STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1649

Robert Earl Leatherberry, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 13, 2020
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CR-15-1250

Robert E. Leatherberry, Rush City, Minnesota (pro se appellant)

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

Mark S. Rubin, St. Louis County Attorney, Jessica J. Fralich, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

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

SMITH, TRACY M., Judge

In this appeal from an order denying postconviction relief, appellant Robert Earl Leatherberry argues that the district court abused its discretion by denying his request for an evidentiary hearing on his claim of ineffective assistance of appellate counsel. He also

argues that the district court abused its discretion by declining to consider his challenge to his criminal-history score as *Knaffla*-barred. Because we hold that the district court properly denied relief on the ineffective-assistance-of-counsel claim but that appellant's challenge to his criminal-history score is not *Knaffla*-barred, we affirm in part, reverse in part, and remand.

FACTS

The state charged Leatherberry with first-degree criminal sexual conduct and first-degree burglary in April 2015, alleging that Leatherberry forced his way into his neighbor's home and sexually assaulted her. A jury found Leatherberry guilty of first-degree criminal sexual conduct, and the district court sentenced him to 306 months' imprisonment.

Leatherberry filed a timely direct appeal of his conviction. *State v. Leatherberry*, No. A16-0731, 2017 WL 1549969 (Minn. App. May 1, 2017), *review denied* (Minn. July 18, 2017). His appellate counsel argued that Leatherberry was denied his right to a speedy trial. *Id.* at *3. Leatherberry also filed a pro se supplemental brief, which included claims that he was denied effective assistance of trial counsel, that he was denied his due-process right to present a complete defense, and that the state violated its *Brady* obligations.[1] *Id.* at *6-7. This court affirmed, determining that Leatherberry was responsible for causing delays before he made a speedy trial demand and that his pro se

[1] *See Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) (holding that the prosecution violates due-process requirements by suppressing material evidence favorable to the defendant).

claims were without merit. *Id.* at *1. The Minnesota Supreme Court denied review on July 18, 2017.

Leatherberry petitioned for postconviction relief on July 22, 2019.[2] He requested relief on two primary grounds: (1) a Sixth Amendment violation based on ineffective assistance of appellate counsel, and (2) a sentencing error based on improper calculation of his criminal-history score. The district court summarily denied his request for relief based on ineffective assistance of appellate counsel because Leatherberry's claim is based on alleged errors of trial counsel that went unchallenged by appellate counsel and Leatherberry failed to show that trial counsel was ineffective. It denied his request for sentencing relief on the grounds that the criminal-history-score issue is *Knaffla*-barred.

This appeal follows.

D E C I S I O N

I. The district court did not err by denying appellant's request for an evidentiary hearing on his ineffective-assistance-of-appellate-counsel claim.

A postconviction court must grant a hearing on a motion for postconviction relief "[u]nless 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 (2018). An appellate

[2] On appeal, the state argues that Leatherberry's petition for postconviction relief is untimely under Minn. Stat. § 590.01, subd. 4 (2018), because Leatherberry filed the postconviction petition over two years after his direct appeal became final when the supreme court denied review on July 18, 2017. But the state did not raise a timeliness argument in the district court, and the district court did not address the issue. The state can forfeit its right to raise the two-year time limit in Minn. Stat. § 590.01, subd. 4, which is not a jurisdictional bar, by failing to raise it in the district court. *Carlton v. State*, 816 N.W.2d 590, 601-06 (Minn. 2012). We accordingly consider the argument forfeited.

court reviews the postconviction court's decision to summarily deny a petition for postconviction relief without an evidentiary hearing for an abuse of discretion. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). An appellate court "will not reverse an order unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (quotation omitted).

"To be entitled to an evidentiary hearing on an ineffective-assistance-of-counsel claim, an appellant must allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)." *Nissalke v. State*, 861 N.W.2d 88, 93 (Minn. 2015) (quotation omitted). Under the *Strickland* test, the petitioner must establish that (1) "his counsel's representation fell below an objective standard of reasonableness" and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 94 (quotation omitted).

"When a petitioner bases his ineffective-assistance-of-appellate-counsel claim on appellate counsel's failure to raise a claim of ineffective assistance of trial counsel, he must first show that trial counsel was ineffective." *Carridine v. State*, 867 N.W.2d 488, 494 (Minn. 2015). Leatherberry argues that his trial counsel was ineffective in three ways, and, by extension, his appellate counsel was ineffective for failing to raise these alleged errors. We examine each alleged error in turn.

A. Unlawful detention under Minn. R. Crim. P. 4.02 and 4.03

Leatherberry argues that his trial counsel should have challenged his initial detention following his arrest because he was detained in violation of rules 4.02 and 4.03 of the Minnesota Rules of Criminal Procedure. Rule 4.02, subdivision 5(1), or the 36-hour rule, states that a person arrested without a warrant ordinarily must "be brought before a judge without unnecessary delay, and not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon as a judge is available." Minn. R. Crim. P. 4.02, subd. 5(1). Rule 4.03, or the 48-hour rule, states that "[w]hen a person arrested without a warrant is not released under this rule or Rule 6, a judge must make a probable cause determination without unnecessary delay, and in any event within 48 hours from the time of the arrest, including the day of arrest, Saturdays, Sundays, and legal holidays." Minn. R. Crim. P. 4.03, subd. 1.

Leatherberry was arrested without a warrant on April 15, 2015, after the police department received DNA test results from the Bureau of Criminal Apprehension (BCA), but before the state had charged him with a crime. The state filed an application for a judicial determination of probable cause to detain Leatherberry, and the district court determined that probable cause existed and approved the request on April 16, 2015. On Friday, April 17, 2015, the state filed a petition for an extension of time to file a complaint against Leatherberry, which the district court granted. The state filed its complaint on Monday, April 20, 2015, and Leatherberry appeared for an arraignment the same day.

In denying postconviction relief, the district court determined that Leatherberry's detention claims necessarily fail because the district court made a judicial determination of

probable cause to detain him on April 16, 2015. Accordingly, the district court concluded, there was no violation of the rules for his trial counsel to challenge and thus no ineffective assistance for his appellate counsel to challenge.

On appeal, Leatherberry argues that the district court considered only his 48-hour-rule-violation claim and ignored his 36-hour-rule-violation claim. He argues that the 36-hour-rule violation was a distinct violation not addressed by the issuance of a judicial determination of probable cause. As to his 48-hour-rule-violation claim, he appears to concede that the judicial determination of probable cause occurred but contends that his rights were nonetheless violated because he was not given notice of the judicial determination to detain him as required by rule 4.03, subdivision 4.

Even if Leatherberry is correct that the 36-hour rule should have been separately assessed and even if the rule was violated, Leatherberry has not shown how this entitles him to relief. In his postconviction petition, Leatherberry asserts that, had his trial counsel filed a motion based on rule 4.02, subdivision 5(1), or rule 4.03, the required relief would have been his immediate release and no complaint filed. But the rules do not support this assertion. In *State v. Waddell*, the supreme court explained that the 36-hour rule is of longstanding importance, particularly to "avoid the coercive nature of custodial surroundings by preventing secret interrogation and the resultant pressure to confess." 655 N.W.2d 803, 811 (Minn. 2003) (quotation omitted). But, even though the *Waddell* court found the 36-hour rule had been violated, it declined to suppress Waddell's confession and affirmed his conviction. *Id.* at 813. Here, Leatherberry is not asserting that he confessed while in custody and has not otherwise explained how a violation of the rule supports his

requested relief. He accordingly has not shown how his trial counsel and appellate counsel were ineffective in failing to raise a claim based on rule 4.02, subdivision 5(1).

He similarly has not shown how his claim regarding lack of notice of the judicial determination of probable cause made under rule 4.03 entitles him to relief. Moreover, the record does contain a notice form filled in with Leatherberry's information. Ultimately, had his trial counsel challenged the lack of notice, nothing suggests that the result of this criminal proceeding would have been different. *See Nissalke*, 861 N.W.2d at 94. Because Leatherberry has not shown how his trial counsel's performance constituted ineffective assistance, he correspondingly has not shown that his appellate counsel's performance constituted ineffective assistance. *Carridine*, 867 N.W.2d at 494.

B. Alleged destruction of DNA evidence

Leatherberry next argues that his trial counsel should have challenged police destruction of DNA evidence. He explains in his postconviction petition that this destruction claim is based on a "Duluth Police Case Report sheet that indicated the 'sexual assault evidence kit;' 'a blood collection kit;' and 'a urine collection kit' were destroyed on November 21, 2014," before being sent to the BCA for testing. The police report that Leatherberry cites and attaches to his petition, though, indicates that the DNA evidence he references was collected November 12 and 21, 2014, and the report itself is dated July 8, 2015. While the case report describes the "Current Custody" of the items as "Destroyed," nothing indicates that the referenced evidence was destroyed prior to being sent to the BCA for testing. On the contrary, the BCA reports entered as evidence at trial, which were dated March 31, 2015, state that the BCA received from the police department each piece of

evidence that Leatherberry now claims was "destroyed" before submission to the BCA. And Leatherberry's trial counsel challenged chain-of-custody issues around the DNA evidence before and at trial. Leatherberry also argued in his pro se supplemental brief on direct appeal that his trial counsel was ineffective in challenging the chain-of-custody issues, and this court decided that his claim was based on trial strategy and thus unreviewable under *Strickland*. *Leatherberry*, 2017 WL 1549969 at *6 (citing *Leake v. State*, 737 N.W.2d 531, 542 (Minn. 2007) ("Decisions about objections at trial are matters of trial strategy.")).

Because Leatherberry has not shown ineffective assistance of trial counsel in regards to destruction of DNA evidence, he cannot show ineffective assistance of appellate counsel on those grounds, and the district court did not abuse its discretion by declining to hold an evidentiary hearing on this claim.

C. Failure to call a witness favorable to the defense

Leatherberry also argues that his trial counsel was ineffective in failing to investigate and call a witness, R.C., who he alleges could have corroborated his claim that the victim had a motive to fabricate the sexual assault allegations. He also claims that trial counsel was ineffective in failing to secure his wife's testimony at trial. He contends that both of these deficiencies should have been raised by appellate counsel on direct appeal.

Leatherberry raised the issue that trial counsel should have secured his wife's testimony at trial in his pro se supplemental brief on direct appeal. *Leatherberry*, 2017 WL 1549969 at *6. This court determined that his ineffective-assistance claim was unreviewable as trial strategy, citing *Carridine*, 867 N.W.2d at 494 (decisions whether to

subpoena a witness and file a motion are matters of trial strategy), and *State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013) ("[T]he extent of any investigation is a part of trial strategy."). A postconviction claim of ineffective assistance of appellate counsel fails when it is based on a claim of ineffective assistance of trial counsel and, on direct appeal, the appellate court concluded that trial counsel was not ineffective. *Nissalke*, 861 N.W.2d at 95. Leatherberry's claim about his wife as a potential witness accordingly fails. And, although Leatherberry did not specifically mention potential witness R.C. in his direct appeal, this alleged error regarding witness testimony also falls within the purview of trial strategy and cannot be reviewed for ineffective assistance of counsel. *Carridine*, 867 N.W.2d at 494; *Nicks*, 831 N.W.2d at 506.

In sum, all of Leatherberry's arguments under his ineffective-assistance of appellate counsel claim are based on nonmeritorious assertions of ineffective assistance of trial counsel. Appellate counsel is under no obligation to assert nonmeritorious arguments. *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009) (explaining that an appellate attorney "is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail"). To be entitled to an evidentiary hearing, Leatherberry needed to allege facts that, if true, would satisfy the two-pronged *Strickland* test. *Nissalke*, 861 N.W.2d at 93. He has not done so. The district court did not abuse its discretion by denying his request for relief.

II. The district court erred by holding that Leatherberry's challenge to his criminal-history score is barred by *Knaffla*.

Leatherberry next argues that he was improperly assigned a criminal-history point for an out-of-state conviction. The district court concluded that this claim is *Knaffla*-barred because the specific criminal-history-point issue was raised and fully litigated at sentencing and Leatherberry failed to raise the issue on direct appeal.

"[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 also* Minn. Stat. § 590.01, subd. 1(2) (2018) ("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). Appellate courts review a district court's denial of postconviction relief based on *Knaffla* for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

Leatherberry argues that the district court abused its discretion by determining that his claim was *Knaffla*-barred because a challenge to an unlawful sentence may not be *Knaffla*-barred. He cites *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007), and *Vazquez v. State*, No. A10-865, 2011 WL 134966, at *2 (Minn. App. Jan. 18, 2011), in support of his position.

Under the Minnesota Rules of Criminal Procedure, a "court may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. "[A] sentence based

on an incorrect criminal history score is an illegal sentence . . . .” *Maurstad,* 733 N.W.2d at 147. In *Maurstad*, the supreme court concluded that “because a sentence based on an incorrect criminal history score is an illegal sentence—and therefore, under Minn. R. Crim. P. 27.03, subd. 9, correctable ‘at any time’—a defendant may not waive review of his criminal history score calculation.” *Id.* As Leatherberry notes, this court has since held in an unpublished opinion that the *Maurstad* holding extends to *Knaffla* bars. *Vazquez,* 2011 WL 134966, at *2. And in a subsequent published opinion involving the same defendant, this court held that the two-year postconviction statute of limitations does not apply to a motion brought under Minn. R. Crim. P. 27.03 to correct a criminal-history score. *Vazquez v. State*, 822 N.W.2d 313, 314 (Minn. App. 2012). Although the first *Vazquez* case is unpublished and thus not precedential, and the second did not specifically address the *Knaffla*-bar issue, both cases contain persuasive reasoning that we apply to reach our conclusion here. Because a criminal defendant cannot waive or forfeit review of a criminal-history-score challenge, the challenge is not *Knaffla*-barred when the defendant did not raise it on direct appeal. The postconviction court accordingly erred by holding that Leatherberry’s claim is *Knaffla*-barred.

Leatherberry’s specific challenge to his criminal history score regards whether the district court erred at sentencing by assigning a criminal-history point for a Wisconsin felony conviction for driving or operating a vehicle without consent. He asserts that, although his Wisconsin offense would have been defined as a felony in Minnesota, he did not receive a “felony-level sentence” and it therefore should not have been counted in his score calculation pursuant to Minn. Sent. Guidelines 2.B.5.b (2014).

A postconviction petitioner is entitled to a hearing on his challenge "[u]nless 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. Here, the district court did not assess whether the petition and records conclusively show that Leatherberry is not entitled to relief because it concluded that *Knaffla* barred consideration of the claim. We thus remand the case for the district court to assess whether, under Minn. Stat. § 590.04, subd. 1, an evidentiary hearing is required, while bearing in mind that the petitioner has the burden of proving that his criminal-history score was inaccurate. *See Williams v. State*, 910 N.W.2d 736, 737 (Minn. 2018).

Affirmed in part, reversed in part, and remanded.