STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2092

Pyotr Shmelev, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 14, 2008
Affirmed; motion denied
Hudson, Judge

Hennepin County District Court
File No. 01031431

Pyotr Shmelev, #208056, MCF – Stillwater, 970 Pickett Street North, Bayport, Minnesota 55003 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

Michael O. Freeman, Hennepin County Attorney, Jean E. Burdorf, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

HUDSON, Judge

In this pro se postconviction appeal, appellant argues that (1) he received ineffective assistance of trial and appellate counsel, and (2) he is entitled to retroactive application of Minn. Stat. § 244.10, subd. 5 (2006). Appellant also moved to strike portions of the state's brief because it is not in conformity with Minn. R. Civ. App. P. 128.03. We affirm, and we deny appellant's motion.

FACTS

On February 24, 2001, appellant Pyotr Shmelev killed his wife, S.P., during a heated argument in which S.P. claimed that she was having an extramarital affair. Appellant then dismembered S.P.'s body, drove to Missouri, and disposed of all of S.P.'s body parts, except for her head, which he retained in the trunk of his car. On March 11, 2001, appellant contacted an attorney who made arrangements for appellant to confess his actions to police on March 14, 2001. Shortly thereafter, appellant was indicted on charges of premeditated first-degree murder and intentional murder in the second degree.

At the close of the evidence at trial, appellant requested jury instructions on felony (unintentional) murder in the second degree and manslaughter in the first degree. The district court granted appellant's requests. The jury then acquitted appellant of premeditated first-degree murder but found him guilty of intentional second-degree murder. The district court subsequently sentenced appellant to 360 months in prison, an upward departure from the guidelines sentence of 306 months. The court cited mutilation of S.P.'s body as the basis for the departure.

Appellant appealed his conviction and this court affirmed in *State v. Shmelev*, No. C2-02-302, 2002 WL 31867453 (Minn. App. Dec. 24, 2002), *review denied* (Minn. Mar. 18, 2003). Appellant also filed a petition for writ of habeas corpus in federal district court, which was denied on February 11, 2005. *Shmelev v. Dingle*, No. 03-3315 (D. Minn. Feb. 11, 2005). Appellant then filed several other motions in federal district court: a motion to proceed in form pauperis; a motion to alter or amend judgment; a motion for hearing to resolve factual questions; and a motion for certificate of appealability. The federal court denied all of his motions, except for his motion to proceed in forma pauperis. *Shmelev v. Dingle*, No. 03-3315 (D. Minn. May 23, 2005). Appellant subsequently filed a petition for postconviction relief, asserting claims of: (1) ineffective assistance of trial counsel; (2) ineffective assistance of appellate counsel; and (3) retroactive application of Minn. Stat. § 244.10, subd. 5 (2006). The district court denied appellant's request for relief on September 4, 2007. This appeal follows.

D E C I S I O N

On review of a postconviction decision, this court determines whether there is sufficient evidence to support the postconviction court's findings. *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006). The postconviction court's decision will not be overturned unless the court has abused its discretion. *Id.* A postconviction court's legal determinations are reviewed de novo, but its factual findings will not be set aside unless they are clearly erroneous. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006); *Doppler v. State*, 660 N.W.2d 797, 801 (Minn. 2003).

I

Appellant argues that he was denied the effective assistance of both trial and appellate counsel. In order to succeed on a claim for ineffective assistance of counsel, appellant "must affirmatively prove that his 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.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). There is a strong presumption that a counsel's performance falls within the range of reasonable professional assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (quotation marks omitted).

A. Trial Counsel

Appellant argues that his trial counsel provided ineffective assistance by: (1) failing to make the proper objection relating to evidence of appellant's pre-arrest consultations with his attorney, and (2) failing to conduct an adequate pre-trial investigation.

1. Evidence of appellant's pre-arrest consultation with counsel

At trial, the prosecutor elicited testimony from a police officer regarding when the police were contacted and when appellant's confession actually occurred. Appellant contends that this testimony implied that he colluded with his attorney prior to confessing in order to concoct a story regarding how the murder happened. Although appellant's

attorney objected at trial on the basis of relevance, appellant claims that his trial counsel should have objected to the evidence under Minn. R. Evid. 403. Appellant contends that his trial counsel's failure to make the proper objection deprived him of the effective assistance of counsel.

We disagree. It is well settled that a defense attorney's failure to make proper objections is not a sufficient basis to find ineffectiveness of counsel. *State v. Prettyman*, 293 Minn. 493, 494, 198 N.W.2d 156, 158 (1972); *Sanderson v. State*, 601 N.W.2d 219, 226 (Minn. App. 1999), *review denied* (Minn. Mar. 28, 2000). Moreover, trial counsel's objection to the challenged testimony on the grounds of relevance was a tactical decision well within trial counsel's proper discretion. This court's "review of trial counsel's performance does not include reviewing attacks on trial strategy." *Pippitt v. State*, 737 N.W.2d 221, 230 (Minn. 2007). Finally, even if appellant was able to establish a deficient performance by his trial counsel, he is not entitled to relief because this court has already determined that any error in the introduction of the challenged testimony constituted harmless error. *Shmelev*, 2002 WL 31867453, at *2.

2. Pre-trial investigation

Appellant also contends that he was denied the effective assistance of counsel because his trial counsel failed to adequately investigate appellant's claim that S.P. had sex with another man on the day she was murdered. Appellant argues that, had the jury heard evidence that his wife was unfaithful on the very day of the murder, the jury would have accepted his heat-of-passion argument.

If a petitioner has directly appealed a conviction, "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). This rule—known as the *Knaffla* rule—includes claims the petitioner should have known about at the time of his direct appeal. *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004). *Knaffla* similarly bars postconviction review of claims that could have been raised in a previous postconviction petition. *Wayne v. State*, 601 N.W.2d 440, 441 (Minn. 1999). There are two exceptions to the *Knaffla* rule, which apply (1) if the claim "is so novel that its legal basis was not reasonably available at the time of the direct appeal" or (2) if "fairness would require a review of the claim in the interest of justice and there was no deliberate or inexcusable reason for the failure to raise the issue on direct appeal." *McKenzie*, 687 N.W.2d 905–06 (quotation omitted).

Here, appellant's claim is barred under the *Knaffla* rule because it was known at the time of appellant's direct appeal and none of the exceptions apply. *See Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007) (stating that the defendant's claim that his defense counsel's failure to interview witnesses and fully investigate the case was barred under *Knaffla*). But even if we addressed the issue on the merits, trial counsel's decision not to investigate the matter further was a tactical decision not reviewable by this court. Moreover, the state presented two witnesses who admitted that they had engaged in extramarital affairs with S.P.; trial counsel apparently determined this evidence was sufficient to support the heat-of-passion claim. Accordingly, appellant has failed to establish that he was denied the effective assistance of trial counsel.

B. Appellate Counsel

The two-prong *Strickland* test also applies to ineffective-assistance-of-counsel claims for appellate counsel. *McDonough v. State*, 675 N.W.2d 53, 56 (Minn. 2004). The supreme court has said that "[a]ppellate counsel need not raise all possible claims on direct appeal, and a claim need not be raised if 'appellate counsel could have legitimately concluded that [it] would not [prevail].'" *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (alterations in original) (quoting *Schneider v. State*, 725 N.W.2d 516, 523 (Minn. 2007)).

Appellant argues that his appellate counsel failed to provide him with effective assistance by: (1) failing to adequately raise and argue sentencing issues; (2) failing to correct factual errors regarding the number and nature of the victim's wounds; and (3) making an improper argument pertaining to the admission of statements concerning appellant's pre-arrest contacts with trial counsel.

1. Sentencing issues

On direct appeal, appellant's appellate counsel argued that appellant's dismemberment of S.P.'s body did not warrant the 54-month upward departure of appellant's sentence. Appellant argues that his appellate counsel should have argued that because the state could have charged appellant with violating Minn. Stat. § 609.502, subd. 1 (2000), for dismembering S.P.'s body, it was precluded from using the dismemberment as an aggravating factor under Minn. Stat. § 609.035 (2000). Appellant claims that because his appellate counsel made the "wrong" argument, he received ineffective assistance from his appellate counsel.

We disagree. Minn. Stat. § 609.502, subd. 1, provides: "Whoever interferes with the body or scene of death with intent to mislead the coroner or conceal evidence is guilty of a gross misdemeanor." But it is unclear whether appellant could have been charged with this offense, which requires intent on the part of a defendant to mislead or conceal evidence. From the record before us, we do not know if appellant acted with intent to conceal evidence or whether he acted out of anger, spite, or to inflict the ultimate insult on the victim and her family. Thus, it is unclear whether appellant could have been charged with this offense.

Even if appellant could have been charged under this statute, the district court was not precluded from using appellant's conduct to establish that the victim and her family were treated with "particular cruelty." *See* Minn. Sentencing Guidelines II.D.2.b.(2) (providing that a permissible aggravating factor includes that "[t]he victim was treated with particular cruelty for which the individual offender should be held responsible"). Appellant's actions were particularly abhorrent and included dismembering S.P.'s body with a reciprocating saw, driving several hundred miles to Missouri where he disposed of all of her body parts, except for her head, which he kept in the trunk of his car for several weeks. The supreme court has upheld sentencing departures based on similar conduct. *See, e.g.*, *State v. Griller*, 583 N.W.2d 736, 744 (Minn. 1998) (affirming upward departure from presumptive 306-month sentence to 480 months where defendant dismembered victim and buried him in backyard).

While the supreme court recently reversed, as based on uncharged conduct, a double durational departure that relied upon the aggravating factors of zone of privacy

and particular cruelty, the court specifically indicated that these factors were not eliminated as permissible aggravating factors and that they may survive in an appropriate case. *State v. Jackson*, 749 N.W.2d 353, 360 n.3 (Minn. 2008). Because appellant's conduct during and after the murder made his offense particularly more serious than that typically involved in the commission of intentional second-degree murder, the district court did not impermissibly base its approximately 16 percent upward departure on uncharged conduct. Thus, appellate counsel was not ineffective for failing to argue the sentencing issue in a different manner. *Cf. Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) (stating that counsel cannot be ineffective for failing to make a motion that would have been denied).

2. Claimed factual errors

According to appellant, the state's brief erroneously stated that the victim was stabbed ten times. Appellant contends that because his attorney failed to resolve on appeal this "critical" factual dispute about the nature and number of the victim's wounds, his appellate counsel was ineffective. We disagree. The record supports the state's assertion that the victim was stabbed ten times. The medical examiner testified that the victim suffered "seven" stab wounds before death and that three of these wounds "directly or in combination together caused her death." He also explained that she suffered "three additional stab wounds to the abdomen, as well as two slash wounds to the abdomen" that "occurred after death." Although appellant correctly states that not all of the ten stab wounds contributed to the victim's death, counsel's apparent failure to make this distinction was irrelevant to the issues appellant raised on direct appeal.

Moreover, even if appellate counsel should have made the distinction, the nature and number of the victim's wounds was not a dispositive factor in this court's holding. This court previously rejected appellant's claim that the district court erred in allowing testimony that impermissibly penalized appellant for exercising his constitutional right to counsel and to remain silent. *Shmelev*, 2002 WL 31867453, at *2–*3. Relying, in part, on the location, severity, and number of the victim's stab wounds, the court concluded that there was ample evidence to show appellant intended to kill his wife, and therefore, "even if" there had been an error, the error was harmless. *Id.* at *3. Because these statements were arguably dicta and were not dispositive of this court's holding, appellant cannot show that "but for" his appellate counsel's alleged error, "the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

3. Pre-arrest consultation with counsel

Appellant's appellate counsel made the argument on appellant's direct appeal that the district court erred by admitting testimony concerning appellant's consultation with counsel prior to appellant's arrest. Appellant contends that admission of this testimony impermissibly penalized appellant for exercising his constitutional right to counsel and to remain silent. Appellant concludes that under "well-established case law" this argument was "guaranteed to fail," and that appellate counsel should have argued that his testimony was inadmissible under Minn. R. Evid. 403. Thus, appellant claims that he was denied the effective assistance of appellate counsel.

Appellant's argument is essentially identical to the argument discussed above regarding appellant's claim of ineffective assistance of trial counsel. As we concluded above, this argument is unavailing because this court has already determined that any error in the admission of this testimony was harmless error. *Shmelev*, 2002 WL 31867453, at *2. Moreover, appellant's claim that his appellate counsel made an "improper" argument is without merit. As this court recognized in *Shmelev*, the Third Circuit Court of Appeals held that a prosecutor's comment at trial that the defendant saw his lawyer the morning after committing his alleged crime was constitutional error. *United States ex rel. Macon v. Yeager*, 476 F.2d 613, 616 (3rd Cir. 1973). Thus, appellant's appellate counsel's argument was not unreasonable.

Appellant further argues that his appellate counsel was ineffective because he failed to argue that his trial counsel was ineffective for not properly objecting to the evidence of appellant's pre-arrest contact with counsel. We disagree. When a petitioner bases his ineffective-assistance-of-appellate-counsel claim on appellate counsel's failure to raise an ineffective-assistance-of-trial-counsel claim, he first must show that trial counsel was ineffective. *Zenanko v. State*, 688 N.W.2d 861, 865 (Minn. 2004). Here, as noted above, appellant has failed to make such a showing. Therefore, appellant's ineffective-assistance-of-appellate-counsel claim fails.

II

Appellant argues that he is entitled to relief under Minn. Stat. § 244.10, subd. 5 (2006). We disagree. In *Blakely v. Washington*, the United States Supreme Court held that the Sixth Amendment to the United States Constitution guarantees the right to have a

jury determine beyond a reasonable doubt any fact, other than a prior conviction, that increases the punishment for an offense beyond the maximum authorized by the jury's verdict and the defendant's admissions. 542 U.S. 296, 303–05, 124 S. Ct. 2531, 2537–38 (2004). In response to *Blakely*, the legislature amended Minn. Stat. § 244.10, subd. 5, to provide for sentencing juries and bifurcated trials. 2005 Minn. Laws ch. 136, art 16, § 4, at 1115. The legislation became effective June 3, 2005. *Id.* After the amendments, Minn. Stat. § 244.10, subd. 5(a), read as follows:

> When the prosecutor provides reasonable notice under subdivision 4, the district court shall allow the state to prove beyond a reasonable doubt to a jury of 12 members the factors in support of the state's request for an aggravated departure from the Sentencing Guidelines . . . as provided in paragraph (b) or (c) [addressing when the proceeding is to be unitary or bifurcated].

Minn. Stat. § 244.10, subd. 5(a).

Here, appellant's conviction became final on or about June 17, 2003, 90 days after the Minnesota Supreme Court denied his petition for further review. *See O'Meara v. State*, 679 N.W.2d 334, 336 (Minn. 2004) ("[A] case is pending until such time as the availability of direct appeal has been exhausted, the time for a petition for certiorari has elapsed or a petition for certiorari with the United States Supreme Court has been filed and finally denied."). Because the amendments to section 244.10, subdivision 5(a), did not become effective until two years after appellant's case became final, the amendments are not applicable to appellant's sentence.

Appellant argues that he is entitled to resentencing because Minn. Stat. § 244.10, subd. 5(a), applies retroactively to his sentence. But Minnesota statutes are not given

retroactive application "unless clearly and manifestly so intended by the legislature." Minn. Stat. § 645.21 (2006). The amendments to Minn. Stat. § 244.10, subd. 5(a), became effective on June 3, 2005, and the legislature did not express an intention for the statutes to apply retroactively. 2005 Minn. Laws ch. 136, art. 16, § 4, at 1115. Accordingly, Minn. Stat. § 244.10, subd. 5(a), does not apply retroactively to appellant's sentence.

III

Appellant filed a motion to strike portions of the state's brief on the basis that the challenged portions of the state's brief contain references to the trial proceedings without citations to specific pages of the transcript and that the transcript does not support the statements made. "[S]tatement[s] of [] material fact shall be accompanied by a reference to the record." Minn. R. Civ. App. P. 128.02, subd. 1(c). "Failure to cite to the record is a violation of Minn. R. Civ. App. P. 128.03." *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999). A flagrant violation of the rules and failure to provide citations to the record "may lead to non-consideration of an issue or dismissal of an appeal." *Id.* However, this court has declined to strike portions of a brief if the critical facts are supported by documents in the record. *Hecker v. Hecker*, 543 N.W.2d. 678, 681 n.2 (Minn. App. 1996).

Here, despite appellant's contention to the contrary, some of the challenged assertions contain sufficient citations to the record, thereby complying with Minn. R. Civ. App. P. 128.03. Although appellant is correct that some assertions do not contain

citations to the record, our review of the record satisfies us that those assertions are likewise supported by the record. Accordingly, we deny appellant's motion to strike.

Affirmed; motion denied.