STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0032

Frank Edward Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 3, 2009
Affirmed
Lansing, Judge

Olmsted County District Court
File No. 55-K2-02-3562

Frank Edward Johnson, #210996, MCF - Rush City, 7600 – 525th Street, Rush City, MN 55069 (pro se appellant)

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

Mark A. Ostrem, Olmsted County Attorney, James S. Martinson, Assistant County Attorney, 151 Fourth Street Southeast, Rochester, MN 55904-3710 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Lansing, Judge; and Worke, Judge.

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

LANSING, Judge

In this pro se postconviction appeal, Frank Johnson challenges the district court's summary denial of his second petition for postconviction relief. Because the district court properly denied Johnson's motion for forensic DNA testing, did not violate his constitutional rights by cancelling his evidentiary hearing, and properly determined that his eight other claims are barred by *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), we affirm.

F A C T S

A jury found Frank Johnson guilty, in November 2002, of first-degree burglary, third-degree criminal sexual conduct, and fifth-degree assault. *See State v. Johnson*, 679 N.W.2d 378, 382-84 (Minn. App. 2004) (summarizing facts underlying convictions), *review denied* (Minn. Aug. 17, 2004) (*Johnson I*). Johnson appealed all three convictions. *Id.* at 382.

In the direct appeal, Johnson argued that the evidence was insufficient to support the burglary conviction, that the district court erred by refusing to instruct the jury on trespass as a lesser-included offense, that the evidence was insufficient to support the criminal-sexual-conduct conviction, and that he was denied a fair trial based on the jury instructions and the prosecutor's improper final argument. *Id.* at 384. Johnson also raised a number of issues in a pro se brief. *Id.* at 389. We reversed the burglary conviction for insufficient evidence to satisfy the statutory elements but affirmed

Johnson's convictions of third-degree criminal sexual conduct and fifth-degree assault. *Id.* at 384-86, 389.

Johnson petitioned for postconviction relief in the fall of 2004. He raised nine claims: prosecutorial misconduct, invalid arrest warrant, lack of a grand-jury indictment, failure to provide a *Miranda* warning, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, lack of personal and subject-matter jurisdiction, insufficient evidence to support the criminal-sexual-conduct conviction, and a claim that the district court failed to dismiss several jurors for cause. *Johnson v. State*, No. A05-240, 2006 WL 91543, at *1-*4 (Minn. App. Jan. 17, 2006), *review denied* (Minn. Mar. 28, 2006) (*Johnson II*). The postconviction court denied the petition, and we affirmed the denial in January 2006. *Id.* at 1.

In September 2007 Johnson filed this second petition for postconviction relief. The district court summarily denied the petition after determining that "the files, records of proceedings, and applicable law conclusively showed that [Johnson was] entitled to no relief." The district court denied Johnson's motion for reconsideration, and Johnson appeals.

D E C I S I O N

A court may summarily deny a petition for postconviction relief if it is the second or successive petition requesting similar relief by the same petitioner or if it raises issues that "have previously been decided by the [c]ourt of [a]ppeals or the [s]upreme [c]ourt in the same case." Minn. Stat. § 590.04, subd. 3 (2006). And, under the *Knaffla* rule, the postconviction court may generally deny a postconviction petition without an evidentiary

hearing on all claims that were either known or available at the time of a petitioner's earlier direct appeal or postconviction petition. 309 Minn. at 252, 243 N.W.2d at 741. We review the decisions of a postconviction court for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006).

Johnson essentially raises ten issues in this appeal. He contends that the postconviction court improperly denied his motion for forensic DNA testing and violated his constitutional rights by not holding an evidentiary hearing. He also raises eight challenges to the original trial and appellate proceedings: prosecutorial misconduct, improper admission of evidence of a prior offense, insufficient evidence to support the criminal-sexual-conduct conviction, improper judicial comments, improper jury instructions, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and improper admission of medical and DNA evidence. We address each of these issues, beginning with Johnson's motion for forensic DNA testing.

A person who has been "convicted of a crime may make a motion for the performance of . . . forensic DNA testing" under Minn. Stat. § 590.01, subd. 1a(a) (2006). But the motion will not be granted unless the convicted person makes certain prima facie showings, including a showing that "identity was an issue in the trial." *Id.*, subd. 1a(b) (2006). Johnson did not address this requirement in his motion to the postconviction court, and the trial transcript demonstrates that identity was not an issue at trial. Specifically, Johnson did not deny that he had sexual intercourse with the victim or claim that the victim had confused him with another person; rather, he disputed that he used force or coercion to accomplish the penetration. His attorney asserted in closing

argument that "[t]he sex [] they had was consensual." Because the trial transcript establishes that identity was not an issue, we affirm the postconviction court's denial of his motion for forensic DNA testing.

Similarly, Johnson's argument that the postconviction court violated his constitutional rights when it denied him an evidentiary hearing is without merit. Johnson does not dispute that a district court may summarily deny a petition for postconviction relief if "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2006). Rather he contends that his rights were violated because the district court scheduled an evidentiary hearing and then cancelled the hearing without formally notifying him after determining the hearing was unnecessary. For support, Johnson cites *Martinek v. State*, 678 N.W.2d 714 (Minn. App. 2004). *Martinek*, however, stands for the proposition that a district court may not correct an unauthorized sentence to the detriment of the defendant unless the "defendant has notice that a correction is required and has not developed a crystallized expectation as to the finality of the sentence." *Id.* at 718. The postconviction court's order did not affect Johnson's sentence. Thus, *Martinek* is inapplicable, and we find no basis for concluding that the cancellation of the evidentiary hearing violated Johnson's constitutional rights.

The other eight issues Johnson raises were either raised or could have been raised on direct appeal or in a previous postconviction petition. Johnson raised claims of prosecutorial misconduct, insufficient evidence to support the criminal-sexual-conduct conviction, ineffective assistance of trial counsel, and improper jury instructions in his direct appeal. *Johnson I*, 679 N.W.2d at 387-89; *see also Johnson II*, 2006 WL 91543,

at *1 (noting that Johnson raised claim of ineffective assistance of trial counsel in direct appeal). He raised claims of ineffective assistance of appellate counsel in his first postconviction petition. *Johnson II*, 2006 WL 91543, at *4. And the other claims that Johnson raised in his petition and motion for reconsideration—that the district court improperly allowed the state to introduce evidence of a prior criminal offense, that the district court made improper comments to the jury, and that the district court improperly admitted medical and DNA evidence—were available to Johnson at the time of his direct appeal. Consequently, these eight claims are barred by the rules set forth in Minn. Stat. § 590.04, subd. 3, and *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

Johnson argues that his eight claims challenging trial and appellate rulings are not barred because they fall under a *Knaffla* exception that allows review of claims that are so novel they could not have been raised in an earlier direct or postconviction appeal. *See Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007) (stating *Knaffla* exceptions). Specifically, he contends that these issues must be reviewed because the supreme court announced new rules of law in *State v. Mayhorn*, 720 N.W.2d 776 (Minn. 2006), and *State v. Ramey*, 721 N.W.2d 294 (Minn. 2006), that mandate a new analysis of his claims. We disagree.

Contrary to Johnson's assertion, the *Mayhorn* court did not announce a new rule when it held that "the cumulative effect of the prosecutorial misconduct and evidentiary errors" denied the defendant the right to a fair trial. 720 N.W.2d at 792. The supreme court applied this cumulative-effect rule in 1994, long before Johnson's 2002 convictions. *See State v. Harris*, 521 N.W.2d 348, 350 (Minn. 1994) (holding that

cumulative effect of court's improper admission of evidence and prosecution's improper conduct denied defendant fair trial).

The same is true of the holding in *Ramey*. The supreme court clarified that reviewing courts must apply the plain-error standard in addressing unobjected-to prosecutorial-misconduct claims. *Id.* at 299. Although appellate courts had generally applied the plain-error analysis to review this type of claim since 1998, the cases had not been entirely consistent. *Id.* at 300. In addition to clarifying the plain-error standard, the supreme court announced a new burden-shifting rule: "when the defendant demonstrates that the prosecutor's conduct constitutes an error that is plain, the burden would then shift to the state to demonstrate . . . that there is no reasonable likelihood that the absence of the misconduct in question would have had a significant effect on the verdict of the jury." *Id.* at 302 (citations and quotations omitted). It is unclear whether an argument based on a new burden-shifting standard of review can qualify for review under the *Knaffla* exception, which expressly applies to novel "claims" or novel "issues" and may exclude more narrowly defined procedural shifts. *See Perry*, 731 N.W.2d at 146 (novel claims); *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003) (novel issues). But it is unnecessary for us to decide this issue because Johnson's attempt to obtain a second review of his prosecutorial-misconduct claim relies on a retroactive application that is unavailable.

The Minnesota Supreme Court has indicated that new rules establishing the standard for reviewing unobjected-to prosecutorial-misconduct claims should not be applied retroactively. In *Rairdon v. State*, the supreme court stated that the proper standard for analyzing prosecutorial-misconduct claims "is found in precedent existing at

the time of [the defendant's] conviction" and further declared, "[i]nsofar as our response to prosecutorial misconduct after [the time of the defendant's convictions] grew more stringent with our experience and the need for deterrence, . . . [the defendant] may not reap any benefit from such decisions merely because he waited nine years to seek review." 557 N.W.2d 318, 323 (Minn. 1996) (citation omitted).

In summary, Johnson's eight challenges to trial and appellate rulings are barred because they were known or available at the time of his earlier direct and postconviction appeals, and he has not demonstrated that they come within the limited exceptions to the *Knaffla* rule.

Affirmed.