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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2053**

John D. Sims, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 25, 2008
Affirmed
Lansing, Judge**

Hennepin County District Court
File No. 27-CR-01-021373

John D. Sims, OID #193169, 1101 Linden Lane, Faribault, MN 55021-6400 (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Connolly, Presiding Judge; Lansing, Judge; and Minge, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this pro se appeal from the denial of postconviction relief without an evidentiary hearing, John Sims raises issues of prosecutorial misconduct, procedural and evidentiary error, ineffective assistance of trial counsel, and ineffective assistance of appellate counsel. Because his trial claims are procedurally barred by his failure to raise them in his direct appeal or to demonstrate that the claims are within an exception to that bar, we affirm. And because the record conclusively shows that Sims was not denied effective assistance of appellate counsel, we affirm on the remaining issue.

FACTS

A jury found John Sims guilty in July 2001 of attempted second-degree murder, first-degree assault, and second-degree assault. The state public defender filed a notice of Sims's direct appeal in November 2001. We affirmed Sims's conviction in July 2002; the underlying facts are fully discussed in that opinion. *See State v. Sims*, No. C4-01-1926, 2002 WL 1611467, at *1-*2 (Minn. App. July 23, 2002).

In February 2007, Sims filed a postconviction petition, seeking relief for three categories of alleged trial errors: prosecutorial misconduct, procedural and evidentiary errors, and ineffective assistance of trial counsel. Sims said he was prevented from raising these issues in his 2002 direct appeal because he did not have timely access to transcripts. He alleged that appellate counsel prepared the brief before providing him transcripts, which left insufficient time for him to prepare his own supplemental brief.

Based on his dissatisfaction with appellate counsel's judgment about which issues to appeal, Sims also contended that appellate counsel was constitutionally ineffective.

The postconviction court did not hold an evidentiary hearing on any of Sims's claims. On the first three sets of claims, the postconviction court found that they were barred because of delay and because of the rule in *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). On the fourth claim, ineffective assistance of appellate counsel, the postconviction court reached the merits but found that the claim was unsupported by the record. Sims now appeals.

DECISION

We review the district court's summary denial of a postconviction petition for abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). If the petition, files, and records conclusively show that the petitioner is entitled to no relief, a postconviction court may dismiss the petition without an evidentiary hearing. Minn. Stat. § 590.04, subd. 1 (2006); *Scales v. State*, 620 N.W.2d 706, 707-08 (Minn. 2001).

This appeal raises two separate questions: (1) whether the postconviction court abused its discretion in barring Sims's trial claims because of *Knaffla* or because of delay, and (2) whether the record conclusively shows that Sims was not denied effective assistance of appellate counsel. We turn, first, to the issues raised by Sims's trial claims.

I

Claims that have been raised on direct appeal, or that could have been raised when the direct appeal was taken, may not be considered in a petition for postconviction relief. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. Two exceptions to this rule permit review

when the failure was not deliberate and the interests of justice require review or when a claim is so novel that its legal basis was not available on direct appeal. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007); *see also* 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097-98 (codifying similar requirements in 2005 amendment).

The factual basis for the allegations of prosecutorial misconduct, procedural and evidentiary error, and ineffective assistance of trial counsel existed at the time of Sims's direct appeal. The allegations of prosecutorial misconduct, for example, all pertain to statements and behaviors during closing argument, statements made at other points during trial, examination of witnesses, or aspects of the presentation of evidence. Sims's basis for all these claims can be found in the transcripts of the proceedings. That is, in fact, where Sims found them. The same is true of the alleged procedural and evidentiary errors, which center on evidentiary rulings, jury instructions, sufficiency of the evidence, and sentencing decisions. These allegations could all have been raised, addressed, and decided solely on the district court record.

A claim of ineffective trial counsel sometimes requires that the defendant develop facts beyond the district court record. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). When this is the case, the claim is best raised in postconviction proceedings. *Id.* at 572 & n.1. But if there is no need to further develop the record, the claim must be raised on direct appeal. *Id.* at 572. Most of Sims's allegations are readily examined by direct reference to the transcripts, including failure to object, inadequate cross-examination of witnesses, and failure to make an available procedural motion. The record's sufficiency as it relates to the remaining allegations might be less apparent,

because these allegations pertain to insufficient preparation and investigation; failure to advise the defendant of his right to remain silent at a presentence investigation; denial of defendant's right to be present at all hearings; and failure to insist on an earlier trial date. But the record contains ample evidence that either implicitly or explicitly addresses these alleged failures. Furthermore, Sims's postconviction petition—despite requesting an evidentiary hearing—did not allege the existence of any facts outside the record that would establish the claimed deficiencies in trial counsel's performance. Thus, the court was free to conclude that no hearing was necessary and that, because the alleged facts were drawn from the record itself, the claim could have been addressed on direct appeal.

Sims argues that, even if he could have raised his claims on direct appeal, they are not presently barred because his lack of access to transcripts brings these claims within the interests-of-justice exception to the *Knaffla* rule. The district court concluded that this exception did not apply to Sims's circumstances, and we now turn to that analysis.

Sims's right to transcripts is established by statute. A defendant has a right to raise appellate issues on his own behalf, even when represented by appointed counsel. Minn. R. Crim. P. 28.02, subd. 5(17) (stating that “[t]he brief filed by the [s]tate [p]ublic [d]efender . . . shall be considered [and] a defendant . . . may also file with the court a supplemental brief”). A defendant's supplemental brief must be filed within thirty days of the filing by the state public defender. *Id.* This rule also requires access to transcripts if a defendant persists in choosing to submit his own brief. The rule provides:

If a defendant requests a copy of the transcript, the [s]tate [p]ublic [d]efender's office shall confer with the defendant concerning the need for the transcript. *If the*

defendant still requests a copy of the transcript it shall be provided to the defendant temporarily.

. . . [T]he defendant must . . . return the transcript to the [s]tate [p]ublic [d]efender's office upon expiration of the time to file any supplementary brief.

Id., subd. 5(18)-(19) (emphasis added).

The allegations in Sims's petition are sufficient to establish his right to transcripts. Sims provided the court with a copy of a letter he sent appellate counsel on March 11, 2002. The letter asked for transcripts "as soon as possible" and referred to a conversation "some time back" in which Sims had previously spoken with counsel's office and requested transcripts. This shows Sims "still request[ing] a copy" after an initial request and a conference with the state public defender. The rule thus required appellate counsel to provide access to transcripts after receiving the letter.

Sims did not allege, however, that his appellate counsel failed to provide the transcript. He says only that he did not get transcripts in time to file his pro se brief. But the rule does not guarantee him enough time; it only requires that, upon persisting with his request, he must be provided access to the transcripts. His deadline to submit a supplemental brief would still have been thirty days after the state public defender's brief was filed. *Id.* The rule itself requires returning the transcript to the state public defender "upon expiration of the time to file any supplementary brief." *Id.*, subd. 5(19).

The postconviction court, in declining to hear Sims's claims, relied on an accurate understanding of the rule. The court said that "if [Sims] did not receive the transcripts by [the time] the direct appeal was filed, it was his burden to make the Court of Appeals aware of this fact." That is, Sims did have a remedy if he needed more time: the remedy

was to ask for an extension from this court, at which point we could have decided whether or not to grant him more time. *See* Minn. R. Civ. App. P. 126.02 (providing that court of appeals may extend filing deadline for good cause shown). But Minn. R. Crim. P. 28.02 does not offer Sims the alternative of later bringing his issues in a postconviction filing, particularly after the passage of four and a half years.

Because Sims's allegations did not establish a violation of the transcript rule, the district court did not abuse its discretion in deciding that fairness was not implicated. The *Knaffla* bar applied and Sims's claims for prosecutorial misconduct, procedural and evidentiary errors, and ineffective assistance of trial counsel were properly barred.

In light of the *Knaffla* bar, it was unnecessary for the postconviction court to address the timeliness of Sims's petition as an independent ground for dismissal. The law respecting time bars for postconviction appeals has recently been in flux, and, for that reason, we address the district court's determination on this issue.

A law effective August 1, 2005, imposed a new two-year time limit on postconviction petitions. Minn. Stat. § 590.01, subd. 4(a) (2006). Its enacting language established an August 1, 2007 deadline for convictions that were final before August 1, 2005. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097-98, *quoted in Gustafson v. State*, 754 N.W.2d 343, 347 n.2 (Minn. 2008). Before this new statute, timeliness had long been a relevant factor in considering a petition for postconviction relief. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003). But when statutory limits are not involved, untimeliness alone does not justify dismissal absent exceptional circumstances. *See Stutelberg v. State*, 741 N.W.2d 867, 873 (Minn. 2007) (deciding that petitioner's delay

in excess of ten years was “troublesome” but did not “conclusively show that appellant is entitled to no relief”).

Sims’s postconviction petition was filed February 23, 2007, within the two-year deadline for convictions prior to August 1, 2005. It is true that it was filed many years after his direct appeal was final, but the record shows nothing that is otherwise exceptional. Sims’s delay was less than five years, a significantly shorter time than in any of the cases discussed in *Stutelberg*, and no evidence suggests that Sims had an improper purpose or “abuse[d] the judicial process.” *Id.* at 872-73 (quoting *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005)). The record does not refute Sims’s assertion that, because he was indigent and unfamiliar with the law, it simply took him a long time to research and understand the legal issues.

These circumstances do not justify a dismissal of Sims’s trial claims for untimeliness. Although delay is a relevant factor, on this record it cannot support a conclusion that untimeliness alone barred Sims’s petition. But, because *Knaffla* was correctly applied in barring those claims, dismissal was still proper.

II

We now turn to the second question—whether Sims’s petition raised a claim that his appellate counsel was constitutionally ineffective. Ineffective-assistance-of-appellate-counsel claims cannot be decided on the district court record and are thus not barred by *Knaffla* when raised in a first petition for postconviction relief. The postconviction court considered this claim on the merits without a hearing. Dismissal without a hearing is proper if the petition, files, and records conclusively show that the petitioner is entitled to

no relief. Minn. Stat. § 590.04, subd. 1; *Scales*, 620 N.W.2d at 707-08. The merits of the claim are reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

The state and federal constitutions guarantee a right to counsel for criminal defendants. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right includes the right to *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984). And under the Minnesota Constitution, it extends to a defendant's initial review of his conviction, whether by direct appeal or postconviction petition. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006).

To establish ineffective assistance of counsel, a defendant must first show that counsel's performance was deficient, *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064, meaning that counsel failed to exercise the customary skills and diligence of a reasonably competent attorney. *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001). Generally, a strong presumption arises that an attorney acts competently. *Id.* If a defendant can show that counsel was deficient, he must also show a reasonable probability that the outcome would have been different but for the deficiency. *Strickland*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068; *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987).

Sims's claim is based entirely on appellate counsel's decision to raise only one issue on appeal: the exclusion of evidence about a prior incident in which Sims alleged the victim had engaged in self-destructive behavior. *Sims*, 2002 WL 1611467, at *1. Sims contends that the following issues should have been raised: prosecutorial misconduct; use of relationship evidence; errors by trial counsel; insufficiency of the evidence; upward departure in Sims's sentence; use of Sims's past crimes for

impeachment; and lack of foundation for expert witness testimony. Because his petition raises many of these claims for consideration on the merits, Sims impliedly asserts that prejudice resulted from not raising these issues on appeal.

The record presented shows that appellate counsel's performance was not deficient. Sims provides, with his appellate brief, typewritten notes apparently taken by the state public defender's office after consultation with Sims in November 2001. He also provides a letter that trial counsel sent to the state public defender two months earlier, discussing issues for appeal. The November notes make it clear that the appellate office evaluated numerous issues and consulted with Sims about their relative merits, including sentencing, sufficiency of the evidence, use of the expert witness, evidentiary issues generally, the use of relationship evidence, and access to the complaining witness for investigation. These circumstances evince familiarity with the details of Sims's case and the issues that were important to its outcome. When a defendant and counsel disagree about which issues to appeal, "counsel has no duty to include claims which would detract from other more meritorious issues." *Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997). The record on appeal shows that appellate counsel took appropriate steps to weigh which issues to bring, and these efforts strongly support the presumption of reasonable competence.

We recognize that, when denying the hearing on this issue, the postconviction court had not been provided with the evidence—considered here—that shows the steps taken by appellate counsel. This was not necessary, however. Sims's petition simply did not allege sufficient facts about counsel's decision-making process to raise an issue of

counsel's competence. And in any case, the "petitions, files, and records" sufficiently demonstrate that, regardless of counsel's performance, no prejudice resulted to Sims. The transcripts of the district court proceedings, thoroughly reviewed and fairly read, do not support claims of misconduct and error in the trial. Given the facts of his case and the standards applied to appellate review, no reasonable probability exists that Sims's direct appeal would have come out differently if the issues he highlights had been raised.

Based on the postconviction record, it was not error to deny Sims a hearing on the ineffectiveness of appellate counsel. Furthermore, we independently conclude that appellate counsel's performance was not unreasonable and that Sims's assertions of prejudice are not supported by the record. He was thus not deprived of effective assistance of appellate counsel.

Affirmed.