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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0400**

Elton James Curtis, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 9, 2020
Affirmed
Gaïtas, Judge**

Cass County District Court
File No. 11-CR-14-2002

Elton James Curtis, Moose Lake, Minnesota (pro se appellant)

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

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Hooten, Judge; and Gaïtas, Judge.

UNPUBLISHED OPINION

GAÏTAS, Judge

On appeal from the denial of his petition for postconviction relief, appellant Elton Curtis argues that the postconviction court abused its discretion in denying (1) his claims

of ineffective assistance of trial counsel; (2) his claims of ineffective assistance of appellate counsel; and (3) a postconviction evidentiary hearing. We affirm.

FACTS

Following a 2017 court trial, Curtis was convicted of two counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subds. 1(a), 1(g) (2014), and two counts of second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(a), (g) (2014). The district court sentenced him to 234 months in prison.

In 2016, Curtis filed a direct appeal challenging his convictions. He was represented in his appeal by an appellate public defender. The sole ground for relief asserted in the direct appeal was the trial judge's failure to recuse herself after conducting an in camera review of confidential documents related to the victim. *State v. Curtis*, No. A16-1858, 2017 WL 5559898 at *2 (Minn. App. Nov. 20, 2017), *review denied* (Minn. Jan. 24, 2018). We affirmed Curtis's convictions, concluding that Curtis "failed to identify any error by the district court's presiding over his bench trial." *Id.* at *3.

On January 8, 2020, Curtis timely filed a pro se petition for postconviction relief in the district court under Minnesota Statutes section 590.01 (2018). Curtis claimed in his petition that his trial attorney had provided ineffective assistance of counsel. Additionally, he alleged that his appellate counsel had rendered ineffective assistance by failing to challenge his trial counsel's inadequate performance on direct appeal. The postconviction court denied Curtis's petition without an evidentiary hearing. Curtis now appeals the postconviction court's order denying relief.

DECISION

Appellate courts “review the denial of a postconviction petition for an abuse of discretion.” *Dolo v. State*, 942 N.W.2d 357, 362 (Minn. 2020). A postconviction court abuses its discretion “when it has 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.” *Fox v. State*, 938 N.W.2d 252, 256 (Minn. 2020) (quotation omitted).

I. The postconviction court did not abuse its discretion when it denied Curtis’s claims of ineffective assistance of trial counsel.

Curtis first argues that the postconviction court erred in rejecting his claims of ineffective assistance of trial counsel. The postconviction court held that Curtis’s claims regarding his trial counsel’s performance were known to him at the time of his direct appeal.

A district court does not abuse its discretion when it denies claims for postconviction relief that are procedurally barred by the *Knaffla* rule. *Zumberge v. State*, 937 N.W.2d 406, 411 (Minn. 2019). Under the *Knaffla* rule, a postconviction court cannot consider claims that were known or should have been known at the time of a petitioner’s direct appeal, but were not raised in that appeal. *Id.*; *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). This rule applies unless there are exceptional circumstances. *Zumberge*, 937 N.W.2d at 411-12. Exceptional circumstances exist where (1) a postconviction petition presents “a novel legal issue . . . that was unavailable at the time of the direct appeal” or (2) “the interests of justice require review.” *Id.*

Curtis argues that his trial attorney was ineffective in several ways. First, he alleges that he received ineffective assistance of trial counsel because his trial attorney failed to subpoena and investigate crucial witnesses. But Curtis conceded in his postconviction petition that he discussed trial strategy with his attorney, including the ultimate decision to challenge the victim's credibility in lieu of calling witnesses. Accordingly, the postconviction court correctly concluded that Curtis was aware of this issue at the time of his direct appeal.

Second, Curtis argues that his trial counsel was ineffective for employing an investigator who had a conflict of interest. Curtis acknowledged in his postconviction petition, however, that he informed trial counsel of this concern during the course of trial counsel's representation. Thus, the postconviction court did not clearly err when it found that Curtis knew of this issue when he filed his direct appeal.

Third, Curtis claims that his trial counsel failed to investigate and present mitigating evidence on his behalf. Curtis was personally present during the entirety of the trial, and was cognizant of the evidence that was offered. The postconviction court correctly found, therefore, that Curtis was aware of this issue when he filed his direct appeal.

Fourth, Curtis argues his trial counsel was ineffective in failing to sequester two witnesses from the courtroom before their testimony. The postconviction court determined that Curtis used the term "sequester" in his postconviction petition to refer to particular evidence that he believes should have been excluded. This court concurs with that interpretation. Specifically, Curtis challenges his attorney's failure to object to the testimony of Dr. Peter Niefert, who Curtis alleges violated his privacy and constitutional

rights by sharing his medical records with an investigator for the Cass County Sheriff's Office. Curtis also challenges his trial counsel's failure to object to the investigator's testimony, which included statements allegedly obtained in violation of Curtis's constitutional right to counsel. Curtis's postconviction petition acknowledged, however, that he was aware of the facts underlying both claims at trial. Thus, the postconviction court did not clearly err in finding that these issues were known to Curtis at the time of his direct appeal.

Finally, Curtis alleges that his trial counsel was ineffective in failing to request a pretrial hearing to challenge the victim's competency. Before trial, however, Curtis moved to obtain documents and records relating to the victim's mental health. Further, Curtis conceded in his postconviction petition that he discussed with trial counsel the strategic decision to challenge the victim's credibility at trial. Accordingly, the postconviction court's conclusion that Curtis was aware of the competency issue at the time of his direct appeal is not clearly erroneous.

Because the grounds for Curtis's ineffective-assistance-of-trial-counsel claims were known to him at the time of his direct appeal, these claims are *Knaffla*-barred unless an exception to the *Knaffla* rule applies. Curtis has not invoked an exception in his postconviction petition or his brief to this court. Moreover, the circumstances of Curtis's case do not trigger either exception to the *Knaffla* rule. Curtis's claims do not present novel issues of law, and because Curtis inexcusably failed to raise these claims on appeal, the interests of justice do not require further review. *See Zumberge*, 937 N.W.2d at 411-12.

Because the substance of Curtis’s ineffective-assistance-of-trial-counsel claims were known but not raised on direct appeal, and Curtis has not identified exceptional circumstances requiring an exemption from the *Knaffla* rule, these claims are procedurally barred. Accordingly, the postconviction court did not abuse its discretion in summarily denying Curtis’s petition.

II. The postconviction court did not abuse its discretion when it denied Curtis’s claims of ineffective assistance of appellate counsel.

Curtis also challenges the postconviction court’s denial of his claims related to his appellate representation. He alleges that his appellate attorney provided ineffective assistance of counsel in failing to pursue his claims of ineffective assistance of trial counsel. Unlike ineffective-assistance-of-trial-counsel claims, ineffective-assistance-of-appellate-counsel claims “are not barred by the *Knaffla* rule in a first postconviction [petition] because these claims could not have been brought on direct appeal.” *Onyelobi v. State*, 932 N.W.2d 272, 280 (Minn. 2019).

To prevail in his claim of ineffective assistance of appellate counsel, Curtis must satisfy the *Strickland* test by showing that (1) 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.’” *Griffin v. State*, 941 N.W.2d 404, 408 (Minn. 2020) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). When a claim of ineffective assistance of appellate counsel is premised on the appellate attorney’s failure to raise a claim of ineffective assistance of trial counsel, the petitioner must also show that

trial counsel's performance was ineffective under the *Strickland* test. *Carridine v. State*, 867 N.W.2d 488, 494-95 (Minn. 2015). "Application of the *Strickland* test involves mixed questions of law and fact that we review de novo." *State v. Mouelle*, 922 N.W.2d 706, 715 (Minn. 2019).

Here, the postconviction court first concluded that all of Curtis's ineffective-assistance-of-appellate-counsel claims were "either insufficient to meet the *Strickland* test for ineffective assistance of counsel or are insufficient to support a grant of relief even assuming [Curtis]'s factual allegations to be true." Although the postconviction court did not perform a detailed analysis of each of Curtis's specific arguments, our review of the record confirms that the postconviction court correctly rejected Curtis's claim that his appellate counsel was ineffective.

As a preliminary matter, Curtis cannot establish that his trial counsel was ineffective. Curtis first argues that his appellate counsel should have challenged his trial counsel's failure to investigate and call crucial witnesses. But decisions about which witnesses to call are a matter of trial strategy that "will generally not be reviewed later for competence." *Carridine*, 867 N.W.2d at 494. Further, the witnesses Curtis identifies would have provided testimony of minimal relevance to the case, offering little more than positive character evidence. Thus, it was not unreasonable for his trial counsel to decide against calling these witnesses. *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65.

Curtis next claims that his trial counsel was ineffective because counsel used an investigator who had a conflict of interest. But the conflict that Curtis alleges is tenuous, at best. Moreover, he fails to credibly explain how the defense investigator's alleged

conflict impacted his trial. Thus, he fails to show that the attorney's use of the investigator was unreasonable. *Id.*

Curtis also argues that his trial counsel failed to investigate and present mitigating evidence. But a trial attorney's decisions about what evidence to present are matters of trial strategy, which generally are not subject to review. *Carridine*, 867 N.W.2d at 494. Moreover, trial counsel clearly made strategic choices about how to present mitigating circumstances at trial. For example, Curtis faults his trial counsel for not presenting inconsistent statements allegedly made by the victim's mother. Trial counsel conducted a thorough cross-examination of the witness at trial, however, repeatedly challenging her credibility. Additionally, Curtis points to evidence concerning an alternative perpetrator theory. But trial counsel developed this theory at the trial. Trial counsel's specific decisions about how to address the mitigating evidence were purely a matter of trial strategy, and therefore not unreasonable. *See id.*

Curtis complains about his trial attorney's failure to challenge certain evidence that the state presented at trial.¹ Specifically, Curtis argues that Dr. Niefert impermissibly testified about Curtis's medical records. But the only medical record admitted into evidence was a letter that Dr. Niefert provided to law enforcement to fulfill his mandatory reporting obligations. Trial counsel successfully argued against the admission of Curtis's

¹ As discussed, Curtis characterizes the issue as the failure of trial counsel to request "sequestration" of certain witnesses, although Curtis appears to be challenging his trial counsel's failure to object to specific portions of witness testimony. It is worth noting that Curtis's trial counsel did move for sequestration of witnesses, the trial court issued a sequestration order, and the record does not reveal any violations of the sequestration order.

other medical records before trial and cross-examined Dr. Niefert about the circumstances surrounding his letter to law enforcement. Additionally, Curtis alleges that the sheriff's investigator testified about a statement taken in violation of Curtis's right to counsel. But Curtis's postconviction petition acknowledges that the investigator did not conduct a custodial interrogation. Further, trial counsel's cross-examination of the investigator indicates that the statements were not made during a custodial interrogation because Curtis volunteered the information to the investigator. The record does not support Curtis's allegations of evidentiary error, therefore.

Finally, Curtis faults his trial counsel for failing to challenge the victim's competency in a pretrial proceeding. But as previously discussed, trial counsel moved for disclosure of the victim's mental health records. And trial counsel then made the strategic decision to challenge the victim's credibility through cross-examination. As noted, such matters of trial strategy generally are not later reviewed for competence. *Carridine*, 867 N.W.2d at 494. Trial counsel's strategic decision to challenge the victim's credibility at trial was therefore not unreasonable. *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064-65.

Curtis is also unable to satisfy the second prong of the *Strickland* test, which requires a defendant to show that there is a reasonable probability the outcome of the case would have been different in the absence of trial counsel's errors. *See id.* at 687, 694, 104 S. Ct. at 2064, 2068. Indeed, Curtis makes no specific assertions as to how the outcome of trial might have been different.

Having concluded that all of Curtis's ineffective-assistance-of-trial-counsel claims failed as a matter of law, the postconviction court next found that appellate counsel's failure

to raise these claims did not deprive Curtis of the effective assistance of appellate counsel. We again agree with the postconviction court. “Appellate counsel does not have a duty to raise all possible issues” on appeal “and may choose to present only the most meritorious claims.” *Zumberge*, 937 N.W.2d at 413 (quotation omitted). Here, Curtis’s appellate counsel had no obligation to raise any of Curtis’s meritless claims regarding his trial counsel’s performance. Thus, Curtis’s claim of ineffective assistance of appellate counsel fails, and the postconviction court did not abuse its discretion in denying the claim.

III. The postconviction court did not abuse its discretion when it rejected Curtis’s postconviction claims without holding an evidentiary hearing.

Finally, Curtis contends that it was an abuse of discretion for the postconviction court to deny his petition without holding an evidentiary hearing. We find no abuse of discretion.

The postconviction court may deny an evidentiary hearing where a petition and the files and records of the proceeding “conclusively show that the petitioner is entitled to no relief.” *Griffin v. State*, 941 N.W.2d 404, 409 (Minn. 2020). Accordingly, the district court does not abuse its discretion when it summarily denies a petition that is procedurally barred by the *Knaffla* rule. *Zumberge*, 937 N.W.2d at 411-12. Further, to obtain an evidentiary hearing on an ineffective-assistance-of-counsel claim based on appellate counsel’s failure to challenge trial counsel’s performance, “the petitioner must allege facts that, if proven by a fair preponderance of the evidence,” would establish ineffective assistance of counsel under *Strickland*. *Carridine*, 867 N.W.2d at 493-94 (quotation omitted).

Here, Curtis's claims regarding his trial counsel are procedurally barred under the *Knaffla* rule. *See Zumberge*, 937 N.W.2d at 411-12. Curtis also failed to allege facts that, if proven by a fair preponderance of the evidence, would demonstrate his trial counsel's representation was ineffective under the two-pronged *Strickland* standard. *See Strickland*, 466 U.S. at 688, 694, 104 S. Ct. at 2064, 2068. Accordingly, it was not an abuse of discretion for the postconviction court to deny Curtis's claims relating to his trial counsel and his appellate counsel without holding an evidentiary hearing. *Zumberge*, 937 N.W.2d at 411; *Carridine*, 867 N.W.2d at 493-94.

Affirmed.