STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0801

Brent Lanier Lynch, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 20, 2017
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-CR-12-1801

Zachary A. Longsdorf, Longsdorf Law Firm PLC, Inver Grove Heights, Minnesota (for appellant)

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

John Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Johnson, Judge; and Bjorkman, Judge.

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

JOHNSON, Judge

In 2012, Brent Lanier Lynch pleaded guilty to intentional second-degree murder. His conviction and sentence were affirmed on direct appeal. In 2015, Lynch petitioned for

postconviction relief, alleging four claims, including a claim of ineffective assistance of appellate counsel. The postconviction court denied the petition, concluding that his appellate counsel was not ineffective and that the other three claims are procedurally barred. We affirm.

FACTS

In March 2012, the body of Lynch's girlfriend, Carolyn Leete, was found in his residence. The county medical examiner determined that she died from a traumatic head injury caused by a physical assault. The state charged Lynch with one count of unintentional second-degree murder, in violation of Minn. Stat. § 609.19, subd. 2(1) (2012), and one count of intentional second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2012).

In April 2012, while Lynch was detained in the Ramsey County jail, his cellmate gave a handwritten letter to his own public defender, who turned it over to a prosecutor. The letter is written from Lynch's perspective and is directed to his brother. The letter writer attempts to persuade Lynch's brother to tell investigators working for Lynch's privately retained attorney that Leete was injured when she accidentally fell down a staircase. The letter writer suggests that Lynch's attorney was aware of and perhaps cooperative in a plan to develop evidence that might exculpate Lynch.

At a status conference on August 6, 2012, Lynch's attorney informed the district court that he might withdraw from representation due to the possibility that, in light of the letter, which had been disclosed by the state, he "would be diminished in the eyes of the jury." On August 10, the state sought a ruling that the letter would be admissible at trial.

On August 13, 2012, Lynch's attorney filed a motion to withdraw as counsel for Lynch. At an August 15 hearing, Lynch's attorney was represented by his own attorney, and the district court granted the motion to withdraw. The district court appointed a public defender for Lynch later that same day.

In September 2012, Lynch and the state entered into a plea agreement. Lynch pleaded guilty to intentional second-degree murder pursuant to *North Carolina v. Alford*, 400 U.S. 25, 26-39, 91 S. Ct. 160, 162-68 (1970), and the state dismissed the charge of unintentional second-degree murder. Before sentencing, Lynch filed a *pro se* motion to withdraw his guilty plea. The district court denied the motion. The district court sentenced Lynch to 386 months of imprisonment and ordered restitution.

Lynch pursued a direct appeal from his conviction and sentence. In his principal brief, Lynch's appellate public defender made arguments concerning the validity of his guilty plea and the restitution award. In a *pro se* supplemental brief, Lynch argued that the district court erred by allowing his retained attorney to withdraw, that the retained attorney was ineffective by withdrawing, and that he was denied the assistance of counsel due to the retained attorney's deficient representation. This court affirmed in an unpublished opinion. *State v. Lynch*, No. A13-0167, 2013 WL 6152187 (Minn. App. Nov. 25, 2013), *review denied* (Minn. Jan. 29, 2014), *cert. denied*, 135 S. Ct. 203 (2014).

Shortly after our opinion, Lynch exchanged written correspondence with his appellate public defender concerning the issues that might be raised in a petition for further review by the supreme court. Lynch's appellate counsel stated her opinion that, contrary to Lynch's suggestion, the case of *State v. Krause*, 817 N.W.2d 136 (Minn. 2012), did not

apply to his case. She wrote that "there is no legal basis for you to claim you were denied the right to counsel or were prejudiced" and that "[y]ou have no constitutional right to the lawyer of your choice or for a private lawyer to be made to continue to represent you when a conflict arises." Before stating that conclusion, Lynch's appellate counsel recited relevant facts, including a statement that Lynch was represented by counsel at the August 15 hearing at which his retained attorney sought withdrawal. In fact, Lynch was not represented at that hearing by any attorney other than the attorney who was seeking to withdraw. Lynch's appellate counsel may have been misled by the first page of the transcript, which states incorrectly that the attorney who represented Lynch's attorney represented Lynch. In her letter, Lynch's appellate counsel invited Lynch to raise additional issues of his choosing in a *pro se* supplemental petition. Lynch did so, though he did not rely on *Krause*. The supreme court denied both the petition and the *pro se* supplemental petition for further review.

Less than two years later, Lynch petitioned for postconviction relief, with the assistance of newly retained counsel. He alleges four claims: (1) he was denied effective assistance of appellate counsel, (2) he was denied the assistance of counsel at a critical stage, (3) the district court violated his right to his counsel of his choice, and (4) he was appointed an attorney with a conflict of interest. Lynch also submitted a memorandum of law in which he presented legal argument in support of his claims.

In January 2016, the postconviction court conducted a motion hearing. In March 2016, the postconviction court issued an order in which it denied Lynch's petition. The postconviction court concluded that Lynch's claim of ineffective assistance of appellate

counsel fails because he did not demonstrate that appellate counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by appellate counsel's performance. The postconviction court further concluded that the three underlying claims are procedurally barred. Lynch appeals.

D E C I S I O N

Lynch argues that the postconviction court erred by denying his petition. In general, this court applies an abuse-of-discretion standard of review to a postconviction court's denial of a postconviction petition. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015); *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

I. Claim of Ineffective Assistance of Appellate Counsel

Lynch argues that the postconviction court erred by denying his petition with respect to his first claim, which alleges that his appellate counsel was ineffective in three ways.

The Sixth Amendment to the U.S. Constitution and the Minnesota Constitution guarantee every criminal defendant "the right . . . to have the Assistance of Counsel." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6; *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984); *Ferguson v. State*, 826 N.W.2d 808, 816 (Minn. 2013). To succeed on a claim of ineffective assistance of appellate counsel, a petitioner must prove that (1) appellate 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 direct appeal would have been different. *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008) (citing *Strickland*, 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068 (1984)). When analyzing the first requirement, a court must be

mindful that "[a]ppellate counsel has no duty to raise all possible issues, and may choose to present only the most meritorious claims to the court." *Zornes v. State*, 880 N.W.2d 363, 371 (Minn. 2016). "Appellate counsel does not act unreasonably by not raising issues that he or she could have legitimately concluded would not prevail." *Id.* Furthermore, reviewing courts "employ a strong presumption that appellate counsel's judgment about which issues to raise falls within the wide range of reasonable professional performance." *Id.*

Lynch contends that his appellate counsel was ineffective in failing to raise three issues on direct appeal.

A. Assistance of Counsel at August 15 Hearing

First, Lynch contends that his appellate counsel was ineffective because she did not argue on direct appeal that Lynch was denied his right to counsel at the August 15 hearing on his retained attorney's motion to withdraw. Specifically, Lynch contends that the hearing on the motion to withdraw was a critical stage of the proceedings and that the absence of counsel is a violation of his Sixth Amendment right to counsel. He further contends that the denial of counsel at the hearing is a structural error, which requires reversal without regard to whether the result would have been different.

Lynch has not identified any caselaw that should have caused appellate counsel to make this argument in Lynch's appellate brief to this court. The caselaw indicates that a hearing is a critical stage if there is a "high probability of substantial harm" to the defendant's ability to prepare his defense. *Gerstein v. Pugh*, 420 U.S. 103, 119-23, 95 S. Ct. 854, 866-68 (1975). On the other hand, a hearing is not a critical stage if it has a

"nonadversary character." *Id.* Because the only issue at the August 15 hearing was whether Lynch's attorney should have been permitted to withdraw, it does not appear to have been a critical stage. In the absence of any caselaw that might have supported an argument that Lynch was denied a right to counsel at that hearing, Lynch cannot show either, first, that "appellate counsel's representation fell below an objective standard of reasonableness" or, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Arredondo*, 754 N.W.2d at 571; *see also Evans v. State*, 788 N.W.2d 38, 45 (Minn. 2010) (stating that "appellate counsel is not ineffective for failing to raise issues that themselves have no merit"); *Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997) (concluding that appellate counsel was not ineffective for not raising issue that counsel deems without merit).

Thus, Lynch cannot establish that his appellate counsel was ineffective for not arguing on direct appeal that he was denied his right to counsel at the August 15, 2012 hearing.

B. Denial of Counsel of His Choice

Second, Lynch contends that his appellate counsel was ineffective because she did not argue on direct appeal that Lynch was denied his right to counsel of his choice when the district court granted his attorney's motion to withdraw.

Again, Lynch has not identified any caselaw that would have supported such an argument. As an initial matter, we doubt that the constitutional right to counsel of one's choice extends to a situation in which counsel does not wish to represent the defendant. In any event, the caselaw indicates that a defendant's right to the counsel of his choice is

limited. *State v. Patterson*, 812 N.W.2d 106, 111 (Minn. 2012). There is no "absolute right to retain counsel who has actual or potential conflicts of interest." *Id.* (citing *United States v. Gonzalez-Lopez*, 548 U.S. 140, 151-52, 126 S. Ct. 2557, 2565-66 (2006)). There is a presumption in favor of a defendant's counsel of choice that "may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." *Wheat v. United States*, 486 U.S. 153, 164, 108 S. Ct. 1692, 1700 (1988). District courts have "substantial latitude" to determine the removal of counsel because they "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." *Patterson*, 812 N.W.2d at 111 (quoting *Wheat*, 486 U.S. at 160, 108 S. Ct. at 1698).

Lynch cites *Krause* in support of his contention. But the issue in *Krause* was dissimilar. In *Krause*, the defendant was unrepresented at a hearing where the district court determined that he had forfeited his right to appointed counsel. 817 N.W.2d at 142-43. The supreme court concluded that Krause was denied his right to procedural due process because he did not have counsel when the district court determined that he had forfeited his constitutional right to counsel. *Id.* at 139-43, 146. *Krause* is inapplicable because Lynch's right to counsel never was in danger and because the district court appointed a public defender after allowing his retained attorney to withdraw. Accordingly, Lynch cannot show that "appellate counsel's representation fell below an objective standard of reasonableness" or, second, that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Arredondo*, 754 N.W.2d at 571; *see also Evans*, 788 N.W.2d at 45; *Black*, 560 N.W.2d at 86.

Moreover, having not made the argument to this court, Lynch's appellate counsel was not ineffective for not raising the issue in a petition for further review by the supreme court.

Thus, Lynch cannot establish that his appellate counsel was ineffective for not arguing on direct appeal that he was denied his right to counsel of his choice.

C. Conflict of Interest

Third, Lynch contends that his appellate counsel was ineffective because she did not argue on direct appeal that Lynch's public defender had a conflict of interest on the ground that the public defender was affiliated with the part-time public defender who previously had given the jailhouse letter to a prosecutor.

Lynch cites no caselaw for the proposition that the affiliation between the two public defenders is sufficient to establish a conflict of interest. *See State v. Holscher*, 417 N.W.2d 698, 701 (Minn. App. 1988) (concluding that conflict of interest did not exist on ground that defendant's public defender worked in same office as public defender representing victim in another matter), *review denied* (Minn. Mar. 18, 1988). Rather, Lynch must prove that his appointed counsel "actively represented conflicting interests" or that conflicting interests "adversely affected [the] lawyer's performance." *Cooper v. State*, 565 N.W.2d 27, 32 (Minn. App. 1997) (alteration in original) (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 348, 350, 100 S. Ct. 1708, 1718, 1719 (1980)), *review denied* (Minn. Aug. 5, 1997). Lynch has not shown that his public defender "actively represented" interests that were adverse to Lynch in such a way that her representation was diminished. *Cooper*, 565 N.W.2d at 32. For that reason, Lynch cannot show that "appellate counsel's representation fell below an objective standard of reasonableness" or, second, that "there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Arredondo*, 754 N.W.2d at 571; *see also Evans*, 788 N.W.2d at 45; *Black*, 560 N.W.2d at 86.

Thus, Lynch cannot establish that his appellate counsel was ineffective for not arguing on direct appeal that he was denied his right to counsel because his public defender had a conflict of interest. Therefore, the postconviction court did not err by concluding that Lynch's claim of ineffective assistance of appellate counsel is without merit.

II. Procedural Bar

Lynch also argues that the postconviction court erred by concluding that the three claims underlying his ineffective-assistance claim, standing alone, are procedurally barred.

After an offender has had a direct appeal, "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* Minn. Stat. § 590.01, subd. 1 (2016). The supreme court has recognized two exceptions to the *Knaffla* bar. A claim may not be procedurally barred: (1) "if the claim involves an issue so novel that its legal basis was not reasonably available at the time of the direct appeal," or (2) if reviewing the claim would be in the interests of justice because it "has substantive merit and the petitioner did not deliberately and inexcusably fail" to raise the issue previously. *Swaney v. State*, 882 N.W.2d 207, 215 (Minn. 2016). It is an open question whether these two exceptions apply to postconviction petitions after the 2005 amendments to chapter 590 of the Minnesota Statutes, which codified the *Knaffla* bar. *Id.* at 215 n.4 (citing Minn. Stat. § 590.01, subd. 1).

The postconviction court reasoned that all three of Lynch's claims are *Knaffla*-barred because they either could have been raised on direct appeal but were not raised or actually were raised on direct appeal. The postconviction court found that neither exception to the *Knaffla* bar applies.

We agree with the postconviction court that Lynch's second, third, and fourth postconviction claims either were raised on direct appeal or were known but not raised at that time. *See Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. We also agree with the postconviction court that none of the exceptions to the *Knaffla* rule applies. First, none of the three postconviction claims "involves an issue so novel that its legal basis was not reasonably available at the time of the direct appeal" but now is available. *Swaney*, 882 N.W.2d at 215; *Sanders v. State*, 628 N.W.2d 597, 600 (Minn. 2001). Rather, the applicable law is unchanged; Lynch does not rely on any intervening developments in the caselaw. Second, for the reasons stated above in part I, none of the three postconviction claims "has substantive merit," and Lynch cannot show that he "did not deliberately and inexcusably fail" to raise the issue on direct appeal. *See Swaney*, 882 N.W.2d at 215.

Therefore, the postconviction court did not err by concluding that Lynch's second, third, and fourth postconviction claims are procedurally barred.

Affirmed.