STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1304

Sherman Eliaz Townsend, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 27, 2010
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-97-069878

Katherine Flom, Meshbesher & Spence, Ltd., Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Minge, Judge.

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

BJORKMAN, Judge

Appellant Sherman Eliaz Townsend challenges the denial of his fifth petition for postconviction relief in which he seeks vacation of his conviction based on a recanting

witness. Because appellant did not raise this issue in his prior postconviction petition and none of the *Knaffla* exceptions apply, we affirm.

FACTS

On August 10, 1997, the Minneapolis Police Department received a 911 call reporting a burglary in a south Minneapolis neighborhood. When the police arrived, they were met by D.A.J., who stated that he witnessed the burglar's flight. D.A.J. told the police that a large black male had come from the house, nearly ran into him, and then fled. The police later arrested appellant within a few blocks of the house. D.A.J. identified appellant as the person who had run into him.

D.A.J. was one of the prosecution's chief witnesses. But his story changed over time. Just prior to trial, D.A.J. recanted his identification to a private investigator, and at a pretrial hearing stated that he could not identify the person who ran into him. Nevertheless, D.A.J. testified at trial, identifying appellant as the person he saw leaving the house. Appellant was convicted of first-degree burglary under Minn. Stat. § 609.582, subd. 1(c) (2006), and sentenced to 240 months' imprisonment.[1]

D.A.J. was later convicted of unrelated charges and sent to the Minnesota Correctional Facility – Moose Lake where appellant was serving his sentence. D.A.J. allegedly admitted to appellant that he was responsible for the 1997 burglary and agreed to write a letter to appellant's attorney acknowledging his involvement.

[1] The sentence was calculated based on appellant's status as a career offender under Minn. Stat. § 609.152, subd. 3 (1996). This statute was later recodified as Minn. Stat. § 609.1095 (1998).

Based on this information, appellant filed his fourth petition for postconviction relief, seeking a new trial. The district court conducted an evidentiary hearing. D.A.J. gave detailed testimony, recounting the events of the burglary and admitting that his testimony at appellant's trial was fabricated in order to draw attention away from himself.

The state objected to the petition, arguing that (1) D.A.J. and appellant were incarcerated together for a lengthy period of time, and D.A.J. could have learned details of the crime from appellant; (2) appellant's conviction was not solely based on D.A.J.'s testimony; and (3) D.A.J.'s recantation was not entirely consistent with the victim's testimony at trial. The state argued that a new trial was not warranted based on these discrepancies.

Before the district court ruled, appellant reached an agreement with the state under which he would withdraw his petition in exchange for being resentenced to time served. The district court held a resentencing hearing during which appellant was represented by counsel and asked directly whether he understood that the agreement would not allow him to seek a new trial or to change his conviction. Appellant acknowledged that he understood the agreement, had no questions, and agreed to be resentenced. The district court vacated appellant's prior sentence and resentenced appellant to time served. Appellant was released from custody that day.

More than a year later, appellant filed his fifth petition for postconviction relief seeking vacation of his conviction or a new trial based on D.A.J.'s recanted testimony. The district court summarily denied the petition, noting that the issues raised were identical to those presented in appellant's prior petition. This appeal follows.

D E C I S I O N

"[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); *see also Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006) (noting that "a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief."). We review a district court's denial of postconviction relief based on the *Knaffla* procedural bar for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

Appellant relies on two recognized exceptions to *Knaffla*. The first applies if a claim is known but not raised by a defendant on appeal, but it is so novel that its legal basis was not reasonably available when the prior appeal was taken. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995). The second permits substantive review of an issue, even if the claim's legal basis was sufficiently available, "when fairness so requires and when the petitioner did not 'deliberately and inexcusably' fail to raise the issue on direct appeal." *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997) (quoting *Roby*, 531 N.W.2d at 484). Neither exception applies here.

The issue is not novel—courts have frequently dealt with witness recantations, and the law is well established in this regard. *See, e.g.*, *State v. Ferguson*, 742 N.W.2d 651, 659 (Minn. 2007) (explaining the standard used by Minnesota courts in handling claims for a new trial based on recantations of witness testimony). Appellant's fourth

postconviction petition was premised on the same recantation that is the subject of this postconviction appeal. There is no novelty under these circumstances.

Likewise, the second *Knaffla* exception does not provide a basis for the relief appellant seeks. While appellant's argument that fairness demands vacation of his conviction on grounds of his innocence is not without merit, it is undisputed that appellant had full knowledge of D.A.J.'s recantation when he filed his fourth postconviction petition. Rather than seek exoneration through a new trial or vacation of his conviction, appellant agreed that the district court could reduce his sentence to time served.

Appellant argues that he was "eager to accept any type of agreement that would allow him to leave prison quickly" and therefore his failure to request vacation of his conviction during his fourth postconviction proceeding was neither deliberate nor inexcusable. We disagree. During the resentencing hearing, the district court made the consequences of appellant's decision to enter into the agreement with the state crystal clear:

> THE COURT: You have had discussions with your attorneys about this motion for resentencing?
>
> APPELLANT: Yes, I have.
>
> THE COURT: You understand that it would not change the conviction, but it would commute the sentence to end today, give you credit for all time served. . . .
>
> APPELLANT: Yes.
>
> THE COURT: Are you in agreement with that?

APPELLANT: Yes.

. . . .

THE COURT: You understand that's not an appealable order or anything you can later change, so if you have questions about it, or if you feel pressured or something else, now is the time to mention it. Because this really is your agreement and a joint motion that the Court is simply approving.

APPELLANT: I understand.

Appellant was represented by counsel. The record reflects that appellant intelligently and voluntarily entered into the agreement with the state, with full awareness of the consequences. "[I]t has long been settled law that courts will honor a defendant's lawful, intentional relinquishment or abandonment of a known right or privilege." *Spann v. State*, 704 N.W.2d 486, 491 (Minn. 2005) (quotations omitted). On this record, we cannot say that appellant's failure to seek vacation of his conviction in the prior postconviction proceeding was not deliberate and inexcusable or that fairness requires us to consider vacating the conviction.

Because appellant's fifth petition for postconviction relief is procedurally barred and because no exception applies, the district court did not abuse its discretion in denying appellant's petition.

Affirmed.