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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1997**

Kevin Patrick Plantin, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 21, 2008
Reversed and remanded
Shumaker, Judge**

Hennepin County District Court
File No. 27CR02030925

Kevin Patrick Plantin, OID #139664, 1000 Lakeshore Drive, Moose Lake, MN 55767
(pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul,
MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County
Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Pro se appellant challenges the district court's order denying his second petition for postconviction relief, alleging that he was improperly convicted of a lesser-included offense and that the "interests of fairness and justice" require appellate review. Although his claim is barred by the *Knaffla* rule, in the interests of justice one conviction of kidnapping must be vacated as a violation of statutory law.

FACTS

In December 2002, appellant Kevin Patrick Plantin was convicted by a jury of attempted first-degree murder, burglary, second-degree assault, and two counts of kidnapping. The district court imposed consecutive sentences of 86 months on one count of kidnapping and 180 months for attempted first-degree murder.

Plantin appealed, arguing that the district court abused its discretion in admitting victim statements, that the admission of various statements denied him his constitutional right to confront his accusers, that out-of-court statements were erroneously admitted, that the prosecutor's closing statement constituted prosecutorial misconduct, that the trial court abused its discretion in admitting evidence of battered-woman syndrome, that he was denied his right to a unanimous jury, that he received ineffective assistance of counsel, and that the district court had a conflict of interest requiring a reversal. He did not challenge his sentence. This court affirmed Plantin's convictions, and the Minnesota Supreme Court denied Plantin's petition for further review. *State v. Plantin*, 682 N.W.2d 653 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

In May 2005, Plantin filed his first pro se petition for postconviction relief, raising a multitude of claims, including that his kidnapping sentence should be vacated; that the sentencing guidelines did not permit consecutive sentences; that the judicial findings regarding consecutive sentences violated the rule set forth in *Blakely*; and that his charge of kidnapping carried a presumptive sentence of 21 months, stayed, instead of the 86-month executed sentence he received. The district court denied the petition for postconviction relief.

Plantin appealed, raising four issues. This court affirmed the district court's denial of Plantin's first petition for postconviction relief, and the Minnesota Supreme Court again denied review. *Plantin v. State*, No. A05-1750, 2006 WL 1229672 (Minn. App. May 9, 2006), *review denied* (Minn. July 19, 2006). In our opinion, we addressed the merits of Plantin's challenges to his sentence, concluding: (1) that the Minnesota Sentencing Guidelines permit his convictions to be sentenced consecutively, (2) that the judicial findings are in accord with *Blakely*, (3) that he was appropriately sentenced on the most-serious kidnapping charge because the jury found him guilty of the most-serious type of kidnapping, and (4) that the sentencing guidelines permit sentences on both of Plantin's convictions. *Id.* at *1-*3.

In April 2007, Plantin filed a second petition for postconviction relief, requesting an evidentiary hearing. For the first time he claimed that one of his kidnapping convictions must be vacated, and he included an assortment of constitutional claims in his petition. The district court denied Plantin's second petition for postconviction relief,

concluding that his claims were, or could have been, raised in his previous petition for postconviction relief. This appeal followed.

DECISION

We review a district court's summary denial of a petition for postconviction relief for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). An evidentiary hearing is required, and a summary denial is therefore an abuse of discretion, only if the petitioner alleges facts that, if proved, would entitle the petitioner to the requested relief. *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). When reviewing a postconviction appeal, appellate courts examine whether the district court's findings are supported by sufficient evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

If a petitioner has directly appealed a conviction, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). This rule—known as the *Knaffla* rule—includes claims that petitioner should have known about at the time of his direct appeal. *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004). *Knaffla* similarly bars postconviction review of claims that could have been raised in a previous postconviction petition. *Wayne v. State*, 601 N.W.2d 440, 441 (Minn. 1999). There are two exceptions to the *Knaffla* rule, which apply (1) if the claim "is 'so novel that its legal basis was not reasonably available at the time of the direct appeal'" or (2) if "fairness would require a review of the claim in the interest of justice and there was no deliberate or inexcusable reason for the failure to raise the issue on direct appeal." *McKenzie*, 687 N.W.2d at 905-06 (quoting *Greer v. State*, 673 N.W.2d

151, 155 (Minn. 2004)). Summary denial of a petition for postconviction relief is not an abuse of discretion if a petition is procedurally barred by *Knaffla*. *Schleicher v. State*, 718 N.W.2d 440, 450 (Minn. 2006).

Plantin filed a direct appeal of his conviction in 2004, and we affirmed the district court. *Plantin*, 682 N.W.2d 653. In 2005, Plantin filed a petition for postconviction relief, which was denied by the district court. He appealed; we affirmed the district court's denial of his first petition for postconviction relief. *Plantin*, 2006 WL 1229672, at *1.

Now, Plantin appeals from the order denying his second petition for postconviction relief. He argues that because he was convicted of two counts of kidnapping, his conviction violates Minn. Stat. § 609.04 (2000), which addresses convictions of lesser-included offenses. In addition, Plantin contends he is entitled to relief in the “interests of fairness and justice.”

Plantin asserts that he was convicted of multiple counts of kidnapping and that one count should be dismissed as a lesser-included offense. Plantin raised the issue of his sentence in a prior petition for postconviction relief and in a prior appeal to this court, but he did not raise the issue of his conviction. He did know, or he should have known, of the conviction issue in the appeal, and *Knaffla* thus bars the assertion of the question now.

Plantin also contends that his claim warrants review under the second exception to *Knaffla*, asserting that the interests of fairness and justice require this court's evaluation of his claim.

In Plantin's appeal, we acknowledged that his crimes of the "kidnapping and the attempted murder were part of a single behavioral incident." *Plantin*, 2006 WL 1229672, at *1. Although Minn. Stat. § 609.251 (2002) permits conviction of another crime committed during a kidnapping, it does not permit conviction of another count of kidnapping. Therefore, in the interests of justice, the conviction under Minn. Stat. § 609.25, subd. 2(2) (2002), specifying failure to release the victim in a safe place, must stand while the additional kidnapping conviction under Minn. Stat. § 609.25, subd. 1(2) (2002), must be vacated, and we reverse and remand for that purpose.

Reversed and remanded.