STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1376

Alan Lee Delvecchio, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 25, 2009
Affirmed
Peterson, Judge

St. Louis County District Court
File No. K6-03-600131

Alan L. DelVecchio, OID #100494, CCA/PCF, P.O. Box 500, Appleton, MN 56208 (pro se appellant)

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

Melanie S. Ford, St. Louis County Attorney, Leslie E. Beiers, Assistant County Attorney, 100 North Fifth Avenue West, Suite 501, Duluth, MN 55802 (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

PETERSON, Judge

In this appeal from a summary denial of his petition for postconviction relief, appellant argues that he was denied effective assistance of counsel and that his Confrontation Clause rights were violated at trial. We affirm.

FACTS

Appellant Alan L. DelVecchio was charged with five counts of criminal sexual conduct. Several days before trial, appellant's counsel requested a short continuance to associate with experienced counsel or allow appellant to apply for a public defender because counsel had no experience with criminal-sexual-conduct trials. Appellant hired another attorney, and the case proceeded on schedule, with both attorneys acting as co-counsel during the trial.

At a pretrial motion hearing, appellant sought to admit at trial a report of a medical examination of the victim performed by Dr. Susan Goltz. Goltz was not available to testify at trial, and appellant argued against allowing a different doctor, Dr. Kathy Halvorson, to explain the report at trial. The district court allowed Halvorson to testify regarding the medical examination. At the motion hearing, the parties also agreed to allow the admission of an exculpatory report prepared by the Bureau of Criminal Apprehension (BCA), and appellant argued that he was entitled to present supporting testimony from a BCA witness. The BCA report was admitted at trial without supporting testimony, but the record does not indicate why the testimony was not presented.

Following a jury trial, appellant was convicted of all five counts and received an executed sentence of 144 months. On direct appeal, appellant argued that (1) the district court erred in admitting expert testimony; (2) the evidence was insufficient to convict; (3) he was denied a fair trial; and (4) the state failed to timely disclose exculpatory evidence. This court affirmed. *State v. DelVecchio*, No. A05-2013 (Minn. App. Dec. 12, 2007), *review denied* (Minn. Feb. 20, 2007).

Appellant then filed a petition for postconviction relief, arguing that (1) his trial counsel was ineffective; and (2) his Confrontation Clause rights were violated when (a) Goltz's medical-examination report was admitted and Halvorson, rather than Goltz, was allowed to testify about the report, and (b) the BCA report was admitted without testimony from the BCA analyst who prepared the report.

The district court denied the petition without a hearing. The district court found that all of the claims were known at the time of the direct appeal and that appellant provided no evidence to support his claim that his counsel's performance fell so far below an objective standard of reasonableness that it was reasonably probable that, but for counsel's errors, the results of the motion hearing and trial would have been different. Finally, the district court found that appellant could not assert a Confrontation Clause violation because he was the party who sought admission of the medical report and the BCA report. This appeal followed.

D E C I S I O N

Appellant argues that the district court erred by denying his petition without an evidentiary hearing. "The decisions of a postconviction court will not be disturbed unless

the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). "An evidentiary hearing is not required unless there are material facts in dispute which must be resolved to determine the postconviction claim on its merits." *Hale v. State*, 566 N.W.2d 923, 926 (Minn. 1997). To be entitled to an evidentiary hearing, a petitioner must allege facts that entitle him to relief that are "more than argumentative assertions without factual support." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (quotation omitted).

The district court determined that the ineffective-assistance-of-counsel claim and the Confrontation Clause claims are barred under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). "[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Knaffla*, 243 N.W.2d at 741.

> There are two exceptions to *Knaffla's* procedural bar: an issue should be considered if it is (1) an issue so novel that its legal basis was not reasonably available at the time of the direct appeal, or (2) in the interest of justice—when fairness so requires and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal.

Quick v. State, 757 N.W.2d 278, 280 (Minn. 2008).

I.

To prevail on an ineffective-assistance-of-counsel claim, appellant "must demonstrate that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 848

(Minn. 2008). The district court found that appellant did not provide evidence to support his claim that his attorneys' assistance fell below the required standard and that, but for his attorneys' errors, the outcome would have been different. On appeal, appellant does not address his attorneys' performance at trial. Instead, citing *United States v. Cronic*, 466 U.S. 648, 104 S. Ct. 2039 (1984), appellant argues that the district court ignored his argument that prejudice was presumed. *Cronic* does not support appellant's argument.

In *Cronic*, the defendant was indicted on mail-fraud charges, and, shortly before the scheduled trial date, his counsel withdrew. *Id.* 466 U.S. at 649, 104 S. Ct. at 2041. The district court appointed a young lawyer with a real estate practice to represent the defendant and allowed him 25 days for pretrial preparation, even though the government had taken more than four and one-half years to investigate the case and had reviewed thousands of documents during the investigation. *Id.* The defendant was convicted on 11 of the 13 counts in the indictment and received a 25-year sentence. *Id.* at 650, 104 S. Ct. at 2041. The Tenth Circuit reversed the conviction after concluding that the defendant did not have the assistance of counsel that is guaranteed by the Sixth Amendment to the United States Constitution. *Id.* at 650, 104 S. Ct. at 2042. The Tenth Circuit's conclusion was not supported by a determination that the defendant's counsel's performance was deficient. *Id.* Instead, the conclusion rested on the premise that no such showing was necessary when the circumstances hampered a lawyer's preparation of a case. *Id.*

The United States Supreme Court reversed the Tenth Circuit and remanded so that it could consider whether the defendant could make out a claim of ineffective assistance

of counsel by pointing to specific errors made by trial counsel. *Id.* at 666-67, 104 S. Ct. at 2051. In reaching this conclusion, the Supreme Court explained that the accused has the burden of demonstrating a constitutional violation but that there are "circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658, 104 S. Ct. at 2046. As examples of such circumstances, the Supreme Court identified "the complete denial of counsel," cases where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing," and circumstances where "although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." *Id.* at 659-60, 104 S. Ct. at 2047. The Supreme Court then stated the general rule that "only when surrounding circumstances justify a presumption of ineffectiveness can a Sixth Amendment claim be sufficient without inquiry into counsel's actual performance at trial." *Id*. at 662, 104 S. Ct. at 2048. The Supreme Court concluded that the circumstances in *Cronic* did not justify a presumption of ineffectiveness that made it unnecessary to examine counsel's actual performance at trial. *Id.* at 666, 104 S. Ct. at 2051.

We conclude that the circumstances in this case do not justify a presumption of ineffectiveness. Appellant's initial counsel indicated that he did not have experience trying a criminal-sexual-conduct case, but before trial, appellant hired another attorney who acted as co-counsel during the trial. Because a presumption of ineffectiveness does not apply, appellant's ineffective-assistance claim is not sufficient without inquiry into

counsel's actual performance at trial, and appellant has chosen not to address his attorneys' performance at trial.

II.

Appellant argues that his Confrontation Clause rights were violated when the court admitted Goltz's report without testimony by Goltz and allowed the BCA report without testimony from the analyst who prepared the report. The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. am. VI. "Where testimonial evidence is at issue . . . the Sixth Amendment demands . . . unavailability and a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 1374 (2004).

Appellant argues that both reports were testimonial and that he did not have an opportunity to cross-examine the people responsible for the reports. But appellant did not raise this argument on direct appeal, and it does not fall under either of the exceptions to the *Knaffla* rule. Because *Crawford* was decided in March 2004, which was more than a year before trial, appellant's argument was reasonably available at the time of his direct appeal. And nothing in the record demonstrates that the interest of justice or fairness requires that appellant be permitted to raise for the first time in a postconviction proceeding an argument that was reasonably available to him during his direct appeal.

Affirmed.