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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0076

State of Minnesota,
Respondent,

vs.

Eric J. Johnson,
Appellant.

Filed August 14, 2017
Affirmed
Jesson, Judge

Scott County District Court
File No. 70-CR-12-10427

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

Ronald B. Hocevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Eric J. Johnson, Rush City, Minnesota (pro se appellant)

Considered and decided by Bratvold, Presiding Judge; Rodenberg, Judge; and Jesson, Judge.

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

JESSON, Judge

Appellant Eric Johnson challenges the district court's denial of his petition for postconviction relief without a hearing on his claims, which include the ineffective

assistance of trial counsel, his request for substitute counsel, and the district court's allegedly improper comments on voir dire. We affirm.

FACTS

Eric Johnson challenges the district court's denial of his pro se petition for postconviction relief. In 2013, following a four-day trial, a jury found Johnson guilty of two counts of first-degree criminal sexual conduct arising from an incident involving his 15-year-old niece. Johnson filed a direct appeal, challenging the admission of *Spreigl* other-acts evidence and arguing that he was improperly convicted of two counts based on the same act against the same complainant. This court affirmed his conviction. On review, the Minnesota Supreme Court affirmed in part, vacated in part, and remanded for reconsideration of the *Spreigl* issue. *See State v. Johnson*, No. A13-1678, 2014 WL 3892013 (Minn. App. Aug. 11, 2014), *aff'd in part, rev'd in part* (Minn. Oct. 28, 2014). On remand, we upheld admission of the *Spreigl* evidence, but vacated one of Johnson's convictions and remanded for correction of the order and warrant of commitment. *State v. Johnson*, No. A13-1678, 2015 WL 234152, at *5 (Minn. App. Jan. 20, 2015), *review denied* (Minn. Mar. 25, 2015). The supreme court subsequently denied review, and the United States Supreme Court denied certiorari review. *Johnson v. Minnesota*, 136 S. Ct. 242 (Oct. 5, 2015).

In 2016, Johnson sought postconviction relief in Scott County District Court. He alleged that he was denied the effective assistance of trial and appellate counsel; that the district court abused its discretion by failing to order a continuance for substitution of counsel, additional discovery, or to compel his attorney to turn over a complete file; and

that the district court judge displayed bias during voir dire when she told the jury panel that "no one is in favor of child abuse."

The postconviction court issued an order denying Johnson's claims without an evidentiary hearing. The postconviction judge, who had presided over Johnson's trial, concluded that his claims of ineffective assistance of trial counsel were barred by *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), because they were known at the time of his direct appeal. The judge further noted that, even if not barred, his claims that trial counsel failed to conduct independent testing of DNA evidence, failed to interview the state's witnesses before trial, and failed to seek removal of the judge were matters of trial strategy, which were not reviewable by the postconviction court, and that counsel's alleged bias based on her belief that he was guilty was mere speculation. She concluded that his argument that she had failed to hold a hearing on his request for substitute counsel was barred by *Knaffla* and was not an abuse of discretion. She found that on direct appeal, Johnson had raised the issue of judicial bias, which was rejected by this court. *See Johnson*, 2014 WL 3892013. Further, the district court found that Johnson had cited no action by the district court that illustrated a bias or prejudice against him, requiring her disqualification. Finally, she denied Johnson's claim of ineffective assistance of appellate counsel, concluding that counsel's decision not to raise certain issues urged by Johnson was objectively reasonable. This appeal follows.

D E C I S I ON

A person who has been convicted of a crime and claims a violation of his or her rights may seek postconviction relief with the district court. Minn. Stat. § 590.01,

subd. 1(1) (2016). Denial of a postconviction petition without a hearing is appropriate if the petition, files, and records show conclusively that the petitioner is entitled to no relief. Minn. Stat. § 590.04, subd. 1 (2016). We review the district court's summary denial of a postconviction petition for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). An abuse of discretion occurs when the postconviction court's "decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

Once a direct appeal has been taken, all claims that were raised in that appeal, and all claims that were known or should have been known, but were not raised in that appeal, are procedurally barred. *Colbert v. State*, 870 N.W.2d 616, 625-26 (Minn. 2015) (citing *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741).[1]

Ineffective assistance of trial counsel

Johnson argues that the postconviction court abused its discretion by failing to hold a hearing on his claim of ineffective assistance of trial counsel. To succeed on the merits of an ineffective-assistance-of-counsel claim, a defendant must show that counsel's performance fell below an objective standard of reasonableness, and that, but for counsel's unprofessional errors, the proceeding would have had a different result. *Strickland v.*

[1] There have traditionally been two exceptions to the *Knaffla* rule: a defendant's failure to raise a claim may be excused if it is so novel that its legal basis was not available in the earlier proceeding, or if it has substantive merit and the petitioner did not deliberately and inexcusably fail to raise it in the earlier proceeding. *Buggs v. State*, 734 N.W.2d 272, 274 (Minn. 2007). The supreme court, however, has declined to address these exceptions when the petitioner did not specifically urge their application. *Zornes v. State*, 880 N.W.2d 363, 368-69 (Minn. 2016). Johnson did not argue either of these exceptions, and we discern no basis for their application in this case.

Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984). The *Knaffla* rule applies to claims of ineffective assistance of trial counsel. *Zornes*, 880 N.W.2d at 369. Thus, Johnson's ineffective-assistance claim is *Knaffla*-barred if it was based on the trial record and was either raised below or should have been known to him at the time of his direct appeal. *See id.*

Johnson maintains that his trial attorney's performance fell below an objective standard of reasonableness because she told him privately at some point during trial that she believed the testimony of the state's witnesses. He maintains that this statement amounted to a concession of his guilt, so that *Knaffla* does not bar his ineffective-assistance claim because its consideration requires review of facts outside the trial record. *See Sanchez-Diaz v. State*, 758 N.W.2d 843, 847 (Minn. 2008) (stating that *Knaffla* does not bar an ineffective-assistance claim that requires consideration of facts outside the trial record).[2]

We disagree. Although defense counsel may not impliedly admit the defendant's guilt without his permission, *Dukes v. State*, 660 N.W.2d 804, 812 (Minn. 2003), in order to review a claim of ineffective assistance based on counsel's concession of guilt, this court examines the trial record. *See, e.g.*, *Torres v. State*, 688 N.W.2d 569, 573 (Minn. 2004) ("[W]e first conduct a de novo review of the trial record to determine whether Torres's trial counsel conceded guilt on any element of the [offense]."). Johnson admits that trial counsel

[2] Johnson also asserted a claim of ineffective-assistance-of-appellate counsel before the district court, but he has not renewed that claim on appeal. Issues not briefed are forfeited. *State v. Beaulieu*, 859 N.W.2d 275, 278-79 (Minn. 2015).

made no concession of his guilt on the record or to the jury. Therefore, *Knaffla* bars this claim. *See id*. at 574 (concluding that *Knaffla* bar applied to ineffective-assistance claim when record disclosed that trial counsel made no concession of guilt).

Failing to hold evidentiary hearing on request for substitute counsel

Johnson argues that the district court abused its discretion by failing to hold a hearing on his request for substitute counsel. In February 2013, he wrote to the district court that his court-appointed attorney had failed to contact his witnesses for over eight months, that he thought that his case was being "stalled," and that he believed his attorney was not able to properly represent him. The district court did not hold a hearing on his request and declined to grant it. As the postconviction court determined, because Johnson knew about this issue at the time of his direct appeal and did not raise it, it is barred under *Knaffla*. 309 Minn. at 252, 243 N.W.2d at 741. Further, we note that general dissatisfaction with appointed counsel, which does not raise serious allegations of inadequate representation, does not meet the level of "exceptional circumstances" affecting counsel's competence or ability to represent the client, so as to warrant the appointment of substitute counsel. *State v. Munt*, 831 N.W.2d 569, 586 (Minn. 2013). The postconviction court properly determined that on this record, no such exceptional circumstances exist.

Johnson also argues that the district court erred by failing to make findings on the record regarding his request for substitute counsel. But Johnson has provided no authority that findings are required in consideration of such a request when no evidence was presented to the district court other than bare allegations, and no exceptional circumstances exist.

Improper comments by the judge during voir dire

Johnson alleges that the district court judge displayed bias by making improper comments to prospective jurors during voir dire, suggesting that she aligned herself with the state. During voir dire, the judge stated to prospective jurors, "I think it's safe to say that no one is in favor of child abuse. That's one of those things that most of society can agree we are against this, and we expect that people have a reaction that is protective because children are involved." The judge then continued, "Would your feelings be so overwhelming that you couldn't listen to the evidence and the testimony and fairly give a trial here to Mr. Johnson, and that is to listen to the evidence and weigh it and not be so overcome by emotion?"

Johnson argues that the judge's first statement indicates bias, which entitles him to a new trial. As the postconviction court noted, on direct appeal Johnson challenged this comment as prejudicial and argued that it required a new trial. Because he raised this argument on direct appeal, it is *Knaffla*-barred. *See Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. In addition, we note that the Chief Judge of the First Judicial District, in denying Johnson's motion to remove the judge from postconviction proceedings, appropriately found that the judge's comments indicate that she was attempting to clarify whether individual prospective jurors could be fair to Johnson, assuring that he would receive a fair trial. Johnson has presented no facts that would support a hearing on his claim of judicial bias. *See* Minn. Stat. § 590.04, subd. 1 (directing the district court to hold a hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief").

Spreigl evidence

Johnson finally argues that the district court abused its discretion by admitting evidence of his 2002 conviction of second-degree criminal sexual conduct arising out of sexual contact with his then-girlfriend's 12-year-old daughter. *See Johnson*, 2015 WL 234152, at *1. This issue was raised in his first appeal, *see id*., and the district court's admission of the evidence was affirmed on remand from the supreme court. *Id*. at *4-*5. Because it was previously raised on direct appeal, the postconviction court properly determined that it is now barred under *Knaffla*.

Affirmed.