STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1395

Don Newcome Conley, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 28, 2014
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-CR-09-16555

Don Newcome Conley, Faribault, Minnesota (pro se 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 Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

LARKIN, Judge

Appellant challenges the district court's summary denial of his pro se request for postconviction relief. Because the district court did not abuse its discretion by

concluding that the record conclusively shows that appellant is not entitled to relief, we affirm.

FACTS

Following a jury trial, appellant Don Newcome Conley was convicted of three counts of aiding and abetting second-degree criminal sexual conduct. The district court sentenced Conley to serve 128 months in prison, followed by a ten-year conditional-release term. Conley appealed, and this court affirmed his convictions. *State v. Conley*, No. A10-1636 (Minn. App. Aug. 22, 2011), *review denied* (Minn. Nov. 15, 2011).

On March 5, 2013, Conley moved to "[r]everse [his] [c]onviction." The district court treated the motion as one for postconviction relief and summarily denied the motion. This appeal follows.

D E C I S I O N

A person convicted of a crime may petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2012). A postconviction court must grant a hearing on a petition for postconviction relief "[u]nless 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). The right to an evidentiary hearing on a postconviction petition depends upon the petitioner "first making an adequate offer of proof." *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007).

Once a direct appeal has been taken, all claims raised in that appeal and all claims known at the time of that appeal "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* Minn. Stat. § 590.01, subd. 1 ("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."). "*Knaffla* also bars claims that should have been known at the time of direct appeal." *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

We "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). A denial of postconviction relief based on the *Knaffla* rule is also reviewed for an abuse of discretion. *See Quick*, 692 N.W.2d at 439 (applying the abuse-of-discretion standard when reviewing the denial of a postconviction petition on *Knaffla* grounds).

Conley argues that the district court improperly "recharacterized [his] post-conviction motion made under . . . 28 U.S.C. § 2255 [(2012)]" without notice. We are not persuaded. The district court reasoned that Conley's action "is not an appeal under § 2255 and this court is not characterizing it as such." 28 U.S.C. § 2255, which allows "[a] person in custody under sentence of a court established by Act of Congress" to challenge his judgment or sentence, does not apply to Conley's challenge to his Minnesota conviction. A request for relief from a conviction obtained in Minnesota state court is made under Minn. Stat. § 590.01. (2012) *See* Minn. Stat. § 590.01 ("a person convicted of a crime . . . may commence a proceeding to secure relief by filing a petition

in the district court in the county in which the conviction was had"). Thus, the district court did not err by treating Conley's motion as a request for postconviction relief.

As to the merits of Conley's request for relief, he argues that the victim perjured herself at trial, that the prosecutor and the police knew of the victim's false statements, and that the prosecutor withheld evidence. Conley also argues that his attorneys failed to raise unspecified objections at trial, were unprepared, and knew of the victim's false statements but failed to object.

Conley's appellate arguments are generally consistent with the arguments that he offered in support of his motion in district court. In denying Conley's request for relief, the district court concluded, in part, that his claims are procedurally barred because they were known but not raised in his direct appeal. Conley's briefing in this court does not address or dispute the district court's conclusion that his postconviction claims are procedurally barred.[1] Error is never presumed on appeal, *White v. Minnesota Dep't of Natural Res.*, 567 N.W.2d 724, 734 (Minn. App. 1997), *review denied* (Minn. Oct. 31, 1997), and we discern no abuse of discretion in the district court's conclusion that Conley's claims are procedurally barred under *Knaffla*.

Although the district court ruled that Conley's claims are largely *Knaffla* barred, it suggested that evidence that the victim had previously reported a sexual assault may be newly discovered evidence. An evidentiary hearing on a petition for postconviction relief

[1] Although there are exceptions to the *Knaffla* procedural bar, Conley does not argue that an exception applies. *See Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007) ("There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented, or (2) if the interests of justice require review.").

"is not required unless the petitioner alleges such facts which, if proved by a fair preponderance of the evidence, would entitle him or her to the requested relief." *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). To obtain a new trial based on newly discovered evidence, a defendant must prove

> (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.

Id.

The district court reasoned that "it is doubtful that the new evidence [regarding the victim's previous sexual assault] would in any way produce a favorable result" because it "may not have been admissible" under Minn. R. Evid. 412. *See* Minn. R. Evid. 412 (1) (generally excluding evidence of the victim's previous sexual conduct in prosecutions for criminal sexual conduct). The district court ruled that "[i]t is not conclusively shown here that the requirements under [rule 412] are met." Because evidence regarding the victim's previous sexual conduct would likely be inadmissible at trial, the district court did not err by concluding that Conley's arguments did not establish grounds for a new trial based on newly discovered evidence.

Affirmed.