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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2207**

Jason Dean Ligtenberg, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 13, 2012
Affirmed
Collins, Judge***

Olmsted County District Court
File No. 55-K0-04-3970

Jean M. Brandl, Heltzer & Houghtaling, P.A., St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County
Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Collins,
Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

Jason Ligtenberg challenges the denial of his second petition for postconviction relief. Because the district court did not abuse its discretion by denying the petition, we affirm.

FACTS

In August 2007, a jury found Ligtenberg guilty of two counts of criminal sexual conduct in the first degree and one count of criminal sexual conduct in the second degree. Ligtenberg was sentenced within the guidelines to consecutive prison terms of 144 months and 48 months.

Ligtenberg filed a direct appeal, but this court stayed the appeal to allow Ligtenberg to pursue postconviction relief. In his petition, Ligtenberg alleged that he received ineffective assistance of trial counsel. The district court summarily denied the petition, and we reinstated the appeal and affirmed Ligtenberg's convictions. *See State v. Ligtenberg*, No. A08-0073, (Minn. App. June 16, 2009), *review denied* (Minn. Aug. 26, 2009).¹

In October 2010, Ligtenberg moved the district court to release all medical records in its possession concerning the victim in this case. This motion was denied. In July 2011, Ligtenberg filed his second petition for postconviction relief, arguing that he received ineffective assistance of both trial and appellate counsel, and that the district

¹ Ligtenberg's argument that he did not file a direct appeal is entirely unfounded.

court erred in denying his motion to release of the victim's medical records. On October 10, 2011, the district court summarily denied relief. This appeal followed.

D E C I S I O N

When reviewing a postconviction court's denial of relief, we examine whether the findings are supported by the evidence. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). The decision to grant or deny a new trial will not be disturbed absent an abuse of discretion. *Id.*

I.

Ligtenberg argues that the district court erred in denying his second postconviction petition because he received ineffective assistance of trial counsel in multiple respects. This claim is procedurally barred by the *Knaffla* rule because Ligtenberg raised the issue of ineffective assistance of his trial counsel in his first postconviction petition and then on direct appeal, and any specific argument relating to this issue that was not raised could have been raised. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (When "direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief."). Having nonetheless evaluated this claim, we find it unavailing for the reasons that follow.

To establish a claim of ineffective assistance of counsel, a claimant must demonstrate by a preponderance of the evidence that (1) counsel's performance fell below an objective standard of reasonableness, such that he failed to exercise the customary skills and diligence of a reasonably competent attorney, and (2) the claimant

was so prejudiced thereby that, but for the error, a different outcome would have resulted. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001).

First, Ligtenberg argues that his trial counsel was ineffective for failing to object to the state's failure to disclose the contents of a report prepared by an expert witness. Ligtenberg did not make this argument to the district court. In his second postconviction petition, Ligtenberg argued only that his trial counsel was ineffective for failing to object to the timeliness of the state's disclosure. We will not consider arguments raised for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Second, Ligtenberg argues that his trial counsel was ineffective for failing to conduct a thorough investigation of the case in order to be more prepared to effectively cross-examine the state's expert witness and to present a defense expert witness. These are elements of trial tactics or strategy that are not reviewable for competence. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

Third, Ligtenberg argues that his trial counsel was ineffective for urging him to lie to the district court at sentencing. Ligtenberg told the sentencing court that he was "sorry that [he] did these things," despite the fact that he testified at trial and had denied all of the allegations. This argument is meritless because Ligtenberg fails to show any prejudice caused by his alleged lie to the sentencing court. Specifically, Ligtenberg has not shown that had he steadfastly maintained his innocence at sentencing, the district court would have been motivated to find any substantial and compelling reason to depart from the guidelines. *See Dukes*, 621 N.W.2d at 252 (requiring appellant to establish that the outcome would have been different).

In sum, we conclude that the district court did not abuse its discretion in denying Ligtenberg's postconviction petition on the basis that he received ineffective assistance of trial counsel.

II.

Ligtenberg also argues that he received ineffective assistance of appellate counsel. He contends that his appellate counsel was ineffective for failing to raise an issue regarding his trial counsel's failure to object to improper venue. "When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

It is apparent from the record that Ligtenberg's trial counsel purposely waived the venue issue. At a bench conference during trial, the prosecutor acknowledged that the state was prosecuting "Ramsey County charges here in Olmsted." The district court proposed to tell the jury "we're going to be proceeding with some of the Ramsey County charges here." After confirming with the district court and the prosecutor that jeopardy would attach and Ligtenberg could not be retried elsewhere should he be acquitted, Ligtenberg's trial counsel agreed.

As evident in the discussion at the bench conference, the decision whether or not to object to venue is a matter of trial strategy reserved for trial counsel's discretion and is not reviewable for competence. *See, e.g., Voorhees*, 596 N.W.2d at 255 (recognizing that decision whether or not to object to venue is a matter of trial strategy). Therefore, Ligtenberg's trial counsel's decision to waive the venue issue did not constitute

ineffective assistance of counsel. *See id.* It follows that Ligtenberg’s appellate counsel was not ineffective for failing to raise the issue of ineffective assistance of trial counsel on this ground. *Fields*, 733 N.W.2d at 468.²

III.

Next, Ligtenberg argues that the district court erred in denying his motion for release of the victim’s medical records. Ligtenberg contends that these records are necessary to impeach the victim at a new trial.

Ligtenberg is not entitled to a new trial on the basis of evidence to be found in the victim’s medical records.

In order for postconviction relief to be granted on the basis of newly-discovered evidence, a petitioner must establish that (1) the evidence was unknown to him and his counsel at the time of trial; (2) the failure to discover that evidence before trial was not due to a lack of diligence; (3) the evidence is material (i.e., not impeaching, cumulative, or doubtful); and (4) the evidence would probably produce a more favorable result on retrial.

Whittaker v. State, 753 N.W.2d 668, 671 (Minn. 2008). Ligtenberg could have pursued discovery of the victim’s medical records before trial with reasonable diligence. *See id.* Moreover, Ligtenberg seeks to use such evidence solely for impeachment purposes. Thus, the evidence is not material. *See id.* Also, Ligtenberg concedes that he does not know what the medical records contain; thus, he cannot show that the evidence “would

² We acknowledge that Ligtenberg’s trial counsel’s decision to waive venue did not relieve the state of its burden to prove venue at trial beyond a reasonable doubt. *See State v. Pierce*, 792 N.W.2d 83, 85 (Minn. App. 2010). But the state’s failure to prove venue relates to the sufficiency of the evidence, *see id.*, which Ligtenberg never raised either in direct appeal or in his postconviction petitions.

probably produce a more favorable result on retrial.” *See id.* Accordingly, the district court did not abuse its discretion in denying Ligtenberg’s motion for release of the victim’s medical records.

IV.

Finally, Ligtenberg argues that the district court erred in denying his second postconviction petition without an evidentiary hearing. A district court must hold a hearing on a petition for postconviction relief unless the petition, files, and record “conclusively show that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2010); *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). “[A] hearing is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief.” *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). For the reasons discussed above, the facts, as alleged, would not entitle Ligtenberg to relief. Therefore, the district court did not abuse its discretion in summarily denying Ligtenberg’s second postconviction petition.

Affirmed.