STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1852

Timothy David Olson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 7, 2009
Affirmed
Johnson, Judge

Swift County District Court
File No. 76-K0-04-000382

Timothy David Olson, OID #217055, MCF – Moose Lake, 1000 Lake Shore Drive, Moose Lake, MN 55767 (for appellant)

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

Robin W. Finke, Swift County Attorney, 211 Eleventh Street North, Benson, MN 56215 (for respondent)

Considered and decided by Connolly, Presiding Judge; Peterson, Judge; and Johnson, Judge.

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

JOHNSON, Judge

In 2005, a Swift County jury found Timothy David Olson guilty of first-degree criminal sexual conduct and third-degree assault based on evidence that he sexually

abused a two-year-old girl. This court affirmed the conviction on direct appeal. In 2008, Olson sought postconviction relief, which the district court denied without an evidentiary hearing. We affirm.

FACTS

At Olson's trial, the state introduced evidence that a two-year-old girl suffered severe injuries to her vaginal area while she was in Olson's care. Olson testified that the injury occurred inadvertently when he tried to stimulate a bowel movement in the child, who had a history of severe constipation. But several treating physicians testified that the girl's injuries were inconsistent with rectal stimulation, and one physician testified that her injuries were caused by a "blunt penetrating trauma."

The state charged Olson with two counts of first-degree criminal sexual conduct and one count of third-degree assault. A jury found Olson guilty on all counts and also found that he treated the child with particular cruelty. The district court sentenced Olson on one of the charges of first-degree criminal sexual conduct, imposing a sentence of 182 months of imprisonment, an upward departure from the sentencing guidelines.

On direct appeal, this court rejected Olson's arguments that the evidence was insufficient, that the district court made erroneous evidentiary rulings involving expert testimony and hearsay, that the prosecutor engaged in misconduct, and that he was denied the right to be present at each stage of trial. *See State v. Olson*, No. A05-1464, 2006 WL 3490280, at *2-*6 (Minn. App. Dec. 5, 2006), *review denied* (Minn. Feb. 20, 2007). But this court reversed on two issues. First, this court held that one of Olson's criminal sexual conduct convictions must be vacated pursuant to Minn. Stat. § 609.04 (2004). *Id.*

at *5. Second, this court remanded for resentencing on the ground that the district court had failed to define the term "particular cruelty" in its instructions to the sentencing jury. *Id.* at *5-*6. On remand, the district court vacated one of the criminal sexual conduct convictions and resentenced Olson to 153 months in prison. Olson did not appeal from the resentencing.

Olson later brought this *pro se* petition for postconviction relief in which he made six allegations. The district court summarized them as follows: (1) that he received ineffective assistance of counsel at trial; (2) that he was unlawfully subjected to "serial prosecution" in violation of his statutory and constitutional protections against double jeopardy; (3) that he was denied due process at trial due to inadequate jury instructions; (4) that the prosecutor committed misconduct at trial; (5) that he was denied his right to confrontation at trial; and (6) that the district court erred by not suppressing evidence introduced by the state at trial. The district court denied Olson's petition on the ground that he failed to meet his burden of setting forth facts that, if true, would warrant postconviction relief. Olson appeals.

D E C I S I O N

Olson argues that the district court erred by denying his postconviction petition. A district court may deny a petition for postconviction relief without an evidentiary hearing if "the files and records of the proceedings conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2006); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). A district court also may summarily deny a

postconviction petition when it raises issues previously decided by this court or the supreme court. Minn. Stat. § 590.04, subd. 3 (2006).

On appeal, Olson pursues only the first three issues identified by the district court, thereby abandoning the latter three issues. We will analyze the three issues raised by Olson in reverse order.

I. Jury Instruction Concerning Intoxication

Olson argues that he is entitled to postconviction relief because the district court did not instruct the jury on the defense of intoxication. Olson did not raise this issue in his direct appeal but, rather, raised it for the first time in his postconviction petition.

"[A]ll matters" raised in a direct appeal and "all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). "There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented or (2) if the interests of justice require review." *Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007). A district court's denial of postconviction relief based on the *Knaffla* procedural bar is reviewed for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

Olson's argument concerning an instruction on intoxication was available to him on direct appeal, but he did not raise it at that time. *See Olson*, 2006 WL 3490280, at *1-*6. Thus, the argument is barred because it was "known but not raised." *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. We have considered whether Olson is entitled to an exception to the *Knaffla* rule. With respect to the first exception, his argument is not "so novel that the legal basis was not available on direct appeal." *McKenzie v. State*, 754

N.W.2d 366, 369 (Minn. 2008) (quotation omitted). With respect to the second exception, we do not believe that the "interests of justice require review" of his claim. *Powers*, 731 N.W.2d at 502. Furthermore, the record reflects that Olson was represented by an attorney on direct appeal, which further weighs against applying either exception. *See Schleicher v. State*, 718 N.W.2d 440, 448 (Minn. 2006). Thus, Olson is not entitled to relief on this ground.

II. Multiple Sentences

Olson argues that he is entitled to postconviction relief because he was convicted of and sentenced for two offenses, criminal sexual conduct and assault, arising from one incident. He contends that he should be sentenced only on the lesser offense of assault. He relies on Minn. Stat. § 609.035, subd. 1 (2004), which generally prohibits multiple sentences for two or more offenses that were committed as part of a single behavioral incident. *See State v. Norregaard*, 384 N.W.2d 449, 449 (Minn. 1986).

This argument also was available to Olson at the time of his direct appeal. The argument is similar to an argument that Olson successfully made on direct appeal -- that he should not be convicted of two charges of criminal sexual conduct in light of Minn. Stat. § 609.04 (2004). That argument resulted in the vacatur of one of those two convictions. *See Olson*, 2006 WL 3490280, at *5. The argument either was "raised" on direct appeal or was "known but not raised." *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. It appears that the supreme court has not decided whether this type of claim, arising in this procedural posture, is barred by *Knaffla*. *Cf. Ture v. State*, 353 N.W.2d 518, 523 (Minn. 1984) (holding on review of denial of postconviction relief that petitioner did not

forfeit multiple-sentencing issue by failing to raise it at sentencing and not taking direct appeal); *State v. Mendoza*, 297 N.W.2d 286, 288 (Minn. 1980) (holding on direct appeal that appellant did not forfeit multiple-sentencing issue by failing to raise it at sentencing); *State v. White*, 300 Minn. 99, 105-06, 219 N.W.2d 89, 93 (1974) (same). But this court has held, in a case arising from the same procedural posture, that *Knaffla* does not apply to the argument Olson is making. *State v. Johnson*, 653 N.W.2d 646, 651 (Minn. App. 2002) (holding on review of denial of postconviction relief that petitioner did not forfeit multiple-sentencing issue by failing to raise it on direct appeal).

Nonetheless, Olson's argument is without merit. By its plain language, section 609.035 contemplates that a defendant may be convicted of multiple offenses arising from a single behavioral incident but punished for only one of the offenses. Minn. Stat. § 609.035, subd. 1; *see also* Minn. Stat. § 609.02, subd. 5 (2004) (defining "conviction" as district court's acceptance of a guilty verdict). That is what occurred in this case. In addition, section 609.035 does not prohibit punishment for the "most serious" of multiple offenses arising out of an incident; rather, "imposing up to the maximum punishment for the most serious offense will include punishment for all offenses." *State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006) (quotations omitted). The district court did not err by sentencing Olson on the more serious offense of first-degree criminal sexual conduct. Thus, Olson is not entitled to relief on this ground.

III. Assistance of Counsel

Olson argues that he is entitled to postconviction relief because his trial counsel represented him in a manner that was constitutionally ineffective. Although Olson's *pro*

se argument is rather difficult to understand, it appears that he contends that his trial counsel's performance was unreasonable because, even though she requested a jury instruction on the defense of intoxication prior to trial, she failed to renew an objection to the absence of such an instruction before the case was submitted to the jury.

A claim of ineffective assistance of trial counsel that is alleged in a postconviction petition following a direct appeal is barred by the *Knaffla* doctrine if the nature of the claim is such that it could have been reviewed on direct appeal based on the record of the trial. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). On the other hand, "an ineffective-assistance-of-counsel claim is not *Knaffla*-barred when the claim requires examination of evidence outside the trial record and additional fact-finding by the postconviction court because it is not based solely on the briefs and trial court transcript." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 847 (Minn. 2008). Olson's argument that trial counsel was constitutionally ineffective could have been raised on direct appeal based on the trial record. Thus, this argument also is barred by the *Knaffla* doctrine.

Even if the argument were not barred by *Knaffla*, we would reject it as being without merit. Olson's argument for postconviction relief is based on the premise that he was too intoxicated to form the intent required to commit a criminal offense. A defendant is entitled to a jury instruction on his theory of the case if the theory is supported by the evidence. *State v. Daniels*, 361 N.W.2d 819, 832 (Minn. 1985); *State v. Ruud*, 259 N.W.2d 567, 578 (Minn. 1977). The district court rejected Olson's intoxication defense because insufficient evidence was presented to support such a defense. There was no evidence presented at trial that Olson was intoxicated. Even

though Olson testified, he did not say that he was intoxicated. There was some evidence of alcohol use by Olson. One witness testified that the child's mother mentioned that Olson smelled like alcohol on the evening in question, and Olson testified that he stopped at a liquor store to purchase some beer before he picked up the girl from daycare. But no one who came into contact with Olson on the evening of the crime testified that he appeared to be intoxicated. Because an intoxication instruction was not warranted, trial counsel's failure to object further to the district court's denial of the request for such an instruction was not unreasonable. *See Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (stating that defendant alleging ineffective assistance of counsel must prove that his trial counsel's "representation 'fell below an objective standard of reasonableness'") (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). Thus, Olson is not entitled to relief on this ground.

In sum, the record "conclusively show[s] that the petitioner is entitled to no relief," *Gustafson*, 754 N.W.2d at 348 (quotation omitted), and the district court did not abuse its discretion by denying Olson's petition for postconviction relief without an evidentiary hearing.

Affirmed.