

*This opinion is nonprecedential except as provided by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
A20-1297**

Emily Anna Jones, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 26, 2021
Reversed and remanded
Frisch, Judge**

Hennepin County District Court
File No. 27-CR-18-11840

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James R. Rowader, Jr., Minneapolis City Attorney, Amy J. Tripp-Steiner, Assistant City Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Reilly, Judge; and Florey, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant challenges the district court's summary denial of her petition for postconviction relief claiming that her counsel was ineffective for failing to timely

challenge a \$400 restitution award. We reverse and remand to the district court for an evidentiary hearing on appellant's postconviction petition.

FACTS

On January 15, 2019, appellant Emily Anna Jones entered a *Norgaard* plea¹ to the charge of misdemeanor theft in violation of Minn. Stat. § 609.52, subd. 2(a)(1) (2016), based on allegations that on March 26, 2018, Jones stole items from the victim's home after a night of drinking. As part of the *Norgaard* plea, Jones claimed to have no recollection of the incident but conceded that a jury was likely to convict her of the charge if she went to trial. The district court accepted the *Norgaard* plea and ordered restitution in the amount of \$400. At the time she entered her plea, counsel for Jones indicated that she intended to challenge restitution, which the district court noted on the sentencing form.

On January 23, 2019, Jones's attorney filed a demand for a restitution hearing to challenge the amount of restitution and Jones's ability to pay any award. On March 7, 2019, Jones signed an affidavit in support of her challenge, but her attorney failed to timely serve and file it.

On April 23, 2019, the morning the restitution hearing was to be held, the state filed a motion to dismiss because the restitution affidavit was not served five days prior to the hearing as required by Minn. Stat. § 611A.045, subd. 3(a) (2020). Jones's attorney

¹ "A plea constitutes a *Norgaard* plea if the defendant asserts an absence of memory on the essential elements of the offense but pleads guilty because the record establishes, and the defendant reasonably believes, that the state has sufficient evidence to obtain a conviction." *Williams v. State*, 760 N.W.2d 8, 12 (Minn. App. 2009).

immediately filed the restitution affidavit, but the state renewed its motion to dismiss due to the untimely submission or, alternatively, because the affidavit was substantively insufficient.

Jones's counsel argued that the restitution challenge should not be dismissed because the affidavit was signed by Jones well in advance of the hearing and the failure to serve and file the document was solely due to attorney error. As to the merits of the challenge, Jones's counsel stated that at the restitution hearing, Jones was expected to testify about her expenses and income to demonstrate her inability to pay the award and argue that the state failed to meet its burden of proof of establishing an inventory of stolen items and the ownership and value of those items. The district court dismissed the restitution challenge based on Jones's failure to timely serve her affidavit.

On April 20, 2020, Jones filed a petition for postconviction relief, alleging that ineffective assistance of counsel deprived her of a restitution hearing. On August 12, 2020, the district court summarily denied the petition based on Jones's untimely affidavit and concluded that, although counsel's failure to serve the restitution affidavit within the deadline fell below an objective standard of reasonableness, the restitution challenge would have been unsuccessful absent her counsel's error.

This appeal follows.

DECISION

Jones argues that the district court abused its discretion by denying her petition without an evidentiary hearing because she received ineffective assistance of counsel when her attorney failed to timely file her restitution affidavit. The state argues, as a threshold

matter, that we should affirm because Minn. Stat. § 611A.045, subd. 3(a), precluded the district court from considering Jones’s postconviction petition. Alternatively, the state argues that counsel’s missed deadline did not fall below an objective standard of reasonableness and there was not a reasonable probability that, but for counsel’s error, the result of the proceeding would have been different.

I. The postconviction statute permits a challenge to an award of restitution arising from a claim of ineffective assistance of counsel.

The state argues that the restitution statute, Minn. Stat. § 611A.045, subd. 3(a), governs this proceeding and that Jones’s failure to abide by its procedural requirements precludes postconviction relief pursuant to Minn. Stat. § 590.01, subd. 1(1) (2018).

Minn. Stat. § 590.01, subd. 1(1), provides that a person convicted of a crime who claims that “the conviction obtained or the sentence or other disposition made violated the person’s rights under the Constitution” may file a petition with the district court for resentencing or other appropriate disposition. Pursuant to Minn. Stat. § 609.125, subd. 1(a)(4) (2016), an order for restitution is a form of criminal sentence. Minn. Stat. § 611A.04, subd. 1 (2020), provides that a “victim of a crime has the right to receive restitution as part of *the disposition of a criminal charge*.” (Emphasis added.) While the procedures for ordering restitution are set forth in Minn. Stat. § 611A.045 (2020), the postconviction statute expressly allows a defendant to petition for relief when a disposition of a criminal charge, including an order for restitution, violates her constitutional rights.

The state argues that Minn. Stat. § 611A.045 and Minn. Stat. § 590.01 (2018) are irreconcilable. Where a general provision and a special provision are in conflict, they must

be “construed, if possible, so that effect may be given to both.” Minn. Stat. § 645.26, subd. 1 (2020). Sections 611A.045 and 590.01 are not irreconcilable because they govern separate issues—section 611A.045 sets forth the procedures to challenge a restitution award directly while section 590.01 provides an avenue of relief for a defendant seeking to vindicate constitutional rights, including the right to the effective assistance of counsel. Here, Jones claims she received ineffective assistance of counsel in violation of her constitutional rights when counsel did not timely file her affidavit challenging the restitution order. Such a claim is governed by Minn. Stat. § 590.01, subd. 1(1), not Minn. Stat. § 611A.045, subd. 3(a).²

Accordingly, Minn. Stat. § 590.01, subd. 1(1), permits a person convicted of a crime to challenge a restitution disposition due to ineffective assistance of counsel.

² The state relies upon inapposite authority in support of its argument that the failure to follow the procedural requirements set forth in Minn. Stat. § 611A.045, subd. 3(a), bars postconviction relief. The state first cites to *State v. Smith*, 876 N.W.2d 310 (Minn. 2016), which did not address the circumstance presented by this case: namely, whether a person convicted of a crime may petition for postconviction relief when the ineffective assistance of counsel caused a procedural defect in perfecting a challenge to a restitution order. The state also relies on *Thompson v. State*, a nonprecedential opinion of this court where a defendant filed a petition for postconviction relief to challenge a restitution order nearly a year after he failed to attend his restitution hearing. No. A17-1057, 2018 WL 1462327, at *5 (Minn. App. 2018), *review denied* (Minn. May 29, 2018). The petition did not assert a constitutional challenge to the restitution disposition, unlike this case, and we held that Thompson could not rely on Minn. Stat. § 590.01 to circumvent his failure to participate in the restitution hearing. *Id.*

II. The district court abused its discretion by denying Jones’s petition for postconviction relief without an evidentiary hearing.

“We review the denial of a petition for postconviction relief, including denial without a hearing, for an abuse of discretion.” *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019).

A postconviction court does not abuse its discretion unless it has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings. A petitioner is entitled to an evidentiary hearing unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief. A postconviction evidentiary hearing is not required when the petitioner alleges facts that, if true, are legally insufficient to grant the requested relief.

Henderson v. State, 906 N.W.2d 501, 505 (Minn. 2018) (quotations and citations omitted); see also Minn. Stat. § 590.04, subd. 1 (2018) (providing that “unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, the court shall promptly set an early hearing on the petition”).

To succeed on a claim of ineffective assistance of counsel, Jones must satisfy the two-prong test set forth in *Strickland v. Washington*. 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). First, Jones must show her counsel’s performance fell below an objective standard of reasonableness. *Id.* Second, Jones must show there is a reasonable probability that, absent her counsel’s error, the result of the proceeding would have been different. *Id.* at 696-97, 104 S. Ct. at 2069.

The district court denied Jones’s petition for postconviction relief without an evidentiary hearing, concluding that although counsel’s performance fell below an

objective standard of reasonableness, the result would have been the same because Jones's affidavit "failed to provide sufficient reasoning to erase [her] restitution responsibility for lack of merit" and did "not detail that the losses did not occur or what amounts would have been appropriate if those requested in the victim's request were incorrect or excessive." Jones argues that she is entitled to an evidentiary hearing because the petition, files, and records of the proceeding do not conclusively show she is entitled to no relief. Jones specifically argues that had her affidavit been timely filed, there is a reasonable probability that the result following a restitution hearing would have been different because Jones properly disputed the victim's ownership and values of the items comprising the restitution award and her ability to pay, and there is no indication that the state could meet its burden to support the restitution awarded.

A. Counsel's conduct fell below an objective standard of reasonableness.

"In Minnesota, the standard for attorney competence is representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). "[C]ourts must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Roe v. Flores-Ortega*, 528 U.S. 470, 477, 120 S. Ct. 1029, 1034 (2000) (quotation omitted). In *Roe*, the Supreme Court held that, while counsel's performance is given high deference for legal strategy,

a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable . . . because a defendant who

instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice. Counsel's failure to do so cannot be considered a strategic decision; filing a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.

Id.

We agree with the district court that the inaction by counsel fell below an objective standard of reasonableness. Counsel notified the court at the plea hearing that Jones intended to challenge restitution. Following the plea hearing and well before the statutory deadline, Jones completed the affidavit challenging restitution and delivered the same to her counsel. Counsel's unfortunate oversight in failing to timely serve and file the affidavit resulted in a procedural bar to challenge the restitution order. As in *Roe*, the failure of counsel to timely file the restitution affidavit was "a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes." *See id.* Counsel's failure to act within the deadline therefore amounts to conduct falling below an objective standard of reasonableness.

B. The district court could not reasonably conclude that the result would not have been different but for counsel's error absent an evidentiary hearing.

The petition, files, and records of the proceeding in this matter contain substantial, substantive challenges to the restitution award. The record makes clear that Jones considered the \$400 restitution award to be significant and burdensome given her circumstances and that she desired to challenge that award. From the time of the plea hearing and through the restitution hearing, Jones consistently and repeatedly maintained and offered specific reasons why she is unable to pay restitution and why the record does

not support such an award. At the plea hearing, counsel informed the court that Jones intended to challenge restitution and initiated an offer of proof of her inability to pay. Counsel stated that Jones was not working, that her only source of income was Social Security income, that she was receiving assistance to pay for groceries and gas, and that “one of the big issues with restitution is that she has no financial resources” and a limited income. Then, after the plea hearing, Jones signed an affidavit (1) explaining her financial situation and her inability to pay and (2) detailing each item of property that she intended to challenge and her basis for challenging those items. Next, at the restitution hearing itself, her counsel made another offer of proof of Jones’s inability to pay the award, noting her living expenses and lack of financial resources. These allegations, submitted to the district court in their various forms, were sufficient to merit an evidentiary hearing on the postconviction petition.

We observe that the restitution affidavit alone was sufficiently detailed to warrant a postconviction evidentiary hearing. The affidavit challenging restitution must “set[] forth all challenges to the restitution or items of restitution, and specify[] all reasons justifying dollar amounts of restitution which differ from the amounts requested by the victim.” Minn. Stat. § 611A.045, subd. 3(a). The burden then shifts to the state to demonstrate “the amount of loss sustained by a victim as a result of the offense and the appropriateness of a particular type of restitution.” *Id.* The level of detail required to support an affidavit is not high, and the supreme court has concluded that an affidavit merely alleging that expenses “were ‘not allowable’ . . . was sufficiently detailed for purposes of the statute.” *State v. Palubicki*, 727 N.W.2d 662, 665 n.3 (Minn. 2007). The restitution affidavit prepared by

Jones was sufficiently detailed for purposes of Minn. Stat. § 611A.045, subd. 3(a), because it contained just as much, if not more, detail than the affidavit in *Palubicki*.

We also observe that the record does not contain the required evidence to sustain *any* restitution award. The basis of a restitution order must originate “from the victim in affidavit form or by other competent evidence” and “*must describe the items or elements of loss, itemize the total dollar amounts of restitution claimed, and specify the reasons justifying these amounts.*” Minn. Stat. § 611A.04, subd. 1(a) (emphasis added). In addition, the restitution statutes “contemplate that before restitution can be ordered, the victim’s loss must be documented.” *State v. Grayson*, 546 N.W.2d 731, 739 (Minn. 1996).

Although the state complains that Jones did not strictly comply with the procedural requirements to challenge the restitution award, the state did not comply with the *substantive* requirements to obtain a restitution award in the first instance. The record before us contains no affidavit or other competent evidence describing the items or elements the victim lost, the itemized total dollar amount of restitution claimed or the reasons for justifying those amounts. Although the criminal complaint contains an allegation that Jones “took a Google Home speaker, Xbox controller, shoes, and a wallet” from the victim’s residence and that the value of the stolen items was “less than \$500,” allegations in a criminal complaint are not “in affidavit form” or “other competent evidence” and are not sufficiently specific to sustain a restitution award under Minn. Stat. § 611A.04, subd. 1(a). The state provided no evidence of the items stolen, their values, or proof of ownership.

Instead of conducting a hearing to determine the amount of loss subject to restitution or evaluating the quality of evidence required to sustain a restitution order, the district court determined that a hearing was unnecessary because “inherent in the [*Norgaard*] plea is the result that a loss potentially occurred to the victim and, if so, he is entitled to restitution and that Petitioner is responsible for such restitution” and “unless there is evidence provided that the items were returned to the victim or that he was otherwise compensated for the cost of the items, he is entitled to some amount of restitution.” This reasoning is erroneous.

The *Norgaard* plea entered by Jones consisted of an admission that she read documents in a file and that if witnesses testified consistently with unidentified reports, that she would likely be convicted of a misdemeanor theft of property valued at less than \$500. The plea contained no factual basis, and Jones did not admit to a theft of any particular item or the value of any particular item. In fact, the record contains no basis for a restitution award of \$400 at all.

We also note that the district court ignored the affidavit and offers of proof indicating that Jones was unable to pay restitution. “To determine whether to order restitution and the amount of restitution, a district court *must* consider the defendant’s ability to pay and the loss sustained by the victim of the crime.” *State v. Boettcher*, 931 N.W.2d 376, 380 (Minn. 2019) (emphasis added) (quotation omitted). In light of the offers of proof of inability to pay and the district court’s failure to consider the same, we cannot conclusively state that Jones would be entitled to no relief.

Had counsel perfected the right to a contested restitution hearing, the burden would have shifted to the state to demonstrate the amount of loss sustained by the victim by the preponderance of the evidence. Minn. Stat. § 611A.045, subd. 3(a). And the district court would have been required to consider both the economic loss sustained by the victim and the income, resources, and obligations of Jones in determining whether to order restitution and the amount to be ordered, all of which Jones challenged. *See* Minn. Stat. § 611A.045, subd. 1(a). But for counsel’s error, Jones would have been entitled to a contested restitution hearing and, given this record of itemized challenges, the offers of proof of inability to pay, and the state’s failure to support the value of its restitution claim, we cannot conclusively state that Jones would be entitled to no relief.

Accordingly, the district court abused its discretion in dismissing Jones’s petition for postconviction relief without an evidentiary hearing because the petition, files, and records of the proceeding do not conclusively show that Jones is entitled to no relief. We reverse and remand for an evidentiary hearing pursuant to Minn. Stat. § 590.04, subd. 1, and further proceedings not inconsistent with this opinion.³

Reversed and remanded.

³ Because we reverse and remand for a postconviction evidentiary hearing, we decline to address Jones’s alternative request to remand the matter directly for a restitution hearing.