STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0403

Jeffrey M. Murdent, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 7, 2009
Affirmed
Kalitowski, Judge

Stearns County District Court
File No. KX-95-1732

Jeffrey M. Murdent, Minnesota Correctional Facility, Oak Park Heights – OID #156444, 5329 Osgood Avenue North, Stillwater, MN 55082-1117 (pro se appellant)

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Crippen, Judge.[*]

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

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

KALITOWSKI, Judge

Appellant Jeffrey M. Murdent challenges the denial of postconviction relief, arguing that the postconviction court: (1) erred in relying on Minn. Stat. § 590.01, subd. 4, to conclude that his petition was untimely; (2) erred in denying him relief based on excessive delay; (3) erred in denying him relief based on *Knaffla*; (4) erred in denying his claim of ineffective assistance of appellate counsel; and (5) abused its discretion by denying him relief without an evidentiary hearing. Although the district court erred in denying relief based on Minn. Stat. § 590.01, subd. 4, and based on excessive delay, because the district court properly determined that appellant is not entitled to relief on other grounds, we affirm.

D E C I S I O N

We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record and will not reverse the findings unless they are clearly erroneous. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). The decisions of a postconviction court will not be disturbed unless the court abused its discretion, but we review the postconviction court's legal determinations de novo. *State v. Stutelberg*, 741 N.W.2d 867, 872 (Minn. 2007). A petitioner's claims must be more than argumentative assertions without factual support. *Stutelberg*, 741 N.W.2d at 872 (quotations omitted). The petitioner has the burden of proving the facts set forth in the petition by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2008).

I.

Appellant argues that the postconviction court erred by concluding that his petition was not timely filed within the requirements of Minn. Stat. § 590.01, subd. 4. We agree.

In *Nestell v. State*, we concluded that petitioners whose convictions became final before August 1, 2005, have two years from that date to file for relief. 758 N.W.2d 610, 613-14 (Minn. App. 2008).

Here, in 1995, a jury convicted appellant of two counts of first-degree criminal sexual conduct.[1] On direct appeal in 1997, this court affirmed appellant's convictions. The record indicates that appellant filed for postconviction relief before August 1, 2007.[2] The postconviction court interpreted chapter 590 to require appellant to file his petition by 1999. But under *Nestell*, appellant had until August 1, 2007, to file his petition and the postconviction court concluding otherwise constitutes error.

II.

Appellant argues that the postconviction court erred when it denied appellant relief on the ground that appellant waited ten years from his conviction to file for

[1] The facts relevant to appellant's convictions are set forth in *State v. Murdent*, No. C6-96-230, 1997 WL 10884, (Minn. App. Jan. 14, 1997), *review denied* (Minn. Mar. 18, 1997).

[2] The certificate of service attached to appellant's petition states that appellant mailed his petition to the district court on July 28, 2007. The state argues that there is evidence that appellant did not file his petition for postconviction relief until after August 1, 2007. But the state did not make this argument below and the district court did not base its decision on whether appellant petitioned for relief after August 1, 2007. Thus we conclude that this argument is waived. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating appellate courts will generally not consider matters not argued to and considered by the district court).

postconviction relief. We agree and conclude that excessive delay alone does not justify dismissing appellant's petition.

A postconviction petitioner's delay in seeking relief is a relevant consideration in determining whether relief should be granted. *Fox v. State*, 474 N.W.2d 821, 826 (Minn. 1991). But in most circumstances, untimeliness alone does not justify dismissal. *See Stutelberg*, 741 N.W.2d at 873 (considering petition brought ten years after the conclusion of direct appeal and discussing untimeliness generally).

Here, appellant brought his petition eight years after his direct appeal. This is a shorter length of delay than in *Stutelberg*, where the supreme court held that the appeal was not untimely, and not as great a delay as those cases discussed in *Stutelberg* where courts affirmed the denial of a petition solely on excessive delay grounds. *See id.* We conclude that although a petitioner's delay in seeking relief may be relevant to determining whether petitioner warrants relief from his convictions, appellant's delay in seeking postconviction relief is, standing alone, an insufficient reason to deny him postconviction relief.

III.

Appellant argues that the postconviction court erred in concluding that *Knaffla* barred his claims. We disagree.

State v. Knaffla bars reconsideration in a postconviction appeal of issues raised on direct appeal, and issues that were known or should have been known by the defendant and were not raised on direct appeal. 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). We review a denial of postconviction relief based on the *Knaffla* procedural bar for an

abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). The supreme court has identified three exceptions to the *Knaffla* rule: if additional fact-finding is required to fairly address a claim of ineffective assistance of counsel; if a novel legal issue is presented; or if the interests of justice require relief. *Sessions v. State*, 666 N.W.2d 718, 721 (Minn. 2003). The interests of justice exception may apply if fairness requires it and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal. *Id.* (quotation omitted). Appellant sought postconviction relief on several grounds; we address each ground individually.

Ineffective assistance of counsel

Appellant argues that he needs to supplement the record in 14 ways in order to address his claim of ineffective assistance of counsel. We disagree.

The district court denied appellant relief on *Knaffla* grounds because he already raised a claim of ineffective assistance of counsel on direct appeal. Appellant asserts that numerous Minnesota cases state that it is more appropriate to raise ineffective-assistance-of-counsel claims in postconviction proceedings than in direct appeal. But the supreme court has held that *Knaffla* bars postconviction claims of ineffective assistance of counsel where the defendant raised the claim on direct appeal. *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). One exception to *Knaffla* is where fairly addressing a claim of ineffective assistance of counsel requires additional fact-finding. *Sessions*, 666 N.W.2d at 721. Consequently, we examine whether fairly addressing appellant's claims requires additional fact-finding.

To prevail on a claim of ineffective assistance of counsel, a petitioner must affirmatively prove that his counsel's representation fell below an objective standard of reasonableness and that but for counsel's unprofessional errors the result of the proceeding would have been different. *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.*

The majority of appellant's contentions involve claims that his trial attorney failed to present certain evidence or call particular witnesses. "Which witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of trial counsel. Such trial tactics should not be reviewed by an appellate court, which, unlike the counsel, has the benefit of hindsight." *Scruggs v. State*, 484 N.W.2d 21, 26 (Minn. 1992). And trial tactics are not to be confused with competence. *Morgan v. State*, 384 N.W.2d 458, 460 (Minn. 1986). We conclude that fairly addressing appellant's ineffective-assistance-of-counsel claims based on failure to offer evidence does not require additional fact-finding and thus, no exception to *Knaffla* applies.

Appellant's remaining contentions are that trial counsel failed to establish that appellant lacked the opportunity to commit the crimes, that he was framed, and that certain witnesses committed perjury. But appellant fails to address the fact that other witnesses, namely the victims, testified against appellant at trial and that the jury found the evidence sufficient to convict him. We conclude that these claims do not require additional fact-finding and therefore no exception to *Knaffla* applies. Thus, the district

court did not abuse its discretion by concluding that *Knaffla* bars appellant relief on his ineffective-assistance-of-counsel claim.

Prosecutorial misconduct

Appellant raises several claims of prosecutorial misconduct that were addressed on direct appeal, including claims regarding closing argument, M.M.'s testimony, and the state's cross-examination of appellant. We conclude that no exception to *Knaffla* applies to these claims and they are therefore barred.

In his postconviction petition, appellant for the first time alleged that the prosecutor manufactured evidence, misled an expert witness, deliberately lied to the jury in closing argument, and was too aggressive on cross-examination. Appellant argues that *Knaffla* should not bar these claims because he was untrained in appellate advocacy and did not know to raise these alleged errors.

But "the *pro se* defendant will be held to the standards of an attorney in presenting his appeal." *State v. Seifert*, 423 N.W.2d 368, 372 (Minn. 1988). Consequently, appellant's new allegations of prosecutorial misconduct are claims that appellant knew or should have known about at the time of direct appeal and are barred by *Knaffla*.

Evidence of past conviction

Appellant argues that the postconviction court erred by dismissing his challenge to the admission of a prior conviction for third-degree assault. This claim was addressed on direct appeal and *Knaffla* applies to bar it.

Sentencing

Appellant challenges his sentence under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). But *Blakely* announced a new rule of criminal procedure that only applies retroactively to cases pending on direct review at the time it was announced. *McKenzie v. State*, 713 N.W.2d 840, 842 (Minn. 2006); *see also Danforth v. State*, ___ N.W.2d ___ (Minn. Feb. 26, 2009) (declining to apply a different state standard of retroactive application of *Blakely*). Appellant's case was not pending direct review when *Blakely* was announced and therefore, his argument fails.

Evidence concerning history of sexual abuse

Appellant argues that *Knaffla* does not bar his challenge to the exclusion of a witness's history of sexual abuse because he did not know of the claim and because the interests of justice require review. We disagree.

"Evidentiary rulings rest within the sound discretion of the trial court and will not be reversed absent a clear abuse of discretion." *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003). "[T]he appellant has the burden of establishing that the trial court abused its discretion and that appellant was thereby prejudiced." *Id.*

Here, appellant provides no facts supporting his contention that this claim was not known to him at the time of direct appeal. Nor does appellant provide any argument or authority that the interests of justice require review of this claim. Moreover, appellant has not established that the alleged trial error prejudiced his defense. Thus, we conclude that the postconviction court did not abuse its discretion in concluding that *Knaffla* bars this claim.

Videotape evidence

Appellant's claim that the district court, without appellant being present, erred by denying the jury's request to review a videotape of the victims' interviews with a police officer during deliberations was known or should have been known at the time of appellant's direct appeal. And appellant provides no argument or authority that the interests of justice require review of these claims. Further, appellant has not established prejudice resulting from the alleged error. Consequently, the postconviction court did not abuse its discretion in concluding that *Knaffla* bars this claim.

IV.

Appellant argues that he received ineffective assistance of appellate counsel. We disagree.

Ordinarily, claims of ineffective assistance of appellate counsel on direct appeal are not barred by the *Knaffla* rule in a first postconviction appeal because they could not have been brought at an earlier time. *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008). Because the record indicates that appellant is appealing from his first petition for postconviction relief, we review appellant's claims of ineffective assistance of appellate counsel. *See id.* (addressing ineffective-assistance-of-appellate-counsel claim where it was appellant's first petition for postconviction relief).

"The basic standard for judging a claim of ineffective assistance of appellate counsel is the same as that applied to trial counsel's performance." *Jama v. State*, 756 N.W.2d 107, 113 n.2 (Minn. App. 2008). Thus, "[i]n order to succeed on an ineffective assistance of appellate counsel claim, [appellant] must show that his appellate counsel's

representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Arredondo*, 754 N.W.2d at 571 (quotation marks omitted). Appellate counsel is not required to raise all possible claims on direct appeal, and representation by appellate counsel does not fall below an objective standard of reasonableness if counsel could have legitimately concluded that appellant would not have prevailed on his claims. *Id.* Appellant must show that there is a reasonable probability that he would have prevailed on the claims he alleges his appellate counsel failed to raise. *Id.* Effective assistance of counsel does not hinge on whether a favorable result was obtained. *State v. Race*, 383 N.W.2d 656, 664 (Minn. 1986).

On direct appeal, appellate counsel raised a claim of prosecutorial misconduct and did not prevail. Appellant now alleges that appellate representation of this claim was deficient but does not provide sufficient facts to establish his claim. We conclude that appellant has failed to show that his appellate counsel's efforts, though unsuccessful, fell below an objective standard of reasonableness.

In his petition for postconviction relief, appellant also alleges that his appellate counsel's representation was deficient because counsel did not challenge the admission of appellant's prior conviction for third-degree assault or raise a claim of ineffective assistance of trial counsel. Appellant raised these claims pro se on direct appeal and did not prevail, a result that reflects the merits of the claims. Thus, appellant cannot show that the outcome would have been different if the claims had been raised by counsel.

Appellant further alleges that his appellate counsel was deficient for failing to challenge the exclusion of a witness's history of sexual abuse and denial of the jury's request to view a videotape. As to these claims, appellant's petition fails to allege facts and cite authority that would permit the conclusion that the failure to raise these issues affected the outcome of either the trial or the appeal. Thus, appellant has not met his burden to show that there is a reasonable probability that he would have prevailed on these claims.

In sum, appellant fails to meet his burden of showing that his appellate counsel's performance fell below an objective standard of reasonableness and we affirm the postconviction court's denial of appellant's claim of ineffective appellate representation.

V.

Appellant argues that the postconviction court abused its discretion by denying him an evidentiary hearing on his claims. We disagree.

We review the postconviction court's denial of a request for an evidentiary hearing for an abuse of discretion. *See Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005) (stating that a summary denial of a postconviction petition is reviewed for an abuse of discretion). A postconviction court is not required to conduct an evidentiary hearing "if the petition, files, and record conclusively show that the petitioner is entitled to no relief." *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004) (quotation marks omitted); *see also* Minn. Stat. § 590.04, subd. 1 (A petitioner is entitled to an evidentiary hearing unless the petition, files, and records of the proceeding conclusively show that petitioner is entitled to no relief.).

Here, the petition, files, and record conclusively show that appellant is not entitled to postconviction relief. We, therefore, conclude that the postconviction court did not abuse its discretion by denying appellant an evidentiary hearing.

Affirmed.