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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-631**

William John Grady, III, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 8, 2009
Affirmed
Johnson, Judge**

Sherburne County District Court
File No. 71-K6-05-000546

William John Grady, III, OID #218588, MCF-Red Wing, 1079 Highway 292, Red Wing,
MN 55066 (pro se appellant)

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

Kathleen A. Heaney, Sherburne County Attorney, Samuel Wertheimer, II, Assistant
County Attorney, Government Center, 13880 Business Center Drive, Elk River, MN
55330 (for respondent)

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

UNPUBLISHED OPINION

JOHNSON, Judge

In March 2005, William John Grady, III, drove the wrong way in the northbound lanes of a four-lane divided highway and caused a head-on collision with an oncoming car, whose driver was killed. Grady's alcohol concentration was .26. He was convicted of two counts of criminal vehicular homicide and one count of a violation of a restricted driver's license. In 2007, this court rejected each of Grady's arguments on direct appeal and affirmed his sentence. In January 2008, Grady filed a motion to correct his sentence. The district court granted the motion in part and denied it in part. On appeal, Grady challenges the district court's partial denial of the motion. We affirm.

FACTS

The facts giving rise to this case are described in detail in our prior opinion and, thus, need not be repeated here. *See State v. Grady*, No. A06-228, 2007 WL 898597, at *1-2 (Minn. App. Mar. 27, 2007), *review denied* (Minn. June 19, 2007).

While Grady's charges were pending, the state moved for an upward sentencing departure pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), which had just recently been decided. In response, Grady challenged the district court's authority to empanel a sentencing jury after a guilty plea. The parties eventually agreed that Grady would waive his right to a jury trial for both the guilt phase and sentencing phase and submit the case to the district court on stipulated facts, pursuant to *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), so as to preserve for appeal his argument concerning the district court's authority to empanel a sentencing jury after a guilty plea.

At the conclusion of the *Lothenbach* proceeding, the district court found Grady guilty. The district court also found that the state had proved beyond a reasonable doubt the existence of four aggravating factors. The district court sentenced Grady to 96 months of imprisonment, which was a double upward durational departure from the presumptive sentence of 48 months.

On direct appeal, Grady argued that (1) the aggravating factors on which the district court relied are invalid, (2) the sentencing departure is disproportionate to the severity of the offense, and (3) the sentencing procedures violated his right against *ex post facto* laws. This court affirmed. *Grady*, 2007 WL 898597, at *5-6.

In January 2008, Grady moved to correct his sentence, pursuant to Minn. R. Crim. P. 27.03, subd. 9. In his motion, Grady argued that (1) his waiver of his right to a jury trial at sentencing was invalid, (2) the sentencing procedures were inconsistent with *Blakely* because the district court made findings of fact and relied on stipulated facts to find aggravating factors, (3) he was adjudicated guilty on multiple counts arising from the same behavioral incident, (4) the aggravating factors on which the district court relied are invalid, and (5) he received ineffective assistance of counsel, both in the district court and on direct appeal.

In March 2009, the district court granted Grady's motion in part. The district court found merit in Grady's third argument and, accordingly, vacated the conviction of one count of criminal vehicular homicide and the conviction of a violation of a restricted driver's license. The district court denied the motion in all other respects. Grady appeals.

DECISION

Grady argues that the district court erred by denying his motion to correct his sentence for three reasons: (1) he did not validly waive his right to a jury trial at sentencing, (2) the sentencing procedures violated *Blakely* because the district court made findings of fact and relied on stipulated facts to find aggravating factors, and (3) he received ineffective assistance of counsel in the district court and on direct appeal. “When reviewing the decision of a postconviction court, we review questions of law de novo, but our review of questions of fact is limited to whether there is sufficient evidence in the record to support the findings of the postconviction court.” *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008).

I. Waiver of Sentencing Jury

Grady first argues that he is entitled to relief because he did not waive his right to a jury trial on aggravating factors. The district court concluded that this argument is procedurally barred by *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976). The district court alternatively found that Grady “freely and voluntarily waived his right to a jury trial on the presence of aggravated sentencing factors.”

In a postconviction proceeding, “all matters” raised in a direct appeal and “all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief.” *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. “Additionally, matters raised or known but not raised in an earlier petition for postconviction relief will generally not be considered in subsequent petitions for postconviction relief.” *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007). There are two exceptions to the *Knaffla* rule.

The first exception was announced in *Case v. State*, 364 N.W.2d 797 (Minn. 1985), in which the supreme court held that if a novel legal issue is presented, a petitioner is excused from the failure to raise it in a prior proceeding. *Id.* at 800. The second exception was fully articulated in *Fox v. State*, 474 N.W.2d 821 (Minn. 1991), in which the supreme court held that a district court may consider an issue otherwise barred by *Knaffla* when “fairness requires.” *Id.* at 825. The second exception often is restated as one that applies when “the interests of justice require review.” *Powers*, 731 N.W.2d at 502.

The district court reasoned that Grady’s argument is procedurally barred because it was known to him at the time of his direct appeal but was not raised in the direct appeal. On appeal, Grady contends that the *Knaffla* procedural bar does not apply because he filed a motion to correct sentence pursuant to Minn. R. Crim. P. 27.03, subd. 3, not a postconviction petition pursuant to chapter 590 of the Minnesota Statutes. But a motion to correct sentence filed pursuant to the first sentence of rule 27.03, subdivision 9, may be treated as a postconviction proceeding brought pursuant to chapter 590 and, therefore, may be subject to the *Knaffla* bar. *Powers*, 731 N.W.2d at 501 n.2 (stating that section 590.01 “is broad enough to encompass a motion pursuant to [rule] 27.03”); *see also Bonga v. State*, 765 N.W.2d 639, 642-43 (Minn. 2009) (noting same). In this case, the district court treated Grady’s motion to correct sentence as a postconviction proceeding. Thus, *Knaffla* applies. *See Powers*, 731 N.W.2d at 501 n.2.

Grady relies on *State v. Stutelberg*, 435 N.W.2d 632 (Minn. App. 1989), in arguing that the *Knaffla* bar does not apply to a motion to correct sentence filed pursuant

to rule 27.03, subdivision 9. The *Stutelberg* opinion, however, did not so hold. The decision in *Stutelberg* was based on what is now commonly recognized as the second exception to the *Knaffla* bar. Compare *Stutelberg*, 435 N.W.2d at 636 (“We believe . . . review is required in the interests of justice.”), with *Powers*, 731 N.W.2d at 502 (stating that second exception applies “if the interests of justice require review”). Grady has not identified any aspect of his motion that makes it deserving of application of the second exception to the *Knaffla* bar. Furthermore, even if *Stutelberg* did hold that the *Knaffla* bar does not apply to a motion to correct sentence under rule 27.03, subdivision 9, as Grady urges, that holding now would be obsolete in light of the supreme court’s opinion in *Powers*, which applied the *Knaffla* bar to such a motion. See 731 N.W.2d at 501-02.

Thus, the district court did not err by concluding that Grady’s first argument is barred by *Knaffla*.

II. Compliance with *Blakely*

Grady next argues that he is entitled to relief because the aggravating factors on which the district court relied for his sentencing departure, and the departure itself, violate principles articulated in *Blakely*. More specifically, he argues that the district court erred by making its own findings of fact on aggravating factors and by relying on one set of stipulated facts for both the finding of guilt and the findings of the aggravating factors.

The district court concluded that Grady’s *Blakely*-related arguments are procedurally barred because they were “raised on direct appeal and rejected.” The

district court explained that Grady’s “arguments here are merely a repackaging of the same or very similar complaints, and are thus *Knaffla*-barred.” Indeed, the arguments Grady makes now are very similar to the arguments he made on direct appeal. Grady previously argued to this court that the district court relied on invalid aggravating factors as bases for the upward durational departure. *Grady*, 2007 WL 898597, at *2. We concluded that the aggravating factors are valid and that the district court did not abuse its discretion by relying on them in sentencing Grady to an upward durational departure. *Id.* at *5. In addition, Grady previously argued that the district court’s sentencing procedures violated the prohibition against *ex post facto* laws because the procedures were instituted after the date of his offense. *Id.* This court rejected that argument as well, reasoning that the retrospective application of *Blakely* is not prohibited by the *ex post facto* clause because the rule of *Blakely* is procedural in nature and is advantageous to defendants. *Id.* (citing *Hankerson v. State*, 723 N.W.2d 232, 243-44 (Minn. 2006)). We also noted that Grady waived his right to a jury trial on aggravating factors and that the district court found that each factor was proved beyond a reasonable doubt. *Id.* at *6. To the extent that Grady’s present *Blakely*-related arguments differ from the *Blakely*-related arguments he made on direct appeal, the present arguments were known at the time of direct appeal and, thus, should have been raised at that time.

Thus, the district court did not err by concluding that Grady’s *Blakely*-related arguments are procedurally barred.

III. Right to Counsel

Grady last argues that he is entitled to relief because he received ineffective assistance of counsel in the district court and on direct appeal. He contends that his attorney was ineffective in failing to fully present arguments related to *Blakely* and in failing to appeal the pre-trial ruling on Grady's argument that a district court may not empanel a sentencing jury after a guilty plea.

The district court concluded that Grady's claim of ineffective assistance of counsel is barred by *Knaffla*. But a claim of ineffective assistance of appellate counsel is properly raised in a postconviction proceeding if the petitioner did not know about the claim at the time of direct appeal and could not have known about it at that time. *Wright v. State*, 765 N.W.2d 85, 90-91 (Minn. 2009); *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Furthermore, Grady's claim that he received ineffective assistance in the district court also is not barred by *Knaffla* because the same attorney represented him on direct appeal. *Jama v. State*, 756 N.W.2d 107, 112 (Minn. App. 2008). Thus, the district court incorrectly relied on the *Knaffla* bar when rejecting Grady's ineffectiveness claim.

To prove that he received ineffective assistance of counsel, Grady must demonstrate that, first, "his counsel's representation 'fell below an objective standard of reasonableness'" and, second, "'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, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). There is a strong presumption that an attorney's performance was reasonable. *Boitnott v. State*, 631 N.W.2d 362, 370

(Minn. 2001). Matters concerning trial strategy are given great deference. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). But we “will examine trial strategy when it implicates fundamental rights,” such as “whether to plead guilty, waive a jury, testify in [one’s] own behalf, or take an appeal.” *Sanchez-Diaz*, 758 N.W.2d at 848 (quotation omitted).

After the state gave notice that it would seek an upward departure, Grady challenged the district court’s authority to empanel a sentencing jury after a guilty plea. On direct appeal, Grady’s attorney recast the argument somewhat to focus on the validity of the aggravating factors. As the district court explained in examining Grady’s postconviction petition, Grady’s attorney initially “challenged the authority of the court to impose an aggravated sentence based on early post-*Blakely* analysis” and later, on direct appeal, “challenged the same authority on more sophisticated grounds.” Grady’s attorney was wise to do so because the initial argument was and is without merit. In fact, the argument is contrary to *Blakely* itself. In that case, the defendant pleaded guilty, 542 U.S. at 298, 124 S. Ct. at 2534, but the Supreme Court held that the defendant was entitled to a jury determination of facts supporting an aggravated sentence, *id.* at 313, 124 S. Ct. at 2543, thus demonstrating that *Blakely* contemplates the procedure that Grady initially argued is impermissible. By abandoning an argument that is not viable and instead concentrating the appeal on arguments that had greater potential for success, Grady’s attorney’s representation did not fall “below an objective standard of reasonableness.” *Gates*, 398 N.W.2d at 561 (quotation omitted).

Furthermore, Grady cannot prove that the result of the direct appeal would have been different if his attorney had reiterated the argument that he had made in the district court. In *Hankerson*, which was decided before this court's decision in Grady's direct appeal, the supreme court held that a district court has the authority to empanel a sentencing jury. 723 N.W.2d at 236. Furthermore, in *State v. Thompson*, 720 N.W.2d 820 (Minn. 2006), which also was decided before this court's decision in Grady's direct appeal, the supreme court specifically approved a procedure by which a defendant could plead guilty and waive his right to a sentencing jury. *Id.* at 827. That a waiver is required in each phase implies that a waiver in the guilt phase does not render the sentencing phase obsolete; rather, the caselaw indicates that another waiver or a sentencing trial is required.

Thus, Grady has failed to establish that "his counsel's representation fell below an objective standard of reasonableness" or that, "but for [trial counsel's] errors, the result of the proceeding would have been different." *Gates*, 398 N.W.2d at 561 (quotation omitted).

In sum, the district court did not err by denying Grady's motion to correct his sentence.

Affirmed.