STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1421

Randall Ricardo Wilson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 21, 2009
Affirmed
Willis, Judge[*]

Hennepin County District Court
File Nos. 27CR01094765, 01-087047

Randall R. Wilson, OID 104639, MCF–Stillwater, 970 Pickett Street North, Bayport, Minnesota 55003-1490 (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and Willis, 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

WILLIS, Judge

In this pro se appeal from a denial of postconviction relief, appellant argues that the postconviction judge should have recused himself. Appellant also contends that he was denied the effective assistance of appellate counsel and that the other claims in his postconviction petition are not procedurally barred. We affirm.

FACTS

On November 15, 2001, appellant Randall Ricardo Wilson was indicted by a grand jury for first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(g) (2000). After a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3, the district court found Wilson guilty. Wilson filed a direct appeal with this court in August 2002 but dismissed the appeal in January 2003.

Wilson petitioned for postconviction relief in June 2004, arguing that his stipulated-facts trial was not authorized under the Minnesota Rules of Criminal Procedure and that he was entitled to a new trial because the victim had recanted her allegations. Wilson also asserted that the district court erred by departing upwardly from the presumptive guidelines sentence. The postconviction court denied Wilson's petition. Wilson appealed from that decision, and this court affirmed. *Wilson v. State*, A04-2014 (Minn. App. Aug. 9, 2005), *review denied* (Minn. Oct. 26, 2005).

Wilson filed a second petition for postconviction relief in September 2007, arguing that procedural irregularities and prosecutorial misconduct during the grand-jury proceedings violated his right to due process, that he received ineffective assistance of

trial and appellate counsel, and that the state gave up its right to prosecute him in exchange for his cooperation in an unrelated murder case. Wilson also raised a different challenge to his sentence and again claimed that he should have a new trial because the victim had recanted.

The postconviction judge—a judge different from the one who considered Wilson's first postconviction petition—denied relief on Wilson's claim of ineffective assistance of appellate counsel, finding that "nothing in the record shows impropriety or ineffectiveness that could reasonably have affected the results of the previous appeal." The postconviction judge further held that Wilson's remaining claims were procedurally barred by *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). In the order denying relief, the postconviction judge noted that he was a former law partner of one of Wilson's trial attorneys "many years ago" but that the former partnership had "no effect on the present decision." This pro se appeal follows.

D E C I S I O N

I. The state has waived any challenge to the timeliness of Wilson's second petition for postconviction relief.

Minn. Stat. § 590.01, subd. 4(a) (2006), provides that "[n]o petition for postconviction relief may be filed more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." Subdivision 4 became effective August 1, 2005, and the legislature provided that any person whose conviction became final before

August 1, 2005, would have until July 31, 2007, to file a petition for postconviction relief. 2005 Minn. Laws ch. 136, art. 14, §13, at 1098.

Here, Wilson's conviction became final when he was sentenced on May 15, 2002. *See State v. Allinder*, 746 N.W.2d 923, 924 (Minn. App. 2008) ("A judgment is considered final when there is a judgment of conviction and sentence is imposed or the imposition of sentence is stayed." (citing Minn. R. Crim. P. 28.02, subd. 2(1))). Accordingly, Wilson's conviction became final before August 1, 2005, and under Minn. Stat. § 590.01, subd. 4(a), he had until July 31, 2007, to petition for postconviction relief.

The state contends that Wilson's second postconviction petition was untimely because the petition was not filed until September 7, 2007. But the state did not raise the issue of timeliness before the postconviction court. "This court will generally not consider matters not raised in the district court." *State v. Coleman*, 661 N.W.2d 296, 299 (Minn. App. 2003) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)), *review denied* (Minn. Aug. 5, 2003). "An exception [exists] if the issue is dispositive of the entire controversy, and there is no advantage or disadvantage to the parties in not having a prior decision by the [district] court." *Id.* (quotation omitted). While the issue of timeliness would dispose of the entire controversy here, Wilson would be disadvantaged if we considered the timeliness issue for the first time on appeal.

In *Nestell v. State*, 758 N.W.2d 610, 614 (Minn. App. 2008), we held that a person whose petition for postconviction relief is untimely may avail himself of the exceptions to the timeliness requirement listed in Minn. Stat. § 590.01, subd. 4(b). But any

exception alleged to apply must be explicitly identified in the petition for relief. *Nestell*, 758 N.W.2d at 614.

Because the state did not raise the issue of timeliness before the postconviction court, Wilson was not put on notice that his petition was untimely and that he needed to identify explicitly an exception to the timeliness requirement in order to proceed with his request for relief. As a result, Wilson would be disadvantaged if we were to consider the timeliness issue for the first time on appeal. Therefore, the general bar against appellate consideration of matters not raised in district court applies here, and by failing to raise the issue of timeliness before the postconviction court, the state has waived consideration of the issue on appeal.

II. The postconviction judge was not required to recuse himself.

Wilson argues that the judge who considered the second postconviction petition should have recused himself because he was a former law partner of one of Wilson's trial attorneys. Canon 3D(1)(a) of the Code of Judicial Conduct provides that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party or a party's lawyer."[1] A judge who is disqualified under the code cannot preside over a trial or other proceeding. Minn. R.

[1] The state asserts that Wilson's recusal claim should be analyzed under canon 3D(1)(b), which provides that a judge shall disqualify himself when "a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter." But canon 3D(1)(b) is inapplicable here because the attorney with whom the postconviction judge was a law partner did not represent Wilson during the time that the partner relationship existed.

Crim. P. 26.03, subd. 13(3). Whether a judge has violated the Code of Judicial Conduct is a question of law, which this court reviews de novo. *State v. Dorsey*, 701 N.W.2d 238, 246 (Minn. 2005).

> The code does not set forth any exceptions to the rule in Canon 3D(1) that a judge must disqualify herself if her impartiality may reasonably be questioned, nor does it provide a precise formula that can automatically be applied in making a disqualification determination. Further, the grounds for disqualification in Canon 3D(1) are stated broadly, leaving considerable room for interpretation in their application to any given set of circumstances. When reviewing a judge's decision not to disqualify herself, [a reviewing court] must make an objective examination of whether the judge's impartiality could reasonably be questioned.

Id. at 248 (quotations omitted). Disqualification is required not only when impropriety objectively exists but also when there is an appearance of partiality. *State v. Laughlin*, 508 N.W.2d 545, 548 (Minn. App. 1993). But this appearance standard requires recusal only when impartiality can reasonably be questioned and not "because a litigant subjectively believes that the judge is biased." *Id*. A judge's failure to disqualify himself or herself under the Code of Judicial Conduct may require the judge's decision to be vacated. *Powell v. Anderson*, 660 N.W.2d 107, 119-21, 124 (Minn. 2003).

Here, nothing in the record suggests that the postconviction judge's decision was influenced by his former relationship with one of Wilson's lawyers. The record shows that the partner relationship ended in 1985—more than 20 years before Wilson's second postconviction petition. Further, the postconviction judge stated that the relationship had "no effect upon the present decision," and although the order denying relief was concise,

it shows that the postconviction court carefully considered the issues raised by Wilson and that court's decision was guided by the relevant legal authority, not personal bias.

Accordingly, we conclude that the postconviction judge's impartiality cannot reasonably be questioned and that he was not required to recuse himself from considering Wilson's second postconviction petition.[2]

III. Wilson was not denied effective assistance of appellate counsel.

Next, Wilson challenges the denial of postconviction relief on his claim of ineffective assistance of appellate 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, an 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, 2068 (1984)). An insufficient showing on either 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).

[2] Wilson also contends that the postconviction judge should have recused himself because the judge "was cited by the state's attorney as an authority for the denial of [Wilson's] first postconviction petition and so was biased by virtue of that authoritative citing by the prosecution." But Wilson does not support this allegation with any argument, citation to the record, or citation to legal authority. Claims unsupported by argument or citation to legal authority are deemed waived. *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002). Further, we have reviewed the transcripts from the first postconviction hearing and the written submissions by the state in that proceeding, and the record does not support Wilson's claim.

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. *Swenson v. State*, 426 N.W.2d 237, 240 (Minn. App. 1988).

There is a strong presumption that a lawyer'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).

Wilson's primary argument is that the lawyer who represented him during the first postconviction proceeding and the 2004 appeal from the denial of postconviction relief declined to raise certain claims. 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). Wilson's lawyer was not required to raise all of the claims that Wilson wanted to raise, and his lawyer's decision to forgo certain claims is not ineffective representation. Further, Wilson fails to allege how the inclusion of any specific claim would have changed the result of the hearing on his first postconviction petition or the result of the 2004 appeal from the denial of relief on that petition.

Wilson also argues that his appellate lawyer was ineffective because the first postconviction petition was not filed until two years after his conviction. But again, Wilson does not show how result of the hearing on his first petition would have been different if the petition had been brought earlier. Nor does the record show any prejudice to Wilson as a result of the delay because the first postconviction court gave full consideration to the issues raised in Wilson's petition. It was not error for the postconviction court here to deny relief on Wilson's claim of ineffective assistance of appellate counsel.

IV. Wilson's remaining claims are procedurally barred.

A defendant is not precluded from postconviction relief following an unsuccessful appeal, but claims made on appeal may not be renewed, and claims known, but not raised, will not be considered on a subsequent petition for postconviction relief. *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004) (citing *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741). This rule is known as the *Knaffla* rule.

In addition to his claims of ineffective assistance of counsel, Wilson raised several additional issues in his second petition for postconviction relief: procedural irregularities and prosecutorial misconduct during the grand-jury proceedings; improper sentencing; victim recantation; and a claim that the state gave up its right to prosecute him. The postconviction court held that these claims were procedurally barred by *Knaffla*. But *Knaffla* applies when a direct appeal is taken and the defendant, in subsequent postconviction proceedings, attempts to assert claims already decided on direct appeal or

claims known at the time of direct appeal but not raised. Here, Wilson dismissed his direct appeal and instead petitioned for postconviction relief.

There is, however, a rule paralleling *Knaffla* that applies here: "a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief." *Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006). Therefore, if Wilson's claims either were raised in his first postconviction petition or were known and could have been raised in his first postconviction petition, the claims are procedurally barred.

In his second petition for postconviction relief, Wilson argued that procedural irregularities and prosecutorial misconduct during the grand-jury proceedings violated his right to due process. Wilson also alleged ineffective assistance of trial counsel. But any alleged irregularities or misconduct during the grand-jury process and any deficiencies in trial counsel's representation would have been known to Wilson at the time of his first petition for postconviction relief. Because these claims were known but not raised in Wilson's first petition for postconviction relief, the claims are procedurally barred.

There are two exceptions to the procedural bar against claims that were raised or could have been raised in an earlier petition for postconviction relief: "(1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Id.* (citations omitted). Wilson asserts that the novel-claim exception applies to his claims of procedural irregularities and prosecutorial misconduct. But the legal bases for these claims were available to Wilson at the time of his first petition for postconviction relief; therefore, the novel-claim exception does not apply.

Wilson also challenged his sentence, claiming that the conditional-release term was not contemplated in the sentencing agreement that he reached with the state. But the record shows that Wilson was aware of the conditional-release term when he was sentenced in May 2002. Accordingly, Wilson knew about this claim at the time of his first petition for postconviction relief but failed to raise it, which thereby precluded him from raising the claim in his second postconviction petition.

Additionally, Wilson asserted that he should be given a new trial because the victim recanted. Because this issue was directly raised and decided in the Wilson's first petition for postconviction relief, it is now procedurally barred. Finally, Wilson claimed that the state gave up its right to prosecute him in exchange for his cooperation in an unrelated murder case. This claim, too, would have been known to Wilson at the time of his first petition for postconviction relief and he is now procedurally barred from raising it.

Because the record shows that Wilson's claims were either raised in his first petition for postconviction relief or were known and could have been raised, the claims are procedurally barred.

Affirmed.