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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1979

Gregory A. Welch, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 15, 2009
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-K4-00-002883

Gregory A. Welch, MCF-Oak Park Heights, 5329 Osgood Avenue North, Stillwater, MN 55082 (pro se appellant)

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

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

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

LARKIN, Judge

In this pro se postconviction appeal, appellant argues that the district court erred by summarily denying his petition for postconviction relief. Because appellant's claims are procedurally barred under the *Knaffla* rule and the postconviction record conclusively demonstrated that appellant was not entitled to relief, the district court did not abuse its discretion by summarily denying appellant's postconviction petition. We affirm.

FACTS

Pro se appellant Gregory Welch appeals from the district court's summary denial of his petition for postconviction relief. After a 2001 bench trial, Welch was convicted of attempted second-degree criminal sexual conduct and kidnapping. The district court sentenced Welch to serve 45 months in prison for the kidnapping conviction and 150 months consecutively for the attempted criminal sexual conduct conviction. The 150-month sentence constituted an upward durational departure.

Welch appealed to this court. We affirmed Welch's convictions, but we remanded the case for further consideration of his sentence in light of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *State v. Grossman*, 622 N.W.2d 394 (Minn. App. 2001), *aff'd*, 636 N.W.2d 545 (Minn. 2001). *State v. Welch*, No. C9-01-1095, 2002 WL 1013152, at *4 (Minn. App. May 21, 2002). Welch petitioned the Minnesota Supreme

Court for further review, and the supreme court reversed his kidnapping conviction. *State v. Welch*, 675 N.W.2d 615, 620-21 (Minn. 2004).[1]

On remand, the district court held a sentencing trial. Welch waived his right to a jury determination of whether aggravating circumstances existed to support an upward durational departure from the presumptive sentence for his attempted criminal sexual conduct conviction. The district court concluded that aggravating circumstances were present and again imposed a 150-month sentence. Welch appealed from that decision, we affirmed the sentence, and the supreme court denied review. *State v. Welch*, No. A06-1411, 2007 WL 1470490 (Minn. App. May 22, 2007), *review denied* (Minn. Aug. 7, 2007). Welch then filed a pro se petition for postconviction relief, which the district court summarily denied. This appeal follows.

D E C I S I O N

A person convicted of a crime may petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2008). A postconviction court must grant a hearing on a petition for postconviction relief "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief . . . ." Minn. Stat. § 590.04, subd. 1 (2008). The right to an evidentiary hearing on a postconviction petition depends upon the petitioner "first making an adequate offer of proof." *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007).

[1] The state did not seek review of the remanded sentencing issue on appeal to the supreme court. *Welch*, 675 N.W.2d at 618.

Once a direct appeal has been taken, all claims raised in that appeal, all claims known at the time of that appeal, and all claims that should have been known at the time of that appeal "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); Minn. Stat. § 590.01, subd. 1 (barring postconviction relief for claims that petitioner "could have . . . raised on direct appeal"). "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); *see also Fox v. State*, 474 N.W.2d 821, 824-25 (Minn. 1991). A district court may apply the second exception "unless the petitioner deliberately and inexcusably fails to raise the issue on direct appeal." *Fox*, 474 N.W.2d at 825 (quotation omitted).

Appellate courts "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). A denial of postconviction relief based on the *Knaffla* procedural bar is also reviewed for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

Welch challenges the district court's summary denial of his petition for postconviction relief. Welch concedes that the issues he raised in his postconviction petition were not raised on direct appeal but argues that he must be provided an evidentiary hearing if material facts are in dispute that, if proved, would entitle him to the requested relief. He asserts that because his postconviction petition alleges potential

violations of the Fourth, Fifth, Sixth, and Fourteenth Amendments, he is entitled to a state corrective process. Welch implicitly argues that application of the *Knaffla* rule violates his right to due process of law and that the *Knaffla* procedural bar cannot prevent him from exercising his right to a state corrective process.

Welch cites *Case v. Nebraska*, 379 U.S. 958, 85 S. Ct. 672 (1965), in which the Supreme Court granted certiorari to decide whether the Fourteenth Amendment requires states to provide prisoners with "some adequate corrective process for the hearing and determination of claims of violation of federal constitutional guarantees." 381 U.S. at 337, 85 S. Ct. at 1487. Because the Nebraska legislature enacted a statute providing a postconviction remedy, the Supreme Court never decided the issue but instead remanded the matter to the Nebraska Supreme Court for consideration in light of the new statute. *Id.*

Minnesota enacted its Postconviction Remedy Act in 1967 in response to *Case v. Nebraska*. *See Knaffla*, 309 Minn. at 251, 243 N.W.2d at 740 (discussing Minn. Stat. § 590.01, subd. 1 (1967)). The *Knaffla* decision "considered the scope of postconviction relief available in Minnesota in two circumstances: where the petitioner did pursue a direct appeal and where the petitioner did not pursue a direct appeal." *Deegan v. State*, 711 N.W.2d 89, 93 (Minn. 2006) (citing *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741). The law is very clear that if a postconviction petitioner has taken a direct appeal, all claims that were either raised or known are barred from further consideration. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

Welch has had two direct appeals, one of which resulted in supreme court review; he is not entitled to yet another state corrective process to determine whether there was a violation of his federal constitutional rights. Welch had the opportunity to raise federal constitutional claims on direct appeal. He does not have a constitutional right to successive appeals. *See Knaffla*, 309 Minn. at 251-52; 243 N.W.2d at 740-41 (citing *Case v. Nebraska*, 381 U.S. at 336, 85 S. Ct. 1487). The district court did not violate Welch's due-process rights by summarily denying his postconviction petition without an evidentiary hearing.

And the district court did not abuse its discretion by concluding that Welch's postconviction claims were barred under *Knaffla*. Welch's postconviction petition alleged that the district court erred by allowing the state to amend the complaint before trial to add a charge of attempted second-degree criminal sexual conduct. Welch claims that in doing so, the district court denied him the opportunity to prepare a defense in violation of his due-process rights. This claim was known, or should have been known, at the time of Welch's direct appeal. Welch actually raised a similar claim pertaining to the kidnapping charge both at trial and on direct appeal. *Welch*, No. C9-01-1095, 2002 WL 1013152, at *3 (Minn. App. May 21, 2002). And Welch does not present a novel legal issue or demonstrate that the interests of justice require review. Because this claim was known but not raised on direct appeal and neither exception to the *Knaffla* rule applies, the claim is procedurally barred. 309 Minn. at 252, 243 N.W.2d at 741.

Welch's postconviction petition also alleged that the district court violated his rights to due process and equal protection by making comments that implied Welch's

guilt immediately at the conclusion of closing arguments instead of waiting seven days after the trial's completion.[2] This claim was likewise known but not raised on direct appeal. Again, Welch does not present a novel legal issue or an argument that the interests of justice require review. Therefore, the claim is barred. *Id.* Even if this argument were not procedurally barred, it is without merit. Welch cites Minn. R. Crim. P. 26.01, subd. 2, in support of the claim, which states: "[i]n a case tried without a jury, the court, within 7 days after the completion of the trial, shall make a general finding of guilty, [or] not guilty . . . ." Minn. R. Crim. P. 26.01, subd. 2. The clear and unambiguous meaning of the phrase "within 7 days" means that the district court must not exceed a time period of seven days; the rule does not prohibit the district court from making a general finding before the expiration of seven days. *See* Minn. R. Crim. P. 26.01, subd. 2.

Finally, Welch's postconviction petition claimed that he received ineffective assistance of counsel at trial based on his counsel's failure to argue that (1) "the State did not file a timely notice under Minn. R. Crim. P. [] 7.02 to introduce Spreigl evidence against appellant"; (2) "the State did not state the full nature and cause of the accusations against appellant in [the] re-amended complaint, as to which intimate part of the victim's body . . . appellant attempted to make sexual contact with, to enable appellant to prepare a defense"; (3) "the State did not allow appellant the opportunity to prepare a defense[] when the State added the additional charge [for attempted second-degree criminal sexual

[2] It is not entirely clear whether this claim relates to Welch's initial trial or his sentencing trial after remand. In either case, the claim is without merit.

conduct]." These alleged deficiencies were known at the time of direct appeal. An ineffective assistance of counsel claim does not present a novel legal issue. *Schleicher v. State*, 718 N.W.2d 440, 447-48 (Minn. 2006). And Welch makes no argument that the interests of justice require review. Welch's ineffective-assistance-of-counsel claim is therefore barred. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

Even if Welch's ineffective-assistance-of-counsel claim was not barred, it lacks merit. To prevail on a claim that counsel was ineffective, a petitioner must demonstrate both that counsel's performance fell below an objective standard of reasonableness, and that a reasonable probability exists that, but for his counsel's unprofessional error, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2068 (1984); *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003); *Gates v. State*, 398 N.W.2d 558, 562 (Minn. 1987). "The court must be 'highly deferential' when scrutinizing defense counsel's performance." *Tsipouras v. State*, 567 N.W.2d 271, 275 (Minn. App. 1997) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). "There is 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Id.* Welch does not offer any evidence that his counsel's performance fell below an objective standard of reasonableness or that but for his trial counsel's unprofessional error, the outcome would have been different. Because Welch failed to make an adequate offer of proof, the district court did not err by summarily denying his petition. *See Erickson*, 725 N.W.2d at 537 (holding that the right to an evidentiary hearing on a postconviction petition is predicated on petitioner making adequate offer of proof).

Because Welch's claims are procedurally barred under *Knaffla* and the postconviction record conclusively demonstrated that Welch was not entitled to relief, the district court did not abuse its discretion by summarily denying Welch's postconviction petition.

Affirmed.

Date:

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Judge Michelle A. Larkin