STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0037

State of Minnesota,
Respondent,

vs.

Antonio Levell Washington,
Appellant.

Filed January 30, 2023
Affirmed
Reilly, Judge

Rice County District Court
File No. 66-CR-17-2939

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

Brian M. Mortenson, Rice County Attorney, Sean R. McCarthy, Assistant County Attorney, Faribault, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

In this direct appeal stayed for postconviction proceedings, appellant challenges the final judgment of conviction for first-degree controlled-substance sale of heroin. He argues that the district court violated statutory protections against serial prosecution and multiple

punishments, as well as his double-jeopardy rights, when the district court entered a conviction and sentenced him to prison based on a single behavioral incident and criminal act for which he had already been punished. In his pro se supplemental brief, he also asserts that he received ineffective assistance of counsel. Because appellant's offenses in Rice County and Dakota County are separate acts, not part of a single behavioral incident, and appellant was not denied his right to effective assistance of counsel, we affirm.

FACTS

The Cannon River Drug and Violent Offender Task Force identified appellant Antonio Levell Washington as the main supplier of heroin in Rice County. On November 29, 2017, officers arranged for an undercover agent to buy heroin from Washington in Rice County. Before the controlled purchase of the heroin, officers conducted surveillance on Washington's residence in Dakota County. Officers saw Washington leave his home shortly after 10:00 a.m. About 25 minutes later, Washington arrived at the Flying J gas station in Rice County and met the undercover agent. Washington sold about 12 grams of heroin to the agent for $1,800. Officers arrested Washington minutes later. That same day after Washington's arrest, officers in Dakota County obtained and executed a search warrant for Washington's home. Officers seized two firearms, $880 in cash, four plastic bags with ripped corners[1], a digital scale, and a small plastic bag containing 3.9 grams of heroin in Washington's bedroom.

[1] At trial in the Dakota County case, the state presented evidence that based on an officer's training and experience, plastic bags with their corners ripped off are often used for packaging smaller quantities of controlled substances for sale.

Respondent State of Minnesota prosecuted Washington in both Rice County and Dakota County. The state filed a complaint in Rice County, charging Washington with first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(3) (2016), for Washington's sale of heroin to the undercover agent. The state also filed a complaint in Dakota County, charging him with second-degree sale of a controlled substance for his possession and intent to sell the heroin discovered in his bedroom in violation of Minn. Stat. § 152.022, subd. 1(3) (2016). The district court in Dakota County held a jury trial in July 2019 and the jury found Washington guilty. The district court sentenced Washington to 141 months in prison for second-degree possession with intent to sell a controlled substance.

In September 2021, the parties reached a plea agreement in the Rice County case. Washington agreed to plead guilty to first-degree sale of a controlled substance, with a sentence of 141 months to run concurrently with his sentence in the Dakota County case. The state agreed to withdraw its notice of intent to seek an aggravated sentence. During his plea colloquy, Washington admitted to selling about 12 grams of heroin at the Flying J gas station in Rice County on November 29, 2017. Washington stated he knew the substance was heroin and he intended to sell it. The district court accepted his guilty plea and entered a conviction. The Rice County district court sentenced Washington to 141 months in prison "concurrent with the sentence [he was] currently serving" on his Dakota County conviction.

Washington appealed and this court granted his motion to stay the direct appeal and remand to the district court to allow him to pursue postconviction proceedings to establish

a factual basis for his claim that his multiple convictions and sentences were unlawful. Washington argued in his petition for postconviction relief that his "Rice County conviction for a first-degree violation of the controlled substance statute [arose] out of the same set of circumstances as his Dakota County conviction for a second-degree violation of the controlled substance statute." As a result, he argued his Rice County conviction and sentence were barred under Minn. Stat. § 609.04, subd. 1 (2016); or, in the alternative, that his sentence was barred under Minn. Stat. § 609.035, subd. 1 (2016), and constituted double jeopardy. To support his contention that both offenses arose from a single behavioral incident, Washington argued that his possession of heroin at the gas station shared a unity of time with the heroin he possessed at his house. He also asserted that the locations of the offenses were only a short distance apart and that both offenses shared the single objective of making money. In its response to Washington's petition, the state argued that the Rice County and Dakota County convictions did not stem from a single behavioral incident as they "occurred 3.5 hours apart in time . . . in separate counties," thus lacking unity of time and place.

The postconviction court denied Washington's petition for relief. Washington moved to reinstate his direct appeal and this court granted his motion. This appeal follows.

DECISION

I. Washington is not entitled to relief from his conviction pursuant to Minn. Stat. § 609.04, subd. 1.

Minnesota law precludes "multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*,

363 N.W.2d 758, 760 (Minn. 1985). Minnesota statutes section 609.04, subdivision 1, provides that, "Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." To examine whether an offense is an included offense that falls under this statute, we examine the elements of the offense. *State v. Bertsch*, 707 N.W.2d 660, 664 (Minn. 2006). "But even if a person . . . is found guilty of a greater offense and an included offense, the protections of section 609.04 will not apply if the offenses constitute separate criminal acts." *Id.* We review whether a conviction violates Minn. Stat. § 609.04 de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

We acknowledge that under Minnesota's criminal statutes, the second-degree sale of a controlled substance (possession with intent to sell) in violation of Minn. Stat. § 152.022, subd. 1(3), is a lesser included offense of first-degree sale of a controlled substance in violation of Minn. Stat. 152.021, subd. 1(3). *See* Minn. Stat. § 609.04, subd. 1(1). Both offenses arise under different sections of the same controlled-substance statute. But section 609.04 cannot afford Washington relief from his conviction because Washington engaged in two entirely separate criminal acts. Washington sold 12 grams of heroin at the Flying J gas station and, separately, possessed with intent to sell 3.9 grams of heroin that Washington stored in his home. *See State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) (concluding that simultaneous possession of different drugs in defendant's house were separate criminal acts and permitted multiple convictions). Thus, Washington's conviction for first-degree sale does not violate Minn. Stat. § 609.04 and he is not entitled to relief.

II. Washington is not entitled to relief from his sentence under Minn. Stat. § 609.035, subd. 1, because his conduct did not constitute a single behavioral incident.

Under Minnesota law, a defendant whose multiple offenses occurred as a single behavioral incident generally may be sentenced for only one of those offenses. Minnesota statutes section 609.035, subdivision 1, provides that "[i]f a person's conduct constitutes more than one offense . . . the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." "Whether the offenses were part of a single behavioral incident is a mixed question of law and fact." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). We review the postconviction court's findings of fact for clear error and its application of law to those facts de novo. *Id.*

To determine whether Washington's offenses were part of a single behavioral incident, we consider: (1) whether the offenses occurred at substantially the same time and place; and (2) whether the conduct was motivated by an effort to obtain a single criminal objective. *Id.* (quotation omitted). The determination does not involve a "mechanical test," but "an examination of all the facts and circumstances." *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). The state bears the burden of proving, by a preponderance of the evidence, that a defendant's offenses were not part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

We first note that the postconviction court did not clearly err in its relevant factual determinations. Washington's testimony during his plea colloquy and testimony from officers during Washington's Dakota County trial reflect that (1) Washington sold heroin

to the undercover agent around 10:26 a.m. in Rice County; and (2) around 2:00 p.m. officers discovered more heroin at Washington's residence when they executed a search warrant there.

The postconviction court found that Washington's offenses were not part of a single behavioral incident. The postconviction court found that the state carried its burden to prove a divisibility of conduct by showing the offenses did not occur at the same time and in the same place, even though both convictions were motivated by profiting from selling drugs. Washington argues the offenses arose out of a single behavioral incident because the actual amount of heroin he sold at the gas station shared a unity of time with the amount he constructively possessed in the house in Dakota County.

In cases involving drug sales, the lack of unity of time or a finding that the offenses occurred at different locations can be dispositive in determining that offenses did not arise out of a single behavioral incident. *See State v. Barnes*, 618 N.W.2d 805, 813 (Minn. App. 2000), *rev. denied* (Minn. Jan. 16, 2001); *State v. Thomas*, 352 N.W.2d 526, 529 (Minn. App. 1984) ("[C]rimes . . . committed within a short time span and within the same area does not mean the single behavioral incident prohibition is violated."), *rev. denied* (Minn. Oct. 11, 1984). Washington's actual sale and the discovery of heroin he possessed with the intent to sell were separated by time and geography when they occurred over three hours apart and in separate counties.[2]

[2] In nonprecedential opinions this court has held offenses separated by less time and shorter distances did not constitute a single behavioral incident. Though nonprecedential, we find the comparison of facts persuasive. *See State v. Kruger*, A11-713, 2012 WL 2077260, at *8 (Minn. App. June 11, 2012) (determining two drug sales were not one behavioral

As to whether both offenses were guided by a single criminal objective, the postconviction court found that "[a]rguably, [Washington]'s conduct . . . had the same motivation—profit from selling drugs." Yet, in the context of multiple drug sales, we have held "the criminal plan of obtaining as much money as possible is too broad an objective to constitute a single criminal goal within the meaning of section 609.035." *Soto*, 562 N.W.2d at 304; *see also State v. Gould*, 562 N.W.2d 518, 521 (Minn. 1997). Testimony from the Dakota County jury trial showed that the heroin Washington constructively possessed in his bedroom, accompanied by plastic bags with the corners ripped off and a scale, suggested that Washington engaged in the sale of drugs. Further, the heroin Washington sold to the undercover agent in Rice County was separate from the heroin later discovered at his home. Though his overarching goal may have been to sell heroin for profit, the evidence shows that the heroin in his home was to be sold at a different time than the heroin he sold to the agent. Thus, Washington's offenses were not motivated by an effort to obtain a single criminal objective.

Washington notes his case does not involve separate actual sales and contends *State v. Kemp* is controlling. 305 N.W.2d 322 (Minn. 1981). In *Kemp*, the defendant sold cocaine to an undercover officer in her apartment. *Id.* at 324. Later that day, officers executed a search warrant on the defendant's apartment where they discovered that she possessed more cocaine. *Id.* The state charged the defendant with both the actual sale of

---

incident when they occurred five and a half hours apart in different locations two blocks away from each other); *State v. Matlock*, A07-1601, 2008 WL 4552768, at *5 (Minn. App. Oct. 14, 2008), *rev. denied* (Minn. Dec. 16, 2008) (determining two drug sales that occurred in the same location only two hours apart were not one behavioral incident).

cocaine and possessing cocaine in her apartment. But the district court found that both convictions "arose from the same behavioral incident." *Id.* at 325. The Minnesota Supreme Court affirmed the district court, holding that "where convictions for selling or distributing cocaine and possessing cocaine with intent to sell or distribute *are based on one criminal act*, only one conviction may be permitted to stand" and imposed a sentence only on the defendant's sale conviction. *Id.* at 326 (emphasis added).

We find *Kemp* distinguishable. Although both cases involve offenses that occurred hours apart on the same day, in *Kemp* the sales unequivocally occurred in the same location: the defendant's apartment. Washington's offenses occurred in different locations separated by county lines and involved two, separate acts: constructively possessing heroin at his home and selling heroin to the agent at the gas station. Further, the state in *Kemp* conceded the offenses were based on the same criminal act and the Minnesota Supreme Court's decision "was based in part on the district court's finding that the offenses were a single behavioral incident." *Bertsch*, 707 N.W.2d at 665; *see Kemp*, 305 N.W.2d at 326. The state makes no such concession here and the postconviction court did not find Washington's conduct to be a single behavioral incident.

Rather, the postconviction court found Washington's case to be more analogous to *State v. Martinez*, 530 N.W.2d 849 (Minn. App. 1995), *rev. denied* (Minn. June 14, 1995). In *Martinez*, an officer conducted a traffic stop in Watonwan County and discovered three pounds of marijuana in the trunk of the defendant's vehicle. *Martinez*, 530 N.W.2d at 850. An investigation revealed that the defendant also possessed 11 pounds of marijuana in a storage unit in Brown County, which the defendant visited to remove a portion of marijuana

to transport on the morning of the traffic stop. *Id.* The state charged the defendant with possession of an illegal substance in Watonwan County, but he was never convicted or acquitted of the offense because he entered a diversion program. *Id.* at 851. After the defendant was also charged with possession of an illegal substance in Brown County, this court determined that Minn. Stat. § 609.035 would not bar his sentence because the offenses constituted separate behavioral incidents. *Id.* This court determined that:

> [T]he two incidents [were] not part of the same criminal conduct because, after [defendant] separated out the supply [of marijuana for transport], he had possession of two discrete amounts of marijuana in two different venues intended for separate use or sales at significantly different times. Although [defendant] *stored* marijuana in Brown County for several days before it was discovered on May 7, another three pounds were in the trunk of the car, and it was being *transported*, presumably to consummate a sale in Iowa.

Id. (emphasis in original). *Cf. Barnes*, 618 N.W.2d at 813 (noting that two possession-with-intent-to-sell offenses constituted a single behavioral incident when there was no evidence that the two substances, found in the same place and both packaged for sale, were to be sold at different times or different places).

The facts here are markedly similar and the postconviction court's consideration of time, place, and single criminal objective factors are identical to those relied on by the district court in *Martinez* in determining whether two incidents were part of distinct criminal offenses and separate behavioral incidents. *See Martinez*, 530 N.W.2d at 851 (citing *State v. Hawkins*, 511 N.W.2d 9, 13 (Minn. 1994) and *Mercer v. State*, 290 N.W.2d 623, 626 (Minn. 1980)). Based on "an examination of all the facts and circumstances," Washington's first-degree sale and second-degree possession-with-intent-to-sell offenses

were separate acts and did not occur at substantially the same time and place, nor was his conduct motivated by an effort to obtain a single criminal objective. *Soto*, 562 N.W.2d at 304. Washington's sentence does not violate Minn. Stat. § 609.035 and he is not entitled to its vacation.

III. Washington's double-jeopardy rights do not entitle him to relief from his conviction and sentence.

The Double Jeopardy Clauses of the Minnesota and United States Constitutions protect criminal defendants from multiple punishments and multiple prosecutions. *State v. Chavarria-Cruz*, 839 N.W.2d 515, 520 (Minn. 2013); *State v. Schmidt*, 612 N.W.2d 871, 876 (Minn. 2000). Particularly, double-jeopardy rights "protect[] criminal defendants from three distinct abuses: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense." *Hankerson v. State*, 723 N.W.2d 232, 236-37 (Minn. 2006) (quotation omitted). We review the application of the constitutional protection against double jeopardy de novo. *State v. Gouleed*, 720 N.W.2d 794, 800 (Minn. 2006).

Washington claims his Rice County conviction and sentence violated the Double Jeopardy Clause because it was a second prosecution and punishment of a greater offense after the conviction and punishment for a lesser offense in Dakota County. Here too, our analysis of Washington's statutory arguments informs our analysis of his constitutional claim.[3] The postconviction court concluded the heroin discovered at Washington's Dakota

[3] Minnesota's statutory serial-prosecution and multiple punishment protections are broader than the double jeopardy clause set forth in the United States Constitution. *See State v. Johnson*, 141 N.W.2d 517, 521 (Minn. 1966) (explaining the "drafters, as well as the

County home was separate from the heroin he sold to the undercover agent, because it was intended for a separate use or sale at a different time. Under these facts, we agree Washington was not prosecuted and punished a second time for the same offense. As a result, Washington is not entitled to relief from his conviction and sentence.

IV. Appellant was not denied effective assistance of counsel.

In his pro se supplemental brief, Washington argues that he received ineffective assistance of counsel. The United States and Minnesota Constitutions guarantee the right to effective assistance of counsel to all criminal defendants. U.S. Const. amend. VI; Minn. Cost. art. I, § 6. To establish an ineffective assistance of counsel claim, a defendant must establish: (1) his counsel's representation fell below an objective standard of reasonableness; and (2) there is a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*. 466 U.S. 668, 687-94 (1984); *Zumberge v. State*, 937 N.W.2d 406, 413 (Minn. 2019). A failure on either element is dispositive. *Nissalke v. State*, 861 N.W.2d 88, 93-94 (Minn. 2015).

Washington appears to contend that, because his offenses in both counties were part of a single course of conduct, his trial counsel's failures to "object to multiple charges" and "tender a not guilty plea under Minn. R. Crim. P. 14.01(d)" were objectively unreasonable as his "only possible defense[s] against the charges." Rule 14.01(d) of the Minnesota Rules

---

legislature, intended . . . to broaden the protection afforded by our constitutional provisions against double jeopardy" by passing Minn. Stat. § 609.035); *Jackson*, 363 N.W.2d at 760 (explaining that Minn. Stat. § 609.04 "expressly prohibits multiple convictions which might not be prohibited by the Double Jeopardy Clause").

of Criminal Procedure permits a defendant to plead "[d]ouble jeopardy or prosecution barred by Minn. Stat. § 609.035" with or without the plea of not guilty. Minn. R. Crim. P. 14.01(d). This court presumes counsel's representation is reasonable and generally will not review a lawyer's trial strategy or tactics. *State v. Rainer*, 502 N.W.2d 784, 788 (Minn. 1993). Counsel's performance need not be perfect, but "simply reasonable under prevailing professional norms." *Strickland*, 466 U.S. at 688.

Despite Washington's contention to the contrary, the record reveals that his trial counsel did consider and seek to assert these defenses. In April 2020 shortly after Washington's conviction in Dakota County, his trial counsel filed a motion in limine in his Rice County case requesting an order from the district court allowing Washington to (1) "plead not guilty on [d]ouble [j]eopardy grounds pursuant to Minn. R. Crim. P. 14.01 and to be able to raise this defense at trial"; and (2) "plead not guilty/prosecution barred by Minn. Stat. § 609.035 pursuant to Minn. R. Crim P. 14.01 and raise this defense at trial." Trial counsel also made a factual offer of proof in support of the motions and argued Washington was entitled to the defenses so the jury could decide whether his conduct had "a singleness of purpose and unity of time and place." The record does not reveal whether the district court ruled on this motion. But in any event, in September 2021, Washington entered a guilty plea and his plea petition waived Washington's previous pretrial defenses.

On these facts, we cannot conclude that trial counsel's representation fell below an objective standard of reasonableness. Trial counsel did not fail to assert Washington's defenses and complied with prevailing professional norms by raising the defenses in a pretrial motion. Even if Washington's ultimate decision to plead guilty rather than not

guilty pursuant to Minn. R. Crim. P. 14.01(d) was tactical, we decline to review a lawyer's trial strategy. Because Washington's failure to show that his counsel's performance fell below an objective standard of reasonableness is dispositive, we need not reach the second *Strickland* prong. Washington cannot prevail on his ineffective assistance of counsel claim.

Affirmed.