STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1162
A18-1163
A18-1962
A18-1963

Philip Lee Carlson, petitioner,
Appellant (A18-1162, A18-1962),

Virginia Marie Carlson, petitioner,
Appellant (A18-1163, A18-1963)

vs.

State of Minnesota,
Respondent.

Filed August 5, 2019
Affirmed
Larkin, Judge

Hennepin County District Court
File Nos. 27-CR-11-29604, 27-CR-11-29606

Philip L. Carlson, Wayzata, Minnesota (pro se appellant)

Virginia Carlson, Wayzata, Minnesota (pro se appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

LARKIN, Judge

In these consolidated appeals, appellants argue that the postconviction court abused its discretion in conducting the evidentiary hearing on their first postconviction petitions, by failing to timely rule on their prehearing motions, and in determining that certain claims were *Knaffla*-barred. Appellants further argue that the postconviction court lacked jurisdiction to rule on their subsequent postconviction petitions and sentence-correction motions. Lastly, appellants argue that it was improper for the district court judge who presided over their trial to preside over their postconviction proceedings. We affirm.

FACTS

In 2014, appellants Philip Carlson and Virginia Carlson were convicted of theft by swindle following a jury trial that lasted more than two weeks. Prior to sentencing, the Carlsons filed posttrial motions seeking to "Over-turn the Verdict" or "in the alternative grant a new trial" based upon purported "Errors in the Court," "Exculpatory Evidence and Evidence withheld by the Prosecution," and "Inadequate Representation." The district court denied the Carlsons' posttrial motions. The district court sentenced each of the Carlsons to a stayed 21-month prison term and placed them on probation.

The Carlsons appealed their convictions, arguing that (1) the evidence was insufficient to support their convictions; (2) the prosecutor engaged in misconduct; (3) the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963); (4) the state failed to disclose exculpatory evidence to the grand jury; (5) the district court erred in ruling that certain documents could not be used at trial; (6) the district court erred in admitting certain

evidence; (7) the district court erred in instructing the jury regarding accomplice liability; (8) they did not adequately waive their rights to testify; and (9) public policy required reversal. *State v. Carlson*, No. A15-0190, 2016 WL 952465, at *3-9 (Minn. App. Mar. 14, 2016), *review denied* (Minn. May 31, 2016); *State v. Carlson*, No. A15-0179, 2016 WL 952453, at *3-10 (Minn. App. Mar. 14, 2016), *review denied* (Minn. May 31, 2016). This court affirmed, *Carlson*, 2016 WL 952465, at *9; *Carlson*, 2016 WL 952453, at *10, and the supreme court denied further review.

In February 2018, each of the Carlsons petitioned for postconviction relief, and each raised the same 38 grounds for relief. The postconviction court granted their requests for an evidentiary hearing. Prior to the hearing, the Carlsons moved (1) for the appointment of advisory counsel; (2) to subpoena witnesses; (3) to sequester witnesses at the hearing; (4) to limit the evidence to that regarding the first count of the criminal complaint; (5) to exclude the public from the hearing or, in the alternative, restrict certain persons from attending the hearing; and (6) to hold the state in contempt. The postconviction court denied the Carlsons' requests for the appointment of advisory counsel, but it did not rule on the Carlsons' other motions. The Carlsons also moved to continue the evidentiary hearing, and the postconviction court denied that motion.

The postconviction court held the evidentiary hearing on March 27, 2018. Virginia Carlson testified at the hearing, and the postconviction court provisionally received over 200 exhibits from the Carlsons. The Carlsons asked the postconviction court to continue the evidentiary hearing to give them an additional day to present evidence. The postconviction court took that request under advisement.

By order dated May 16, 2018, the postconviction court denied the Carlsons' continuance request for additional hearing time, reasoning that the court previously denied their request for a continuance and that the proffered testimony would have been irrelevant and cumulative. The postconviction court also denied the Carlsons' motions to limit the evidence and to hold the state in contempt. Lastly, the postconviction court denied the Carlsons' requests for relief, reasoning that 37 of the 38 grounds raised in their postconviction petitions were procedurally barred and that the remaining claim of ineffective assistance of counsel failed on the merits.

On June 18, 2018, each of the Carlsons petitioned for postconviction relief a second time, raising 15 grounds for relief. On June 19, 2018, each of the Carlsons petitioned for postconviction relief a third time, raising four additional grounds for relief. In July 2018, the Carlsons appealed the postconviction court's May 16, 2018 order. In September 2018, the Carlsons each moved for sentence modification, requesting that their probation be terminated and that "they be discharged from [their] stay of execution."

In an order dated October 5, 2018, the postconviction court denied the Carlsons' second and third postconviction petitions without a hearing, reasoning that their claims were either properly directed to the court of appeals or procedurally barred. The postconviction court also denied the Carlsons' requests to modify their sentences. In December 2018, the Carlsons appealed the October 5, 2018 postconviction order. This court consolidated the Carlsons' appeals from the October 5, 2018 and May 16, 2018 postconviction orders.

D E C I S I O N

Minnesota's postconviction statute provides that

> a person convicted of a crime, who claims that: (1) the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state . . . may commence a proceeding to secure relief by filing a petition in the district court in the county in which the conviction was had to vacate and set aside the judgment and to discharge the petitioner or to resentence the petitioner or grant a new trial or correct the sentence or make other disposition as may be appropriate.

Minn. Stat. § 590.01, subd. 1 (2016).

"Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief," the postconviction court shall promptly hold a hearing regarding the petition. Minn. Stat. § 590.04, subd. 1 (2016). "In the discretion of the court, it may receive evidence in the form of affidavit, deposition, or oral testimony. The court may inquire into and decide any grounds for relief, even though not raised by the petitioner." *Id.*, subd. 3 (2016). "Unless otherwise ordered by the court, the burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." *Id.*

This court reviews a denial of postconviction relief for an abuse of discretion. *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). In doing so, this court reviews the postconviction court's legal determinations de novo and its factual findings for clear error. *Brown v. State*, 895 N.W.2d 612, 617 (Minn. 2017).

I.

The Carlsons contend that the postconviction court "abused its discretion by conducting the [evidentiary hearing] as if it were a pre-hearing that denied [their] right to present 'burden of proof' evidence . . . and in denying a continuance." This court reviews the postconviction court's evidentiary and continuance rulings for an abuse of discretion. *Johnson v. State*, 697 N.W.2d 194, 198 (Minn. 2005); *State v. Hole*, 400 N.W.2d 430, 435 (Minn. App. 1987).

As to the Carlsons' argument that the postconviction court erroneously limited their presentation of evidence, we note that the postconviction court provisionally received over 200 exhibits from the Carlsons at the postconviction evidentiary hearing. The postconviction court also heard the testimony of Virginia Carlson. The Carlsons did not call any other witnesses. As the postconviction court noted in its May 16, 2018 order, the Carlsons were not precluded from calling additional witnesses at the scheduled evidentiary hearing, nor did they explain their failure to call additional witnesses at that time.[1]

The Carlsons argue that they have "clear and convincing newly-obtained evidence that unequivocally and intrinsically proves they are not guilty of any of the 5 Counts in [the] State's Complaint." But they do not identify or describe that evidence on appeal. And at the evidentiary hearing, Virginia Carlson said that the purported new evidence consisted of emails that she admittedly possessed at the time of trial. On this record, we are not persuaded that the postconviction court erred in its evidentiary rulings.

[1] The postconviction court speculated that the Carlsons did not call other witnesses at the evidentiary hearing as part of a strategy to obtain additional time to present evidence.

As to the Carlsons' argument that the postconviction court erroneously denied their requests to continue the hearing for additional evidence, the postconviction court reasoned that it was unnecessary to do so because additional witness testimony would have been irrelevant and cumulative. We discern no abuse of discretion in the postconviction court's ruling.

II.

The Carlsons contend that the postconviction court's failure to "rule on several of [their] motions in limine . . . severely prejudiced [their] substantial rights and pre-determined the outcome of the hearing."

"[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal. . . . [And] the burden of showing error rests upon the one who relies upon it." *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (quotation omitted). Moreover, to prevail on appeal, an appellant must show both error and prejudice resulting from the error. *See* Minn. R. Crim. P. 31.01 ("Any error that does not affect substantial rights must be disregarded."); *see also Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 237 N.W.2d 76, 78 (Minn. 1975) ("[E]rror without prejudice is not ground for reversal." (quotation omitted)).

The Carlsons do not explain why the postconviction court's failure to rule on their prehearing motions prior to the hearing prejudiced them or why the timing of the rulings affected the postconviction court's decision to deny relief. The prejudicial impact of the alleged error is not apparent to us. For example, the Carlsons moved to sequester witnesses,

but Virginia Carlson was the only witness who testified at the hearing. In sum, the Carlsons have failed to establish prejudicial error entitling them to relief.

III.

The Carlsons contend that the postconviction court abused its discretion by concluding that all but one of their claims was procedurally barred.

Under *State v. Knaffla*, "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." 243 N.W.2d 737, 741 (Minn. 1976); *see* Minn. Stat. § 590.01, subd. 1 ("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."). Any claim that should have been known, but was not raised, at the time of direct appeal is also barred by *Knaffla*. *Andersen v. State*, 830 N.W.2d 1, 8 (Minn. 2013). "A claim is not *Knaffla*-barred, however, if (1) the defendant presents a novel legal issue or (2) the interests of justice require the court to consider the claim." *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011).

The postconviction court ruled that all of the Carlsons' claims were *Knaffla*-barred except for their ineffective-assistance-of-counsel claim.[2] The postconviction court reasoned that "there is extensive evidence in the record that [the Carlsons] knew of all of their claims, with the exception of ineffective assistance of counsel, at the time of trial or

[2] The postconviction court rejected the Carlsons' ineffective-assistance-of-counsel claim on the merits, and the Carlsons do not challenge the postconviction court's ruling on that claim.

on direct appeal." The postconviction court also reasoned that "several of [the Carlsons'] claims, including claims of insufficient evidence, prosecutorial misconduct, and *Brady* violations, were considered and rejected on their direct appeal."

The Carlsons make arguments regarding claims that the district court rejected as *Knaffla*-barred, namely, that the state withheld exculpatory evidence and that the evidence was insufficient to support their convictions. They also argue that their claims fall within an exception to the *Knaffla* bar. We address each argument in turn.

Withholding Exculpatory Evidence

Under *Brady*, the suppression by the state of material evidence favorable to the defendant violates due process. 373 U.S. at 87, 83 S. Ct. at 1196-97; *State v. Brown*, 815 N.W.2d 609, 622 (Minn. 2012). The Carlsons generally argue that "[e]xculpatory evidence was withheld at Trial by the State," namely a Federal Deposit Insurance Corporation (FDIC) "disk of evidence" that "consisted of approximately 5,700 . . . documents and spreadsheets."

In the Carlsons' direct appeals, this court noted that the Carlsons appeared to "argue that the state committed a *Brady* violation by delaying its subpoena of documents regarding the Amber Woods project from the Federal Deposit Insurance Corporation (FDIC documents) and by failing to more thoroughly investigate and disclose the financial details of the project." *Carlson*, 2016 WL 952465, at *7; *Carlson*, 2016 WL 952453, at *8. This court rejected that argument because the Carlsons failed to explain why the timing of the state's subpoena and the scope of the state's investigation constituted suppression of evidence under *Brady*, why the documents were exculpatory or impeaching, and why the

alleged suppression was prejudicial. *Carlson*, 2016 WL 952465, at *7; *Carlson*, 2016 WL 952453, at *8.

Because the Carlsons argued that the state withheld exculpatory FDIC evidence in their direct appeals, those claims are *Knaffla*-barred. *See Knaffla*, 243 N.W.2d at 741. To the extent that the Carlsons' *Brady*-violation claims in their first postconviction petitions are different than the related claims in their direct appeals, their postconviction *Brady* claims are nonetheless *Knaffla*-barred because the Carlsons were aware of the existence of the FDIC documents at the time of their direct appeals. Thus, any related claims should have been known and raised at that time.

Sufficiency of the Evidence

The Carlsons extensively argue that their convictions are based on "false evidence," that the underlying criminal charges are "false," that "the State's Complaint is false," and that the crimes of which they were convicted "do not exist." (Emphasis omitted.) We construe those arguments as challenges to the sufficiency of the evidence to sustain the Carlsons' convictions. Such challenges were considered and rejected in the Carlsons' direct appeals, *Carlson*, 2016 WL 952465, at *5-6; *Carlson*, 2016 WL 952453, at *3-4, and are therefore *Knaffla*-barred. *See Knaffla*, 243 N.W.2d at 741.

Interests-of-Justice Exception

The Carlsons argue that their claims fall within the interests-of-justice exception to the *Knaffla* bar. A claim is not *Knaffla*-barred if "the interests of justice require the court to consider the claim." *Buckingham*, 799 N.W.2d at 231. The interests-of-justice exception applies "if fairness requires it and the petitioner did not deliberately and

inexcusably fail to raise the claim on direct appeal." *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). Such claims must also have substantive merit. *Anderson v. State*, 811 N.W.2d 632, 634 (Minn. 2012).

The postconviction court determined that the interests-of-justice exception does not apply, reasoning that the Carlsons "failed to demonstrate that they did not deliberately or inexcusably fail to raise the issues on direct appeal" and that "the record demonstrates that [they] repeatedly raised these arguments in *pro se* motions and briefs both on direct appeal and post-verdict."

The Carlsons argue that their claims have substantive merit, that they "did not have the new information to raise on direct appeal," that they "were not a party to the State's error of withholding exculpatory information," and that their "false convictions for crimes that do not exist is fundamental unfairness that needs to be addressed." We are not persuaded. As the postconviction court noted, the Carlsons have repeatedly raised *Brady*-violation and sufficiency-of-the-evidence claims, including on direct appeal. This court previously found that those claims have no merit. *Carlson*, 2016 WL 952465, at *5-7; *Carlson*, 2016 WL 952453, at *3-4, *8. Thus, the postconviction court did not abuse its discretion by determining that the Carlsons' *Brady*-violation and sufficiency-of-the-evidence claims are *Knaffla*-barred.

IV.

The Carlsons contend that the postconviction court "lacked jurisdiction" to rule on their subsequent postconviction petitions and motions while their appeals of the postconviction court's first order were pending.

"[T]he filing of a timely and proper appeal suspends the [district] court's authority to make any order that affects the order or judgment appealed from, although the [district] court retains jurisdiction as to matters independent of, supplemental to, or collateral to the order or judgment appealed from." Minn. R. Civ. App. P. 108.01, subd. 2; *see also Muecke v. State*, 348 N.W.2d 808, 810 (Minn. App. 1984). Whether a court has jurisdiction to entertain a specific claim for relief is a question of law reviewed de novo. *City of Waite Park v. Minn. Office of Admin. Hearings*, 758 N.W.2d 347, 352 (Minn. App. 2008), *review denied* (Minn. Feb. 25, 2009).

In the postconviction court's October 5, 2018 order, it noted that the Carlsons' claims regarding the March 27, 2018 evidentiary hearing were "properly directed to the court of appeals" and did not address them. Thus, the postconviction court properly limited its consideration of the claims in the Carlsons' second and third postconviction petitions and sentence-modification motions to those that were not currently before this court on appeal. In doing so, the postconviction court did not exceed its jurisdiction.

V.

The Carlsons contend that they were prejudiced because the same district court judge presided at their jury trial and over the postconviction proceedings. "A postconviction proceeding is an extension of the criminal prosecution." *Hooper v. State*, 680 N.W.2d 89, 92 (Minn. 2004). It is not improper for the district court judge who presided over a criminal trial to also preside over postconviction proceedings. *Berg v. State*, 403 N.W.2d 316, 318 (Minn. App. 1987), *review denied* (Minn. May 18, 1987). And although a criminal defendant has a constitutional right to a fair and impartial judge, we

"presume that a judge has discharged her duties properly." *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). "[B]ias must be proved in light of the record as a whole." *Id.*

The Carlsons argue that the district court judge here could not have properly conducted the evidentiary hearing because the judge had made prior rulings adverse to them that were erroneous. But such rulings, on their own, do not establish judicial bias. *See id.* ("Previous adverse rulings by themselves do not demonstrate judicial bias."). Once again, the Carlsons have failed to establish prejudicial error entitling them to relief.

Conclusion

The postconviction court generously accommodated the Carlsons' requests for postconviction review. It granted their requests for an evidentiary hearing and allowed them to present testimony and numerous exhibits. And it described its findings, analysis, and decisions in two single-spaced written orders that were 25 and 15 pages long, indicating that it thoroughly analyzed the relevant evidence in deciding their claims. The postconviction court did not err in doing so. Indeed, we commend the postconviction court for its careful consideration of the issues.

Affirmed.