STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2098

Charles Edward Vickers,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 10, 2008
Affirmed
Crippen, Judge[*]

Hennepin County District Court
File No. CR-99-064448

Rachel B. Rosen, 10400 Viking Drive, Suite 500, Eden Prairie, MN 55344 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, 300 S. 6th Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Crippen, 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

CRIPPEN, Judge

On appeal from the district court's order summarily denying his petition for postconviction relief, appellant Charles Vickers argues that the court erroneously failed to address his ineffective-assistance-of-trial-counsel claim because appellant did not raise it on direct appeal. Because his claim is procedurally barred by the *Knaffla* rule, he has failed to establish that the claim meets one of the *Knaffla* exceptions, and his claim of ineffective assistance of appellate counsel has no merit, we affirm.

FACTS

Following a jury trial, appellant was convicted of second-degree murder and second-degree assault, and sentenced to concurrent 195-month and 21-month sentences. Appellant filed a direct appeal and this court affirmed his convictions and sentences, rejecting his challenge to the district court's admission of *Spreigl* evidence. *State v. Vickers*, No. C2-00-828 (Minn. App. May 8, 2001), *review denied* (Minn. July 24, 2001).

In July 2007 appellant filed a petition for postconviction relief, asserting that both his trial and appellate counsel were ineffective. Without an evidentiary hearing, the district court concluded that appellant's claims were procedurally barred. The postconviction court did not address appellant's claim of ineffective assistance of appellate counsel, except in the context of appellant's argument that his trial-counsel claim survived *Knaffla* because a conflict of interest precluded the appellate public defender from raising the claim against trial counsel who was also a public defender.

D E C I S I O N

We will not disturb the decision of the postconviction court absent an abuse of discretion. *Zenanko v. State*, 688 N.W.2d 861, 864 (Minn. 2004). On issues of fact, our review is limited to determining whether the evidence is sufficient to support the postconviction court's findings. *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). We review the postconviction court's application of law de novo. *Id.*

A petition for postconviction relief is a collateral attack on a judgment that carries a presumption of regularity. *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). The petitioner bears the burden of establishing by a preponderance of the evidence that he or she is entitled to relief. Minn. Stat. § 590.04, subd. 3 (2006). When the petition, files, and record show that the petitioner is not entitled to relief, the postconviction petition may be denied without a hearing. *Id.*, subd. 1 (2006).

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). The *Knaffla* rule includes claims that the petitioner should have known about at the time of his direct appeal. *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004). There are two exceptions: (1) when a claim is so novel that the legal basis for the appeal was not available on direct appeal; or (2) when the interests of justice require review. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). Under the second exception, this court may allow substantive review of the claim in limited situations when fairness requires and when the petitioner did not "deliberately and inexcusably" fail to raise the

issue on direct appeal. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995) (quotation omitted). An ineffective-assistance-of-counsel claim must be given postconviction review in the interests of justice if the court requires additional fact-finding to evaluate the merits of the claim. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

1.

Under the interests-of-justice exception to the *Knaffla* rule, appellant contends that because he was represented by a public defender both at trial and on appeal, a conflict of interest existed that precluded raising the ineffective-assistance-of-trial-counsel claim on direct appeal. Thus, appellant argues that this proceeding is his first opportunity for review of the claim. Appellant's argument is unsupported by any legal authority and is without merit.

The Sixth Amendment right to counsel includes "a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U.S. 261, 271, 101 S. Ct. 1097, 1103 (1981). To establish a Sixth Amendment violation based on a conflict of interest, a defendant must minimally show an "actual conflict of interest," i.e., a conflict that adversely affected the adequacy of his or her representation. *Cuyler v. Sullivan*, 446 U.S. 335, 348, 100 S. Ct. 1708, 1718 (1980). A defendant has not established the constitutional predicate for an ineffective-assistance claim "until [the] defendant shows that his counsel actively represented conflicting interests." *Id.* at 350, 100 S. Ct. at 1719. The "possibility of conflict" is insufficient to establish a violation. *Id.*

Appellant cites non-Minnesota authority to support the contention that the circumstances here created an automatic conflict, including *People v. White*, 421 N.E.2d 379, 380 (Ill. App. Ct. 1981) (addressing conflict of interest argument in the context of multiple representation of co-defendants by the same attorney); *State v. Price*, 888 P.2d 935, 935-936 (N.M. Ct. App. 1994) (order opinion from the Court of Appeals of New Mexico addressing the state's motions to hold briefing in abeyance pending resolution of a possible conflict of interest); and *McCall v. Dist. Court for Twenty-first Judicial Dist.*, 783 P.2d 1223, 1228 (Colo. 1989) (adopting a per se rule that the public defender from the same local office as trial counsel should be able to withdraw from an ineffective assistance of trial counsel appeal due to an imputed conflict of interest). But these cases are factually distinguishable from the present case.

Nothing in this record shows the appearance of a conflict of interest between the public defender's office that represented appellant at trial and the separate office that represented him on appeal. Because appellant's general speculation that appellate counsel did not raise the trial-counsel claim due to a conflict of interest does not come within the interests-of-justice exception to the *Knaffla* rule, the district court did not err in finding that appellant's claim was procedurally barred.

2.

Appellant next argues that he was denied effective assistance of appellate counsel on direct appeal because counsel raised only one issue and failed to raise several others. Because it could not be known at the time of direct appeal, a claim of ineffective

assistance of appellate counsel may be brought in a petition for postconviction relief after the direct appeal has been completed. *Leake v. State*, 737 N.W.2d 531 536 (Minn. 2007).

To prevail on a claim of ineffective assistance of appellate counsel, appellant must show "that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's . . . 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, 687-88, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Under the first prong, "an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001) (quotations omitted). "Under the second prong, [appellant] must show by a preponderance of the evidence that his counsel's error so prejudiced" appellant "that a different outcome would have resulted but for the error." *Id.* (quotation omitted) (application to issue of trial-counsel assistance).

Appellant contends that claims not raised by his appellate counsel include ineffective assistance of trial counsel, erroneous exclusion of evidence of the victim's prior crimes, and erroneous jury instructions. Appellant further argues that it is clear his appellate counsel's conduct fell below an objective standard of reasonableness simply because "[w]ith the sentence facing [him], there was no possible reason not to present more than one issue on appeal." Appellant's claims are without merit.

Ineffective Assistance of Trial Counsel

When a claim for ineffective assistance of trial counsel has no legal merit, an appellant may not base a claim of ineffectiveness of appellate counsel on the failure to raise the claim. *Zenanko*, 688 N.W.2d at 865; *Sutherlin v. State*, 574 N.W.2d 428, 435 (Minn. 1998). Appellant has the burden of proof on his trial-counsel claim and must rebut the strong presumption that trial counsel's performance fell within a wide range of reasonable assistance. *Gail v. State*, 732 N.W.2d 243, 248 (Minn. 2007).

Appellant contends that trial counsel was ineffective for failing to "properly investigate and present evidence of prior assaults and/or crimes of [the victim]." But trial counsel did move the district court seeking admission of the victim's prior charges for assault, disorderly conduct, and obstruction of the legal process. Appellant contends that the victim had two other Hennepin County DWI's that counsel should have further investigated. And in an affidavit supporting his postconviction petition appellant stated: "I told [trial counsel] that I knew that [the victim] had been involved in drugs, had a history of violent behavior, [] that he had criminal charges and/or convictions in North Carolina and in Chicago, Illinois . . . [and] had some domestic assaults and restraining orders in Minnesota involving a former girlfriend named Vivian." Appellant also asserts that counsel failed to call as witnesses police officers who were previously threatened by the victim.

But decisions regarding what evidence to present and whether to call certain witnesses are matters of trial strategy generally not subject to appellate review for attorney competency. *See Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004) (stating

that appellate courts generally will not review claims of ineffective assistance of counsel based on trial strategy). Trial counsel made several attempts to introduce evidence of the victim's past crimes and the issue was discussed at length on the record. Although appellant may disagree with the outcome of the strategy employed by defense counsel, he has not established that counsel's decisions about what evidence to present and which witnesses to call fell below an objective standard of reasonableness or that he was prejudiced by defense counsel's performance such that the outcome would have been different but for counsel's errors.

Appellant also argues that trial counsel was ineffective because he failed to investigate "[a]dditional compelling forensic evidence" related to the defensive nature of his wounds. Appellant asserts that he "had numerous wounds on the bottoms and sides of his arms which could have supported testimony regarding [his] defensive posture," and that "[t]his evidence, if presented would undoubtedly have had a compelling impact in the outcome of the case." But counsel did use evidence regarding appellant's wounds, and appellant does not explain how or why the outcome of the case might have been different. And, as noted above, trial counsel's decisions regarding witnesses and evidence were strategic decisions not reviewable for attorney competency on appeal.

Appellant next asserts that trial counsel's assistance was ineffective because counsel failed to request a lesser-included-offense jury instruction. Appellant contends that counsel "left this decision up to [him], a lay person, uneducated and unfamiliar with the law and sentencing guidelines." But appellant's waiver on the record of lesser-included offense instructions belies this argument. Appellant was extensively questioned

by both his attorney and the district court regarding his decision not to have lesser-included offense instructions read to the jury. Appellant indicated that he had enough time to discuss the matter with counsel and that it was a voluntary and knowing decision. He makes no allegation that any aspect of that waiver was defective.

Appellant further argues that the district court should have allowed him an evidentiary hearing because "significant material facts were in issue with regard to trial counsel's preparation." But appellant does not identify which material facts are at issue that he believes need to be resolved in order to determine the merits of his postconviction claims.

An evidentiary hearing is only required when "there are material facts in dispute which must be resolved in order to determine the postconviction claim on the merits." *King v. State*, 562 N.W.2d 791, 794 (Minn. 1997). "If a petitioner does not allege facts that if proved would entitle him to relief, a court may deny a petitioner a hearing if 'the files and records of the proceeding conclusively show that the petitioner is entitled to no relief.'" *McDonough v. State*, 675 N.W.2d 53, 56 (Minn. 2004) (quoting Minn. Stat. § 590.04, subd. 1 (2002)). Summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). Because all of appellant's claims regarding trial counsel's ineffectiveness are based on matters in the record, the district court did not err in denying appellant's postconviction petition without conducting an evidentiary hearing.

Finally, we take added note of appellant's conflict-of-interest argument, stated in reference to his claim that *Knaffla* does not bar his failure to previously appeal on his

claim of ineffective assistance of trial counsel. Insofar as this argument implies a contention as to inadequacy of appellate counsel, not specifically asserted, we repeat the conclusion that appellant has failed to show a conflict of interest entitling him to postconviction relief.

Evidence of the Victim's Prior Crimes

Appellant argues that appellate counsel was ineffective because he failed to challenge the district court's decision to exclude specific evidence related to the victim's prior criminal record. As previously noted, appellant sought to introduce this evidence to support his defense of self-defense and establish the victim's intent on the night of their confrontation. The district court concluded, based on relevant caselaw, that appellant could testify about his general knowledge of a prior crime that he knew the victim was involved in, but not the details, and that such information would be sufficient to argue that the victim was the aggressor with intent to harm appellant.

Although appellant is dissatisfied with the amount of detail he was allowed to give regarding the victim's prior criminal behavior, he was permitted to testify to his general knowledge and argue and develop his claims of self-defense. He fails to show that other evidence might have changed the result of the trial. Appellate counsel could have legitimately decided that a claim of error regarding this decision would not have prevailed on appeal.

Jury Instructions

Appellant also argues that appellate counsel was ineffective for failing to argue that CRIMJIGS 7.05 and 7.07 should have been read to the jury. However, CRIMJIG

7.07 (Self-Defense—Revival of Aggressor's Right of Self-Defense) was read to the jury. Additionally, the district court concluded that the defense of dwelling portion of CRIMJIG 7.05 should not be read because a defendant cannot claim defense of dwelling against a co-resident, citing *State v. Hare*, 575 N.W.2d 828, 832 (Minn. 1998). Although appellant now disputes it, both he and his wife testified at trial that the victim was essentially a co-resident at appellant's home for a period of time leading up to the night of the confrontation. Again, it is reasonable to conclude, based on these circumstances, that appellate counsel did not raise this issue because it would likely detract from a more meritorious claim.

Choice of Issues

Appellant contends that appellate counsel was ineffective because he raised only one issue on appeal. But appellate counsel is not required to raise all possible claims on direct appeal, and counsel need not raise a claim if she "could have legitimately concluded that [it] would not [prevail]." *Cooper v. State*, 745 N.W.2d 188, 193 (Minn. 2008) (alteration in original) (quotation omitted). "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." *Gibson v. State*, 569 N.W.2d 421, 423 (Minn. App. 1997) (quotation omitted), *review denied* (Minn. Oct. 31, 1997).

Because appellant has not met his burden of proof to show that appellate counsel's representation fell below an objective standard of reasonableness or that the result would have been different but for counsel's errors, we affirm.

Affirmed.