STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1811

Kurt Alan Kluessendorf, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 20, 2011
Affirmed
Peterson, Judge

Dakota County District Court
File No. 19-K8-05-3356

Kyle D. White, St. Paul, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Shirley A. Leko, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Toussaint, Judge; and Crippen, Judge.*

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

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

PETERSON, Judge

In this appeal from an order summarily denying his petition for postconviction relief, appellant argues that (1) the district court abused its discretion in denying his petition without an evidentiary hearing, (2) he is entitled to a new trial based on newly discovered evidence and the state's suppression of exculpatory evidence, (3) he was denied his right to effective assistance of counsel, and (4) polygraph examiners should be allowed to testify at postconviction hearings as experts regarding polygraph-testing results. We affirm.

FACTS

In October 2005, appellant Kurt Kluessendorf was charged with two counts of second-degree criminal sexual conduct involving a five-year-old girl who lived next door to him. At the time of the offense, a registered sex offender lived in the same neighborhood, just a few doors away from the victim. Appellant entered a not-guilty plea. Before trial, the complaint was amended to include two counts of first-degree criminal sexual conduct. Following trial, a jury found appellant guilty on all four counts.

On direct appeal, appellant asserted evidentiary errors and challenged the sufficiency of the evidence. This court determined that the district court did not abuse its discretion in admitting the child victim's out-of-court statements or in permitting the jury to view a videotaped interview twice during deliberations. *State v. Kluessendorf*, No. A07-0843, 2008 WL 2340478, at *4, 6 (Minn. App. June 10, 2008). This court affirmed the conviction on one count of first-degree criminal sexual conduct, reversed the

conviction on the second count, and remanded for the district court to vacate the convictions on both counts of second-degree criminal sexual conduct. *Id.* at *6-7.

In June 2010, appellant sought postconviction relief, alleging that (1) he was denied his right to effective assistance of trial counsel; (2) exculpatory evidence was not disclosed by the state; (3) he was denied his right to effective assistance of appellate counsel; (4) he passed a polygraph examination and, in the interests of justice, the state should stipulate to the admission of polygraph evidence at a postconviction evidentiary hearing; (5) psychological testing demonstrates that he does not fit the profile of a sex offender; and (6) increasing his conditional release period from five years to ten years following his direct appeal violated his due process rights and resulted in an unauthorized sentence. Without conducting a hearing, the district court reduced appellant's conditional release period to five years and otherwise denied his petition. This appeal followed.

D E C I S I O N

If the petition, files, and record conclusively demonstrate that no relief is warranted, a postconviction court may deny a postconviction petition without an evidentiary hearing. Minn. Stat. § 590.04, subd. 1 (2004). To receive an evidentiary hearing, a "[petitioner] must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief." *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). A district court's summary denial of a postconviction petition is reviewed for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006).

Claims raised on direct appeal or those that were "known but not raised" may not be considered in a petition for postconviction relief. *State v. Knaffla*, 309 Minn. 246,

indicates that 252, 243 N.W.2d 737, 741 (1976). An exception from the rule in *Knaffla* permits consideration of an issue when fairness requires review and the failure to raise the issue on direct appeal was not deliberate and inexcusable. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). Appellant argues that because he was not aware of newly discovered exculpatory evidence that was not disclosed by the state, he did not deliberately and inexcusably fail to raise his postconviction issues in his direct appeal and, therefore, the *Knaffla* exception applies.

I.

Appellant contends that he is entitled to a new trial based on newly discovered evidence that indicates that a convicted sex offender lived in his neighborhood at the time of the offense, and the state did not reveal this alternative perpetrator's presence to the defense before trial. To support his claim that the state knew about and concealed evidence about the alternative perpetrator, appellant alleged in his petition that (1) the lieutenant in the Hastings Police Department who was the lead investigator in the case involving the convicted sex offender, which occurred five years earlier, was also the complainant in appellant's case; (2) the lieutenant and the primary investigator in appellant's case participated in the investigation of appellant's case and were on the state's witness list, but neither testified at trial; (3) in terms of the ages of the victims and modus operandi, the two cases were nearly identical; and (4) the Hastings Police Department and the Dakota County Attorney's Office were aware of the similarities of the two cases and failed to disclose the exculpatory evidence.

If proved, the facts that appellant alleged in his petition would not entitle appellant to a new trial based on the state's failure to disclose exculpatory evidence because the alleged facts do not show that the state knew that an alternative perpetrator lived in the neighborhood. The facts of both offenses that appellant claims were similar are that the victim in appellant's case was a five-year-old girl and one of the victims in the earlier case was a five-year-old girl, and, in both cases, the victim was touched underneath her clothes on her skin. Even if these similarities were sufficient to suggest to an investigator that the offenses were committed by the same perpetrator, none of the allegations in appellant's petition suggest that the person convicted of the earlier offense was living in appellant's neighborhood when the later offense occurred. Appellant offers only speculation that the investigators suspected that the convicted offender committed the current offense and that the convicted offender would have registered with the Hastings police and, therefore, the investigators would have known that he was living in the neighborhood.[1] Speculation is not sufficient to entitle appellant to relief.

II.

Appellant also argues that he was denied his right to due process and a fair trial when the prosecutor failed to disclose evidence about the convicted sex offender living in the neighborhood. *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (recognizing that prosecution's suppression of evidence favorable to accused violates due process and warrants a new trial). But because appellant failed to allege

[1] Appellant did not allege in his petition that the convicted offender was registered as living at an address in appellant's neighborhood.

facts that would show that the prosecutor knew that the convicted offender lived in the neighborhood, the district court did not abuse its discretion by denying relief on appellant's due-process claim without a postconviction hearing.

III.

Appellant argues that he did not receive the effective assistance of counsel because his trial counsel's investigation of the alleged offenses did not include interviewing surrounding neighbors, which, appellant contends, would have revealed the presence of the convicted sex offender. To establish a claim of ineffective assistance of counsel, a criminal defendant must demonstrate that (1) his counsel's representation fell below an objective standard of reasonableness, and (2) 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). "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). "Even if counsel's performance is objectively deficient, [appellant] must also affirmatively prove prejudice." *Miles v. State*, 512 N.W.2d 601, 603 (Minn. App. 1994) (citing *Strickland*, 466 U.S. at 693, 104 S. Ct. at 2067), *review denied* (Minn. May 17, 1994).

Even if we assume that appellant's factual allegations are sufficient to show that his counsel's representation fell below an objective standard of reasonableness, we, nevertheless, conclude that he failed to establish that he is entitled to relief based on his counsel's performance because his allegations do not show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding

would have been different. To obtain a postconviction hearing on his ineffective-assistance claim, appellant needed to allege facts showing that the newly discovered evidence about the alternative perpetrator would have been admissible at trial, and he has failed to do so. *See Roby v. State*, 547 N.W.2d 354, 356 (Minn. 1996) (stating that a petitioner is entitled to postconviction hearing only if facts are alleged that, if true, would entitle him to relief). Appellant argues that the evidence about the alternative perpetrator would have been admissible as reverse-*Spreigl* evidence to cast reasonable doubt on his guilt. *See State v. Jones*, 678 N.W.2d 1, 16 (Minn. 2004) (explaining that evidence of other crimes committed by alleged alternative perpetrator is sometimes called reverse-*Spreigl* evidence). But before a defendant may introduce reverse-*Spreigl* evidence,

> he must lay a foundation consisting of additional evidence which has an inherent tendency to connect such other person with the actual commission of the crime. . . . In other words, in addition to evidence connecting a third party to the victim, the threshold also requires a foundation consisting of evidence connecting that third party to the crime of which the defendant is accused.

Woodruff v. State, 608 N.W.2d 881, 885 (Minn. 2000) (citation and quotations omitted).

Appellant alleged that a convicted sex offender lived in the neighborhood and that the offense for which that offender was convicted was similar in some respects to the offense for which appellant was charged. But the alleged similarities between the current offense and the earlier offense, which the convicted offender committed five years earlier against three girls who were in his wife's care as their day-care provider, do not establish a distinctive modus operandi that could establish a link between the two offenses. Consequently, the alleged facts do not have an "inherent tendency to connect [the alleged

alternative perpetrator] with the commission of the [current] crime." Therefore, the alleged facts would not establish the foundation required to admit the reverse-*Spreigl* evidence, and the district court did not abuse its discretion by summarily denying postconviction relief on appellant's claim that he did not receive effective assistance of trial counsel.

IV.

Appellant also argues that he was denied his right to effective assistance of trial counsel when his counsel (1) failed to challenge the child victim's competency to testify, (2) commented about appellant's failure to testify, (3) failed to impeach a witness by questioning her about her employer's bias, (4) failed to call certain witnesses, and (5) suggested during closing argument that the jury review the victim's videotaped interview. Because each of these claims was known at the time of appellant's direct appeal and appellant does not explain why he did not raise these claims in his direct appeal, the claims are barred under *Knaffla*. *See Evans v. State*, 788 N.W.2d 38, 44 (Minn. 2010) (holding that ineffective assistance claims based on trial record were *Knaffla*-barred); *Perry*, 731 N.W.2d at 147 (determining that fairness exception to *Knaffla* does not apply when petitioner fails to explain why claims were not raised in earlier proceeding).

V.

Appellant argues that a polygraph examiner should be permitted to testify at an evidentiary hearing about the results of polygraph testing that occurred after appellant's trial. Appellant acknowledges that, in Minnesota, the results of polygraph tests are not

admissible in civil or criminal trials. *See State v. Anderson*, 379 N.W.2d 70, 79 (Minn. 1985). However, he contends that, unlike jury trials, where the court is concerned about polygraph-testing results usurping the jury's fact-finding authority, polygraph examiners should be allowed to testify as experts in postconviction proceedings where manifest injustice is at stake. But appellant does not identify any permissible purpose for presenting expert testimony about polygraph-testing results in a postconviction proceeding and does not explain how the postconviction court erred by failing to conduct an evidentiary hearing to consider the testimony. Therefore, we will not consider appellant's argument. *See State Dep't of Labor Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue not adequately briefed). Appellant also states in his brief that psychological testing conducted after his trial indicates that he does not fit the profile of a sex offender. But appellant makes no argument and cites no authority that indicates that the postconviction court abused its discretion when it did not allow an evidentiary hearing to consider this evidence.

VI.

Finally, appellant argues that the totality of circumstances, combined with all of the now-known facts, "dramatically demonstrates that an innocent man is behind bars." Quoting *State v. Blasus*, 445 N.W.2d 535, 541 (Minn. 1989), appellant contends that "[w]here error may have prejudiced a close factual case, this court will order a new trial, even if the evidence is otherwise sufficient to support the verdict." But with respect to the issues that appellant presented to the postconviction court that are not barred under *Knaffla*, appellant did not allege facts that, if proved, would establish that an error may

have prejudiced his case. Appellant has not shown that the postconviction court abused its discretion in denying a hearing on his claims that he is entitled to a new trial based on newly discovered evidence and ineffective assistance of counsel or in denying an evidentiary hearing to consider testimony about polygraph testing or psychological testing that occurred after appellant's trial.

Affirmed.