STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0690

Anthony Scott David Auginaush, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 29, 2021
Affirmed
Connolly, Judge

Clearwater County District Court
File No. 15-CR-18-33

Anthony Scott David Auginaush, Moose Lake, Minnesota (pro se appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kathryn A. Lorsbach, Clearwater County Attorney, Bagley, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Frisch, Judge; and Smith, John, Judge.*

NONPRECEDENTIAL OPINION

CONNOLLY, Judge

Pro se appellant challenges the denial of his postconviction petition, arguing that he received ineffective assistance of counsel in negotiating his plea agreement, and with

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

respect to a waiver of his right to an adult certification hearing. Because the postconviction court did not abuse its discretion in denying the petition, we affirm.

FACTS

In December 2017, appellant Anthony Auginaush was charged in juvenile court with one count of criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1(g) (2012). At the time of the petition, appellant was 22 years old. The petition alleged that when appellant was 17 years old, he engaged in sexual penetration with the complainant, who was under 16 years of age.[1]

Respondent State of Minnesota moved to certify the case for prosecution of appellant as an adult. The offense was a presumptive certification because appellant was 17 at the time the offense was committed, and the offense was a presumptive commitment to prison under the sentencing guidelines. *See* Minn. Stat. § 260B.125, subd. 3 (2020).

Appellant waived his right to a certification hearing in January 2018, and agreed to have the charge prosecuted in adult court. As part of his plea agreement, the state agreed to charge only one count of criminal sexual conduct, even though the complaint alleged that there were two other victims. The state also agreed to jointly recommend a stay of execution of any prison sentence.

At the plea hearing, the district court asked appellant if he understood that "the only agreement [offered was] that the state [would] not charge out additional charges and that

[1] The petition also alleged that appellant sexually abused three of his female cousins, all of whom were significantly younger than him, but did not include any charges based on these incidents.

they [would] jointly *recommend* that the Court not send [him] to prison and stay the execution of sentence." (Emphasis added.) He answered, "[y]es." Appellant also signed a plea petition that clearly stated that he had "been told by his attorney and under[stood]" his rights to a jury trial, and that he could request to withdraw his plea. The plea petition also states the following:

> I have been told by my attorney and I understand that:
>
> My attorney discussed this case with one of the prosecuting attorneys, and my attorney and the prosecuting attorney agree that if I enter a plea of guilty, the prosecutor will do the following . . . : *Waive cert[ification], [and] plead as charged, [and] they will recommend a stay of execution, [and] probation, [and] won't charge out [the] two other counts*.

(Emphasis added.) The district court accepted appellant's guilty plea to one count of criminal sexual conduct in the first degree.

At sentencing, the district court again asked appellant if he understood that his plea agreement only guaranteed that the state would recommend probation, and that the recommendation "is just a recommendation that [the court doesn't] have to follow," and that the court could choose to execute the sentence. He answered "[y]es." Further, the court noted that it sounded like appellant had talked at length with his attorney, "about the issues and the risks of withdrawing [a] plea and going to trial on all the charges as well as the risks of proceeding [with sentencing]," which appellant agreed was true.

Before appellant was sentenced, his counsel asked the district court to follow the joint recommendation and grant appellant's motion for a downward dispositional departure from the sentencing guidelines. The state noted that although the victims and their families

wanted the district court to impose a prison sentence, the state would still be recommending probation per the plea agreement. The district court proceeded to impose a 144-month executed prison sentence, reasoning that despite the joint recommendation for probation and "some" evidence of amenability, there was also evidence that "cuts the other way."

Appellant filed a direct appeal of the denial of his motion for a downward dispositional departure on the grounds that "his culpability [was] mitigated," and "that he [was] particularly amenable to probation." *State v. Auginaush*, No. A18-1363, 2019 WL 3407225, at *2-4 (Minn. App. July 29, 2019), *rev. denied* (Minn. Oct. 15, 2019). This court affirmed the district court's decision, stating that "the fact that the state and [appellant] jointly recommended probation does not mean that the district court abused its discretion by not adopting the recommendation." *Id*. at *5.

In January 2021, appellant filed a petition for postconviction relief. The petition primarily alleged ineffective assistance of counsel, and because of that ineffectiveness, improper advisement as to his rights to a hearing on his adult certification. Appellant requested that the district court's judgment and sentence be vacated, that an evidentiary hearing be held to examine the material facts surrounding his case, and that he be granted a new trial. The postconviction court denied his petition for postconviction relief, and appellant challenges the denial.

DECISION

This court reviews the denial of a postconviction petition for abuse of discretion. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016). The postconviction court's legal conclusions are reviewed de novo and its findings of fact are reviewed for clear error. *Id*.

An appellate court will "not reverse the postconviction court unless the postconviction court exercised its discretion in an arbitrary and capricious manner, based on its rulings on an erroneous view of the law, or made clearly erroneous factual findings." *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015) (quotation omitted). Finally, a postconviction court's denial of relief on a claim of ineffective assistance of counsel involves questions of law and fact. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). Thus, an appellate court reviews factual findings for clear error and the court's legal conclusions concerning ineffective assistance of counsel de novo. *Id*. at 503-04.

I. Appellant's claims are *Knaffla* barred.

Appellant challenges the postconviction court's decision that his claims of ineffective assistance of counsel are barred by *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). Under the *Knaffla* rule, "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Knaffla*, 243 N.W.2d at 741. The *Knaffla* rule bars a postconviction ineffective-assistance-of-trial-counsel claim when the claim is based solely on the trial record and thus, the claims were known, or should have been known, and brought, on direct appeal.[2] *Evans v. State*, 788 N.W.2d 38, 44 (Minn. 2010).

There are two exceptions to the *Knaffla* rule. A claim that was not raised on direct appeal may be considered "if (1) the defendant presents a novel legal issue or (2) the

[2] This rule is codified under Minn. Stat. § 590.01, subd. 1 (2020), which states that a petition for postconviction relief filed after the disposition of a direct appeal "may not be based on grounds that could have been raised on direct appeal of the conviction or sentence."

interests of justice require the court to consider the claim." *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011). To fall under the second exception, and be considered in the interest of justice, a claim must "have merit and be asserted without deliberate or inexcusable delay." *Id*. (quotations omitted).

The postconviction court determined that appellant's claims of ineffective assistance of trial counsel were known when he filed his direct appeal and were not raised. The postconviction court concluded that because both the claim of ineffective assistance of counsel and the claim related to a certification hearing were known or should have been known based on the record of the plea hearing, they should have been raised on direct appeal and are subsequently barred by *Knaffla*.

Appellant argues that the postconviction court's decision is erroneous for two reasons. First, he contends that he did not understand his rights as to the waiver of his certification hearing and that the only reason he waived his rights was so that he could agree to the plea agreement. Further, he contends that the only reason he agreed to the plea agreement was because there was a "promise outlined in the plea agreement that he would not be sentenced to prison and would only receive probation." Second, he argues that his counsel was ineffective because he was under the false impression, due to his lawyer, that "the state was bound to their plea agreement and that he would not [go] to prison." Finally, he argues that conversations between his lawyer and himself go "beyond the trial record" and thus, were not available to him at the time of direct appeal. He posits that the attorney-client communications between him and his attorney must be further investigated and

require an evidentiary hearing. This, he claims, falls within the interests-of-justice exception to *Knaffla*. We disagree.

It is well established that claims that could have been brought based on the district court record are barred by *Knaffla* if not raised on direct appeal. *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007). *Knaffla* prohibits examining the merits of a claim that was already brought, or should have been brought, on direct appeal. *Buckingham*, 799 N.W.2d at 232 (holding two of petitioner's allegations were "undoubtedly *Knaffla* barred because [the court] expressly considered and rejected identical arguments in [petitioner's] direct appeal"). Additionally, claims based on information contained in the district court record are precisely the kind that are available to petitioner on direct appeal and subsequently barred by *Knaffla*. *Wright v. State,* 765 N.W.2d 85, 90 (Minn. 2009) (stating that "[w]ith the exception of [petitioner's] claim for ineffective assistance of appellate counsel and his claim [related to] new evidence . . ., [the court] agree[s] with the postconviction court that *Knaffla* bars consideration of [petitioner's] other claims" (quotations omitted).

Here, the record reflects that appellant, through his counsel, waived his rights to a certification hearing on the record at the January 2018 hearing. The testimony included the following:

> The Court: I am going to read, and have read, the [plea] petition that was filed and accept the information in that as true. In essence you, [appellant], are admitting that the information and the allegations in the [plea] petition are true, do you understand that?
>
> [Appellant]: Yes.

> The Court: Okay. I am going to order a pre-sentence investigation. Accept the agreement to certify so, we will open an adult file.

The record also reflects that, at the May 2018 hearing, the district court confirmed with appellant that he had spoken at length with his lawyer about his choice to accept the plea agreement. The court also confirmed that appellant knew the agreement only required the state to recommend that he receive probation and that the court had every right to choose not to abide by that recommendation. The testimony included the following:

> The Court: First thing then, [appellant], do you understand, sir, that if we proceed to sentencing the state has to follow through with their side of the agreement, which is to recommend that you don't go to prison. But, that is just a recommendation that I don't have to follow it. And that I could choose to execute the sentence. Do you understand that?
>
> [Appellant]: Yes.

As the postconviction court found, both appellant's claims of ineffective assistance of trial counsel (one related to his rights to a certification hearing and the other related to the waiver of his trial rights and plea agreement) are barred by *Knaffla* because neither claim required further development of the record. Similar to the claims in *Buckingham*, appellant's claims rely on the trial record and were available to him on direct appeal. First, his claim related to lack of information as to his certification hearing was duly noted on the record at the January 3, 2018 hearing, meaning it was available to him on direct appeal and is now barred under *Knaffla*. While appellant asserts this claim should be considered as falling under the interests-of-justice exception to *Knaffla*, he does not provide support for this assertion. Additionally, his argument for an evidentiary hearing, related to the

certification issue, relies on reasons why he should not have been certified. He asserts that he should not have been certified because of mitigated culpability and because he was found to be particularly amenable to probation. These issues were specifically addressed on direct appeal and again, are barred by *Knaffla*.

II. Even if not barred by *Knaffla*, appellant's claims for ineffective assistance of counsel fail under both prongs of the *Strickland* test.

Appellant also argues that his counsel provided ineffective assistance of counsel as defined by *Strickland v. Washington*, 466 U.S. 668 (1984). Under *Strickland*, a convicted defendant alleging ineffective assistance of counsel must show that (1) their 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. 466 U.S. at 687-91; *see also Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015). If a petitioner fails to prove one prong, the court need not address the other. *Nissalke*, 861 N.W.2d at 94. We conclude that appellant's argument fails under both prongs of *Strickland*.

In order for a defendant to prove that his counsel's representation fell below an objective standard of reasonableness, he must show that his attorney's performance was unreasonable "under prevailing professional norms." *Strickland*, 466 U.S. at 687-88. In a criminal case, the professional expectation is that counsel advocate for the defendant's cause and "consult with [him] on important decisions." *Id* at 688. If counsel's "assistance was reasonable considering all the circumstances" then they have met their professional duty. *Id*.

Appellant argues that his counsel's performance fell below an objective standard of reasonableness because she did not advise him of his rights to a jury trial and failed to "negotiate a new plea before sentencing," which caused appellant to be sentenced to the 144-month sentence. He also argues that his counsel did not properly notify him of his rights as to his certification hearing and that he would not have waived his certification hearing if he had known he would be sentenced to prison.

These claims fail under the first prong of *Strickland*. Appellant's plea petition clearly laid out his waiver of a probable cause hearing, pre-trial hearing, and jury trial. It was also clear from the record that appellant's counsel, in the presence of appellant, agreed to waive a certification hearing after stating that she had reviewed appellant's rights with him. And in an order certifying the matter to adult court, the district court noted that appellant agreed to waive his right to a certification hearing. This was done pursuant to the parties' agreements and pursuant to Minn. Stat. § 260B.125, subd. 6 (2020).[3]

Appellant's counsel also secured a plea agreement that omitted several other allegations of criminal sexual conduct and included a joint recommendation with the state that appellant receive probation instead of an executed prison sentence. Moreover, there is evidence that appellant's counsel asked to continue hearings so that she could "have time

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[3] A child can waive the right to a certification hearing. Minn. R. Juv. Delinq. P. 18.07, subd. 1. Any order issued under rule 18 is a final order and appealable under rule 21.03. *Id.*, subds. 4, 5; Minn. R. Juv. Delinq. P. 21.03, subd. 1(A)(1). Under Minn. R. Juv. Delinq. P. 21.03, subd. 2(B)(1), appellant had 30 days from the certification order to file an appeal. Because no appeal was filed, the certification order became final 30 days after it was entered. The order was entered on January 3, 2018, and became final around February 2, 2018. Appellant did not appeal his certification order until May 26, 2021, and thus, is untimely and barred.

to talk to with him" about his case. And at sentencing, counsel advocated for the district court to issue a downward dispositional departure because appellant was victimized as a child and was deemed to be particularly amenable to probation. Further, the district court noted that "it sound[ed] like [appellant had] talked at length with [counsel]" about his case. These actions evidence counsel's advocacy for appellant and thoroughness in consulting him on important aspects of his case. Therefore, appellant cannot prove that his counsel's performance fell below an objective standard of reasonableness.

Similarly, both of appellant's claims fail the second prong of *Strickland* and the postconviction court did not err in denying appellant's claims. First, appellant's claim that his counsel failed to advise him of his trial rights, and that this contributed to his decision to plead guilty, is clearly contradicted by the record. The district court asked appellant multiple times if he understood his plea agreement and each time he agreed in the affirmative. Moreover, the plea petition specifically mentioned that he was waiving his right to a certification hearing. Appellant's argument that his claims successfully proved the second prong of *Strickland* is erroneous.

Second, appellant's claim that but for his counsel's ineffectiveness he would not have waived his certification right and thus, would not have accepted the plea agreement that resulted in his 144-month sentence, fails. Under Minnesota law, it is presumed that a child will be certified for prosecution in adult court if "(1) the child was 16 or 17 years old at the time of the offense; and (2) the delinquency petition alleges that the child committed an offense that would result in a presumptive commitment to prison." Minn. Stat. § 260B.125, subd. 3; *See* Minn. R. Juv. Del. Pro. 18.06, subd. 1. The presumption of

certification is overcome if the juvenile demonstrates by clear and convincing evidence that retaining the proceedings in juvenile court serves public safety. *Id.*

In *In re Welfare of S.J.T.*, this court stated that "[i]nsufficient time for rehabilitation under the juvenile system is an appropriate consideration when determining whether to certify a juvenile." 736 N.W.2d 341, 354 (Minn. App. 2007), *rev. denied* (Minn. Oct. 24, 2007). Here, appellant was 17 years old at the time of the offense and was alleged to have committed a crime for which there is a presumptive sentence. *See* Minn. R. Juv. Del. Pro. 18.06, subd. 1. Thus, it would have been appellant's burden to show by clear and convincing evidence that retaining the case in juvenile court would serve public safety. *See id*. The postconviction court found that there was no reasonable probability that appellant would have met this burden. This finding is supported by the record. Appellant was charged with criminal sexual conduct in the first degree, abused his victim multiple times, required sex offender treatment, and was 22 at the time he pled guilty for the events that occurred in 2013. As such, there was insufficient time for rehabilitation under the juvenile system. *See S.J.T*, 736 N.W.2d at 354. Appellant cannot say that but for his counsel's advice in waiving his certification hearing he would not have been certified. Thus, his claims fail the second prong of *Strickland.*

In reaching our decision, we are aware of the Supreme Court's interpretation of the second prong of *Strickland* as discussed in *Lee v. United States*, 137 S. Ct. 1958 (2017). In *Lee,* the defendant was indicted on one count of possessing ecstasy with intent to distribute. *Id*. at 1963. The defendant, a lawful permanent resident of the United States "repeatedly" asked his attorney of the risk of deportation if he entered a guilty plea. *Id*.

The defendant's attorney consistently, and erroneously, assured him that "there was nothing to worry about [because] the Government would not deport him if he pleaded guilty." *Id* at 1962. The defendant's sentence, as a result of his guilty plea, included deportation after completion of his prison sentence. *Id*. at 1963.

In addressing the defendant's ineffective assistance of counsel claim, the Supreme Court focused not on whether ineffective counsel would have changed the outcome of the case, but on "whether the defendant was prejudiced by the denial of the entire judicial proceeding to which he had a right." *Id*. at 1965 (quotation omitted). The Supreme Court noted that the error committed by the defendant's counsel affected his understanding of the implications of pleading guilty. *Id*. The Court emphasized that this was a determinative factor as to why the defendant would not have pleaded guilty but for his counsel's erroneous advisement. *Id*. at 1967. The Court determined "[t]here [was] no reason to doubt [that] the paramount importance" for the defendant was avoiding deportation and that he would have gambled a lengthier prison sentence at trial in order to avoid deportation. *Id*. at 1968; *see also Padilla v. Kentucky*, 559 U.S. 356, 357 (2010).

The present case is easily distinguishable from *Lee*. Here, appellant was not given false information about his plea agreement. Appellant's counsel and the district court repeatedly explained to appellant the implications of his guilty plea and that the joint recommendation outlined in said plea was "just a recommendation that [the court does not] have to follow." Unlike in *Lee*, appellant was never told that he was not going to prison.

Not only did appellant receive proper counsel from his attorney, but his best option was to accept the plea agreement offered to him. The district court's decision not to follow

the plea agreement is not evidence of ineffective assistance of counsel, as "[i]t is all too tempting for a defendant to second-guess counsel's assistance after [an] . . . adverse sentence." *Strickland*, 466 U.S. at 689. Therefore, even under *Lee's* recent interpretation of the second prong of *Strickland*, appellant's claims fail. Accordingly, the postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief.

Affirmed.