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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2149**

Victor L. Burke, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 16, 2008
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. K3-02-28

Victor L. Burke, 756 Manomin Avenue, St. Paul, MN 55107 (pro se appellant)

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

UNPUBLISHED OPINION

LARKIN, Judge

Pro se appellant challenges the district court's denial of his petition for postconviction relief, which alleges ineffective assistance of trial and appellate counsel.

Because the district court did not abuse its discretion in denying the petition without an evidentiary hearing, we affirm.

FACTS

Following a jury trial, appellant Victor L. Burke was convicted in 2002 of first- and fifth-degree controlled substance crimes, after a package containing a large amount of cocaine was shipped to his home in St. Paul and a smaller amount of marijuana was found inside his home during the execution of a search warrant.

On direct appeal, appellant challenged the district court's decision to admit appellant's prior drug-related convictions as impeachment evidence. *State v. Burke*, No. C1-03-26, 2003 WL 22705393, slip op. at *1 (Minn. App. Nov. 18, 2003), *review denied* (Minn. Jan. 28, 2004). Appellant also argued that he received ineffective assistance of counsel because his trial attorney, during closing argument, conceded that appellant was guilty of fifth-degree controlled substance crime, a charge that stemmed from the marijuana found in appellant's residence. In a pro se supplemental brief, appellant argued that the prosecutor committed misconduct, witnesses gave inconsistent testimony at trial, and the jury improperly heard arguments that tainted his trial.

This court addressed and rejected appellant's challenge to the admission of appellant's prior crimes as impeachment evidence and appellant's pro se arguments. *Id.* But with respect to appellant's claim that he received ineffective assistance of counsel because his attorney conceded his guilt, this court determined that it could not "decide on the record before it if [appellant] admitted that he understood that his guilt was being conceded in his attorney's closing statement." *Id.* at *4. This court thus did not reach the

merits of appellant's claim of ineffective assistance of counsel and stated that appellant's "remedy is to pursue the ineffective assistance of counsel claim in a petition for postconviction relief." *Id.* (footnote omitted).

Almost four years later, on July 31, 2007, appellant filed a pro se petition for postconviction relief, claiming ineffective assistance of trial and appellate counsel and requesting an evidentiary hearing. But the petition contains no claim that appellant's trial attorney was ineffective because he conceded appellant's guilt without appellant's permission, which is the issue that this court preserved for postconviction proceedings.

By order filed August 29, 2007, the district court denied appellant's petition without an evidentiary hearing, concluding that appellant's claim of ineffective assistance of trial counsel was barred by *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976) because it was not made upon direct appeal. The court further concluded that even if appellant's claims were not barred, "the evidence of his trial attorney's reprimand and probation [for disciplinary reasons] do not on their own support the claim of ineffective assistance of counsel at trial." The district court emphasized that appellant provided no factual support for his claim that the tactical decisions of his trial attorney were unprofessional. Finally, the court concluded that while *Knaffla* does not apply to appellant's ineffective assistance of appellate counsel claim, that claim failed because appellant merely made broad allegations regarding that attorney's failure to raise "significant issues," and because appellant merely referred back to the tactical decisions of his trial attorney.

DECISION

A person convicted of a crime may petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2006). A postconviction court must grant a hearing on a petition for postconviction relief “[u]nless 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 (2006). The right to an evidentiary hearing on a postconviction petition depends upon the petitioner first making an adequate offer of proof. *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007).

A petitioner who makes a claim of ineffective assistance of counsel must make more than general allegations of ineffectiveness in order to obtain an evidentiary hearing. *McDonough v. State*, 675 N.W.2d 53, 56 (Minn. 2004). The petitioner must “allege facts which, if proved, would entitle [him] to the requested relief.” *Id.* (quotation omitted). If he fails to do so, the district court may refuse to grant a hearing and deny the petition. *Id.* “To receive an evidentiary hearing on an ineffective assistance of counsel claim, a petitioner must allege facts that would affirmatively show that his attorney’s representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different.” *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007) (quotation omitted); *see also Townsend v. State*, 582 N.W.2d 225, 229 (Minn. 1998).

Once a direct appeal has been taken, all claims raised in that appeal, all claims known at the time of that appeal, and all claims that should have been known at the time of that appeal “will not be considered upon a subsequent petition for postconviction

relief.” *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741; *see* Minn. Stat. § 590.01, subd. 1 (barring postconviction relief for claims that petitioner “could have . . . raised on direct appeal”); *Koskela v. State*, 690 N.W.2d 133, 134 (Minn. 2004). “There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented, or (2) if the interests of justice require review.” *Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007); *see also* *Fox v. State*, 474 N.W.2d 821, 824 (Minn. 1991). A court may apply the second exception if fairness requires it and the petitioner did not “deliberately and inexcusably” fail to raise the claim on direct appeal. *Fox*, 474 N.W.2d at 825. “Under the second exception, . . . a claim of ineffective assistance of trial counsel is not barred by *Knaffla* if it cannot be determined from the . . . record and requires additional evidence.” *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (citation omitted).

Summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). A denial of postconviction relief based on the *Knaffla* procedural bar is also reviewed for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). Appellant argues that the district court erred in denying appellant’s request for postconviction relief without an evidentiary hearing. This court will address the district court’s decisions regarding appellant’s ineffective assistance of trial and appellate counsel claims separately.

Ineffective assistance of trial counsel claim.

Appellant raised the following issues in support of his claim that his trial attorney was ineffective: (1) the attorney waived a Rasmussen hearing and never allowed appellant to view evidence to be used against him; (2) the attorney failed to object to the

admission of a photograph of an “AR-15 rifle found at [appellant’s] residence, as prejudicial and irrelevant”; (3) the attorney “failed to obtain or review material evidence, failed to conduct a reasonable investigation, failed to remove the trial judge, [and] failed to object to irrelevant and prejudicial evidence”; (4) the attorney met appellant at a bar the day before trial regarding “important strategic and tactical decisions” and made himself drinks at the “Bloody Mary Bar” before discussing the case; and (5) the attorney was the subject of disciplinary proceedings involving conduct that occurred during the time period around appellant’s trial.

The first four issues were known at the time of appellant’s direct appeal and are therefore barred by *Knaffla* unless a recognized exception applies. Neither *Knaffla* exception applies. First, appellant’s claim does not involve a novel legal issue. Second, appellant did not offer any explanation as to why he failed to raise the underlying issues on direct appeal. Appellant did not explain why the claim could not be determined from the record or why additional evidence was necessary for determination of the claim. When a petitioner fails to argue a basis for application of either exception to the *Knaffla* rule, a postconviction court may decline to apply either exception. *Erickson*, 725 N.W.2d at 535 (citing *White v. State*, 711 N.W.2d 106, 110 (Minn. 2006)). Because neither exception to the *Knaffla* rule applies, appellant’s ineffective assistance of trial counsel claim is procedurally barred to the extent it is based on issues that were known at the time of the direct appeal.

Whether appellant knew of his attorney’s disciplinary proceedings at the time of his direct appeal is unclear. The record does not specify when appellant learned of the

disciplinary proceedings. The “Charges of Unprofessional Conduct, Notice of Pre-Hearing and Notice of Panel Assignment” regarding appellant’s attorney is dated August 13, 2003. Appellant’s conviction was affirmed by this court on November 18, 2003. The Minnesota Supreme Court’s disciplinary order regarding appellant’s attorney was issued on May 12, 2004. On this record, it is not clear that appellant knew, or should have known, of the disciplinary proceedings at the time of his direct appeal.

However, as reasoned by the district court, even if appellant’s claim survived the *Knaffla* bar, summary denial was appropriate because appellant failed to allege specific facts that would warrant an evidentiary hearing on any of the issues raised in support of appellant’s ineffective assistance of trial counsel claim. Appellant did not allege that trial counsel’s actions fell below an objectively reasonable standard or that the result would have been different but for counsel’s actions. *See Dukes v. State*, 621 N.W.2d 246, 252 (Minn. 2001); *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). Appellant merely made a general, unsupported allegation that trial counsel was ineffective. Appellant was required to make more than general allegations of ineffectiveness in order to obtain an evidentiary hearing. *McDonough*, 675 N.W.2d at 56.

And while it is true that this court preserved appellant’s ineffective assistance of trial counsel claim for postconviction proceedings, the preserved claim was based on trial counsel’s concession of guilt. Appellant did not raise this issue in his petition for postconviction relief. Because all but one of the issues that appellant did raise are *Knaffla* barred and because appellant failed to allege facts that if proved would entitle appellant to relief on any of the issues, the district court did not abuse its discretion in

denying appellant's ineffective assistance of trial counsel claim without an evidentiary hearing.

Ineffective assistance of appellate counsel claim.

Appellant asserted that his appellate attorney was ineffective because he failed to raise issues regarding (1) ineffective assistance of trial counsel; (2) the admissibility of evidence; and (3) prosecutorial misconduct. Ineffective assistance of appellate counsel claims are not barred by *Knaffla* and may be raised in a first postconviction petition. *Leake*, 737 N.W.2d at 536. However “[w]hen an ineffective assistance of appellate counsel claim is based on appellate counsel’s failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective.” *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007); *see Doppler v. State*, 660 N.W.2d 797, 802 (Minn. 2003). As discussed above, appellant failed to allege facts that demonstrate that appellant’s trial counsel was ineffective. Accordingly, appellant’s ineffective assistance of appellate counsel claim fails to the extent it is based on appellate counsel’s failure to raise the issue of ineffective assistance of trial counsel on appeal.

As to counsel’s failure to raise evidentiary issues and prosecutorial misconduct, appellant failed to allege specific facts that warranted an evidentiary hearing. Appellant did not allege that counsel’s actions fell below an objectively reasonable standard or that the result would have been different but for counsel’s actions. *See Leake*, 737 N.W.2d at 536 (requiring postconviction petitioner to allege facts that if established would show counsel’s representation fell below an objective standard of reasonableness and that, “but for the errors, the result would have been different”) (quotations omitted)). Appellant did

not offer supporting affidavits or other documents, but rather made a general, unsupported allegation that “appellate counsel was ineffective and failed to adequately represent [appellant] by not raising significant issues.” Because appellant did not allege facts that if proved would entitle him to relief, the district court did not abuse its discretion in denying appellant’s claim of ineffective assistance of appellate counsel without an evidentiary hearing.

Affirmed.