STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1300

James Warren Moon, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent,

Filed June 16, 2009
Affirmed in part, reversed in part,
and remanded
Hudson, Judge

Crow Wing County District Court
File No. 18-K4-02-000771

James Warren Moon, Jr., OID No. 216048, St. Cloud Correctional Facility, 2305 Minnesota Boulevard Southeast, St. Cloud, Minnesota 56304 (pro se appellant)

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

Donald F. Ryan, Crow Wing County Attorney, Crow Wing County Judicial Center, 213 Laurel Street, Suite 31, Brainerd, Minnesota 56401 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Hudson, Judge; and Harten, 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

HUDSON, Judge

In this pro se postconviction appeal, appellant challenges the denial of relief on his claims of ineffective assistance of counsel. Appellant further contends that it was error for the postconviction court to deny his request to impeach the verdict. Finally, appellant makes several additional requests for relief not raised before the postconviction court. We affirm in part, reverse in part, and remand.

FACTS

On December 17, 2004, a jury convicted appellant James Warren Moon, Jr., of second-degree murder. Appellant challenged his conviction on appeal, arguing, inter alia, that each of his three attorneys provided ineffective assistance of counsel. *State v. Moon*, 717 N.W.2d 429, 439 (Minn. App. 2006), *review denied* (Minn. Sept. 19, 2006), *overruled by State v. Reed*, 737 N.W.2d 572 (Minn. 2007). This court affirmed appellant's conviction, but we declined to review appellant's ineffective-assistance-of-counsel claims because the record was insufficient to allow for adequate review. *Id.* at 435, 439. We held, however, that "the claims [were] not barred and may be addressed in postconviction proceedings." *Id.* at 439.

Appellant subsequently petitioned for postconviction relief, asserting ineffective assistance of trial and appellate counsel, and alleging that the state used defective search warrants. The postconviction court asked for more information regarding appellant's claims of ineffective assistance of counsel, but it held that appellant's search-warrant challenge was raised and addressed on direct appeal and was therefore procedurally

barred under *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Appellant responded to the district court's request for more information, specifically raising seventeen claims of ineffective assistance of counsel and requesting to impeach the verdict.

The postconviction court granted relief in part, ordering an evidentiary hearing on the claim that appellant's counsel failed to communicate a plea offer to appellant. Appellant's remaining claims of ineffective assistance of counsel were denied. Further, the postconviction court denied appellant's request to impeach the verdict, finding that this issue was also raised and addressed on direct appeal and was therefore barred by *Knaffla*. Appellant voluntarily canceled the scheduled evidentiary hearing, wishing instead to seek appellate review of his denied postconviction claims. In response, the postconviction court dismissed the claim that counsel failed to communicate a plea offer to appellant. This pro se appeal follows.

D E C I S I O N

I

Appellant challenges the denial of postconviction relief regarding his claims of ineffective assistance of counsel. An appellant bears the burden of proof on an ineffective-assistance-of-counsel claim. *State v. Miller*, 666 N.W.2d 703, 716 (Minn. 2003). To prove ineffective assistance of counsel, appellant must show that (1) his attorney's representation "'fell below an objective standard of reasonableness,'" and (2) "'there is a reasonable probability 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) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). An insufficient showing on one of these requirements defeats a claim of ineffective assistance of counsel. *Id.* at 562 n.1 (citing *Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069).

There is a strong presumption that counsel's performance "falls within the wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065; *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998). A postconviction court's decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

A. Counsel Halverson

Admission of guilt

Appellant raised several ineffective-assistance-of-counsel claims regarding Charles Halverson, the assistant public defender who represented appellant at trial. Appellant first claimed that Halverson admitted appellant's guilt without his permission. When asserting an ineffective-assistance-of-counsel claim, a defendant must generally prove prejudice, but there are some Sixth Amendment right-to-counsel violations in which prejudice to the defendant will be presumed. *Strickland*, 466 U.S. at 692, 104 S. Ct. 2067. One such instance is when counsel admits a defendant's guilt without the consent of the defendant. *See State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984) (stating that decision to admit guilt "can only be made by the defendant"); *see also State v. Pilcher*, 472 N.W.2d 327, 337 (Minn. 1991) (stating that the decision to admit guilt is

the defendant's decision to make). When counsel admits guilt without the consent of the defendant, the defendant is entitled to a new trial regardless of whether he would have been convicted without the admission. *Wiplinger*, 343 N.W.2d at 861.

Appellant was charged with first-degree murder in the shooting death of his brother. Appellant testified that, during a struggle with his brother, appellant asked an acquaintance to retrieve a gun from appellant's vehicle. Appellant thought that introducing a gun into the struggle would help calm the situation and cause his brother to leave. Appellant maintained, however, that the gun was not in his possession or direct control when it discharged.

In addition to instructions on the elements of first-degree murder, the district court instructed the jury on the lesser-included offenses of second-degree murder, second-degree felony murder, and second-degree manslaughter. The district court told the jury that in order to find appellant guilty of second-degree manslaughter, they would have to find that appellant caused the death of the victim by culpable negligence.

During closing argument, Halverson argued to the jury that the evidence was insufficient to convict appellant of first-degree murder, second-degree murder, or second-degree felony murder. Halverson then discussed the offense of second-degree manslaughter, stating:

> If it's not felony murder, then you are dealing with culpable negligence. And I've already conceded to you that bringing a gun loaded into a situation with three people wrestling on the ground, and at some point that gun has the capability of being put in a fire mode and the safety disengaged and it goes off, is culpable negligence.

> If you are going to find him guilty, if based on some of those questions that you got during jury selection where justification was talked about and [the prosecutor] said, well there needs to be some accountability, find my client accountable. Find him guilty of manslaughter in the second degree.

Earlier in closing argument, Halverson stated, "Getting that gun out, having it there and having it discharged under any of the circumstances as have been talked about here is culpable negligence. You caused the death. The death is caused, it was there, it happened."

The postconviction court found that Halverson's statements did not amount to an admission of guilt; rather, the statements were merely an attempt to mitigate the verdict to the least serious of all charges should the jury find appellant guilty. We disagree. At best, Halverson's comments imply that appellant caused the death of his brother through culpable negligence. It is improper for defense counsel to impliedly admit the defendant's guilt without the defendant's permission. At worst, Halverson's statement directly concedes that appellant caused the death of his brother through culpable negligence. Although concession of guilt may be a valid trial strategy, it cannot be done without the defendant's consent. *State v. Moore*, 458 N.W.2d 90, 96 (Minn. 1990).

If Halverson's admission of guilt was without appellant's consent, appellant is presumed to have suffered prejudice and is entitled to a new trial. Appellant claims that Halverson did not have permission to concede guilt, but the postconviction court denied an evidentiary hearing on this issue. As a result, we cannot determine whether Halverson had permission to admit appellant's guilt. We conclude that it was error for the

postconviction court to deny an evidentiary hearing on this issue, and we remand to the postconviction court for a hearing to determine whether Halverson had permission to admit that appellant caused the death of his brother through culpable negligence.

We acknowledge that appellant did not object to Halverson's admission of guilt. In *State v. Provost*, 490 N.W.2d 93, 97 (Minn. 1992), the supreme court concluded that the defendant acquiesced in the admission of guilt because his counsel used the same strategy throughout trial and the defendant never objected. But here, we cannot say that appellant's failure to object constitutes acquiescence to the admission of his guilt. It is clear from appellant's testimony that he wished to maintain his innocence, and although appellant did not object to Halverson's comments in open court, appellant claims to have told Halverson on several occasions that he did not want Halverson to concede guilt.

Further, while the record reflects that Halverson's strategy throughout trial was to mitigate any verdict against appellant, Halverson only admitted appellant's guilt at the end of trial. Thus, unlike counsel in *Provost*, Halverson did not use the same strategy throughout trial. Therefore, on this record, we cannot conclude that appellant acquiesced in the admission of his guilt. *See Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001) (holding that even though the defendant raised no objection to counsel's strategy, *Provost* was not controlling because counsel's strategy was not the same throughout trial).

Conflict of interest

During jury selection, Halverson agreed to excuse a prospective juror without requiring the prosecutor to use a peremptory challenge. Appellant alleges that Halverson agreed to excuse the juror because Halverson had a past relationship with the prosecutor,

thereby creating a conflict of interest and depriving appellant of effective assistance of counsel. The postconviction court denied relief on this claim, finding that appellant failed to support this allegation with any factual evidence.

"[A]n evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Thus, the petitioner must allege "more than argumentative assertions without factual support." *Id*. (quotation omitted). Here, appellant's allegation of a past relationship between Halverson and the prosecutor is without factual support. Further, the gravamen of appellant's complaint is that the alleged conflict of interest allowed the prosecutor to excuse a juror without having to use a peremptory challenge. *See* Minn. R. Crim. P. 26.02, subd. 6 (describing allocation of peremptory challenges). But appellant makes no argument as to how the result of the proceeding would have been different if the prosecutor had to use a peremptory challenge to excuse the juror in question. Accordingly, appellant has not alleged sufficient facts to warrant an evidentiary hearing, and the postconviction court did not err by denying relief on this claim.

Failing to request a jury instruction on accomplice testimony

On direct appeal, appellant claimed that the district court committed reversible error when it failed to give an accomplice-testimony instruction. *Moon*, 717 N.W.2d at 437. We held that although the district court erred by not instructing the jury on accomplice testimony, the error was harmless because the omission of the instruction did not have a significant impact on the verdict. *Id*. at 438. Appellant now contends that he was denied effective assistance of counsel because Halverson failed to request a jury

instruction on accomplice testimony. The postconviction court held that this claim was raised and decided on direct appeal and was therefore barred by *Knaffla*.

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. at 252, 243 N.W.2d at 741. 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).

Although now phrased as a claim of ineffective assistance of counsel, appellant's claim here is merely a recharacterization of the argument he raised on direct appeal. Appellant cannot avoid the *Knaffla* rule by simply recasting an issue that was raised on direct appeal. *See Sutherlin v. State*, 574 N.W.2d 428, 435 (Minn. 1998) (stating that defendant's ineffective-assistance-of-appellate-counsel claim was "recharacterizing an issue that he should have raised on direct appeal"); *Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997) (stating that appellant cannot avoid *Knaffla* limitation by simply recasting evidentiary issues as claim of ineffective assistance of trial counsel). As a result, the postconviction court did not abuse its discretion by holding that appellant's jury instruction claim here is barred by *Knaffla*.

Failing to arrange for appellant to be present during certain stages of trial

Appellant also contends that Halverson failed to arrange for appellant to be present during certain stages of trial. But appellant raised these claims on direct appeal in the context of district court error. We found that, to the extent the district court erred by failing to have appellant present during all stages of trial, such error was harmless

because "the verdict was surely unattributable to any error committed by the district court," and appellant "fail[ed] to indicate how he would have contributed to his defense if he had been physically present." *Moon*, 717 N.W.2d at 444. Appellant cannot avoid the *Knaffla* rule simply by recasting this claim under the rubric of ineffective assistance of counsel. Therefore, as the postconviction court found, this claim is procedurally barred.

Failing to prepare for trial, locate witnesses, make objections, and introduce evidence

Finally, appellant avers that he was denied the effective assistance of counsel because Halverson failed to prepare for trial, locate witnesses, make objections, and introduce evidence. The postconviction court determined that appellant's allegations related to Halverson's trial strategy, which courts generally do not review, and that appellant could not establish any prejudice as a result of Halverson's allegedly defective tactics.

Appellant's claim that Halverson failed to prepare for trial is not supported by the record. Halverson presented the defense's theory of the case during opening statement and closing arguments, thoroughly cross-examined the state's witnesses, and presented evidence and testimony through the direct examination of the defense's witnesses. Further, on direct appeal, we noted that Halverson successfully argued, over the state's objections, for jury instructions on self-defense and on the lesser-included offenses of second-degree murder, second-degree felony murder, and second-degree manslaughter. *Moon*, 717 N.W.2d 442.

Additionally, "[w]hich witnesses to call at trial and what information to present to the jury are questions that lie within the proper discretion of the trial counsel." *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Appellate courts generally will not review attacks on counsel's trial strategy. *Opsahl*, 677 N.W.2d at 421. Because appellant's claims regarding the failure to locate witnesses, make objections, and introduce evidence all relate to trial strategy, appellant is not entitled to relief on these claims.

B. Counsel Rhodes

Appellant also raises two ineffective-assistance-of-counsel claims against Bradley Rhodes, appellant's pretrial counsel. First, appellant argues that he was denied effective assistance of counsel when Rhodes failed to file a brief for a reopened omnibus hearing. Rhodes was publicly reprimanded for his failure to file the brief. *In re Disciplinary Action Against Rhodes*, 696 N.W.2d 328, 329 (Minn. 2005). The postconviction court acknowledged Rhodes's public reprimand and held that, as a result of Rhodes's failure to file the brief, his representation fell below an objective standard of reasonableness. But the postconviction court found that, notwithstanding Rhodes's defective representation, appellant could not establish how the proceedings would have been different had the brief been filed.

Appellant argues that the failure to file the brief should, alone, be sufficient to constitute ineffective assistance of counsel. But to establish a claim of ineffective assistance of counsel, the law clearly requires a defendant to show both defective representation and resulting prejudice. *Gates*, 398 N.W.2d at 562 n.1. Therefore, appellant is required to show that he was prejudiced by Rhodes's failure to file the brief.

Appellant cannot meet this burden because he has not identified any claims that should have been brought in the brief or any way in which the proceedings would have been different if the brief had been filed.

Appellant also contends that Rhodes provided ineffective assistance by failing to give appellant access to certain discovery materials. But again, appellant fails to allege what those discovery materials were or how the trial result would have been different if appellant had access to the materials. Thus, appellant has not alleged sufficient facts to entitle him to an evidentiary hearing or postconviction relief.

C. Counsel Hermerding

In his petition for postconviction relief, appellant asserted that David Hermerding, appellant's counsel at the time of the grand jury hearing, failed to communicate to appellant a plea offer from the state. The postconviction court granted a hearing on this matter, but appellant voluntarily canceled the hearing in order to seek appellate review of the denied postconviction claims. In response, the postconviction court dismissed the claim against Hermerding. At no time did the postconviction court inform appellant that canceling the hearing would result in dismissal of the claim.

Appellant does not ask this court to consider the merits of his claim against Hermerding. Instead, appellant asserts that the postconviction court erred in dismissing the claim because appellant only wished to postpone the hearing. While we do not find error with the postconviction court's decision, the better practice would have been to inform appellant that cancellation of the scheduled hearing would result in dismissal of the claim. Informing appellant about the consequences of cancellation was especially

important here because appellant's claim against Hermerding was the sole surviving claim from appellant's postconviction petition. Accordingly, we reverse the dismissal of appellant's claim against Hermerding, and we remand to the postconviction court for an evidentiary hearing on the claim.

D. Counsel Andrews

Appellant's final ineffective-assistance-of-counsel claim involves Susan Andrews, appellate counsel from the direct appeal. A defendant's right to the effective assistance of counsel extends to the initial review of his conviction, whether by direct appeal or postconviction petition. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006). The *Strickland* standard also applies to a claim of ineffective assistance of appellate counsel. *See Swenson v. State*, 426 N.W.2d 237, 240 (Minn. App. 1988) (concluding that reasonably effective assistance is the standard for claims of ineffective appellate counsel).

Appellant claims that Andrews did not raise all of the issues that appellant wished to raise on direct appeal. But "[w]hen an appellant and his counsel have divergent opinions as to what issues should be raised on appeal, his counsel has no duty to include claims which would detract from other more meritorious issues." *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985). Instead, the better practice is for the appellant to submit a supplemental pro se brief. *Id.* Because Andrews was not required to raise all of the claims appellant wished to raise, appellant cannot show that Andrews's representation fell below an objective standard of reasonableness.

Further, appellant submitted a pro se brief on direct appeal, and this court gave significant consideration to the issues raised in appellant's pro se brief. *See Moon*, 717

N.W.2d. at 439–48 (addressing issues from pro se supplemental brief). Appellant does not explain how the outcome of his direct appeal would have been different had his pro se arguments—or any additional arguments—been raised by Andrews. Therefore, it was not error for the postconviction court to deny relief on this issue.

II

Appellant requested to impeach the verdict pursuant to Minn. R. Crim. P. 26.03, subd. 19(6), which states that "[a] defendant who has reason to believe that the verdict is subject to impeachment shall move the court for a summary hearing." "If a defendant has reason to believe that the jurors' verdict is subject to impeachment, he must move for a summary hearing, in which the trial court decides whether to order a *Schwartz* hearing." *State v. Martin*, 614 N.W.2d 214, 226 (Minn. 2000). "If the motion is granted, the trial court conducts a postverdict hearing . . . in which jurors are examined under oath as a means of addressing concerns of juror misconduct." *Id*.

The postconviction court held that this claim was barred by *Knaffla*. Because the record reflects that any issues regarding jury misconduct would have been known to appellant at the time of his direct appeal, the district court did not abuse its discretion by concluding that this claim is procedurally barred under *Knaffla*.

III

Appellant makes several additional requests for relief not raised before the postconviction court. First, appellant asks this court to review its decision in appellant's direct appeal. But "[n]o petition for rehearing shall be allowed in the Court of Appeals." Minn. R. Civ. App. P. 140.01; *see State v. Vonderharr*, 733 N.W.2d 847, 850 n.2 (Minn.

App. 2007) (applying Minn. R. Civ. App. P. 140.01 in the criminal context). Accordingly, we deny appellant's request.

Next, appellant seeks to raise additional claims of prosecutorial misconduct not raised on direct appeal. But the misconduct issues appellant now attempts to raise were known to appellant at the time of his direct appeal. Therefore, these claims are procedurally barred by *Knaffla*. Finally, appellant requests a change of venue for any further postconviction proceedings. Because appellant did not request a change of venue before the postconviction court, the issue is not properly before us. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (explaining that appellate courts will generally not consider matters not argued and considered by the district court).

C O N C L U S I O N

Because counsel Halverson admitted that appellant caused the death of his brother through culpable negligence, we remand to the postconviction court for an evidentiary hearing to determine whether Halverson had permission to concede appellant's guilt. We also reverse the dismissal of appellant's claim against counsel Hermerding and remand for a hearing to determine whether Hermerding failed to communicate a plea offer to appellant. In all other respects, we affirm.

Affirmed in part, reversed in part, and remanded.