STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2192

Antonio Maurice Delk, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 4, 2012
Affirmed
Hudson, Judge

Stearns County District Court
File No. 73-K8-05-005488

Antonio Maurice Delk, Bayport, Minnesota (pro se appellant)

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Peterson, Judge; and Schellhas, Judge.

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

HUDSON, Judge

Appellant challenges the postconviction court's summary denial of his petition for postconviction relief. Because appellant's postconviction claims are either procedurally barred or fail on the merits, we affirm.

FACTS

In 2007, a jury convicted appellant Antonio Maurice Delk of second-degree intentional murder; second-degree unintentional murder, third-degree depraved-mind murder, and second–degree assault for causing the death of T.M. in 2005. Appellant filed a direct appeal, and this court concluded that the evidence was insufficient to sustain appellant's conviction of second-degree intentional murder and remanded for resentencing on the remaining charges. *State v. Delk*, No. A07-1861, 2008 WL 5333757 (Minn. App. Dec. 23, 2008), *review denied* (Minn. Mar. 17, 2009). On remand, the district court dismissed the second-degree intentional murder charge and vacated appellant's conviction on that count. The district court adopted the jury's verdict on the second-degree unintentional murder charge and sentenced appellant to 240 months in prison.

Appellant filed a second appeal challenging the length of his sentence. He also filed a pro se supplemental brief claiming that, on remand, his sentencing on the second-degree unintentional murder offense violated double-jeopardy principles. This court affirmed appellant's sentence and stated that "[a]fter carefully reviewing appellant's pro se arguments, we find that they lack merit." *State v. Delk*, 781 N.W.2d 426, 430 (Minn. App. 2010), *review denied* (Minn. July 20, 2010), *cert. denied*, 131 S. Ct. 920 (Jan. 10, 2011).

In August 2011, appellant filed a pro se petition for postconviction relief. He argued that, after this court vacated his conviction for second-degree intentional murder, he was entitled to a jury trial on the additional charges of second-degree unintentional

murder and third-degree murder. He also argued that he received ineffective assistance from trial and appellate counsel because they failed to raise this argument, and this court did not previously address this claim when he raised it on his own behalf.

The district court denied appellant's petition without a hearing. The district court concluded that appellant's argument relating to a "defective verdict" was procedurally barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976), because this court had addressed his pro se arguments in the second appeal. *See State v. Delk*, 781 N.W.2d at 430. The district court also concluded that appellant failed to allege sufficient facts to warrant a hearing on his ineffective-assistance claims. The district court noted that decisions regarding trial tactics and which claims to appeal rest in counsel's discretion. The district court observed that, after remand, appellant's counsel filed a notice of appeal challenging the length of his sentence and that appellate counsel could reasonably have concluded that the claimed issue relating to a "defective verdict" lacked merit and would have detracted from the sentencing argument. This appeal follows.

D E C I S I O N

This court reviews the 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 petitioner for postconviction relief "has the burden of establishing, by a fair preponderance of the evidence, facts [that] warrant a reopening of the case." *State v. Rainer*, 502 N.W.2d 784, 787 (Minn. 1993). 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 (2010). 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). "[M]ere argumentative assertions that lack factual support" are insufficient to sustain a petition for postconviction relief. *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000).

I

The district court denied appellant's postconviction petition without an evidentiary hearing, concluding that appellant's "defective verdict" argument was *Knaffla*-barred because it was raised in his direct appeal. If a "direct appeal has once been taken," all issues raised in the appeal, and all issues "known but not raised, will not be considered [in] a subsequent petition for postconviction relief." *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. An exception to this bar applies only if a claim was so novel that its legal basis was not available on direct appeal, or "the petitioner did not 'deliberately and inexcusably' fail to raise the issue on direct appeal," and fairness requires its consideration. *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004). We review a denial of postconviction relief based on the *Knaffla* procedural bar for an abuse of discretion. *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011).

In his sentencing appeal, appellant argued in a pro se supplemental brief that his sentencing violated double-jeopardy provisions because, when this court vacated his conviction for second-degree intentional murder, it was "essentially an acquittal of the charged offense and any and all lesser offenses of murder." This court reviewed appellant's argument and concluded that it lacked merit. *Delk*, 781 N.W.2d at 430.

Therefore, because this issue was raised and considered in appellant's direct appeal, the district court did not err by concluding that it was *Knaffla*-barred and denying an evidentiary hearing on appellant's claim. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

Even if we were to consider appellant's argument relating to a jury trial as somehow differing from his pro se argument in the sentencing appeal, we would conclude that the district court did not abuse its discretion by denying an evidentiary hearing on that claim. Appellant appears to argue that, on remand, the district court erred by sentencing him on the second-degree unintentional murder offense because the state had not proved beyond a reasonable doubt that he committed that offense or third-degree depraved-mind murder. But the jury had already issued its verdict convicting appellant of those offenses. Because appellant had already been convicted of those offenses, the district court's adoption of the jury verdicts and its resentencing did not violate appellant's double-jeopardy rights. *See, e.g.*, *Hankerson v. State*, 723 N.W.2d 232, 240 (Minn. 2006) (recognizing that resentencing is merely continuation of original prosecution for double-jeopardy purposes).

Appellant also appears to suggest, based on Minn. Stat. § 611.02 (2004), that his sentence may be reduced based on "reasonable doubt" about the sufficiency of the evidence to support his conviction of second-degree unintentional murder, as opposed to third-degree depraved-mind murder. *See* Minn. Stat. § 611.02 (stating that if reasonable doubt exists as to which of two or more degrees of an offense a defendant is guilty of, defendant shall be convicted of lowest-degree offense). But the Minnesota Supreme Court has expressly declined to adopt this proposed application of the statute, and

accordingly we reject this argument as well. *State v. Young*, 710 N.W.2d 272, 279 n.1 (Minn. 2006).

II

Appellant argues that his trial and appellate counsel provided prejudicially ineffective assistance by failing to argue that he was entitled to an additional jury trial on the offenses of second-degree unintentional murder and third-degree depraved-mind murder. A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

A party seeking relief on the ground that counsel provided prejudicially ineffective assistance must show "that counsel's representation fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687–88, 694, 104 S. Ct. 2052 (1984)) (quotation marks omitted). The objective-reasonableness prong has been described as "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).

Counsel's performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). Matters involving trial strategy, including what evidence to present, which witnesses to call, and what defenses to raise at trial, are not reviewable for

competency. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999). And "appellate counsel is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail." *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). "When an appellant and his counsel have divergent opinions as to what issues should be raised on appeal, his counsel has no duty to include claims which would detract from other more meritorious issues." *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985).

Appellant argues that both trial counsel and appellate counsel provided prejudicially ineffective assistance because, after remand, they failed to raise the issue of his right to a jury trial on his remaining convictions. The district court concluded that appellant failed to show sufficient facts to warrant an evidentiary hearing based on this argument.[1] We agree. Trial counsel's decision on remand not to raise appellant's suggested jury-trial issue represents a matter of strategy, which this court does not review for competency. *Voorhees*, 596 N.W.2d at 255. And appellate counsel's decision to present only the sentencing argument on appeal was a reasonable choice. As the district court noted, counsel could easily have concluded that appellant's "defective-verdict" argument would have detracted from counsel's argument relating to sentencing. *Case*, 364 N.W.2d at 800. Therefore, we conclude that the district court properly denied a

[1] Although the district court's order denying postconviction relief referred specifically to the denial of appellant's claim of ineffective assistance of appellate counsel, the district court also included in its order legal authority supporting the denial of an ineffective-assistance claim relating to trial strategy. *Voorhees*, 596 N.W.2d at 255. Therefore, we conclude that the district court also implicitly denied appellant's claim relating to ineffective assistance of trial counsel.

hearing on appellant's claim that he was denied effective assistance of appellate counsel. *See* Minn. Stat. § 590.04, subd. 1.

Appellant also argues for the first time on appeal that the district court erred by failing to instruct the jury on the lesser-included offenses of first- and second-degree manslaughter. But because appellant did not raise this argument before the postconviction court, we decline to consider it. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that reviewing court will not consider matters not argued to and considered by the district court).

Affirmed.