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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2169**

Lovell N. Oates, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 30, 2008
Affirmed
Minge, Judge**

Hennepin County District Court
File No. 98124740

Lovell N. Oates, 970 Pickett Street North, Bayport, MN 55003-1490 (pro se 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, Minneapolis, MN 55487 (for respondent)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and
Johnson, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges the summary denial of his fifth petition for postconviction relief. Because the issues raised by appellant either were known at the time of his direct appeal, were raised in a previous postconviction petition, or lack merit, we affirm.

FACTS

The facts giving rise to appellant Lovell N. Oates's conviction arise out of a 1998 shooting at a nightclub in Minneapolis.¹ This court affirmed Oates's conviction on direct appeal, holding that any errors in the jury instructions were harmless and that the evidence was sufficient to support the conviction. *State v. Oates*, 611 N.W.2d 580, 584-87 (Minn. App. 2000), *review denied* (Minn. Aug. 22, 2000). We also affirmed Oates's sentence, holding that the imposition of consecutive sentences was not an abuse of discretion. *Id.* at 587.

Oates filed his first petition for postconviction relief in 2002, arguing (1) ineffective assistance of trial and appellate counsel; (2) prosecutorial misconduct; and (3) prejudicial conflict of interest of his defense counsel. *Oates v. State*, No. C7-02-2269, 2003 WL 21911197, at *1 (Minn. App. Aug. 12, 2003). The district court denied the petition without an evidentiary hearing, and this court affirmed. *Id.* at *3.

In 2004, Oates filed his second petition for postconviction relief, arguing that (1) he was erroneously convicted of second-degree murder because the charge was not

¹A detailed account of the facts leading to Oates's conviction is set forth in *State v. Oates*, 611 N.W.2d 580, 582-84 (Minn. App. 2000), *review denied* (Minn. Aug. 22, 2000).

contained in the indictment; (2) the statutes under which he was convicted were void because they lacked titles and enacting clauses; and (3) both the trial judge and the postconviction relief judge exhibited bias. *Oates v. State*, No. A04-1749, 2005 WL 1545431, at *1 (Minn. App. July 5, 2005), *review denied* (Aug. 24, 2005). In a supplemental petition, which the district court construed as a third petition for postconviction relief, Oates raised several challenges to his sentence including that (1) separate sentences were erroneously imposed because the assaults were part of the same behavioral incident; and (2) his sentence was imposed in violation of the Sixth Amendment right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *Oates*, 2005 WL 1545431, at *2. The district court denied postconviction relief on the bases that the issues were raised or decided in a previous case, could have been raised on direct appeal but were not, and failed on the merits. *Id.* at *2-*4. We affirmed. *Id.* at *4.

In 2006, Oates filed his fourth petition for postconviction relief. The district court summarily denied his requests. In an order opinion, this court rejected Oates's claims that: (1) his conviction of second-degree murder constituted reversible error because that charge was not contained in the indictment; (2) the imposition of consecutive sentences for the same behavioral incidents was a violation of Minn. Stat. § 609.035 and his Sixth Amendment rights; (3) he was erroneously convicted of the use of a dangerous weapon under Minn. Stat. § 609.11, subd. 4 (1998) and *Blakely*; and (4) the district court exhibited bias by denying the motions under the *Knaffla* rule without addressing the merits. *Oates v. State*, A06-1279 (Minn. App. Aug. 1, 2007).

The current petition for postconviction relief was filed on August 1, 2007. The district court denied the postconviction petition in its entirety, finding that because all of the issues raised in the present petition had been or could have been raised and ruled upon in the previous appeal or postconviction petitions, they are barred by the *Knaffla* rule. This appeal follows.

D E C I S I O N

Oates identifies eight bases for postconviction relief and argues that the summary denial of his petition by the district court was error. In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo, and issues of fact are reviewed for sufficiency of the evidence. *Leak v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Under the rule established in *State v. Knaffla*, when a direct appeal has been taken, all matters raised in the appeal and all claims that are known but not raised "will not be considered upon a subsequent petition for postconviction relief." 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). We review the denial of postconviction relief based on the *Knaffla* procedural bar for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

I.

First, Oates argues that, under *Blakely v. Washington* and under a recent modification to Minnesota sentencing statutes in response to *Blakely*, a jury should have determined the "aggravating factors, such as sentencing enhancement and mandatory minimum statutes" beyond a reasonable doubt. 542 U.S. 296, 303-05, 124 S. Ct. 2531, 2537-38 (2004). In *Blakely*, the 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 punishment for an offense beyond the maximum authorized by a jury's verdict and defendant's admissions. *Blakely*, 542 U.S. at 303-05, 124 S. Ct. at 2537-38. In response to *Blakely*, the legislature amended the Minnesota sentencing statutes to address the procedures in cases where the state seeks an aggravated departure:

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) (2006); *see* 2005 Minn. Laws ch. 136, art. 16, § 4.

Oates was sentenced in 1999 for assault under Minn. Stat. § 609.11 (1998), which provided a mandatory minimum sentence for each conviction of second-degree assault with a deadly weapon. Oates argues that Minn. Stat. § 609.11 was modified in 2006 to require the finding that a defendant used a firearm or a dangerous weapon be made by the jury and not the court, that he was denied due process, and that this amendment should be applied retroactively. *See* Minn. Stat. § 609.11, subd. 7 (2006); *see* 2006 Minn. Laws ch. 260, art. 1, § 13. Further, Oates argues that the *Knaffla* bar should not apply because the modifications to the statutes were made in 2005 and 2006, after his initial appeal. Finally, Oates claims that failure to use a jury and a proof-beyond-a-reasonable-doubt standard constituted a denial of due process.

Oates is correct in arguing that no court has addressed the effect of the 2006 statutory modification on his conviction. However, there are three reasons why Oates's current petition and appeal are not meritorious on this *Blakely*-based claim. First, as we have previously held, Oates did not receive an upward departure in his sentence:

Contrary to his argument, Oates did not receive an upward durational departure. For the second-degree murder offense, the district court imposed the presumptive guidelines sentence of 306 months' imprisonment. *See* Minn. Sent. Guidelines IV (with a criminal history score of zero, the guidelines sentence for second-degree murder, a severity level X offense, is 306 months). The district court also imposed the 36-month mandatory minimum sentence for each conviction of second-degree assault. *See* Minn. Stat. § 609.11, subds. 5, 9 (1998). When a statute provides for a mandatory minimum sentence, the presumptive sentence is the mandatory minimum duration or the duration under the guidelines grid, whichever is longer. Minn. Sent. Guidelines II.E. Because the 36-month mandatory minimum is longer than the 21-month sentence under the guidelines grid, the 36-month sentence imposed for each second-degree assault offense is the presumptive guidelines sentence.

Oates, 2005 WL 1545431, at *4. Without an upward departure, the *Blakely* rule and Minn. Stat. § 244.10 do not apply.

Secondly, this court has reviewed the assault sentencing statute in light of *Blakely* and held:

[T]he jury was instructed regarding the elements of assault with a dangerous weapon Thus, by returning guilty verdicts on the assault charges, the jury found beyond a reasonable doubt that Oates assaulted the victims with a dangerous weapon, a firearm. To the extent that the 36-month sentences for the assault convictions were dictated by section 609.11, the sentence imposed was based on jury findings, not on the judicial finding under 609.11.

Oates v. State, No. A06-1279 (Minn. App. Aug. 1, 2007) (order op.). Thus, the jury made the dangerous-weapon finding using the proof-beyond-a-reasonable-doubt standard. Given prior consideration of this portion of Oates's appeal, the *Knaffla* rule applies.

Third, both statutory amendments cited by Oates make it clear that they were not meant to apply retroactively. *See* 2006 Minn. Laws ch. 260, art. 1, § 13; 2005 Minn. Laws ch. 136, art. 16, § 4. Regardless, Minnesota statutes and modifications are not given retroactive application unless clearly and manifestly intended by the legislature. Minn. Stat. § 645.21 (2006); *see also Rural Am. Bank of Greenwald v. Herickhoff*, 485 N.W.2d 702, 706-07 (Minn. 1992).

For the foregoing reasons, we conclude that these *Blakely*, jury, proof-beyond-a-reasonable doubt, and due process claims are not meritorious.

II.

As his second basis for postconviction relief, Oates claims that the modification of Minn. Stat. § 609.11 creates a new element of the offense that should be retroactively applied. This argument raises substantially the same issues as Oates's first basis. As previously stated, this court has already determined that the jury, and not the court, "found beyond a reasonable doubt that Oates assaulted the victims with a dangerous weapon, a firearm." *Oates v. State*, No. A06-1279 (Minn. App. Aug. 1, 2007) (order op.). Additionally, the legislature made it clear that the amendments to Minn. Stat. § 609.11 were not to be retroactively applied. *See* 2006 Minn. Laws ch. 260, art. 1, § 13.

We conclude that the district court did not abuse its discretion in determining that Oates's claims were barred.

III.

Third, Oates argues that the *Spreigl* evidence admitted under Minn. R. Evid. 404(b) should have been listed in the charging instrument and that the jury should have determined that the basis for its admission into evidence had been proven beyond a reasonable doubt. Although these claims could have been brought in the original appeal and are therefore barred by *Knaffla*, Oates argues that the claims are revived by the 2005 amendment of Minn. Stat. § 244.10. Because Oates was not given an upward durational departure based on this evidence, it is unclear how the modification to the sentencing guidelines would revive this argument and preclude application of the *Knaffla* bar. Additionally, even if the *Knaffla* procedural bar did not apply, Minn. R. Evid. 404(b) explicitly states that the bases for admission of evidence under the rule need only be determined by a clear and convincing standard. Oates appears to confuse standards for the *admission* of evidence and the burden required to *convict* someone of a crime. This is a crucial distinction.

Because the amendment of Minn. Stat. § 244.10 does not revive this claim, the district court did not abuse its discretion in determining that this claim was barred by *Knaffla*.

IV.

As his fourth basis for postconviction relief, Oates argues that the dangerous-weapon element of Minn. Stat. § 609.11 and evidence under Minn. R. Evid. 404(b)

should have been submitted to the jury to be proven beyond a reasonable doubt. Oates's arguments are misguided for two reasons that we have already discussed: first, the jury was instructed to find the dangerous-weapon element of the crime as a part of its guilty determination; second, Oates's 404(b) argument confuses the burden of proof for *admission* of evidence with the burden of proof for establishing *guilt*. Because the arguments were either already addressed by this court or would be barred by *Knaffla* because a challenge to 404(b) evidence could have been brought on direct appeal, we conclude that the district court did not abuse its discretion in determining that these claims by Oates were barred by *Knaffla*.

V.

Oates recasts his postconviction challenges based on Minn. Stat. § 609.11 and Minn. R. Evid. 404(b) as not barred by *Knaffla* by further arguing that, because they are novel issues, a hearing must be held under Minn. Stat. § 590.01, subd. 13 (2006) and that the district court erred by deciding them without a hearing. Under Minnesota law, a district court is not required to set an evidentiary hearing if the petition and files conclusively show that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2006). As stated above, Oates's challenge to Minn. Stat. § 609.11 was previously decided by this court, and therefore would be barred by *Knaffla*. In regard to the burden of proof needed to determine whether to admit rule 404(b) evidence, Oates argues that a diligent attorney would not have uncovered case law indicating that the Minn. R. Evid. 404(b) clear-and-convincing standard is unconstitutional and, thus, his challenge is so novel that one of the *Knaffla* exceptions should apply. However, as previously discussed,

Oates's claim regarding the burden of proof for the admission of evidence pursuant to Minn. R. Evid. 404(b) is not meritorious. As for the constitutionality of the clear-and-convincing evidence standard in 404(b), Oates advances no legal analysis and we do not consider the constitutional issue properly raised.

As a result, we conclude that there is no applicable exception to the *Knaffla* rule and that the district court did not abuse its discretion in declining to hold an evidentiary hearing.

VI.

The sixth basis for postconviction relief is not clearly articulated, but appears to raise one new claim for relief: ineffective assistance of counsel based on the failure to require that § 609.11 “elements” be submitted to the jury and the failure to challenge the standard of proof under Minn. R. Evid. 404(b). Although ineffective-assistance-of-counsel claims that were known on direct appeal but not raised may be barred from review under *Knaffla*, this court will review an ineffective-assistance-of-counsel claim if the claim is novel or the interest of justice requires review. *Ives v. State*, 655 N.W.2d 633, 636 (Minn. 2003). To succeed on an ineffective-assistance-of-counsel claim, Oates needs to demonstrate 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) (citation omitted).

In a previous postconviction relief petition, Oates argued that his trial and appellate counsel were ineffective based on conflicts of interest, failure to vigorously

cross-examine a witness, failure to investigate, and with respect to the appeal, failure to bring a claim of ineffective assistance of trial counsel. *Oates*, 2003 WL 21911197, at *2. While the court of appeals in 2003 indicated that the ineffective-assistance-of-counsel claim would likely be procedurally barred because it was not brought on direct appeal, the court noted that the claim would fail on the merits as well. *Id.* The court of appeals stated, “this court has already noted that the evidence of appellant’s guilt was ‘quite strong’ and included two firm eyewitness identifications, corroborating evidence found at appellant’s home, and Fuller’s testimony.” *Id.* (citing *Oates*, 611 N.W.2d at 586).

Here, we address the merits. As a general matter, *Oates* argues that amendments to the statutes should be applied retroactively. Because the retroactive-application claim is based on a change in the law that occurred after trial, trial counsel could not have known about the issue. Thus, there is not a basis for ineffective representation. Regardless, the retroactive-application argument has no legal merit for four reasons that have been discussed: (1) the issue of whether defendant was proven to have used a dangerous weapon was determined by the jury and not the court; (2) *Oates*’s rule 404(b) argument appears to be based on a misunderstanding of rule 404(b) evidence; (3) *Oates*’s sentence was not an upward departure; and (4) the change in the law was not intended to be retroactive.

Again, we conclude that the district court did not abuse its discretion in summarily denying *Oates*’s petition.

VII.

As a seventh basis for postconviction relief, Oates raises a different ineffective-assistance-of-counsel claim. Oates argues that his trial and postconviction counsel were ineffective because they failed to challenge the conviction of second-degree murder when Oates was indicted only on first-degree murder charges. In his 2005 postconviction relief appeal, Oates challenged that the second-degree conviction was erroneous because it was not included in the indictment. *Oates*, 2005 WL 1545431, at *1. This court determined that Oates's claim was procedurally barred because it could have been raised on direct appeal. *Id.* at *2. In a subsequent petition, Oates again challenged his second-degree murder conviction based on the same grounds, and, in 2007, this court again rejected his argument. In an order opinion, this court stated "this issue is barred under *Knaffla* because Oates failed to raise the issue on direct appeal." *Oates v. State*, No. A06-1279 (Minn. App. Aug. 1, 2007). We also noted that on the merits, "a jury can find a defendant guilty of a lesser-included offense even when it is not contained in the indictment." *Id.*

Here, Oates raises essentially the same issue but under the guise of an ineffective-assistance-of-counsel claim. Recasting a meritless substantive argument as an ineffective-assistance-of-counsel claim does not give the argument new life. It is a flawed derivative claim. Because counsel is not obliged to raise a claim that is without merit, we conclude this argument by Oates is properly dismissed.

VIII.

Finally, Oates argues the district court abused its discretion by failing to issue a detailed order with findings of fact and conclusions of law under Minn. Stat. § 546.27 (2006). Under Minnesota law, the district court “may summarily deny a second or successive petition for similar [postconviction] relief on behalf of the same petitioner and may summarily deny a petition when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case.” Minn. Stat. § 590.04, subd. 3 (2006). On appeal, Oates erroneously cites to Minn. Stat. § 546.27 which governs trials and not postconviction hearings. Here, Oates’s claims are clearly barred because they could have been brought on direct appeal, because they were brought in a previous petition, or because they are without merit. The district court’s decision to issue only a summary denial of Oates’s postconviction petition was not an abuse of discretion. We have addressed them in greater detail hopefully to bring closure to the continuing postconviction petitions.

Affirmed.

Dated: