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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2081

Alberto Rivera, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 13, 2013
Affirmed
Toussaint, Judge[*]

Hennepin County District Court
File No. 27-CR-08-38132

Alberto Rivera, Bayport, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, III, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Toussaint, Judge.

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

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

TOUSSAINT, Judge

In this pro se appeal, appellant Alberto Rivera challenges the district court's denial of his petition for postconviction relief as untimely and *Knaffla*-barred. Because the district court properly denied the petition, we affirm.

D E C I S I O N

We review the district court's denial of a postconviction petition for abuse of discretion and will not reverse the decision unless the district court "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Reed v. State*, 793 N.W.2d 725, 732 (Minn. 2010).

I. Timeliness

The first basis on which the postconviction court denied Rivera's petition was that it was untimely. A criminal defendant may not file a petition for postconviction relief more than two years "after the entry of judgment of conviction or sentence if no direct appeal is filed." Minn. Stat. § 590.01, subd. 4(a)(1) (2012). When a defendant files a direct appeal, a petition for postconviction relief may not be filed more than two years after the disposition of the direct appeal. *Id.*, subd. 4(a)(2) (2012).

Rivera filed a direct appeal from his sentence, and this court issued its decision on April 27, 2010, affirming his first-degree criminal-sexual-conduct conviction. *State v. Rivera*, No. A09-1023, 2010 WL 1657400 (Minn. App. Apr. 27, 2010), *review denied* (Minn. June 29, 2010). Rivera's conviction became final on June 29, 2010, when the

supreme court denied his petition for further review. *Id.* Rivera, however, did not file his post-conviction petition until October 10, 2012, nearly three and a half months after the time limit had expired. Therefore, his post-conviction petition is untimely under Minn. Stat. § 590.01, subd. 4(a)(2).

An otherwise untimely petition for postconviction relief may be heard by the court if an exception set out in section 590.01, subdivision 4(b), applies. *See id.*, subd. 4(b) (2012). One such exception is that the petition is based on newly discovered evidence that "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition . . . and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." *Id.*, subd. 4(b)(2) (2012); *see also Tscheu v. State*, __ N.W.2d __ (Minn. Apr. 24, 2013) (stating that newly discovered evidence must be "material, not merely impeaching, cumulative, or doubtful") (quotation omitted).

Rivera claims his petition is not barred because it is based on newly discovered statements made by I.S., sister to the two victims, to the police during the investigation. I.S. told the police that Rivera never abused her and that she never witnessed him abusing her siblings. Rivera admits that his trial counsel was aware of I.S.'s statements to the police, but claims that his trial counsel deliberately withheld them to convince Rivera to plead guilty. Because Rivera's counsel was aware of the statements, they are not newly discovered. *See id.* (stating that newly discovered evidence is evidence that could not known to "petitioner or petitioner's attorney").

Moreover, as the district court found, I.S.'s statements do not establish by "clear and convincing" evidence that Rivera did not sexually abuse I.S.'s siblings. Thus, the district court properly concluded that the newly discovered evidence exception did not apply.

Rivera also argues that his petition should be heard because it is not frivolous and is in the interests of justice. *See* Minn. Stat. § 590.02, subd. 4(b)(5) ("[A] court may hear a petition for postconviction relief if . . . the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice."). This exception only applies in "exceptional situations." *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010). In deciding whether to grant relief in the interests of justice, a court should also consider the degree to which the parties may have been at fault for the alleged error, whether some fundamental unfairness to the petitioner needs to be addressed, and whether action by the court is necessary to protect the integrity of judicial proceedings. *Id.* at 587.

This is not an exceptional situation where a fundamental unfairness needs to be addressed. I.S.'s statements do not completely exonerate Rivera and the district court did not abuse its discretion in concluding that "I.S.'[s] testimony would [not] have changed [Rivera's] chances at trial." Rivera fails to demonstrate that the interests-of-justice exception applies. Thus, the district court properly concluded that Rivera's petition was time barred.

II. *Knaffla*

Rivera also raises claims in his postconviction appeal regarding his guilty plea that we conclude are not only untimely, but are also barred under the *Knaffla* rule. The *Knaffla* rule provides that when a petition for postconviction relief follows a direct appeal of a conviction, all claims that were raised in the direct appeal are procedurally barred and may not be considered. *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011) (citing *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976)); *see* Minn. Stat. § 590.01, subd. 1(2) (2012) ("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."). This bar also applies to all claims that should have been known on direct appeal. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002).

Rivera previously filed a direct appeal in which he challenged the voluntariness and intelligence of his guilty plea. *Rivera*, 2010 WL 1657400, at *2-3. Here, Rivera also challenges the voluntariness of his plea, arguing that the district court accepted it against his wishes and that his microphone during the plea hearing was not working correctly. Because issues involving the validity of Rivera's plea depend on evidence that he possessed during his direct appeal and because those issues are similar, although not identical, to issues raised by Rivera in his direct appeal, the district court correctly concluded that those claims are barred by *Knaffla*. *See Ives v. State*, 655 N.W.2d 633, 635–36 (Minn. 2003) (concluding that claims which are similar, although not identical, to those raised on direct appeal are barred by *Knaffla*).

III. Evidentiary Hearing

Finally, Rivera argues that the district court erred by not holding an evidentiary hearing about the newly discovered exculpatory evidence. The postconviction court must grant an evidentiary hearing if the petitioner alleges "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). If the petition, the files, and the records of the proceeding conclusively show that the petitioner is not entitled to relief, the court may summarily deny the petitioner's motion without granting such a hearing. Minn. Stat. § 590.04, subd. 1 (2012); *see also Ferguson*, 645 N.W.2d at 446 (stating that the petitioner must present "more than argumentative assertions without factual support" in order to receive an evidentiary hearing (quotation omitted)). Because Rivera's claims are time-barred and *Knaffla*-barred, the district court did not err by dismissing his petition without an evidentiary hearing.

Affirmed.