STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0321

Andrew James Gibbons, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 2, 2017
Affirmed
Kalitowski, Judge[*]

Dakota County District Court
File No. 19HA-CR-15-4317

Andrew Gibbons, Moose Lake, Minnesota (pro se appellant)

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

James C. Backstrom, Dakota County Attorney, Mary Russell, Heather Pipenhagen, Assistant County Attorneys, Hastings, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Kalitowski, 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

KALITOWSKI, Judge

Appellant, pro se, challenges the denial, without a hearing, of his second petition for postconviction relief. Because the district court did not abuse its discretion in denying appellant's petition on *Knaffla* grounds, we affirm.

D E C I S I O N

"We review a denial of a petition for postconviction relief, as well as a request for an evidentiary hearing, for an abuse of discretion. A postconviction court abuses its discretion when its 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) (citations and quotations omitted).

Appellant was charged with violation of Minn. Stat. § 609.342, subd. 1(a) (2016) (providing that one who engages in sexual penetration of another person or sexual contact with a person under 13 is guilty of criminal sexual conduct in the first degree if the complainant is under 13 and the actor is more than 36 months older than the complainant). At the hearing on his petition to plead guilty to this charge, he testified that: (1) he engaged in sexual penetration with the victim when she was nine or ten and he was 36, (2) his penis had contact with and went into the victim's mouth numerous times, and (3) this was an intentional act on his part and was done with sexual intent. The district court found appellant guilty of violating Minn. Stat. § 609.342, subd. 1(a), and he was sentenced to the statutory mandatory minimum of 144 months in prison under Minn. Stat. § 609.342, subd. 2(b) (2016).

In June 2016, acting pro se, appellant filed his first petition for postconviction relief, seeking either to vacate his conviction because his plea was inaccurate or to withdraw his plea. His petition was denied without a hearing. The district court concluded that appellant's testimony at the hearing had furnished a sufficient factual basis for his guilty plea, he was not entitled to withdraw the plea because it was knowing, voluntary, and intelligent and there was no manifest injustice; and his argument regarding consent was misplaced because consent was not and could not be a defense with a complainant aged nine or ten.

In December 2016, appellant filed a second petition for postconviction relief, arguing that (1) his conviction should be vacated because his counsel was ineffective in not relying on a mental-health defense and in not arguing for a dispositional departure and (2) his sentence was illegal. The district court denied the petition on *Knaffla* grounds, noting that appellant failed to allege facts that would entitle him to a hearing. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (holding that, once a petitioner has directly appealed a conviction, neither matters raised in that appeal nor matters known but not raised will be considered upon a subsequent petition for postconviction relief); *Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006) ("Similarly [to the *Knaffla* court], a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief.").

Appellant raises the same issues in this appeal from the denial of his petition. He does not explain why his ineffective-assistance-of-counsel claim was not available at the time of his first postconviction petition; but he reiterates his view that his counsel erred by

saying or implying that appellant was guilty without appellant's consent. The statement to which appellant objected was made by counsel at the sentencing hearing:

> [Appellant is] someone who made bad decisions and is trying to figure out why that happened. And the main reason for that is a lack of medication and some serious mental health issues that were going on with him; things that are treatable, though, if he can get the right medications. He stopped taking them. Really a bad decision, which he recognizes now.

For an ineffective-assistance claim to warrant reversal of a conviction, a defendant must show both that counsel's performance fell below an objective standard of reasonableness and that a different outcome would have resulted but for counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 694, 104 S. Ct. 2052, 2064, 2068 (1984). Appellant meets neither of these criteria. Appellant was tried and sentenced for sexual contact with a person under 13. Counsel's statement did not mention sexual contact but rather concerned appellant's medical issues. Thus, it was not conduct falling below an objective standard of reasonableness. In addition, counsel's statement occurred at the sentencing hearing, after appellant's conviction, so it could not have resulted in a different outcome than conviction.

Moreover, at the sentencing hearing, appellant himself said:

> I did not do it [the sexual contact] because I wanted to hurt [the victim]. . . . I did do it [the sexual contact] but I . . . [thought] it would be okay. . . .
> . . . I know what I was thinking was wrong and illegal, but my psychotic mind thought it would be okay or secret or safe or private.
>
> In short, I had a severe lapse in judgment as to what was proper and I thought I could get away with it.
> . . . I wish every day that I had not done it. I confessed because I felt bad. Same reason I pled guilty.

Appellant's testimony defeats his argument that his counsel was ineffective in failing to seek a dispositional departure at the sentencing hearing because there was no basis for departing from the statutory mandatory-minimum sentence. Thus, not seeking a departure was not conduct that falls below an objective standard of reasonableness, nor would a different outcome have resulted if counsel had sought a dispositional departure. *See Strickland v. Washington*, 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

Appellant relies on *White v. State*, 711 N.W.2d 106 (Minn. 2006) and *Dukes v. State*, 621 N.W.2d 246 (Minn. 2001) to argue that *Knaffla* does not apply to a claim of ineffective assistance of counsel "if the claim could not be decided on the transcripts and briefs." Neither case supports appellant's position.

In *White*, five of the defendant's eight ineffective-assistance-of trial-counsel claims were held to be *Knaffla*-barred because they could "be decided on the basis of the district court record." *White*, 711 N.W.2d at 110. The defendant's three remaining ineffective-assistance claims were without merit, and none of them has any relevance to appellant's case.

In *Dukes*, the denial of relief on three of the four ineffective-assistance claims was affirmed; the claim that the defendant had not consented to his counsel's admission of guilt to one of the charges in closing argument was remanded because it "need[ed] additional fact-finding," namely "testimony from [the defendant] and his [trial] counsel." *Dukes*, 621 N.W.2d at 255. *Dukes* is distinguishable because there is no need for fact-finding on

whether appellant consented to his counsel's statement that appellant had failed to take his medication because that statement was irrelevant to appellant's conviction and sentence.

Appellant's argument that his counsel was ineffective because the trial strategy did not involve a mental-illness defense fails for two reasons. First, trial strategy is not reviewable on a claim of ineffective assistance. *Opsahl v. State*, 677 N.W.2d at 421 (Minn. 2004). Second, appellant has presented no evidence to support the statutory mental-health defense: i.e., evidence that, at the time of his offenses, he was so affected by mental illness or deficiency that he did not "know the nature of the act, or that it was wrong." Minn. Stat. § 611.026 (2016). Difficulty with medication or having a mental-health issue does not meet this standard. Moreover, appellant answered, "No" when asked at the plea hearing, "You're not claiming that at the time this [abuse] happened you were under the influence of either some drugs or medications and so you didn't know what you were doing?" Absent any evidence that appellant did not know that what he was doing was wrong, appellant's counsel had no basis for offering a mental-health defense.

The district court also correctly concluded that appellant's argument that his sentence was illegal was "merely an argumentative assertion without any factual basis and is without merit." *See Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) ("Allegations in a postconviction petition must be more than argumentative assertions without factual support." (quotation omitted)).

Finally, appellant filed a "motion to amend postconviction remedy petition, briefs and all future pleadings and proceedings to be held to a pro se litigant standard of review" urging this court to liberally construe his pleadings. "[A]lthough some accommodations

may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys." *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001). Nevertheless, we have thoroughly considered appellant's submissions.

We conclude that the district court did not abuse its discretion in denying appellant's second petition for postconviction relief.

Affirmed.