STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1447

John Melvin Karnes, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 16, 2008
Affirmed
Shumaker, Judge

Mower County District Court
File No. K5-99-1281

John Melvin Karnes, 1505 8th Avenue N.W., Austin, MN 55912 (pro se appellant)

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

Kristen Marie Nelsen, Mower County Attorney, 201 First Street N.E., Austin, MN 55912 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

U N P U B L I S H E D O P I N I O N

SHUMAKER, Judge

Appellant claims that the district court's unauthorized ex parte communications with appellant's deliberating jury violated his constitutional rights and that the district

court erred in denying his petition for postconviction relief. Because the *Knaffla* rule bars review of appellant's claim, the district court did not err in denying the petition, and we affirm.

FACTS

In 2000, a jury found appellant John Melvin Karnes guilty of criminal sexual conduct. This court affirmed the conviction in 2002. *State v. Karnes*, No. C8-01-794 (Minn. App. May 17, 2002).

In 2007, Karnes filed a petition for postconviction relief, the denial of which is the basis of this appeal. Karnes alleged that the district court violated his constitutional rights by having unauthorized ex parte contact with the deliberating jury. Karnes cited four instances of allegedly improper contact. Applying *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), the district court denied the petition without an evidentiary hearing, ruling that Karnes "now brings before the Court issues/facts which were known at the time of the appeal, since all proceedings involving the Court, counsel, and the jury were a part of the record and were subject to appellate review, should [Karnes] have so desired." This appeal followed.

D E C I S I O N

We review the district court's application of the *Knaffla* procedural bar for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). Furthermore, we review the court's findings to determine whether they are supported by sufficient evidence. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007).

In its order denying postconviction relief, the district court found that all contacts between the trial judge and the jury were placed on the record and that the record was available at the time of Karnes's appeal.

The trial record shows five instances in which the court had contact with the deliberating jury. The first occurred shortly after the jury retired and concerned exhibits received in evidence. The contact was in open court, both counsel were present, and Karnes was present.

The record shows that, after that contact, the jury again retired to deliberate at 4:25 p.m., and at 7:25 p.m. the jury inquired about viewing a videotape. Both counsel were present in the judge's chambers and the judge decided on an instruction he would give to the jury. Following this chambers conference, the judge instructed the jury in open court and in the presence of Karnes and both counsel about the procedure for viewing the videotape.

After that contact, the judge received a note from the jury stating, "We are still deliberating and there is still movement. Should we continue on or let the majority decide to adjourn." The judge contacted counsel by telephone and discussed the note. The record does not show whether Karnes was a party to the conversation. The judge indicated that, if there was no objection, he would tell the jury to continue as long as it desired or "adjourn at their own call." Counsel did not object, and they did not object to the judge giving that instruction in the jury room on the record with the court reporter and clerk present. The judge then instructed the jury as he indicated in his telephone

conference with counsel. The record does not show a waiver by Karnes of his presence for this contact.

When the jury then notified the judge that it had decided to adjourn for the evening, the judge again addressed the jury in the jury room on the record indicating the time for returning the next morning and reminding the jurors not to discuss the case with anyone. The record does not show a waiver by Karnes of his presence for this contact.

On the following day, the jury sent a note to the judge indicating that a verdict had been reached and that the jury had a question about the law. With counsels' agreement, the judge re-read a jury instruction in the jury room with both counsel present. The record shows that Karnes waived his right to be present at this reading.

When a direct appeal has been taken, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007) (quoting *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741). The *Knaffla* rule applies "if the defendant knew or should have known about the issue at the time of appeal." *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002).

The trial record contained all of the bases upon which Karnes premises his petition and current appeal. Thus, in his first appeal, he either knew of or could readily have known of the allegedly improper contacts between the trial judge and the jury.

There are two exceptions to the *Knaffla* procedural bar, namely, (1) if the petition presents a novel legal issue, and (2) if the interests of justice require review. *Powers*, 731 N.W.2d at 502.

Karnes has not raised a novel legal issue in his claim that a trial judge's contacts with a deliberating jury violated his constitutional rights. That issue has been addressed by the courts previously. *See, e.g., State v. Kelley*, 517 N.W.2d 905 (Minn. 1994) (finding court's ex parte communications required new trial); *State v. McGath*, 370 N.W.2d 882 (Minn. 1985) (finding no prejudice when trial court communicated with juror); *State v. Danforth*, 573 N.W.2d 369 (Minn. App. 1997) (finding no prejudice with court's communication with jury on procedural matters).

Nor is it necessary to address Karnes's claim in the interest of justice. "Communication between a judge and a jury *on a substantive matter* without the defendant's presence or consent may be reversible error." *Leake v. State*, 737 N.W.2d 531, 537 (Minn. 2007) (emphasis added). As shown by the record, the judge's ex parte contacts with the jury concerned the issue of adjourning for the evening and the communication was limited to telling the jurors that adjournment was their call and that they should not talk about the case with anyone during their adjournment. This was not a substantive matter but rather a "housekeeping" procedural issue.

Furthermore, *Leake* holds that prejudice is not to be presumed from ex parte contact between the trial judge and a deliberating jury but rather must be shown by the appellant. *Id.* Karnes has made no showing whatsoever of prejudice as a result of the trial judge's contacts with the jury.

Finally, we do not address Karnes's claim of ineffective assistance of trial counsel. He did not raise that issue in the district court, and we have no record on which to conduct a review of the allegation. *See Ferguson v. State*, 645 N.W.2d 437, 448 (Minn.

2002) (declining to review claim of ineffective assistance of counsel when the issue was not raised in the postconviction proceeding in the district court).

Affirmed.