STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0670

Jeffrey Thomas Peterson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 14, 2009
Affirmed
Peterson, Judge

Chippewa County District Court
File No. 12-K0-04-000380

Jeffrey Thomas Peterson, MCF - OID #144083, 1000 Lake Shore Drive, Moose Lake, MN 55767 (pro se appellant)

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

Dwayne N. Knutsen, Chippewa County Attorney, 102 Parkway Drive, P.O. Box 514, Montevideo, MN 56265 (for respondent)

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Randall, 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

PETERSON, Judge

This pro se appeal is from an order denying appellant's petition for postconviction relief. We affirm.

FACTS

Appellant Jeffrey Thomas Peterson was convicted of two counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b), (g) (2004), and sentenced to 144 months in prison, and this court affirmed. *State v. Peterson*, A05-682, (Minn. App. Aug. 1, 2006), *review denied* (Minn. Oct. 17, 2006). In January 2008, appellant made a motion under Minn. Stat. § 590.01, subd. 1a (2008), for forensic testing of two bottles of gel that were entered into evidence during appellant's trial.

Before the two bottles were admitted into evidence, a police officer who executed a search warrant for appellant's residence testified that he recovered the bottles from appellant's bedroom. Also at appellant's trial, the victim testified about appellant's use of a gel, and a tape-recording of an interview of the victim was played for the court, in which she described one occasion when appellant forced her to perform oral sex on him and used what she described as a "flavored, clear gel."

Appellant argued in his motion that testing of the bottles of gel will prove his innocence. In the context of this argument, appellant also alleged evidentiary errors regarding the admission of the bottles. The district court treated appellant's motion as a motion for postconviction relief. The court concluded that the motion did not meet the

requirements of Minn. Stat. § 590.01, subd. 1a, and that appellant's evidentiary claims are barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (Minn. 1976).

D E C I S I O N

"A petition for postconviction relief is a collateral attack on a judgment that carries a presumption of regularity." *Shoen v. State*, 648 N.W.2d 228, 231 (Minn. 2002). A reviewing court will not overturn the postconviction court's determination absent an abuse of discretion. *Pippitt v. State*, 737 N.W.2d 221, 226 (Minn. 2007). We review the district court's legal determinations de novo and will not set aside its factual determinations unless they are clearly erroneous. *Id.*

Minn. Stat. § 590.01, subd. 1a(a), provides:

> A person convicted of a crime may make a motion for the performance of fingerprint or forensic DNA testing to demonstrate the person's actual innocence if:
>
> (1) the testing is to be performed on evidence secured in relation to the trial which resulted in the conviction; and
>
> (2) the evidence was not subject to the testing because either the technology for the testing was not available at the time of the trial or the testing was not available as evidence at the time of the trial.

But the statute also provides:

> A person who makes a motion under paragraph (a) must present a prima facie case that:
>
> (1) identity was an issue in the trial; and
>
> (2) the evidence to be tested has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

Minn. Stat. § 590.01, subd. 1a(b). Among other deficiencies in the presentation of appellant's motion, the district court determined that appellant did not make the required showings that identity was an issue in appellant's trial and that the gel has been subject to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material aspect.

We agree with the district court that appellant failed to present the prima facie case required under Minn. Stat. § 590.01, subd. 1a(b). Identity was not an issue in appellant's trial because appellant was well-known to the victim, who identified appellant as the person who forced her to perform oral sex on him. And appellant made no showing regarding the chain of custody of the bottles of gel after they were admitted into evidence at trial.

We also agree with the district court that appellant's evidentiary claims are barred under *Knaffla*. When a defendant has already made a direct appeal, he is barred from seeking postconviction review of all matters raised in the appeal or known at the time of appeal. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. The *Knaffla* rule also precludes review of issues the postconviction petitioner should have known of at the time of appeal. *Sutherlin v. State*, 574 N.W.2d 428, 432 (Minn. 1998). An exception to the rule exists when the petitioner's claim is novel or fairness requires further review. *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997). A novel claim means one for which a legal basis was not reasonably available at the time the direct appeal was taken. *Fox v. State*, 474 N.W.2d 821, 824 (Minn. 1991).

The bottles of gel were offered as evidence in appellant's trial. Appellant objected to admitting one of the bottles into evidence, and, in his postconviction motion, he alluded to problems with admitting the bottles into evidence. But he does not present any reason why any of these problems were not known, or should not have been known, at the time of his appeal. Nor does he cite any legal authority that indicates that the evidentiary issues that he now raises are novel claims.

Finally, appellant asks that we consider the issue of ineffective assistance of counsel if his postconviction claims are barred under *Knaffla*. But appellant did not raise an ineffective-assistance-of-counsel claim in the district court, and we will not consider this claim for the first time on appeal. *See State v. Roby*, 463 N.W.2d 506, 508 (Minn. 1990) (holding that an appellate court will not decide issues that are raised for the first time on appeal).

Affirmed.