STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1537

Anthony Walker, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 29, 2010
Affirmed
Schellhas, Judge

Benton County District Court
File No. 05-K2-03-1031

Anthony Walker, Stillwater, Minnesota (pro se appellant)

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

Robert Raupp, Benton County Attorney, Karl Schmidt, Assistant County Attorney, Foley, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

SCHELLHAS, Judge

Following his conviction of first-degree controlled-substance crime, appellant challenges the denial of his postconviction petition without an evidentiary hearing. We affirm.

FACTS

Appellant Anthony Walker purchased cocaine in July 2003, as part of a controlled buy through a confidential informant. Respondent State of Minnesota charged appellant with (I) aiding and abetting first-degree controlled-substance crime in violation of Minn. Stat. §§ 152.021, subd. 1(1), and 609.05, subd. 1 (2002); (II) aiding and abetting first-degree controlled-substance crime in violation of Minn. Stat. §§ 152.021, subd. 2(1) (2002), and 609.05, subd. 1; and (III) obstructing legal process or arrest in violation of Minn. Stat. § 609.50, subd. 1(2) (2002). A court-appointed public defender represented appellant in the district court proceedings. Prior to trial, the state dismissed count I, and appellant waived his right to a jury trial on the remaining counts. The district court found appellant guilty of counts II and III and sentenced him to a term of imprisonment.

With the assistance of private counsel, appellant challenged his conviction of aiding and abetting first-degree controlled-substance crime, arguing that the evidence was insufficient to support his conviction. This court affirmed appellant's conviction, *State v. Walker*, No. A06-198, 2007 WL 1120972 (Minn. App. Apr. 17, 2007) (*Walker I*), *review denied* (Minn. July 17, 2007), and appellant then petitioned for postconviction relief, arguing ineffective assistance of trial and appellate counsel. The district court denied the postconviction petition without an evidentiary hearing. This appeal follows.

D E C I S I O N

Appellant challenges the district court's summary denial of his postconviction petition without an evidentiary hearing.

"After a postconviction court has summarily denied postconviction relief, we review that decision under an abuse of discretion standard." *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009). "[W]e review questions of law de novo and findings of fact for an abuse of discretion." *Francis v. State*, ___ N.W.2d ___, ___, 2010 WL 1904549, at *3 (Minn. May 13, 2010).

A person who is convicted of a crime and who claims that "the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state" may file a petition for postconviction relief. Minn. Stat. § 590.01, subd. 1(1) (2008).

> The petitioner must prove the facts alleged in the petition by a fair preponderance of the evidence. The postconviction court must hold an evidentiary hearing unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief. An evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him to the relief requested. Any doubts as to whether to conduct an evidentiary hearing should be resolved in favor of the party requesting the hearing.

Francis, ___ N.W.2d at___, 2010 WL 1904549, at *3 (quotations and citations omitted).

To obtain an evidentiary hearing, the petitioner "must allege facts sufficient to entitle him to the relief requested and must make allegations that are more than argumentative assertions without factual support." *Chambers*, 769 N.W.2d at 764 (quotation omitted). "A postconviction court must evaluate whether, in light of the significance of the claimed error and the evidence presented at trial, a petitioner has raised and factually supported material matters that must be resolved in order to decide the postconviction issues on their merits." *Id.* (quotation omitted).

"A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence." Minn. Stat. § 590.01, subd. 1 (2008); *accord State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). "When a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, it must be brought on direct appeal or it is *Knaffla*-barred." *Sanchez-Diaz v. State*, 758 N.W.2d 843, 847 (Minn. 2008). "But an ineffective-assistance-of-counsel claim is not *Knaffla*-barred when the claim requires examination of evidence outside the trial record and additional fact-finding by the postconviction court because it is not based solely on the briefs and trial court transcript." *Id.*

Appellant argues that he was entitled to relief from the postconviction court because his Sixth Amendment rights were violated due to ineffective assistance of trial and appellate counsel. The Sixth Amendment provides that in "all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense." U.S. Const. amend. VI. "To assert a claim of ineffective assistance of counsel, a defendant must prove 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." *Francis*, ___ N.W.2d at ___, 2010 WL 1904549, at *5 (citing *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052 (1984)). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Id.* (quotation omitted). "We generally do not review ineffective assistance of counsel claims based on trial strategy." *Id*

Claims of Ineffective Assistance of Trial Counsel

Appellant argues that his trial counsel was ineffective because he failed to: (1) object to unnecessary in-court identifications; (2) "move for a judgment of acquittal on the grounds of defective/improper complaint raising the issue of *variance*" (3) move to quash the complaint due to a lack of jurisdiction in Benton County; (4) investigate or interview state witnesses prior to trial; and (5) hire an expert witness "on identification/vision analysis and observation" to challenge an officer's ability to see and identify him from 150 feet away.[1] Appellant argues that he was entitled to an evidentiary hearing on all of these issues because "testimony from counsel is needed to discover the reasons as to why counsel" made these alleged errors.

Although appellant had different counsel on direct appeal than at trial, he did not raise the ineffective-assistance-of-trial-counsel claim on direct appeal, and the postconviction court determined that appellant's claims were *Knaffla*-barred. Citing *Massaro v. United States*, 538 U.S. 500, 123 S. Ct. 1690 (2003), appellant argues that the district court erred by ruling that his claims were *Knaffla*-barred. In *Massaro*, based on federal criminal procedure, the Supreme Court held that a criminal defendant is not required to bring ineffective-assistance-of-counsel claims on direct appeal, but may instead assert the claims in a collateral proceeding. 538 U.S. at 504, 123 S. Ct. at 1693–94. Appellant's reliance on *Massaro* is misplaced. *Massaro* is "based on the Supreme Court's supervisory power over federal courts and is not constitutional in nature" and

[1] Appellant says "150 yards" in his brief, but the undisputed testimony at trial was that the officer observed appellant from a distance of 150 feet.

therefore it is not binding on Minnesota state courts. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). Moreover, the Minnesota Supreme Court has declined to adopt the rule in *Massaro*. *Id.*

After careful consideration of appellant's arguments and the record, we conclude that resolution of his claims based on in-court identification, variance, and county of jurisdiction do not require examination of evidence outside the trial record or additional fact-finding. The district court correctly determined that these claims were *Knaffla*-barred.

Although appellant's claims that his trial counsel provided ineffective assistance because he failed to investigate or interview state witnesses or "to hire an expert witness on identification/vision analysis" are not *Knaffla*-barred because they would require extrinsic evidence to resolve, the district court acted within its discretion by denying appellant an evidentiary hearing. Neither appellant's allegations nor his proffered evidence in his petition were sufficient to establish that his counsel's performance fell below an objective standard of reasonableness and that the outcome would have been different but for trial counsel's errors. Mere "argumentative assertions without factual support" are insufficient to support an ineffective-assistance claim. *Chambers*, 769 N.W.2d at 765 (quotation omitted). Appellant's claims of ineffective assistance of trial counsel therefore fail.

Claims of Ineffective Assistance of Appellate Counsel

Appellant argues that the postconviction court abused its discretion by denying him an evidentiary hearing on the question of ineffective assistance of appellate counsel.

Appellant argued in his petition that his counsel on direct appeal provided ineffective assistance because (1) he failed to raise the issues of ineffective assistance of trial counsel, variance, and jurisdiction on direct appeal, and (2) he failed to present evidence or call witnesses to support a motion for release pending appeal. In this appeal, appellant additionally argues that his appellate counsel provided ineffective assistance by failing to file a postconviction petition based on newly discovered evidence proffered in the form of an April 14, 2009 affidavit from someone who was with appellant on the day of his arrest. Appellant argues that this affidavit exonerates him, "freeing him from any criminal liability." Appellant did not expressly raise this issue before the postconviction court; he attached the affidavit to his postconviction petition without mentioning it. The postconviction court did not address the affidavit.

Failure to Raise Certain Issues

"The right to effective assistance of appellate counsel does not require an attorney to advance every conceivable argument on appeal that the trial record supports." *Garasha v. State*, 393 N.W.2d 20, 22 (Minn. App. 1986); *accord Dent v. State*, 441 N.W.2d 497, 500 (Minn. 1989) ("Counsel appealing a criminal conviction has no duty to raise all possible issues."). Appellate counsel's choice of issues for appeal simply must not fall below an objective standard of reasonableness. *Garasha*, 393 N.W.2d at 22. When an appellant and his counsel have "divergent opinions as to what issues should be raised on appeal," counsel has no duty to include claims that would "detract from other more meritorious issues." *Dent*, 441 N.W.2d at 500.

Here, appellant argues that his counsel should have raised the issues of ineffective assistance of trial counsel, variance, and county of jurisdiction on direct appeal. But appellate counsel's decision to argue insufficiency of the evidence instead was a strategic decision and was not an unreasonable choice. And as to the variance issue, although not raised by appellate counsel, this court substantially addressed the issue on direct appeal.[2] If appellant was dissatisfied with the issues argued by his appellate counsel, he could have submitted a pro se supplemental brief arguing additional issues. *See Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985) (stating that dissatisfied appellants may state their contentions in a supplemental brief). We conclude that counsel's choice of issues on direct appeal did not fall below an objective standard of reasonableness and that the district court was within its discretion to deny appellant's request for an evidentiary hearing.

Failure to Obtain Release Pending Appeal

Appellant also argues that he received ineffective assistance of appellate counsel due to counsel's failure to properly present a motion for release pending appeal. But, as the district court noted, appellant presented no evidence or argument about what counsel should have done differently or how the successful prosecution of such a motion would have affected the outcome of his direct appeal. Therefore, the district court's denial of

[2] The variance refers to the variance between the allegation in the complaint of aiding and abetting and the facts that instead supported constructive possession. In its decision affirming appellant's conviction, this court noted that it was "troubled here because the facts of this case support a conviction for constructive possession, rather than aiding and abetting possession," but this court affirmed appellant's conviction because the evidence was sufficient to sustain appellant's conviction of first-degree possession of a controlled substance under a constructive-possession theory. *Walker I*, 2007 WL 1120972, at *2.

appellant's petition for postconviction relief without an evidentiary hearing was not an abuse of discretion.

Newly Discovered Evidence

Appellant also argues that "before direct appeal was taken, appellant asked his counsel to . . . go back post conviction based upon the affidavit of (new evidence)." As noted above, appellant claims that "[t]his affidavit exonerates appellant, freeing him from any criminal liability." The affidavit states that on the day of the incident, appellant was "not in [the witness's] company and was totally oblivious regarding [the] drugs." But the affidavit also says that "the drug transaction took place . . . on the day in question," and that prior to the hour of the sale, appellant "*was* in [the witness's] company, where [appellant] and [the witness] smoked marijuana sticks and ate food shortly thereafter." (Emphasis added.)

> To receive a new trial based on newly-discovered evidence, a petitioner must show: (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Doppler v. State, 771 N.W.2d 867, 871–72 (Minn. 2009) (quotation omitted). Appellant has provided no evidence that the proffered testimony was not known to him or his counsel at the time of trial or that, if it was not known, it could not have been discovered. Moreover, the evidence is doubtful: although it contains only five short paragraphs, the affidavit directly contradicts itself on one of its central points—whether appellant was in

the witness's company on the day of the incident. Appellant has not shown that this evidence would probably produce an acquittal or a more favorable result. Appellant therefore has not shown that, if his appellate counsel had raised this issue on direct appeal, there is a reasonable probability that it would have resulted in a favorable outcome for him. Appellant has failed to prove that the outcome of his direct appeal would have been different but for the errors of his appellate counsel, and his claims of ineffective assistance of appellate counsel fail.

The district court's summary denial of appellant's postconviction petition was not an abuse of discretion.

Affirmed.