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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1713**

Fong Lee, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 13, 2009
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. 62K804003298

Gary R. Wolf, Barristers Trust Building, 247 Third Avenue South, Minneapolis, MN 55415 (for appellant)

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102-1657 (for respondent)

Considered and decided by Toussaint, Chief Judge; Stoneburner, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges denial of his petition for postconviction relief, asserting that he was denied his due process right to a fair trial before an impartial judge when the district court compelled the state to call a witness in the postconviction proceeding. Appellant also asserts that the district court erred in ruling that he failed to establish ineffective assistance of trial counsel. Because we find no merit in appellant's argument that his due process rights were violated and because the record supports the district court's determination that appellant failed to demonstrate that counsel was ineffective, we affirm.

FACTS

In June 2005, appellant Fong Lee was convicted of second-degree intentional murder and attempted second-degree intentional murder arising out of a shooting incident outside of a St. Paul bar. Fong Lee was sentenced to consecutive 306-month and 153-month sentences. Fong Lee appealed, challenging the sufficiency of the evidence to support the convictions. This court affirmed the convictions and the supreme court denied his petition for further review.

In October 2007, Fong Lee petitioned for postconviction relief asserting ineffective assistance of trial counsel. At the evidentiary hearing on his petition, Fong Lee testified that trial counsel immediately advised him to plead guilty without asking about the shootings and with little investigation. Fong Lee said he inquired about self defense and trial counsel told him that "there's no such thing as self-defense in

Minnesota,” but went on to give an example of a situation in which self-defense could be asserted. Fong Lee testified that he never told trial counsel that he was the shooter: throughout the trial, presentence investigation and sentencing, Fong Lee steadfastly maintained that he was not the person who fired the shots. But at the postconviction hearing Fong Lee testified that he was the shooter.

After Fong Lee testified in the postconviction proceeding, the state rested without presenting any evidence. Following an off-the-record chambers conference between the district court and counsel, the state moved to reopen the record and continue the hearing for the purpose of calling Fong Lee’s trial counsel. Fong Lee opposed the motion.

The district court summarized the chambers conversation for the record, stating that, in chambers, the district court inquired about why trial counsel had not been called to testify. The district court stated on the record that it wanted to hear from trial counsel “in order to be able to make a reasoned decision,” and granted the state’s motion to reopen the record.

The state provided Fong Lee’s trial counsel with a copy of Fong Lee’s testimony from the first postconviction hearing. At the continued hearing, trial counsel testified that he had met with Fong Lee for longer periods than Fong Lee had testified to. According to trial counsel, Fong Lee asked about self-defense and trial counsel told him that he would have to admit that he was the shooter in order to assert self-defense, but Fong Lee never admitted that he was the shooter.

The district court subsequently issued its findings of fact and order denying the petition for postconviction relief. The district court stated that “[e]ven excluding [trial

counsel's] testimony and affidavit evidence in this postconviction proceeding, [Fong Lee] has failed to prove his claim that [trial counsel] misadvised him about Minnesota law.” The district court found that additional claims of ineffective assistance of counsel were *Knaffla* barred because they were known or should have been known at the time of the direct appeal. This appeal followed.

DECISION

Fong Lee asserts that he was deprived of due process of law because the district court's request for trial counsel's testimony constituted an abandonment of the district court's role as a neutral and detached arbiter of the facts. A criminal defendant has a constitutional right to a fair and impartial judge. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (citing *Bracy v. Gramley*, 520 U.S. 899, 904–05, 117 S. Ct. 1793, 1797 (1997)). There is a presumption that a judge has discharged his or her judicial duties properly. *McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998).

Fong Lee argues that, by injecting itself into trial strategy by requiring the testimony of trial counsel, the district court ceased to be “an independent examiner of the facts” and became “one of the parties by virtue of excessive involvement.” In his brief on appeal, Fong Lee cites two cases to support his argument: a case involving the district court's acceptance of a guilty plea and a case involving a challenge to the district court's interrogation of defendant at a jury trial. *See State v. Johnson*, 279 Minn. 209, 216, 156 N.W.2d 218, 223 (1968) (stating that, in the context of accepting a guilty plea, the district court should neither usurp the responsibility of nor participate in plea bargaining negotiation itself, but “its proper role of discreet inquiry into the propriety of the

settlement submitted for judicial acceptance cannot seriously be doubted”); *State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980) (noting the provision for questioning by the district court contained in the rules of evidence and declining to reach the issue of whether the district court’s questioning of defendant was improper because defendant failed to preserve the issue on appeal). Fong Lee asserts that the district court’s actions in this case constitute “meddling” that is just as problematic as meddling in plea negotiations or examining witnesses.¹

At oral argument, Fong Lee argued for the first time that the circumstances of this case are similar to the circumstances in *State v. Dorsey*, 701 N.W.2d 238, 241 (Minn. 2005) (granting a new trial due to structural defect in trial caused by district court’s independent, off-record investigation of facts in evidence). We disagree. And we do not find any of the cases relied on by Fong Lee relevant to the circumstances of this case.

Minnesota Rule of Evidence 614 provides that the district court may, on its own motion, call witnesses and interrogate witnesses. Advisory comments to the rule note that this right is consistent with the responsibility of the court in insuring a speedy and just determination of the issues, but also note that “[t]he right to call and question witnesses can be abused by the trial court which assumes an advocate’s position, particularly in a jury trial.” Minn. R. Evid. 614 1977 comm. cmt.

[T]he [evidence] rules contemplate that the trial judge is not a passive observer or umpire in the trial process. Minn. R. Evid. 403, 611 and 614 establish that the trial judge has an obligation to apply [the rules of evidence] to “secure fairness

¹ Fong Lee apparently failed to recognize that the supreme court did not address the issue of the district court’s questioning of a defendant in *State v. Olisa*.

in administration, eliminat[e] unjustifiable expense and delay...to the end that the truth may be ascertained and proceedings justly determined.” Broad discretion is provided the trial judge in the admission and exclusion of evidence and in the control of the trial. Rule 614 codifies the traditional right of judges to call and interrogate witnesses.

11 Peter N. Thompson, *Minnesota Practice* § 614.01 (3rd ed. 2001) (footnotes omitted).²

At oral argument, Fong Lee conceded that the district court’s action in this case is the same as the district court having called trial counsel as a witness. The district court stated on the record that the purpose of obtaining trial counsel’s testimony was to permit the district court to make a reasoned decision about an important issue. There is no indication in the record that the district court had any knowledge of how trial counsel would testify. The district court, as the factfinder, concluded that the existing record was insufficient to allow it to make a reasoned decision and requested the testimony of trial counsel. Both counsel questioned the witness. The district court did not question the witness. There is no indication in this record that the district court’s action reflected partiality or bias toward either party.

Unlike the court in *Dorsey*, the district court here did not engage in off-the-record investigation or insert its own knowledge of facts into the record. 701 N.W.2d at 253. And consistent with the supreme court’s caution in *Johnson*, the district court here did

² Counsel suggested that the evidence rule is an unconstitutional violation of a defendant’s right to due process. Because this issue was not raised in the district court or briefed on appeal, we decline to address it. See *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating appellate courts will generally not consider matters not argued to and considered by the district court); see also *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (stating that an issue not argued in the briefs must be deemed waived on appeal).

not usurp the responsibility for or participate in plea negotiations. 279 Minn. at 216, 156 N.W.2d at 223. Under the circumstances of this case, we cannot conclude that the district court's action gave rise to even the appearance of partiality. We find no merit in Fong Lee's assertion that his due process right to a fair and impartial judge was violated.

Fong Lee argues that even if this court does not find a due-process violation, the district court erroneously concluded that he failed to meet his burden of showing ineffective assistance of counsel and entitlement to postconviction relief. "The denial of a new trial by a postconviction court will not be disturbed absent an abuse of discretion and review is limited to whether there is sufficient evidence to sustain the postconviction court's findings." *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000).

To succeed on a claim of ineffective assistance of counsel, appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

"[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." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Although Fong Lee asserts that the *Knaffla* rule does not apply to his claims of ineffective assistance of counsel, he makes this argument only with regard to his claim

that he was misadvised about the law of self-defense because he did not know about the defense until his direct appeal had been denied. The district court correctly determined that Fong Lee's other asserted bases for his claim of ineffective assistance of counsel were barred by the *Knaffla* rule, and the district court did not apply the bar to Fong Lee's claim that he was misadvised about the law of self-defense. *See generally Sanchez-Diaz v. State*, 758 N.W.2d 843, 847 (Minn. 2008) (holding that when a claim of ineffective assistance of counsel can be decided based on the trial record, it is *Knaffla*-barred if not brought on direct appeal). Rather, the district court found Fong Lee's assertion that he was misadvised about the law of self-defense not credible. We defer to the district court's credibility determinations. *See State v. Johnson*, 568 N.W.2d 426, 435 (Minn. 1997) (stating that judging the credibility of witnesses and the weight given to their testimony rests within the province of the finder of fact). The district court specifically noted that trial counsel filed numerous pretrial motions, engaged an investigator, interviewed witnesses, and "vigorously represented [Fong Lee] throughout the trial." Because Fong Lee maintained throughout the trial that he was not the shooter, he could not also claim that he acted in self-defense. Under these circumstances, trial counsel's failure to assert self-defense could not be said to fall below an objective standard of reasonableness.

Affirmed.