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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0194**

Jeremia Joseph Loper, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 13, 2018
Affirmed
Kirk, Judge**

Stearns County District Court
File No. 73-CR-14-3180

Jeremia Joseph Loper, Moose Lake, Minnesota (pro se appellant)

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

Janelle P. Kendall, Stearns County Attorney, Chad T. May, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this pro se appeal from an order denying postconviction relief, appellant argues that the postconviction court abused its discretion in denying his petition without an evidentiary hearing. We affirm.

FACTS

Appellant Jeremia Joseph Loper was charged with second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (2010), and attempted indecent exposure in violation of Minn. Stat. §§ 609.17, 617.23, subd. 2(1) (2010), for conduct involving a 10- to 11-year-old victim when he was 19 to 20 years old. After a bench trial, the district court found appellant guilty of both charges, entered convictions on both offenses, and sentenced him to 70 months in prison. The facts underlying this case can be found in this court's opinion affirming appellant's conviction of second-degree criminal sexual conduct following appellant's direct appeal, in which he challenged the sufficiency of the evidence supporting his conviction. *See State v. Loper*, No. A15-0509, 2016 WL 764140, at *1 (Minn. App. Feb. 29, 2016), *review denied* (Minn. May 17, 2016).

After this court affirmed his conviction, appellant filed a postconviction petition, which he amended once, and raised a number of claims.¹ The postconviction court denied appellant's petition without an evidentiary hearing, determining that his claims of ineffective assistance of appellate counsel and denial of access to the courts entitled him to no relief, and that all his remaining postconviction claims are *Knaffla*-barred. This appeal follows.

¹ Appellant's postconviction claims include: (1) prosecutorial misconduct; (2) ineffective assistance of trial counsel; (3) ineffective assistance of appellate counsel; (4) denial of access to the courts; (5) denial of right to counsel during presentence investigation; (6) failure of the district court to protect his trial rights; (7) improper evidence introduced at trial; and (8) insufficiency of the evidence. Appellant also argued that the cumulative effect of the alleged errors violated his due-process rights and require a new trial.

DECISION

Appellant challenges the denial of his postconviction petition without an evidentiary hearing, arguing that the postconviction court failed to liberally construe his petition and that the interests-of-justice exception to the *Knaffla* bar permits review of his otherwise barred claims.

Appellate courts “review a denial of a petition for postconviction relief, including a denial of relief without an evidentiary hearing, for an abuse of discretion.” *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). “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.” *Id.* (quotation omitted). We review the postconviction court’s conclusions of law de novo. *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010).

A petition for postconviction relief must include “a statement of the facts and the grounds upon which the petition is based and the relief desired.” Minn. Stat. § 590.02, subd. 1(1) (2016). A postconviction court must “liberally construe the petition . . . and shall look to the substance thereof and waive any irregularities or defects in form.” Minn. Stat. § 590.03 (2016); *see also Wallace v. State*, 820 N.W.2d 843, 849 (Minn. 2012) (noting that a postconviction court must liberally construe a petition in determining whether the petitioner has invoked an exception for failing to timely assert a claim). A postconviction court may dismiss the petition without an evidentiary hearing if, taking the facts alleged in the light most favorable to the petitioner, “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 (2016); *Fox v. State*, ___N.W.2d ___, ___, 2018 WL 2945100, at *2 (Minn. June 13, 2018).

A petitioner is not entitled to postconviction relief if his claim is *Knaffla*-barred. *Colbert v. State*, 870 N.W.2d 616, 626 (Minn. 2015). Under the *Knaffla* rule, “once a direct appeal has been taken, all claims raised in the direct appeal and all claims that were known *or should have been known* but were not raised in the direct appeal are procedurally barred.” *Id.*; *see also* Minn. Stat. § 590.01, subd. 1(2) (2016) (“A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence.”).

There are two recognized exceptions to the *Knaffla* bar. *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009). A claim is not *Knaffla*-barred if the petitioner (1) “presents a novel legal issue” or (2) “if the interests of justice require the court to review the claim.” *Id.* “Under the interests-of-justice exception to the *Knaffla* rule, the court may review a claim as fairness requires when the claim has substantive merit and the petitioner did not deliberately and inexcusably fail to raise the issue in the direct appeal or a previous postconviction petition.” *Colbert*, 870 N.W.2d at 626.

We first consider whether the postconviction court erred in determining that appellant’s claims of ineffective assistance of appellate counsel and denial of access to the courts, which appellant contends excuse his failure to bring his otherwise *Knaffla*-barred claims in his direct appeal, entitle him to no relief.

I. The postconviction court did not err in determining that appellant’s claim of ineffective assistance of appellate counsel entitles him to no relief.

Appellant argues that he received ineffective assistance of appellate counsel because his counsel failed to (1) investigate certain trial records and (2) adequately communicate with him. We disagree.

Ineffective-assistance-of-counsel claims involve mixed questions of law and fact subject to de novo review. *Carney v. State*, 692 N.W.2d 888, 890–91 (Minn. 2005). A claim of ineffective assistance of appellate counsel is not barred by *Knaffla* in a first postconviction petition because it cannot be raised on direct appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). The “postconviction petition must be more than argumentative assertions without factual support, and an evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested.” *Id.* at 535 (citation and quotation omitted). Thus, to receive an evidentiary hearing on a claim of ineffective assistance of counsel, the petitioner must “allege facts which would affirmatively prove that his 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.” *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990) (quotations omitted).

A. Investigation of trial records

Appellant contends that his appellate counsel failed to adequately investigate a statement that he gave to a police investigator, which the state introduced at trial in a redacted form. In his petition, appellant alleged that the redactions to his statement

improperly edited interview questions, cast his responses as admitting to conduct that he did not admit to in the original statement, and omitted alibi information, and that his trial counsel failed to inform him of the redactions. Appellant also alleged that he specifically asked his appellate counsel to investigate the discrepancies in the statements, but his counsel conducted only a limited investigation and informed him that the claim was without merit.

Here, even if we accept appellant's description of his original statement as true, the facts alleged in his petition do not establish a reasonable probability that the outcome of trial would have been different. The redacted statement presented the investigator's question to appellant as, "You may have touched where you shouldn't have touched, but you're telling me it wasn't intentional," to which appellant replied, "Yes." Appellant alleged that the investigator actually asked him, "You may have touched *them* where you shouldn't have touched *them*, but you're telling me it wasn't intentional." But appellant made no allegation that the term, "them," did not encompass a reference to the victim. The evidence in the record supports the postconviction court's conclusion that the redactions were made to appellant's statement only to remove references to another alleged victim. Appellant does not explain how the statement in its unredacted form is not an admission that he unintentionally touched both the victim and another person where he should not have touched.

With regard to appellant's allegation that the redacted statement omitted responses relevant to his alibi, he failed in his petition to identify the specific responses that he claims were omitted or to explain their relevance to his alibi. On appeal, appellant contends that

the omitted responses would have shown that he did not admit to living in the same apartment building as the victim during the relevant timeframe. But the redacted statement included responses by appellant in which he disputed living at the apartment during the timeframe and claimed that the events he was being asked about happened one year earlier, as well as his admission that he moved back to the apartment in late August 2011. Appellant failed to show how any omitted portions of his statement, which he did not specify, would have made a difference in establishing his alibi.

Moreover, following the bench trial, the district court made a number of findings of fact in support of its conclusion that the evidence proved beyond a reasonable doubt that appellant had sexually assaulted the victim. Among these, the district court found that the victim credibly testified that appellant intentionally touched her bare breast with his hand. The district court made no findings regarding any admissions by appellant and did not rely on the redacted statement as an admission of guilt. Therefore, the record does not demonstrate a reasonable probability that, but for the admission of the redacted statement, the result of the trial would have been different. Accordingly, even assuming without deciding that appellant's appellate counsel unreasonably failed to investigate his claim regarding his statements to the police investigator, he cannot show that his counsel's decision resulted in prejudice.

B. Adequate communication

Appellant also argues that he received ineffective assistance of appellate counsel because of difficulties communicating with his counsel. In his petition, appellant specifically alleged that he was denied private consultation with his appellate counsel

because he had access only to a phone located in a public area of the prison, that he had to make collect phone calls, that he received only two postcards to use for written communication, and that his counsel refused to meet with him in person to review his file.

In his postconviction petition, appellant cited a federal court decision from the Eighth Circuit as support for his argument that an accused person receives ineffective assistance of counsel if he is denied private consultation with his counsel, and that requiring a detainee to meet with his counsel in a public area is a violation of that privacy. *Johnson-El v. Schoemehl*, 878 F.2d 1043, 1053-54 (8th Cir. 1989). However, *Johnson-El* involved a constitutional challenge for deprivation of access to counsel during pretrial criminal proceedings and did not address access to appellate counsel following a trial. *Id.* at 1051. Further, this court is bound only by decisions of the Minnesota Supreme Court and the United States Supreme Court. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 20 (Minn. App. 2003). Appellant has cited no Minnesota case holding either that a prisoner has a right to consult with appellate counsel in a private area of the prison or that appellate representation may fall below an objective standard of reasonableness based on the quantity of appellate counsel's phone calls, meetings, or written communications. Here, it is clear from appellant's petition that he and his counsel communicated by phone and letter. Even accepting appellant's allegations as true, they do not establish that his counsel's representation fell below an objective standard of reasonableness.

Because the facts alleged in appellant's petition, even taken in the light most favorable to him, do not provide adequate support for either of his ineffective-assistance-

of-appellate-counsel claims, we conclude that the postconviction court did not err in determining, without an evidentiary hearing, that these claims entitle him to no relief.

II. The postconviction court did not err in determining that appellant’s claim of denial of access to the courts entitles him to no relief.

Appellant argues that he was denied access to the courts during his direct appeal, which he contends excuses his failure to bring the claims deemed *Knaffla*-barred by the postconviction court because he otherwise would have raised those claims in a pro se supplemental brief. Appellant alleged in his petition that he was denied the tools to meaningfully assert his rights because he had no access to caselaw in the prison library, which impeded his ability to conduct legal research, that the prison provided him only five free sheets of paper, and that the prison would not provide him free envelopes. Appellant argues that his level of access violated *Bounds v. Smith*, in which the United States Supreme Court recognized that prisoners have constitutional due-process rights to access the courts. 430 U.S. 817, 821, 97 S. Ct. 1491, 1494 (1977).

In *Bounds v. Smith*, the Supreme Court held that “the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law.” *Bounds*, 430 U.S. at 828, 97 S. Ct. at 1498 (emphasis added). In *State v. Seifert*, the Minnesota Supreme Court held that the state provides prisoners meaningful access to the courts “either by providing counsel for discretionary appeals *or* by providing an adequate law library.” 423 N.W.2d 368, 372 (Minn. 1988). The Minnesota Supreme Court also held that “[t]he defendant may not have

it both ways. He must either accept appointed appellate counsel or proceed *pro se* at his own risk, which, we might add, is considerable. If he makes that choice, the defendant must proceed with whatever limited resources are on hand.” *Id.* at 373. When a prisoner receives “adequate assistance from an attorney he ha[s] meaningful access to the courts.” *West v. State*, 390 N.W.2d 368, 371 (Minn. App. 1986), *review denied* (Minn. Aug. 27, 1986).

Here, the state provided appellant with an appellate public defender to represent him in his direct appeal, and he accepted. Because the facts alleged in appellant’s petition do not demonstrate ineffective assistance of appellate counsel, appellant cannot show that he was denied access to the courts regardless of his inability to conduct his own legal research. As in *Seifert*, appellant may not have it both ways. Appellant received meaningful access to the courts through the adequate assistance of his appellate public defender. The postconviction court did not err in determining, without an evidentiary hearing, that appellant’s claim of denial of access to the courts entitles him to no relief.

III. The postconviction court did not err in determining that appellant’s remaining postconviction claims are *Knaffla*-barred.

Appellant does not dispute that he knew or should have known about his remaining claims and failed to raise them in his direct appeal. *See Colbert*, 870 N.W.2d at 626 (discussing application of *Knaffla* bar to postconviction claims that should have been raised in direct appeal). Rather, appellant argues that his claims of ineffective assistance of counsel and denial of access to the courts excuse his failure to have brought these other claims in his direct appeal and satisfy the interests-of-justice exception to the *Knaffla* bar.

Because appellant's ineffective-assistance-of-appellate-counsel and denial-of-access-to-the-courts claims are his only asserted excuse for failing to bring the claims in his direct appeal that he concedes would otherwise be *Knaffla*-barred, and because we conclude that neither claim entitles him to any postconviction relief, the interests-of-justice exception to the *Knaffla* bar does not apply to permit postconviction review of his remaining claims. We conclude that the postconviction court did not err in determining that appellant's remaining claims are *Knaffla*-barred and in denying his petition without an evidentiary hearing.

Affirmed.