written closing arguments to the district court.

Based on the stipulated evidence, the district court found Campbell guilty of each of the charged offenses. For the offense of third-degree criminal sexual conduct, the district court sentenced Campbell to 57 months in prison followed by a lifetime conditional-release term.

In March 2019, represented by the private attorney he initially retained for trial, Campbell appealed to this court. He then filed a motion to stay the appeal to pursue a claim of ineffective assistance of trial counsel in postconviction proceedings in the district court. We stayed the appeal but requested monthly status updates regarding the progress of the postconviction proceedings. Over a period of nearly two years, we issued eight orders directing Campbell’s counsel to file the required status letters and warning that failure to comply could result in dismissal of the appeal. In August 2021, due to counsel’s lack of compliance, we dissolved the stay and ordered counsel to file an appellate brief.²

² The record shows that the attorney filed a postconviction petition in the district court while the appeal was stayed. This court’s order dissolving the stay suspended the district court’s jurisdiction over the postconviction petition. *State v. Barnes*, 81 N.W.2d 864, 866 (Minn. 1957) (“Pending a duly executed appeal, the jurisdiction of the [district] court is [s]uspended . . . as to those matters necessarily involved in the appeal.”). On appeal, Campbell does not challenge this court’s order dissolving the stay or contend that a postconviction hearing was necessary to pursue his claims.

DECISION

Campbell argues that the public defender who represented him at trial provided ineffective assistance of counsel. Under the federal and state constitutions, a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right means “the right to *effective* assistance of counsel.” *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970) (emphasis added). The threshold for assessing any ineffective-assistance-of-counsel claim is “whether counsel’s conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.” *Strickland v. Washington*, 466 U.S. 668, 686 (1984). To prevail on a claim that counsel was ineffective, a defendant must show that (1) counsel was deficient and (2) the deficient performance prejudiced the defense. *Id.*

“Generally, an ineffective-assistance-of-counsel claim should be raised in a postconviction petition for relief” because a postconviction evidentiary hearing provides the district court with additional facts regarding an attorney’s decisions. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000). However, “[w]hen a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

When, as here, an ineffective-assistance-of-counsel claim is raised in a direct appeal, we examine the claim under the two-prong test set forth in *Strickland*. *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017) (citing *Andersen*, 830 N.W.2d at 10). “Application of the *Strickland* test involves a mixed question of law and fact, which we review de novo.” *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019). “If a claim

fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement.” *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (citation omitted).

Campbell asserts that his attorney’s performance was inadequate in three ways. First, he argues that, because the attorney did not ask the district court to review L.M.G.’s confidential records for possible impeachment evidence, the attorney failed to fully investigate the case. Second, he contends that the record shows his attorney was unprepared to represent him at trial. Third, he argues that the attorney’s advice to waive most of his trial rights and to have a stipulated-evidence court trial was per se deficient.

Trial counsel’s representation is deficient when counsel “does not exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *White v. State*, 248 N.W.2d 281, 285 (Minn. 1976) (quoting *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976)); see also *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Whether an attorney’s performance was adequate “is necessarily linked to the practice and expectations of the legal community: ‘The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.’” *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (quoting *Strickland*, 466 U.S. at 688). “There is a strong presumption that a counsel’s performance falls within a wide range of reasonable assistance.” *State v. Reek*, 942 N.W.2d 148, 166 (Minn. 2020).

An attorney’s tactical decisions are within the discretion of counsel and will not be reviewed for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). But an attorney’s strategic decisions are only entitled to deference when “made after thorough investigation of law and facts relevant to plausible options.” *Strickland*, 466 U.S. at 690.

Where an attorney's failure to investigate thoroughly is the result of "inattention, not reasoned strategic judgment," counsel's performance may be deficient. *Wiggins v. Smith*, 539 U.S. 510, 526 (2003). Moreover, the fact that an attorney's failing could be characterized as a "trial strategy" should not be an "impregnable barrier" to an ineffective-assistance-of-counsel claim; the Minnesota Supreme Court has specifically rejected "such a formalistic approach." *State v. Nicks*, 831 N.W.2d 493, 507 (Minn. 2013).

Still, appellate courts' "reluctance to scrutinize trial tactics is grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible." *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (quotation omitted). Matters involving trial strategy that we generally do not review include "[t]he extent of counsel's investigation," *id.*, counsel's decisions regarding what evidence to present, *see Voorhees*, 596 N.W.2d at 255 ("What evidence to present to the [court], including which defenses to raise . . . , represent[s] an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence."), and counsel's advice to the client, *e.g.*, *State v. Brocks*, 587 N.W.2d 37, 43 (Minn. 1998) (concluding that counsel's advice about what the defendant should discuss at trial was reasonable trial strategy).

Against this legal backdrop, we consider whether the performance of Campbell's attorney was inadequate.

Campbell first argues that the attorney's performance was deficient because he failed to file a motion seeking in camera review of L.M.G.'s confidential medical records. Such a motion is often called a "*Paradee* motion," named for the Minnesota Supreme Court

decision setting forth the procedure to be followed in criminal cases when the defendant seeks relevant evidence that may be in confidential records, such as medical records. *See State v. Paradee*, 403 N.W.2d 640, 642 (Minn. 1987).

But Campbell's claim that impeaching records may have existed is purely speculative.³ And "it is not proper to reverse a conviction on speculation that an investigation might have found evidence that would have helped the defendant's case." *Swaney v. State*, 882 N.W.2d 207, 218 (Minn. 2016) (citing *Gates v. State*, 398 N.W.2d 558, 563 (Minn. 1987)). Moreover, before trial, the attorney knew that the district court was not likely to allow impeaching evidence of this nature. Counsel attempted to admit statements about L.M.G.'s reputation for truthfulness and credibility from L.M.G.'s mother, a social worker, and L.M.G. herself. The district court rejected this evidence as irrelevant. Finally, we do not second-guess an attorney's investigation decisions. *See Opsahl*, 677 N.W.2d at 421. Thus, we reject Campbell's argument that his attorney's decision not to file a *Paradee* motion constituted deficient performance.

Campbell next argues that his attorney admitted that he was unprepared to represent Campbell at trial when he told the district court on September 18, 2018 that he would provide ineffective assistance if he were forced to try the case the following week. Campbell contends that the attorney's decision to recommend a stipulated-evidence trial is further evidence of the attorney's lack of preparation.

³ Campbell has not identified any particular records of interest, although his brief once references "medical records." It appears that Campbell is arguing that his trial attorney should have requested in camera review of *all* of L.M.G.'s confidential records.

But the attorney stated that he was not prepared because Campbell repeatedly missed their scheduled meetings. Thus, it was Campbell's own conduct that impacted the attorney's ability to prepare. "Defendants cannot take advantage of their own willful choice to defeat the ends of justice." *State v. Worthy*, 583 N.W.2d 270, 277-78 (Minn. 1998) (holding that defendants' strategic and voluntary absence from trial could not form the basis for a claim that they did not validly waive their right to be present at trial). Moreover, the record shows that after the September 18 hearing, the attorney and Campbell met to prepare for the trial. During Campbell's waiver of trial rights, the attorney specifically addressed the issue, and Campbell acknowledged that there had been sufficient opportunity to discuss the case with the attorney.

ATTORNEY: Now, we've talked a little bit about some communication problems you and I have had in the past but since we were in court last week you and I have talked about your case at length, correct?

CAMPBELL: Yes.

ATTORNEY: In fact, we have met in person?

CAMPBELL: Yes.

ATTORNEY: We have talked about your case here in the courthouse?

CAMPBELL: Yes.

ATTORNEY: And we've texted each other about it, correct?

CAMPBELL: Yes.

ATTORNEY: And we've talked on the phone about it, correct?

CAMPBELL: Yes.

ATTORNEY: Do you feel that, since the last time we were in court to today's court appearance, you've had sufficient time to talk with me about your case? Yes?

CAMPBELL: Yes.

The transcript of the September 18 hearing shows that the attorney clearly understood how to make a record of his concerns about insufficient preparation. The

attorney made no such record during Campbell's trial. And other than the remarks at the September 18 hearing, there is no record support for Campbell's claim that the attorney was unprepared for trial. To the contrary, the attorney stated that he was "fully prepared" for trial. Thus, Campbell's claim that his attorney was unprepared fails.

Finally, Campbell argues that his attorney's advice to proceed with a stipulated-evidence trial was per se deficient performance. Citing *Dereje v. State*, 837 N.W.2d 714 (Minn. 2013), Campbell contends that his attorney entirely failed to challenge the state's case and was therefore ineffective.

In *Dereje*, where the defendant alleged that his attorney was ineffective for advising him to proceed with a stipulated-facts court trial, the Minnesota Supreme Court addressed the "narrow exception" to *Strickland*'s requirement that a defendant show both deficient performance and prejudice to establish ineffective assistance of counsel. 837 N.W.2d at 722 (quoting *Florida v. Nixon*, 543 U.S. 175, 190 (2004)). When an attorney "*entirely* fails to subject the prosecution's case to meaningful adversarial testing," the resulting conviction must be reversed without regard to prejudice because "the adversary process itself [is] presumptively unreliable." *Id.* (emphasis added) (quoting *United States v. Cronin*, 466 U.S. 648, 659 (1984)). But in *Dereje*, the supreme court found no such deficient performance because the defendant's attorney challenged the state's case by including stipulations that contained the defendant's version of the events to the district court. *Id.* at 723. Moreover, the supreme court observed that the stipulated-facts court trial "was part of a negotiated plan" that ensured the defendant would receive a more favorable

sentence. *Id.* Given these circumstances, the supreme court concluded that the defendant failed to satisfy his burden of showing that the narrow exception to *Strickland* applied. *Id.*

Campbell likewise has not shown that his attorney entirely failed to advocate on his behalf. The attorney subjected the state's case to "meaningful adversarial testing" by filing and arguing defense motions, investigating witnesses, and submitting a written closing argument. Moreover, in exchange for Campbell's decision to have a stipulated-evidence court trial, the attorney secured a negotiated sentence of no more than 57 months and ensured that there would be no upward durational departure from the sentencing guidelines. Had Campbell proceeded with a jury trial, the state would have pursued an aggravated sentence of 96 months' imprisonment based on the presence of several aggravating factors, including Campbell's violation of his position of trust, possession of a firearm during the commission of the offenses, and abuse of his authority, as well as the multiple sexual assaults over an extended time period and L.M.G.'s particular vulnerability. Because the record shows that the attorney did, in fact, subject the state's case to meaningful adversarial testing, we cannot conclude that his advice to proceed by stipulated evidence was per se deficient. Moreover, we reject Campbell's suggestion that the narrow exception to *Strickland* applies here.

Campbell also addresses the second *Strickland* prong, arguing that there is a reasonable probability that but for his trial attorney's lack of preparation and advocacy, the outcome of his trial would have been different. If the first *Strickland* prong is not satisfied, we do not need to reach the second *Strickland* prong. *See Mosley*, 895 N.W.2d at 591. We briefly discuss the second prong, nonetheless.

To prove prejudice resulting from an attorney's deficient performance, a defendant must show that there is "a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *Nicks*, 831 N.W.2d at 504 (citing *Strickland*, 466 U.S. at 687-96). "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of a proceeding. *Strickland*, 466 U.S. at 694.

Beyond a bald assertion that the outcome of his case would have been different but for the alleged errors of his trial attorney, Campbell does not explain what that outcome would have been or how the alleged errors impacted the guilty verdicts and his sentence. Moreover, we note that the evidence against Campbell was strong. In addition to L.M.G.'s allegations, the state presented corroborating social media conversations between Campbell and L.M.G., Campbell's bank statements, photos from Campbell's officer-worn body camera, photos of L.M.G. on Campbell's phone, and Campbell's squad car records. Given the strength of the state's case and Campbell's failure to articulate how the attorney's performance impacted the outcome of his case, we reject his prejudice argument.

Affirmed.