STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1858

Michael David Henderson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 10, 2019
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-14-8400

Michael Henderson, Rush City, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

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

LARKIN, Judge

Appellant challenges the postconviction court's summary denial of his petition for relief, arguing that his trial and appellate attorneys provided ineffective assistance of

counsel and that this court applied an incorrect standard of review in his direct appeal. We affirm.

FACTS

In 2014, appellant Michael David Henderson was convicted of attempted second-degree murder, first-degree aggravated robbery, and second-degree assault following a jury trial. Henderson appealed, challenging the sufficiency of the evidence to support his conviction of attempted second-degree murder and the district court's imposition of consecutive sentences. *State v. Henderson*, No. A15-0127, 2016 WL 208133, at *2-3 (Minn. App. Jan. 19, 2016), *review denied* (Minn. Mar. 29, 2016). This court affirmed, *id.* at *4, and the supreme court denied Henderson's petition for further review.

In 2018, Henderson petitioned for postconviction relief, arguing that this court did not apply the correct standard of review to his sufficiency challenge, that the district court erroneously instructed the jury, and that his trial and appellate attorneys provided ineffective assistance of counsel. The postconviction court denied relief without an evidentiary hearing. Henderson appeals.[1]

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

[1] Henderson does not challenge the postconviction court's ruling on the jury-instruction issue.

> 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).

A postconviction court may deny a petition for relief without a hearing if "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). "An evidentiary hearing upon a petition for postconviction relief is not required unless the petitioner alleges such facts which, if proved by a fair preponderance of the evidence, would entitle him or her to the requested relief." *Roby v. State*, 547 N.W.2d 354, 356 (Minn. 1996). Allegations in a postconviction petition must be "more than argumentative assertions without factual support." *State v. Caldwell*, 803 N.W.2d 373, 388 (Minn. 2011) (quotation omitted).

"[W]here 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." *State v. Knaffla*, 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."). "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).

This court reviews a summary denial of postconviction relief for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). In doing so, this court

reviews the postconviction court's legal determinations de novo and its factual findings for clear error. *Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011).

I.

Henderson contends that the postconviction court erred by denying his claim of ineffective assistance of trial counsel. In doing so, the postconviction court concluded that the claim is *Knaffla*-barred and that it fails on the merits.

As to the *Knaffla* bar, the postconviction court reasoned that Henderson knew or should have known of his ineffective-assistance-of-trial-counsel claim at the time of his initial appeal because he was aware of the attorney conduct on which the claim is based. The district court further reasoned that neither of the *Knaffla* exceptions applies. Henderson argues that the interest-of-justice exception to the *Knaffla* bar applies.

Whether the postconviction court correctly determined that Henderson's claim of ineffective assistance of trial counsel is barred under *Knaffla* is immaterial because the court also considered and correctly rejected the claim on the merits. As explained in section II of this opinion, it was necessary for the district court to do so because Henderson's claim of ineffective assistance of appellate counsel was based on his appellate counsel's failure to raise a claim of ineffective assistance of trial counsel. We therefore address the merits of Henderson's ineffective-assistance-of-trial-counsel claim.

A determination whether a defendant received ineffective assistance of counsel involves a mixed question of law and fact that is reviewed de novo. *Dereje v. State*, 837 N.W.2d 714, 721 (Minn. 2013). Appellate courts generally analyze ineffective-assistance-of-counsel claims under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Id. To prevail under *Strickland*, a defendant "must show 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." 466 U.S. at 687-88, 694, 104 S. Ct. at 2064, 2068; *see also State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (applying *Strickland* to a claim of ineffective assistance of counsel). Appellate courts apply "a strong presumption that [an attorney's] performance falls within the wide range of 'reasonable professional assistance.'" *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Appellate courts need not analyze both parts of the *Strickland* test if either one is determinative. *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009).

Henderson asserts that his trial counsel provided ineffective assistance because she failed to object to the testimony of certain witnesses regarding his intent to commit murder, because she "unduly influenced him to abandon his desire to testify," and because she did not "accompany[] him during the [presentence investigation] (PSI) process."

As to Henderson's assertion that trial counsel unreasonably failed to object to certain testimony and therefore failed to present "the only *reasonable* argument that [could have] prevailed," a reviewing court generally "will not review attacks on counsel's trial strategy," *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). "[D]ecisions about objections at trial are matters of trial strategy . . . ." *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017) (quotation omitted). Henderson does not persuade us that trial counsel's decisions regarding what arguments to make at trial and whether to object to certain testimony are anything other than matters of unreviewable trial strategy.

As to Henderson's assertion that trial counsel "unduly influenced" him to not testify,

> A defendant's right to testify is a constitutional right that can only be waived by the defendant. Such waiver must be made voluntarily and knowingly. The defendant's counsel cannot waive the defendant's right to testify, and a court is required to grant a new trial if it determines that counsel denied the defendant the right to testify. If, however, a court determines that a defendant's decision not to testify was adversely affected by the counsel's failure to adequately inform the defendant about the relevant facts, a new trial will be granted only if the defendant was prejudiced by the error.

State v. Berkovitz, 705 N.W.2d 399, 404-05 (Minn. 2005) (citations omitted).

> When a defendant knows and understands his right to testify, a claim that his attorneys' actions denied him the right to testify must fail absent some indication in the record that his lawyers coerced him into not testifying by applying undue pressure, using illegitimate means, or otherwise depriving him of his free will. The defendant has the burden of proving that he or she did not voluntarily and knowingly waive the right to testify. Absent a finding to the contrary, [appellate courts] presume that the defendant waived the right to testify for the reasons stated on the record. Solemn declarations in open court carry a strong presumption of verity and subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal.

Andersen v. State, 830 N.W.2d 1, 11 (Minn. 2013) (quotations and citations omitted).

Here, the district court advised Henderson on the record regarding his right to testify. The next day, the district court asked Henderson whether he had considered testifying. Henderson replied that he had and that he wanted to testify. The prosecutor and trial counsel then reviewed jury instructions off the record. When the proceedings resumed on the record, the district court stated that, while the attorneys were reviewing the jury instructions, "Henderson indicated that he now does not wish to testify." The district court

stated, "The choice is yours, obviously, and you have an attorney who can advise you as to what she thinks might be appropriate, but ultimately it's your choice; do you understand that, sir?" Henderson responded, "Yes, Your Honor, I understand." The district court asked Henderson whether he wanted to testify, and Henderson stated, "I do not."

Henderson argues that "Trial Counsel unduly influenced [him] not to testify through advising [him] in a deceptive tone" and that "[s]uch advice is unreasonable" when a defendant admits committing a robbery but denies intent or motive to cause death. Henderson's vague allegation that trial counsel advised him "in a deceptive tone" does not demonstrate that his trial attorney coerced him into not testifying by applying undue pressure, using illegitimate means, or otherwise depriving him of his free will. Because the record indicates that Henderson knew of and understood his right to testify and he has not presented evidence of coercion, he is not entitled to a new trial on the theory that trial counsel denied him his right to testify. *See id.*

Henderson's argument that his attorney misadvised him regarding his decision to testify is also unavailing. We presume that Henderson's trial counsel provided advice that fell "within the wide range of 'reasonable professional assistance.'" *Jones*, 392 N.W.2d at 236. There are reasons why a reasonably competent attorney might advise a defendant not to testify under the circumstances described by Henderson. Thus, Henderson's conclusory assertions regarding the reasonableness of his attorney's advice fail to rebut the presumption of reasonable professional assistance. *See Davis v. State*, 784 N.W.2d 387, 391 (Minn. 2010) (affirming postconviction court's rejection of ineffective-assistance-of-counsel claims that were based solely on "conclusory, argumentative assertions without

factual support"). Moreover, Henderson does not explain how there is a reasonable probability that the result of the proceeding would have been different but for the alleged unprofessional error.

As to Henderson's assertion that his trial counsel unreasonably failed to accompany him to his PSI interview, this court has previously held that a PSI interview does not constitute a critical stage of the proceedings at which a defendant has a Sixth Amendment right to counsel. *State v. Barber*, 494 N.W.2d 497, 501-02 (Minn. App. 1993), *review denied* (Minn. Feb. 25, 1993). Even if it were objectively unreasonable for trial counsel not to accompany Henderson to his PSI interview, he does not persuade us that trial counsel's presence would have changed the result of the proceeding.

In sum, Henderson's claim of ineffective assistance of trial counsel is without merit, and the postconviction court did not err by summarily denying relief.

II.

Henderson contends that the postconviction court erred by denying his claim of ineffective assistance of appellate counsel. He argues that his appellate counsel was ineffective for failing to raise a claim of ineffective assistance of trial counsel.

"Appellate counsel is not required to raise all possible claims on direct appeal, and counsel need not raise a claim if she could have legitimately concluded that it would not prevail." *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008) (quotation omitted). A claim of ineffective assistance of appellate counsel is "properly raised in a first postconviction petition, because the petitioner could not have known of such a claim at the time of direct appeal." *Zornes v. State*, 880 N.W.2d 363, 370-71 (Minn. 2016). "When an

ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the [petitioner] must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). As explained in section I, Henderson fails to show that his trial counsel provided ineffective assistance. His ineffective-assistance-of-appellate-counsel claim therefore fails as a matter of law, and the postconviction court did not err by rejecting it.

III.

Henderson contends that this court erred in his direct appeal by failing to apply the heightened circumstantial-evidence standard of review when addressing his argument that the evidence was insufficient to sustain his conviction of attempted second-degree murder. Henderson generally argues that he "is not guilty of 2nd degree attempted murder."

To the extent that Henderson argues that the evidence at trial was insufficient to sustain his conviction, that claim was decided in his direct appeal and it is therefore *Knaffla*-barred. Moreover, as the postconviction court correctly observed, that court was "not the appropriate venue to be addressing the Court of Appeals' standard of review." *See* Minn. R. Civ. App. 117, subd. 1 ("Any party seeking review of a decision of the Court of Appeals shall separately petition the Supreme Court.").

Because the petition, files, and records of the proceeding conclusively show that Henderson is not entitled to relief, the postconviction court did not abuse its discretion by denying Henderson's petition for relief without a hearing.

Affirmed.