This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0507

Aka Lawrence Fualefeh, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 22, 2021
Affirmed
Larkin, Judge

Anoka County District Court
File No. 02-CR-11-7278

Aka Lawrence Fualefeh, Albert Lea, Minnesota (pro se appellant)

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the summary denial of his fourth petition for postconviction relief. He argues that his Sixth Amendment right to counsel was violated because his

attorney was not authorized to practice law when the attorney represented him at a criminal trial. We affirm.

FACTS

In September 2012, a jury found appellant Aka Lawrence Fualefeh guilty of first-degree criminal sexual conduct. This court affirmed the resulting conviction in a direct appeal. *State v. Fualefeh*, No. A13-0678, 2014 WL 2807533, at *1 (Minn. App. June 23, 2014), *rev. denied* (Minn. Sept. 16, 2014).

In November 2014, Fualefeh petitioned for postconviction relief. The postconviction court summarily denied his petition. Fualefeh appealed to this court, raising an ineffective-assistance-of-counsel claim for the first time. *Fualefeh v. State*, No. A15-0186, 2015 WL 6113484, at *2 (Minn. App. Oct. 19, 2015), *rev. denied* (Minn. Dec. 29, 2015). This court affirmed the summary denial of postconviction relief. *Id.* at *1-2.

In March 2018, Fualefeh filed his second petition for postconviction relief. He again claimed ineffective assistance of counsel. The postconviction court summarily denied his petition, and this court affirmed the denial of relief. *Fualefeh v. State*, No. A18-0726 (Minn. App. Feb. 11, 2019) (order op.).

In June 2018, Fualefeh filed his third petition for postconviction relief, once again claiming ineffective assistance of counsel. The postconviction court summarily denied his petition, and this court affirmed the denial of relief. *Fualefeh v. State*, No. A18-1715 (Minn. App. June 25, 2019) (order op.).

In January 2021, Fualefeh filed his fourth petition for postconviction relief. That petition was based on Fualefeh's discovery that his attorney, Joseph Awah Fru, was not

authorized to practice law when he represented Fualefeh at the underlying criminal trial. Fualefeh stated that the Office of Lawyers Professional Responsibility (OLPR) had investigated Fru for misconduct and that the supreme court ultimately suspended Fru in April 2013. He indicated that he did not become aware of Fru's investigation and suspension until June 2020 and that his petition was therefore based on "newly discovered evidence."

The postconviction court summarily denied Fualefeh's fourth postconviction petition, concluding that his claims were procedurally barred and untimely. Fualefeh appeals.

DECISION

Under Minnesota's postconviction statute, a person convicted of a crime may seek relief by filing a petition claiming that the conviction "violated the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1) (2020). "The person seeking postconviction relief bears the burden of establishing by a preponderance of the evidence that his claims merit relief." *Crow v. State*, 923 N.W.2d 2, 10 (Minn. 2019). An evidentiary hearing on a postconviction petition must be held unless "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 (2020); *Hannon v. State*, 957 N.W.2d 425, 434 (Minn. 2021) (quotation omitted).

We review the denial of a postconviction petition for an abuse of discretion. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). In doing so, we review legal issues de novo and factual findings for clear error. *Id.* The 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." *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013) (quotation omitted).

I.

Fualefeh contends that the postconviction court abused its discretion in denying his fourth postconviction petition as procedurally barred and untimely. As support for his request for postconviction relief, Fualefeh asserted that he was denied his Sixth Amendment right to counsel because his trial attorney, Fru, was on restricted status at the time of his trial and was subsequently suspended from the practice of law.[1]

The circumstances leading to Fru's suspension are described in *In re Disciplinary Action Against Fru*, 829 N.W.2d 379 (Minn. 2013). Fru was admitted to practice law in Minnesota in 2004. *Id*. at 381. On April 9, 2009, the supreme court placed Fru on involuntary restricted status for failing to complete continuing legal education requirements. *Id*. at 387. Despite being prohibited from practicing law while on restricted status, Fru represented a client on April 16, 2009. *Id*. Additionally, between 2004 and 2012, Fru mishandled numerous cases. *Id*. at 380-87.

In September 2011, the OLPR director petitioned for disciplinary action against Fru. *Id*. at 380, 387. In March 2012, a referee held a hearing and determined that Fru had violated multiple rules of professional conduct. *Id*. at 387. In April 2013, the supreme

[1] Although it is not clear that Fru was on restricted status at the time of Fualefeh's trial, Fualefeh made that assertion in his petition. "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). Thus, we assume that Fru was on restricted status at the time of Fualefeh's trial.

court suspended Fru for a minimum of two years, effective May 8, 2013, for engaging in a pattern of client neglect, disobeying court rules, mishandling client funds, engaging in the unauthorized practice of law, and failing to cooperate with the disciplinary process. *Id.* at 380, 391.

Fualefeh argues that his conviction "is void" because he was "tried and convicted of a first degree felony without the assistance of counsel and without a valid waiver." Fualefeh's argument is based on the proposition that representation by an unlicensed attorney results in a per se violation of the right to counsel. The Minnesota Supreme Court rejected that proposition in *State v. Smith*, 476 N.W.2d 511 (Minn. 1991). In doing so, the supreme court differentiated between cases in which "counsel has never been a lawyer," which could give rise to a per se Sixth Amendment violation, and "situations where counsel has been admitted to the bar but, at the time of the court proceedings, has lost licensure because of suspension or disbarment." *Id.* at 513. In the latter scenario, the supreme court declined to apply a per se rule, explaining:

> Here, it seems to us, the reasons for loss of licensure can be so varied in kind and degree that imposition of a per se rule is inappropriate. Where suspension is for technical reasons, such as failure to pay an annual registration fee, the courts have declined to find a Sixth Amendment violation. Yet even where licensure is lost for substantive reasons, *i.e.*, reasons bearing on counsel's character or competence, the courts, with few exceptions, have refused to find a per se violation of the constitutional right-to-counsel.
>
> . . . Whether there has been a Sixth Amendment violation requires, we think, a more flexible approach than a per se rule. We reject, therefore, defendant Smith's claim of a per se violation.

Id. at 513-14 (footnotes omitted).

Having rejected a per se rule, the supreme court reviewed the *Smith* defendant's claim of ineffective assistance of counsel under the test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 514. To obtain relief under the *Strickland* test, a defendant must prove that counsel's assistance "failed to meet the standard of a reasonably competent criminal defense attorney," and that "there is a reasonable probability that, but for counsel's unprofessional errors," a different verdict would have been reached. *Id.* (quotation omitted).

Smith controls our analysis here. This is not a case in which "counsel has never been a lawyer." *Id*. at 513. Here, Fualefeh's trial attorney was admitted to the practice of law in Minnesota in 2004. Thus, his unauthorized representation of Fualefeh does not give rise to a per se violation of the Sixth Amendment right to counsel. *See id*. Instead, Fualefeh's Sixth Amendment challenge must be analyzed as an ineffective-assistance-of-counsel claim, using the *Strickland* test.

II.

Having determined that the circumstances in this case do not give rise to a per se violation of the Sixth Amendment right to counsel and that Fualefeh's claim is properly analyzed under the traditional *Strickland* test, we now consider whether the postconviction court abused its discretion by summarily denying his claim as procedurally barred and untimely.

Procedural Bar

"[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 (2020) (providing that "[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"). The *Knaffla* rule also "bars claims that were raised or could have been raised in an earlier postconviction petition." *Doppler v. State*, 771 N.W.2d 867, 873 (Minn. 2009).

Fualefeh obtained review of his conviction in a direct appeal to this court in 2014. He was represented by a new attorney on appeal, and not his suspended trial attorney. In that appeal, neither appellate counsel nor Fualefeh challenged the effectiveness of his trial counsel or alleged a violation of his Sixth Amendment right to counsel. Even if Fualefeh was not aware of his trial attorney's disciplinary proceedings at that time, he was aware of his trial attorney's performance during the underlying trial and could have raised any concerns regarding that attorney's competence in his direct appeal. Moreover, Fualefeh later raised ineffective-assistance-of-counsel claims in his second appeal and in his second and third petitions for postconviction relief. Because Fualefeh knew or should have known of an ineffective-assistance-of-counsel claim at the time of his initial appeal and actually raised such a claim in his subsequent appeal and postconviction proceedings, his current claim is barred under the *Knaffla* rule unless an exception applies.

"There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Taylor v. State*, 691 N.W.2d 78, 79 (Minn. 2005). The postconviction court concluded that "[n]o *Knaffla* exceptions apply to any of [Fualefeh's] claims."

As to the first *Knaffla* exception, "a claim must be so novel that its legal basis was not reasonably available to petitioner at the time the direct appeal was taken." *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). An ineffective-assistance-of-counsel claim is not a novel legal issue for the purposes of the first *Knaffla* exception. *Schleicher v. State*, 718 N.W.2d 440, 447-48 (Minn. 2006).

The second *Knaffla* exception may be applied if fairness requires it and the petitioner did not deliberately or inexcusably fail to raise the issue on direct appeal. *Andersen v. State*, 830 N.W.2d 1, 8 (Minn. 2013); *see Griffin v. State*, 883 N.W.2d 282, 286 (Minn. 2016) (stating that a claim is *Knaffla* barred if it should have been known at the time of direct appeal). Again, Fualefeh obtained review of his conviction in a direct appeal in 2014, he was represented by a new attorney on appeal, and neither Fualefeh nor his appellate attorney challenged the effectiveness of trial counsel. Moreover, to the extent that Fualefeh could bolster such a challenge with information regarding his trial attorney's disciplinary status, the postconviction court found that Fru's disciplinary issues have been a matter of public record since 2013. Yet, Fualefeh did not raise those issues as a basis for relief until 2021.

On this record, the postconviction court did not abuse its discretion in determining that no exception applied and that Fualefeh's claims were therefore procedurally barred.

Time Bar

A postconviction petition must be filed within two years of "an appellate court's disposition of petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a)(2) (2020). Fualefeh failed to comply with that statutory deadline, filing his fourth petition nearly seven years after this court's disposition of his direct appeal.

There are five exceptions to the time bar in subdivision 4(a). *Id.*, subd. 4(b) (2020). Fualefeh primarily relies on an exception for newly discovered evidence, which may allow untimely relief if

> the petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted.

Id., subd. 4(b)(2).

"Any petition invoking an exception provided in [subdivision 4(b)] must be filed within two years of the date the claim arises." *Id.*, subd. 4(c) (2020). That two-year time limit applies to all the exceptions listed in subdivision 4(b). *Sanchez v. State*, 816 N.W.2d 550, 552 (Minn. 2012). For purposes of calculating the two-year time limit, a claim based on an exception in subdivision 4(b) arises when the claimant knew or should have known that the claim existed. *Id.* The postconviction court's determination of when a claim arose is a question of fact subject to clear-error review. *Id.* at 560.

Once again, a grant of relief based on Fualefeh's attorney's disciplinary status must satisfy the *Strickland* standard, which requires proof that counsel's assistance "failed to meet the standard of a reasonably competent criminal defense attorney." *Smith*, 476 N.W.2d at 514. Information regarding Fru's performance at the underlying trial was known to Fualefeh at the time of his first appeal. And information regarding Fru's restricted license status and subsequent suspension has been a matter of public record since 2013. Thus, the postconviction court correctly found that Fualefeh's claim for relief under the newly-discovered-evidence exception arose in 2013 and was therefore untimely.

In conclusion, the postconviction court did not abuse its discretion by summarily denying Fualefeh's fourth postconviction petition as procedurally barred and untimely.

Affirmed.