STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0592

Tyvarus Lee Lindsey, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 13, 2014
Affirmed; motion denied
Connolly, Judge

Ramsey County District Court
File No. 62-K1-07-001181

Jon M. Hopeman, Felhaber, Larson, Fenlon & Vogt, P.A., Minneapolis, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Worke, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant challenges the district court's denial of his petition for postconviction relief. We affirm.

FACTS

On April 24, 2005, Leon Brooks (Brooks) attended an after-hours party in St. Paul with his girlfriend, J.S., and another female friend, S.V. As the threesome left the party and attempted to get into Brooks's car, they were attacked by men armed with handguns. One of the men chased Brooks and shot him through his left elbow and right hand; Brooks also had an entrance wound in his side. He was taken to the hospital, where he died from internal hemorrhaging and blood loss.

Law enforcement learned that, on the night of the shooting, Brooks was wearing a diamond ring and a watch that had a large rectangular face surrounded by black diamonds. The ring was valued at approximately $3,000 and the watch was valued at approximately $4,000. When Brooks was brought to the hospital, he was missing both items.

On May 17, law enforcement executed a search warrant on the apartment where appellant Tyvarus Lee Lindsey and his girlfriend, C.J., lived. During the execution of the search warrant, police seized five disposable cameras. After examining the film in the cameras, some of the photographs showed two individuals posing with blue bandanas over the lower parts of their faces displaying a ring and watch that matched the description of the jewelry taken from Brooks at the time of his murder. These

photographs also showed a table displaying cash, Newport cigarettes (the brand Brooks smoked) and two guns that were capable of firing the bullets that killed Brooks. Other photographs showed appellant and his co-defendant, Vincent Smith (Smith), wearing a ring and watch that match the description of the ring and watch taken from Brooks on the date of the murder.

Appellant was charged with two counts of second-degree murder in connection with Brooks's death: intentional murder without premeditation in violation of Minn. Stat. § 609.19, subd. 1(1) (2004), and unintentional murder while committing or attempting to commit a felony, in violation of Minn. Stat. § 609.19, subd. 2(1) (2004).

On June 22, 2007, the parties appeared for a scheduling hearing. At the hearing, appellant directly voiced his concern about receiving a speedy trial. After conferring with his attorney, appellant agreed to a tentative trial date of October 8, 2007. However, his attorney filed a speedy-trial demand later that same day. October 8 is 111 days after appellant filed his speedy-trial demand.

At a September 11 hearing, the state said that it planned to try Smith before appellant. The state argued that, if it tried Smith on October 8 and tried appellant immediately thereafter, it would not violate appellant's speedy-trial rights. This argument was made under the state's mistaken belief that appellant had not filed his speedy trial demand until August 13. The district court set appellant's trial to begin on October 8 and appellant did not object.

The trial ran from October 8 to October 23, when the jury found appellant guilty of both counts. The district court sentenced appellant to 429 months in prison. In 2009,

this court affirmed his convictions. *See State v. Lindsey*, No. A08-453, 2009 WL 4908842 (Minn. App. Dec. 22, 2009), *review denied* (Minn. Mar. 16, 2010).

On March 15, 2012, appellant filed a petition for postconviction relief, alleging ineffective assistance of both trial and appellate counsel. Appellant's postconviction petition raised seven issues for consideration: (1) that both counsel were ineffective for failing to bring a challenge to the affidavit in support of the search warrant pursuant to *Franks v. Delaware*, 438 U.S. 154, 98 S. Ct. 2674 (1978), (2) that both counsel were ineffective for failing to better assert a speedy trial demand, (3) that trial counsel failed to have a transcription made of bench conferences at trial and appellant counsel failed to raise the issue on appeal, (4) that appellate counsel was ineffective for failing to challenge the lack of foundation for certain photographs, (5) that cumulative errors of both counsel prevented appellant from having a fair trial, (6) that trial counsel failed to make objections pursuant to *Bruton v. United States*, 391 U.S. 123, 88 S. Ct. 1620 (1968) to certain testimony and appellant counsel failed to raise the issue on appeal, and (7) that trial counsel was ineffective in failing to obtain an exculpatory statement from Smith. An evidentiary hearing was held solely on the issue of a new exculpatory statement from Smith.

On February 6, 2013, the postconviction court issued an order and memorandum denying appellant's petition for postconviction relief. It concluded that appellant's ineffective-assistance-of-trial-counsel claims are barred by *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1975) and without merit. It also determined that

appellant's ineffective-assistance-of-appellate-counsel claims must be summarily dismissed.

D E C I S I O N

Appellant challenges the postconviction court's denial of his petition for postconviction relief, dismissing his claims for ineffective assistance of trial and appellate counsel. Claims that a conviction violated a person's rights may be raised in a petition for postconviction relief. Minn. Stat. § 590.01, subd. 1(1) (2012). "We review postconviction decisions under the abuse-of-discretion standard of review." *Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). "We review a postconviction court's factual determinations under a clearly erroneous standard, and do not reverse those determinations unless they are not factually supported by the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). We review the postconviction court's legal conclusions de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Because a postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law, it is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

I. *Knaffla* bar to ineffective-assistance-of-trial-counsel claims

Appellant first argues that the postconviction court erred in finding that his ineffective-assistance-of-trial-counsel claims are barred under *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. We disagree.

Once a direct appeal has been taken from a conviction, "all matters raised therein, 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. "This bar also applies to claims that should have been known on direct appeal." *Reed v. State*, 793 N.W.2d 725, 729-30 (Minn. 2010). Claims are not barred under *Knaffla* if (1) the claims are so novel that their legal bases were unavailable at the time of direct appeal, or (2) the claims are required to be addressed in the interest of fairness, unless the petitioner deliberately and inexcusably failed to raise them on appeal. *Ashby v. State*, 752 N.W.2d 76, 78-79 (Minn. 2008). We review the denial of postconviction relief based on the *Knaffla* procedural bar for abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

Knaffla bars a postconviction ineffective-assistance-of-trial-counsel claim if the claim is based solely on the trial record and the claim was known or should have been known on direct appeal. *Evans v. State*, 788 N.W.2d 38, 44 (Minn. 2010). But *Knaffla* does not bar an ineffective-assistance-of-trial-counsel claim if the postconviction court requires additional evidence regarding an act or omission that counsel allegedly committed off the record to be able to determine the merits of the ineffectiveness claim. *Barnes v. State*, 768 N.W.2d 359, 364 (Minn. 2009).

In a thorough and well-written opinion, the postconviction court held that appellant's ineffective-assistance-of-trial-counsel claims were *Knaffla*-barred because they were known or available at the time of his direct appeal. Appellant makes three arguments in opposition.

First, appellant argues that his ineffective-assistance-of-trial-counsel claims should not be barred because they cannot be determined on the trial record and require additional

evidence. Appellant's claims were that trial counsel failed to challenge the search warrant pursuant to *Franks*, 435 U.S. 154, 98 S. Ct. 2674, to challenge the violation of appellant's speedy-trial right, to obtain a record of bench conferences, and to obtain exculpatory evidence from Smith. No evidence other than the record is required to determine whether these claims have merit. Moreover, appellant's appellate counsel challenged the search warrant on appeal, indicating that this failure to request a *Franks* hearing could have been made then.

Second, Appellant argues that his *Franks* claim was so novel that it was not available at the time of direct appeal. His *Franks* claim is based on the contention that the affiant deceived the signing judge into believing that a confidential reliable informant known as CRI1 and a witness, O.G., were two different people. He claims that this situation has not been addressed by the Minnesota appellate courts. But Minnesota courts have addressed issues concerning the competing interests of protecting informants' identities and making material misstatements in search warrant affidavits. *See e.g.*, *State v. Moore*, 438 N.W.2d 101, 106-07 (Minn. 1989) (stating it is permissible to mask the identity of an informant so long as it does not mislead the magistrate as to a material fact); *State v. McGrath*, 706 N.W.2d 532, 541 (Minn. App. 2005) (affirming that an affiant's mischaracterization of an informant as a concerned citizen was false and misleading because law enforcement was relieved of having to establish credibility and veracity independently through corroboration of history of providing reliable information). The postconviction court correctly determined that this claim was not novel.

Third, appellant argues that, even if this ineffective-assistance-of-trial-counsel claim based on counsel's failure to challenge the search warrant under *Franks* is procedurally barred, the court should address the claim in the interests of justice. Appellant argues that the interest of justice is "that the State of Minnesota's judges not be deceived when signing warrants." But "[c]laims decided in the interests of fairness and justice also require that the claims have substantive merit." *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). As we discuss more fully later in this opinion, appellant's ineffective-assistance-of-trial-counsel claim based on *Franks* does not have merit.

Because none of the *Knaffla* exceptions apply, the postconviction court did not abuse its discretion in deciding that appellant's claims of ineffective assistance of trial counsel are barred for failure to raise them on direct appeal.

II. Merits of ineffective-assistance-of trial-counsel claims

Although appellant's ineffective-assistance-of-trial-counsel claims are barred by *Knaffla*, we also address the postconviction court's determination that these claims are without merit because that determination is necessary to an evaluation of the merits of his ineffective-assistance-of-appellate-counsel-claims. *See Reed*, 793 N.W.2d at 732-33 (discussing the merits of the appellant's *Knaffla*-barred claims in order to determine whether his appellate counsel was ineffective).

To establish ineffective assistance of counsel, appellant "'must show that (1) his counsel's performances fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different.'" *State v. Nissalke*, 801 N.W.2d 82, 111

(Minn. 2011) (quoting *State v. Yang*, 774 N.W.2d 539, 564-65 (Minn. 2009)). "We 'need not address both the performance and prejudice prongs if one is determinative.'" *Id.* (quoting *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003)).

"[T]he standard for attorney competence is representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). "What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney's decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence." *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). There is a strong presumption that counsel's performance fell within the range of reasonable assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

A. Failure to bring a *Franks* search warrant challenge

Appellant claims that his trial counsel was ineffective for failing to bring a *Franks* challenge to the search warrant. The courts presume the validity of search warrant affidavits. *Franks*, 438 U.S. at 171, 98 S. Ct. at 2684. A defendant has a right to challenge the truth and accuracy of statements made in a facially valid search-warrant affidavit upon a proper showing. *Id.* at 172, 98 S. Ct. at 2684-85. "A search warrant is void, and the fruits of the search must be excluded, if the application includes intentional or reckless misrepresentations of fact material to the findings of probable cause." *State v. Moore*, 438 N.W.2d 101, 105 (Minn. 1989) (citing *Franks*, 438 U.S. at 171-72, 98 S. Ct. at 2684-85). To invalidate a search warrant under this test, the defendant must show

(1) the affiant deliberately made a statement that was false or in reckless disregard of the truth, and (2) the statement was material to the probable-cause determination. *State v. Andersen*, 784 N.W.2d 320, 327 (Minn. 2010). "A misrepresentation or omission is material if, when the misrepresentation is set aside or the omission supplied, probable cause to issue the search warrant no longer exists. *Id.*

1. The alleged misstatements

Appellant first argues that the search-warrant affidavit for appellant and C.J.'s apartment contained false statements made in reckless disregard of the truth because the affiant intentionally masked the identity of CRI1. CRI1 was later disclosed to be O.G., a known gang member.

Appellant argues that O.G. was not a CRI but rather a citizen witness. He bases this argument on a statement drafted by a sergeant in the case, who referred to O.G. as a citizen witness. The sergeant who made this statement was not the affiant and did not refer to O.G. by name in the statement.

The affidavit states that CRI1 has previously provided the affiant with information that led to the arrest and charging of offenders and the recovery of evidence. In appellant's direct appeal, this court determined that "there was adequate information to establish the reliability of the CRI." *Lindsey*, A08-453, 2009 WL 4908842, at *9. The affidavit states that CRI1 identified T.C., Vincent Smith, and appellant as the three men who attacked Brooks, J.B., and S.V. CRI1 stated that C.J. is appellant's girlfriend and that appellant and C.J. recently moved in together at 298 Ruth Street. CRI1 reported that

C.J. had a gun at the apartment. Therefore, classifying O.G. as a CRI was not a material misstatement.

Additionally, in support of her affidavit, the affiant stated,

> On 4-19-05 Your Affiant received information on a group of Hilltop and Shotgun Crip gang members that were banning (sic) together to form their own gang. These gang members were responsible for robbery of persons and car jacking. The gang members names (sic) that were given to me were: [appellant, D.P., Smith, J.C., O.G. and C.W.]

Appellant argues that this statement shows that the affiant deliberately misled the signing judge to believe that CRI1 and O.G. are two separate people. Although the affiant did not disclose that CRI1 is a known gang member, she did include information about his extensive criminal history. Furthermore, the affidavit does not state that CRI1 gave this information about O.G. Had CRI1 given this information, he may very well have identified himself as one of the gang members responsible for robberies and car jacking. An affiant is allowed to protect the identity of a CRI to some extent. *Moore*, 438 N.W.2d at 106-07 (stating it is permissible to mask the identity of an informant so long as it does not mislead the magistrate as to a material fact). The affiant, therefore, did not make a material misstatement by protecting CRI1's identity.

Second, appellant next argues that the affiant incorrectly recounted the statements of an eyewitness in the affidavit. The affidavit states that J.S. reported a third male chasing the victim on the night in question. However, the 2005 report of J.S.'s statement to the police indicates that J.S. actually said she "remember[ed] the driver's door opening and someone pulling her out of the vehicle. She said it happened so fast she wasn't sure

if the same person that had been in the vehicle had gotten out and ran (sic) around the vehicle or if someone else had opened the door . . . ." Because CRI1 informed the affiant that there were three men at the scene, appellant argues that the affiant made a deliberate misrepresentation to enhance the credibility of CRI1. At the time the search-warrant application was submitted, the officers involved in this case had not determined with certainty how many men were involved in Brooks's murder. Because it is not clear from J.S.'s statement whether she identified two or three men as involved in the attack, the affiant did not deliberately make a false statement when she said that J.S. identified three men.

Third, appellant argues that the affidavit contains falsehoods concerning a carjacking that occurred approximately two hours before Brooks's murder in the same area. During the carjacking, several black males with guns pulled R.S. and her boyfriend from their car and stole it. This vehicle was later discovered at C.J.'s apartment. The affidavit in support of the search warrant states, "R.S. later viewed a photo lineup containing [appellant] and positively identified him as one of the black males . . . ." Appellant argues that this statement is false because, according to the April 24 report of one of the responding officers, R.S. could not even describe the males except for the fact that they were black and in their early 20s.

We disagree. On April 26, a detective showed R.S. a photographic lineup. The report states that R.S. "tentatively" identified appellant as someone involved in the car jacking. At trial, the sergeant who showed R.S. the photo lineup testified as follows:

> She had actually viewed a couple of photo lineups prior to viewing his. And when she looked at his photo lineup, she looked at each individual photo until she got to [appellant's] photo, and she said, "I think that's him."
> . . .
> I asked her—She said "I think that's him." And I said, "You think that's who?" She said, "That's the driver of the blue SUV." And I said, "How certain are you," And she said, "Well, I'm pretty sure." And I said, "Are you certain enough to sign your name underneath this photo that he, in fact, was the driver?" And she says, "I'm not signing anything. I don't want my name involved in this."

This testimony shows that R.S. did identify appellant with reasonable certainty and that her failure to sign her name under his photograph was based on her fear of being involved in this case. The postconviction court did not abuse its discretion is determining that the affiant did not make any intentional or reckless falsehoods in the search-warrant affidavit.

2. The alleged omissions

Appellant also argues that the affidavit had three material omissions because it did not state that (1) J.S. was unable to identify appellant from a photographic lineup; (2) J.R., the owner of the store where the party was held, was arrested in the case for aiding an offender, and S.V.'s purse and 29 pages of property related to the murder were discovered at J.R.'s business; and (3) Brooks's acquaintance, J.M., was also arrested in this case for aiding an offender and Brooks's family told police that they believed J.M. arranged for Brooks to come to St. Paul so J.M.'s friend could rob him.[1]

[1] Appellant also claims that the affiant omitted information that S.V. identified the doorman as being involved in the robbery that led to the homicide. This contention is incorrect. S.V. did not identify the doorman as one of the robbers.

The postconviction court determined that none of these omissions would have undermined the conclusion that there was probable cause to search the apartment. Most of these omissions were not relevant to whether there was a fair probability that contraband or evidence of a crime would be found at the apartment. *See Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983) (explaining the requirements for finding probable cause). Even if the affiant had included the omissions, this information does not contradict the statements in the affidavit that C.J. and appellant were involved in the homicide and the earlier carjacking, that C.J. had a gun in the apartment, and that C.J. was at the after-hours party on the night of the offense.

Appellant also argues that C.J. was positively identified by J.R. as having been present at the after-hours party, and that the affidavit omits information that C.J. was still inside the after-hours party when shots were fired. There is a pending motion to strike this portion of appellant's brief. Because appellant's argument fails, this motion is denied as being moot.

Without the alleged misstatements and omissions the search warrant contains the following information: (1) CRI1 told officers that C.J. helped appellant, Smith, and one other man rob and kill Brooks; (2) J.R. corroborated this statement by stating that C.J. was at the after-hours party on the night in question; (3) CRI1 told police that C.J. previously lived at the address where police discovered the vehicle belonging to the victims of the carjacking that occurred near the after-hours party two hours before the homicide; (4) CRI1 told police that C.J. had moved into an apartment with appellant and that they had a gun there; and (5) J.M. and J.R. were arrested for aiding in this offense.

These facts taken together establish probable cause to search C.J. and appellant's apartment. *See Id.*, 103 S. Ct. at 2332 (explaining that probable cause required to support a search warrant exists when there is a fair probability that contraband or evidence of a crime will be found in a particular place).

Because appellant's *Franks* claim fails on the merits, the record does not support appellant's claim that his trial counsel's failure to assert a *Franks* challenge fell below an objective standard of reasonableness.

B. Failure to move for a new trial due to a speedy-trial violation

Appellant argues that his trial counsel was ineffective for failing to assert his speedy-trial rights after the initial demand.

"The right to a speedy trial is guaranteed by the Sixth Amendment to the United States Constitution and Article I, Section 6 of the Minnesota Constitution." *State v. DeRosier*, 695 N.W.2d 97, 108 (Minn. 2005). "By rule in Minnesota, trial is to commence within 60 days from the date of the demand unless good cause is shown . . . why the defendant should not be brought to trial within that period." *Id.* at 108-09. "To determine whether a delay constitutes a deprivation of the right to a speedy trial, a court must balance the following four factors: (1) the length of the delay, (2) the reason for the delay, (3) whether the defendant asserted his or her right to a speedy trial, and (4) whether the delay prejudiced the defendant." *State v. Griffin*, 760 N.W.2d 336, 339-40 (Minn. App. 2009) (quotation omitted).

"Under Minnesota law, a delay of more than 60 days from the date of the speedy-trial demand is presumptively prejudicial, triggering review of the remaining three

factors." *State v. Johnson*, 811 N.W.2d 136, 144 (Minn. App. 2012), *review denied* (Minn. Mar. 28, 2012). Appellant demanded a speedy trial on June 22, 2007. To be within the 60-day speedy trial time period, appellant's trial should have commenced on approximately August 22, 2007. Appellant's trial actually began on October 8, 2007, approximately 111 days after his speedy-trial demand.

Although appellant's trial was delayed between five and six weeks, "the length of time does not, as an independent factor, provide strong support for finding a violation." *State v. Rhoads*, 802 N.W.2d 794, 806 (Minn. App. 2011), *rev'd on other grounds*, 813 N.W.2d 880 (Minn. 2012). A defendant cannot delay his own trial to a point where we find there was a speedy-trial violation. *State v. Johnson*, 498 N.W.2d 10, 16 (Minn. 1993). "[W]e have held on numerous occasions that when the overall delay in bringing a case to trial is a result of the defendant's actions, there is no speedy trial violation." *Id.*

The reason for the delay here is appellant's failure to object to the October trial date. When discussing October and November trial dates at the June 22 scheduling hearing, appellant asked the court, "Well, if I demanded a speedy trial, you know, where would that put me?" Appellant spoke privately with his trial counsel and did not object when the court tentatively set trial to commence on October 8. In fact, all parties agreed to the October date. At a later motion hearing held on September 11, the court set appellant's trial to begin on October 8. Appellant again did not object. A defendant's failure to assert his right to a speedy trial weighs against the conclusion that his right to a speedy trial was violated. *State v. Friberg*, 435 N.W.2d 509, 515 (Minn. 1989) ("Defendants' attorney . . . failed to bring to the assignment clerk's attention that a

demand had been made when the trial date was being rescheduled . . . . This minimal effort lends support to the trial court's conclusion that defendants did not suffer serious prejudice from the delay of trial.").

Furthermore, appellant has not shown how the October trial date impaired his ability to prepare his case. He argues that he was prejudiced because the state was able to present evidence that would not have been presented during trial had trial counsel asserted appellant's speedy trial rights. "To determine whether a delay prejudices a defendant, this court considers three interests that the right to a speedy trial protects: (1) preventing lengthy pretrial incarceration; (2) minimizing the defendant's anxiety and concern; and (3) preventing possible impairment to the defendant's case." *Griffin*, 760 N.W.2d at 340-41 (citing *State v. Windish*, 590 N.W.2d 311, 316 (Minn. 1999)).

Appellant claims that the prosecution investigated and found *Spriegel* evidence based on the carjacking incident and the testimony of two witnesses, T.G. and B.J. However, the inquiry is not whether the state was able to strengthen its case, but rather whether the delay affected the defendant's ability to present his own case. *Barker v. Wingo*, 407 U.S. 514, 532, 92 S. Ct. 2182, 2193 (1972) ("[T]he inability of a defendant adequately to prepare his case skews the fairness of the entire system. If witnesses die or disappear during a delay, the prejudice is obvious.") Appellant has not presented evidence that the state delayed trial in order to impede the defense. *See Id*. at 531, 92 S. Ct. at 2192 ("A deliberate attempt to delay the trial in order to hamper the defense should be weighted heavily against the government."). Appellant had fair notice that the state was investigating the carjacking because it was referenced in the search-warrant affidavit

and various police reports disclosed during discovery. Similarly, the state did not continue the trial date in order to investigate T.G.'s or B.J.'s testimony. The state discovered that T.G. had information about this case while trial was pending. Similarly, B.J. was first interviewed on April 16, 2007. B.J. left the state and did not return until the week of October 15, 2007. Based on these factors, appellant's right to a speedy trial was not violated.

The record does not support appellant's claim that his trial counsel's failure to assert his speedy trial rights fell below an objective standard of reasonableness. *See Nissalke*, 801 N.W.2d at 111.

C. Failure to record all bench conferences

Appellant argues that he was denied his right to the effective assistance of trial counsel when his counsel failed to have a transcribed record made of all bench proceedings throughout the proceedings and failed to prepare a statement of the bench conferences.

There is no caselaw in Minnesota holding that all bench conferences must be recorded. The Minnesota Rules of Criminal Procedure do not contain such a requirement. Appellant cites to the practice in federal court where most bench conferences are transcribed. However, appellant's counsel conceded at oral argument that there is no such requirement in the Federal Rules of Criminal Procedure. Moreover, in *Morales v. United States*, CIV. 03-980ADM, 2003 WL 22999561 (D. Minn. Dec. 18, 2003), the federal judge summarily rejected a similar claim made by appellant's counsel

because he had not shown that the failure to record a bench conference prejudiced his client's due-process rights.

In this case, both parties were granted the opportunity to make a record of bench conferences when they determined it was necessary. The transcript shows when bench conferences were held as well as the grounds for and rulings on objections raised by each party. Thus, appellant's trial counsel exercised the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances. *See Gassler*, 505 N.W.2d at 70.

D. Failure to interview Smith to obtain exculpatory evidence

Appellant argues that he was denied his right to effective assistance of trial counsel when his counsel failed to interview Smith to obtain exculpatory evidence in support of a motion for a new trial based on newly discovered evidence. After appellant was convicted, but before he was sentenced, Smith pleaded guilty to intentional second-degree murder. Three years after appellant was sentenced, Smith provided an affidavit in which he claimed that appellant was not involved in the homicide. Smith did not identify any other participant in the homicide.

The decision not to obtain an affidavit from Smith immediately after his guilty plea and sentencing can properly be classified as trial strategy, which we do not review. *See State v. Davis*, 820 N.W.2d 525, 539 n.10 (Minn. 2012) (noting that decisions about which witnesses to interview are typically matters of trial strategy that we will not review). Moreover, Smith had not yet been convicted during appellant's trial. Therefore, appellant's trial counsel's failure to interview Smith was not objectively unreasonable

based on the inference that Smith would not have given self-incriminating evidence before his trial. *See Nissalke*, 801 N.W.2d at 111.

Appellant also has not shown how he was prejudiced by this decision. The postconviction court held an evidentiary hearing on this issue on December 13, 2012. The court found that Smith's testimony was not credible, especially in light of the strong evidence admitted against appellant. "We afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). This finding is factually supported by the record. Smith is a felon. He did not make this statement until three years after appellant was convicted and did not identify any other accomplice.

Appellant has not shown that any of his trial counsel's acts in not obtaining a *Franks* hearing on the search warrant, not asserting the violation of appellant's right to a speedy trial, not having all bench conferences recorded, and not interviewing Smith to obtain exculpatory evidence fell below an objective standard of reasonableness or that there is a reasonable probability that, but for these alleged errors, the results of appellant's trial would have been different. *See Nissalke*, 801 N.W.2d at 111. Appellant's claims of ineffective assistance of trial counsel are without merit.

III. Merits of ineffective-assistance-of appellate-counsel claims

Appellant argues that he was denied effective assistance of appellate counsel because his appellate counsel failed (1) to apply for a stay of direct appeal to allow appellant to pursue postconviction proceedings on his ineffective-assistance-of-trial-counsel claims; (2) to apply to the district court for an evidentiary hearing to challenge

trial counsel's ineffective assistance on the *Franks* issue; (3) to prepare a statement of the bench conferences by the best available means under Minn. R. Civ. App. P. 110.03 and 110.04; and (4) to interview Smith to obtain exculpatory evidence. None of these claims has merit.

A. Failure to postpone appeal

Appellant argues first that his appellate counsel provided ineffective assistance by failing to postpone the appeal in order to first claim ineffective assistance at a postconviction proceeding and, if that claim were denied, to challenge the denial on appeal. "[R]efusing to postpone direct appeal to pursue an ineffectiveness claim at a postconviction proceeding is a tactical decision that directly relates to counsel's decisions on what issues to appeal." *Reed*, 793 N.W.2d at 736. "[T]he exercise of tactical judgment . . . will not support a claim of ineffective assistance [of counsel]." *Cooper v. State*, 565 N.W.2d 27, 33 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Thus, appellate counsel's decision not to postpone the appeal and raise claims of ineffective assistance of trial counsel was not ineffective assistance.

Moreover, appellate counsel is not required to raise ineffective-assistance-of-trial-counsel claims that appellate counsel could have legitimately concluded would not prevail. *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). Appellate counsel raised four issues on direct appeal and may have reasonably concluded, as we have concluded, that appellant's ineffective-assistance-of-trial-counsel claims were without merit. Therefore, we conclude that the postconviction court did not abuse its discretion in

rejecting appellant's ineffective-assistance-of-appellate-counsel claims based on counsel's refusal to raise ineffective-assistance-of-trial-counsel claims.

B. Failure to obtain a hearing on the *Franks* issue

Appellant next argues that the postconviction court erred by denying his petition for postconviction relief without conducting an evidentiary hearing on the *Franks* issue. We disagree.

A denial of a petition without a hearing is appropriate if "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 (2012). This court reviews a district court's summary denial of a postconviction petition for abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

The postconviction court denied appellant's petition without a hearing on his ineffective-assistance-of-counsel claims because it determined that appellant "provided no basis for holding that his counsels' performance fell below objective professional standards or justifying further proceedings to explore the issue." Because the record conclusively showed that appellant was not entitled to relief on his *Franks* claim, the postconviction court did not abuse its discretion in denying appellant's request for an evidentiary hearing.

C. Failure to prepare a statement of the bench conferences

Appellant argues that he was denied his right to an effective appellate counsel because his appellate counsel failed to prepare a statement of the bench conferences from the best available means. If a transcript from the district court proceeding is unavailable, "the appellant may prepare a statement of the proceedings from the best available means, including recollection." Minn. R. Civ. App. P. 110.03 (2011); *see also* Minn. R. Crim. P. 28.02, subd. 9 ("To the extent applicable, the Minnesota Rules of Civil Appellate Procedure govern preparation of the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals. . . ."). Additionally, Minn. R. Civ. App. P. 110.04 provides:

> [T]he parties may prepare and sign a statement of the record showing how the issues presented by the appeal arose and were decided in the [district] court and setting forth only the facts averred and proved or sought to be proved which are essential to a decision of the issues presented. The agreed statement shall be approved by the [district] court....

The transcript of the proceeding is available. Both parties pursued evidentiary matters on the record and had the opportunity to make a record of any off-the-record bench conferences. The record contains the grounds and rulings for objections raised by either party. Because the record is sufficiently complete, appellate counsel did not act in an objectively unreasonable manner by failing to prepare a statement of the bench conferences. Appellant has not explained how he was prejudiced by his appellate counsel's decision. *See Nissalke*, 801 N.W.2d at 111. We conclude that the

postconviction court did not abuse its discretion in rejecting appellant's ineffective-assistance-of-appellate-counsel claim on this basis.

D. Failure to pursue a new trial based on Smith's affidavit

Appellant argues that he should be granted a new trial based upon newly discovered evidence in Smith's affidavit and that his appellate counsel, like his trial counsel, provided ineffective assistance by failing to interview Smith. A new trial based upon newly discovered evidence may be granted when a defendant proves:

> (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.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997).

This evidence was not known at the time of trial and could not have been discovered through due diligence because Smith had not yet been convicted. The postconviction court determined that this evidence was doubtful and not credible. This finding is factually supported by the record. As previously stated, Smith is a felon, he did not come forward for approximately three years, and did not identify his accomplice. Moreover, because this evidence is not credible, appellant has not shown that the evidence would likely produce an acquittal or more favorable result. Apart from Smith's testimony, there was strong evidence of appellant's guilt. Two witnesses testified that appellant instructed them to tell police that someone else had committed the murder. Another witness testified that appellant showed off a ring and watch matching those

stolen from Brooks. O.G. testified that appellant told him that he shot someone and that appellant spoke of leaving town after the murder.

Appellant's claims of ineffective assistance of trial counsel are barred by *Knaffla*, and those claims as well as his claims of ineffective assistance of appellant counsel are without merit.

IV. Cumulative errors

Appellant argues that he was denied his right to a fair trial and direct appeal by the cumulative effect of his trial and appellate counsel's ineffective assistance. Because appellant has not shown that he would succeed on any of his ineffective-assistance-of-counsel claims, he has not demonstrated cumulative error.

Affirmed; motion denied.