

*This opinion is nonprecedential except as provided by  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  
A20-0869**

Deontray Vershon Tate, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed March 22, 2021  
Affirmed  
Bjorkman, Judge**

Hennepin County District Court  
File No. 27-CR-13-22120

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jordan W. Rude, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

**NONPRECEDENTIAL OPINION**

**BJORKMAN**, Judge

Appellant challenges the denial of his petition for postconviction relief from two assault convictions following an evidentiary hearing. The petition is premised on his

appellate counsel's failure to argue that trial counsel was ineffective because he did not object to the lack of timely written notice of the state's intent to seek an aggravated sentence. Because the district court did not abuse its discretion by denying relief, we affirm.

## **FACTS**

In June 2013, appellant Deontray Vershon Tate shot a man who was standing outside a vehicle and a four-year-old child who was in the back seat of the vehicle with another child. Tate was charged with first-degree assault against the child and second-degree assault against the man.<sup>1</sup> He retained trial counsel in November, and an omnibus hearing occurred on December 18. After plea negotiations failed, the case proceeded to trial.

On March 18, 2014, just before jury selection, the prosecutor moved to amend the second-degree assault charge and to seek an aggravated sentence based on the child victim's particular vulnerability and the presence of children. Trial counsel did not object to the timeliness of the state's notice, but the district court raised the issue.<sup>2</sup> The court expressed its recollection that the prosecutor "verbally" told the defense about the intent to seek an aggravated sentence and asked whether that communication occurred during "the Omnibus hearing." The prosecutor answered affirmatively, adding that the parties had

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<sup>1</sup> Tate was also charged with aiding and abetting a third assault based on another shooter's actions; he was acquitted on that charge.

<sup>2</sup> When the state intends to seek an aggravated sentence, the prosecutor must give "written notice" stating the grounds and factual basis supporting the aggravated sentence "at least 7 days before the Omnibus Hearing." Minn. R. Crim. P. 7.03.

been trying to resolve the matter until mid-February, when Tate rejected the state's proposed plea agreement. The district court asked trial counsel whether he agreed that the prosecutor "at least notif[ied] [him] verbally back in probably December that she was going to be filing amendments." Trial counsel responded:

I'm not disagreeing with the fact that she had mentioned she was going to file the amendments and the upward departure. I will note we didn't get a formal written motion, so on and so forth, but it was mentioned I believe orally and probably in an email or so. So we have been on notice of that, Judge.

The court instructed the parties to review the rules of procedure and ensure they agreed "the proper procedures are being followed."

Later that day, the district court revisited the issue. The court stated that trial counsel "concede[d] that . . . the State gave adequate notice of [the sentencing departure]," and trial counsel responded: "[W]e concede that we didn't get the formal notice, but we were certainly put on notice that that was something that they were intending to do if it wasn't resolved." The court asked whether trial counsel was claiming prejudice "by the way notice was given," and he said no. The court then noted that the state was required to provide notice of the grounds for departure and a summary of the factual basis, which in this case is inseparable from the facts for trial, "so there's not really anything for the State to have to give [the defense] in addition to that as far as a summary of what the grounds would be for the aggravation."

The jury found Tate guilty. In response to special-verdict questions, the jury found that (1) the child victim was "four years old at the time of the offense," (2) the child victim was "in the back seat of a vehicle with closed doors at the time of the shooting," and

(3) Tate shot the man “in the presence of children.” The district court sentenced Tate to 206 months’ imprisonment for the assault against the child, a double upward durational departure based on the child’s particular vulnerability. For the assault against the man, the court imposed a consecutive 103-month sentence for a total of 309 months’ imprisonment.

Tate appealed. At his request, this court stayed the appeal to allow postconviction proceedings. Through appellate counsel, he asserted two postconviction claims: (1) that he was denied his right to present a complete defense because the district court excluded alternative-perpetrator evidence, and (2) he received ineffective assistance of counsel because trial counsel did not introduce the evidence properly. The district court denied relief. In the reinstated appeal, appellate counsel reiterated Tate’s postconviction claims and also argued that: (1) the evidence was insufficient to prove that the victims suffered “great bodily harm,” (2) the district court plainly erred by permitting a doctor to testify that a gunshot wound is a “serious injury,” (3) the prosecutor committed misconduct during closing argument, and (4) the district court abused its discretion by imposing an upward sentencing departure and consecutive sentences. We affirmed Tate’s convictions and sentences. *State v. Tate*, No. A14-1339 (Minn. App. Mar. 14, 2016), *review denied* (Minn. May 31, 2016).

Tate thereafter retained new counsel and filed a second postconviction petition. Noting that Minn. R. Crim. P. 7.03 requires a prosecutor to give written notice before the omnibus hearing if the state intends to seek an aggravated sentence, Tate asserted that: (1) appellate counsel was ineffective because she failed to raise any claims related to trial counsel’s failure to object to the “lack of proper notice,” (2) trial counsel was ineffective

because he failed to object, and (3) he was denied due process by the state's failure to give proper notice. The district court denied relief without an evidentiary hearing, reasoning that the claims are procedurally barred based on the prior postconviction proceeding and direct appeal, and lack merit because trial counsel had actual notice of the state's intent to seek an upward departure and Tate was not prejudiced.

Tate appealed. We agreed that Tate's trial claims are procedurally barred but concluded his claim of ineffective assistance of appellate counsel is not similarly barred unless Tate knew of the basis for the claim at the time of his direct appeal. *Tate v. State*, No. A18-0909, 2019 WL 1007771, at \*3-4 (Minn. App. Mar. 4, 2019), *review denied* (Minn. May 28, 2019). We also concluded that the district court abused its discretion by summarily rejecting Tate's ineffective-assistance-of-appellate-counsel claim on the merits. We noted that a petitioner is entitled to an evidentiary hearing unless he fails to allege facts that would, if proven, sustain the claim. *Id.* at \*3. Taking as true Tate's allegations that the state "could not" demonstrate good cause as required under Minn. R. Crim. P. 7.03 and the district court "would have to sustain an objection," we reasoned that Tate stated a viable claim of ineffective assistance of trial counsel and we could not say "with any certainty" that appellate counsel reasonably declined to assert the claim. *Id.* at \*4-5. Accordingly, we reversed and remanded for an evidentiary hearing.

At the hearing, Tate testified that he only learned of the possibility of an aggravated sentence on the first day of trial. And he told appellate counsel as much in a letter he sent while his direct appeal was pending. The letter stated that he wanted appellate counsel to pursue an ineffective-assistance claim based on trial counsel's failure to advise him of his

sentencing exposure earlier. Tate also testified that he was unaware until after his direct appeal that the state was required to provide written notice regarding an aggravated sentence.

In her testimony, appellate counsel agreed that she spoke with Tate about the possibility of asserting an ineffective-assistance claim related to his sentence. She also indicated that she was “concerned” about trial counsel’s failure to object to the lack of “formal notice” of the aggravated sentence and discussed it with her supervising attorney. But she stated that she “did not have any reason to believe that the outcome would have been different” if counsel had objected because “the prosecutor had given notice of the intent to depart.” She explained that she was familiar with the requirements of an ineffective-assistance claim and knew she would have to demonstrate that trial counsel’s failure to object caused Tate prejudice. No prejudice was apparent in this case, she believed, because “[t]here’s an ability for the Court to find that—if there was good cause shown—that that strict written standard doesn’t need to be followed. And I felt that on the record that I had, I didn’t have enough to show that strict adherence [with rule 7.03] would have been required.”

The district court denied Tate’s petition, reasoning that appellate counsel’s performance was neither deficient nor prejudicial because her conclusion that a claim of ineffective assistance of trial counsel would have failed on the prejudice prong was reasonable. The court also noted that counsel’s assessment was consistent with its experience that “good cause and lack of unfair prejudice to the defendant are routinely

found as long as the State has facilitated the function—notice to a defendant of the intent to seek an aggravated sentence—of [rule 7.03].” Tate appeals.

## DECISION

We review the denial of postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). We review legal issues de novo and factual findings for clear error. *Zornes v. State*, 880 N.W.2d 363, 368 (Minn. 2016).

We analyze claims of ineffective assistance of counsel under the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). *Nissalke v. State*, 861 N.W.2d 88, 93-94 (Minn. 2015). To prevail, a defendant must show that “counsel’s performance was deficient” and “the deficient performance prejudiced the defense.” *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. On the first prong, counsel’s representation is deficient when it falls below an objective standard of reasonableness. *Id.* at 688, 104 S. Ct. at 2064. On the second prong, deficient representation is prejudicial if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694, 104 S. Ct. at 2068. A failure on either prong may be dispositive. *Nissalke*, 861 N.W.2d at 94.

We “give trial counsel wide latitude to determine the best strategy for the client.” *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013). We afford appellate counsel similar latitude. Counsel is not obligated “to include all possible claims on direct appeal, but rather [is] permitted to argue only the most meritorious claims.” *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (alteration in original) (quotation omitted). And we presume that

counsel’s “judgment about which issues to raise falls within the wide range of reasonable professional assistance.” *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012) (quotation omitted). Counsel “does not act unreasonably” by declining to assert claims that she “could have legitimately concluded would not prevail.” *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009).

Tate argues the district court abused its discretion by determining that appellate counsel acted reasonably in concluding that an ineffective-assistance-of-trial-counsel claim would have failed on the prejudice prong. To show that trial counsel’s failure to object caused Tate prejudice, appellate counsel would have needed to show that there was a reasonable likelihood an objection would have resulted in the state being precluded from seeking an aggravated sentence. She concluded that she would have been unable to do so. We are persuaded that appellate counsel’s conclusion was reasonable based on the circumstances of this case and applicable law.

The prosecutor did not give written notice of the state’s intent to seek an aggravated sentence at least seven days before the omnibus hearing, as rule 7.03 requires. In such a case, the rule provides: “Notice may be given later if permitted by the court on good cause and on conditions that will not unfairly prejudice the defendant.” Minn. R. Crim. P. 7.03. In other words, an objection by trial counsel would not have *required* the district court to preclude the state from seeking an aggravated sentence. Rather, the district court would have assessed whether there was good cause to permit the state to pursue the sentence despite the notice failure. Two circumstances suggest the district court would have permitted the deficient notice. First, the record supports the district court’s finding that the

prosecutor gave Tate oral notice four months before trial that the state intended to seek an aggravated sentence if plea negotiations were unsuccessful. Second, Tate required neither additional time to prepare a defense nor a separate sentencing trial because the facts the state alleged in support of an aggravated sentence—the age of the child victim, his confinement in the back seat, and the presence of another child—were intertwined with the facts of the charged offenses. And no binding caselaw precludes a finding of good cause under these circumstances.

At the time of Tate’s direct appeal, neither our supreme court nor this court had addressed rule 7.03’s good-cause provision.<sup>3</sup> But the supreme court’s recent interpretation of the rule in *State v. Barthman*, 938 N.W.2d 257, 268 (Minn. 2020), supports appellate counsel’s assessment that district courts would construe the rule in a manner that favors function over form. In *Barthman*, the state gave timely written notice of its intent to seek an aggravated sentence and identified the departure grounds, but did not include the requisite factual summary. 938 N.W.2d at 268. As here, *Barthman* did not object at trial, but he argued that the district court plainly erred by permitting the state to seek an

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<sup>3</sup> We have done so since but not in a precedential opinion. And nothing in our nonprecedential opinions addressing good cause persuades us that appellate counsel unreasonably assessed the likelihood of successfully demonstrating prejudice from counsel’s failure to object and demand a ruling on good cause. See *State v. Huyber*, No. A19-0760, 2020 WL 2312505, at \*3-4 (Minn. App. May 11, 2020) (concluding that “good cause” requires a “legally sufficient reason,” which was present when defendant’s early guilty plea and other factors prevented prosecutor from giving timely notice), *review denied* (Minn. July 23, 2020); *State v. Harrison*, No. A17-0157, 2017 WL 6567654, at \*6 (Minn. App. Dec. 26, 2017) (upholding implicit finding of good cause when state gave notice shortly after omnibus hearing and defendant was familiar with facts underlying aggravated sentence), *review denied* (Minn. Mar. 20, 2018).

aggravated sentence. *Id.* The supreme court concluded that the notice did not comply with rule 7.03. *Id.* But it also reasoned that the lack of compliance did not affect Barthman's substantial rights because he was aware of the underlying facts and did not claim that, given proper notice, he would have taken a different tack in contesting the state's sentencing allegations. *Id.* at 268-69. The supreme court concluded, "Simply put, Barthman has not shown he was prejudiced by the lack of a factual summary in the notice of aggravating factors that he was given." *Id.* at 269.

Tate's appellate counsel similarly determined, after deliberation and consultation with her supervisor, that there was no reasonable basis to conclude that the district court would have denied the state's request to seek an aggravated sentence if trial counsel had objected to the state's deficient notice. And for that reason she declined to assert a claim that trial counsel was ineffective for failing to object, instead pursuing numerous other claims she determined to be more meritorious. In short, she did not simply overlook a potential claim but carefully examined and prioritized among potential claims, based on the law and the record, as we expect a competent appellate attorney to do. *See Nunn*, 753 N.W.2d at 661 (stating that an appellate attorney is "permitted to argue only the most meritorious claims" (quotation omitted)). We discern nothing objectively unreasonable in her professional judgment that Tate would not be best served by advancing the ineffective-assistance-of-trial counsel claim that Tate now urges. Accordingly, we conclude that the district court did not abuse its discretion by rejecting Tate's claim of ineffective assistance of appellate counsel.

**Affirmed.**