

*This opinion is nonprecedential except as provided by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
A21-1157**

Mario Pedro Moreno, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 4, 2022
Affirmed
Frisch, Judge**

Faribault County District Court
File No. 22-CR-16-499

Mario Pedro Moreno, Rush City, Minnesota (pro se appellant)

Keith Ellison, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

Cameron Davis, Faribault County Attorney, Blue Earth, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Gaïtas, Judge; and Smith, John,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the postconviction court abused its discretion by denying his motion to stay postconviction proceedings and by denying his postconviction petition without granting an evidentiary hearing. We affirm.

FACTS

In August 2010, L.C. (mother) moved into a house in Wells, Minnesota with her two daughters, the victim and her sister. That October, appellant Mario Pedro Moreno moved into the house with them. At the time that Moreno moved in, the victim was seven years old.

In August 2016, the victim told mother that Moreno had “hurt her.” The victim was not able to articulate exactly what happened, but when mother asked if Moreno touched her and raped her, the victim responded “yes.” On September 6, 2016, a child-protection specialist interviewed the victim. During the interview, the victim disclosed “sexual abuse, vaginal penetration, and anal penetration” to the specialist and identified her abuser as Moreno. She told the specialist that the abuse had occurred from the time she was seven to when she was twelve years old, while Moreno lived with them. The victim told the specialist that the abuse happened “[e]very other day,” always at the home.

On September 8, 2016, respondent State of Minnesota charged Moreno with three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2010). Moreno waived his right to a jury trial, and the district court held a

three-day court trial in April 2018. The district court found Moreno guilty of all three charges.

Moreno subsequently moved for a judgment of acquittal or a new trial, arguing that the state failed to provide proper discovery, that the charges were overly broad, and that the case against Moreno was based on inconsistent and unreliable claims. The district court denied these motions and sentenced Moreno to concurrent 234-, 360-, and 360-month prison terms.

Moreno appealed, arguing that insufficient evidence supported his convictions, that the district court erred by denying his motions because the state committed discovery violations, and that two of his convictions stemmed from the same course of conduct. *State v. Moreno*, No. A18-1534, 2019 WL 3410036, at *1 (Minn. App. July 29, 2019), *rev. denied* (Minn. Oct. 15, 2019). We affirmed. *Id.* at *8.

On January 19, 2021, Moreno filed a postconviction petition and later moved to stay the postconviction proceedings stating that he needed “about four months” to finalize his petition. The postconviction court, noting that it was not permitted to stay the postconviction proceedings, construed Moreno’s motion as one to amend the petition and granted the motion, providing Moreno with an additional 90 days to finalize his petition. On May 17, Moreno submitted a finalized petition. The postconviction court denied Moreno’s petition without an evidentiary hearing, finding that his claims were either procedurally barred, lacked merit, or were not supported by the record. Moreno appeals.

DECISION

I. The postconviction court acted within its discretion by denying Moreno's motion to stay the postconviction proceedings.

Moreno first argues that the postconviction court violated his due-process rights when it denied his motion to stay, and instead granted to him a 90-day extension of time to amend his petition. In a postconviction proceeding, a defendant must “be afforded a meaningful opportunity to present a complete defense.” *Carlton v. State*, 816 N.W.2d 590, 614 (Minn. 2012) (quotation omitted). A postconviction court may grant a petitioner time to amend or withdraw their petition but cannot stay the proceeding. Minn. Stat. § 590.03 (2020). We review a postconviction court's rulings related to the timing of filings for an abuse of discretion. *See Dhaemers v. State*, 175 N.W.2d 457, 461 (Minn. 1970).

Here, Moreno filed his petition on January 19, 2021, and moved to stay his petition on February 8, stating that he needed “about four months” to finalize his petition. On February 17, the postconviction court, construing Moreno's motion as one to amend the petition, granted the motion, and gave Moreno an additional 90 days to finalize his petition. Although Moreno argues that the postconviction court did not afford him with sufficient time to prepare his petition, Moreno fails to explain how any additional time beyond that granted by the postconviction court would have affected his postconviction claims. In any event, the postconviction court granted Moreno's request and permitted Moreno to submit his amended petition close to four months after he filed his original petition. We see no abuse of discretion by the postconviction court, as it afforded Moreno “a meaningful opportunity to present a complete defense.” *Carlton*, 816 N.W.2d at 614.

II. Moreno’s claims of ineffective assistance of trial and appellate counsel are procedurally barred and lack merit.

Moreno argues that both trial and appellate counsel provided him with ineffective assistance by failing to raise or properly argue a variety of issues that Moreno believes affected the outcome of his case. Moreno argues that his trial counsel (1) failed to properly cite to cases showing a double-jeopardy violation; (2) failed to investigate police interviews related to his arrest, the victim’s alleged prior relationship, and evidence of other false allegations made by the victim; and (3) employed a deficient trial strategy. Moreno argues that his appellate counsel failed to raise ineffective assistance of trial counsel on direct appeal. These arguments are either procedurally barred, fail on the merits, or both.

A. All claims of ineffective assistance of trial counsel are *Knaffla*-barred and fail on the merits.

1. Moreno’s claims are *Knaffla*-barred.

“Claims that were raised on direct appeal, or were known or should have been known but were not raised on direct appeal, are procedurally barred.” *Sontoya v. State*, 829 N.W.2d 602, 604 (Minn. 2013) (citing *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976) (holding that “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”)); *see also* Minn. Stat. § 590.01, subd. 1 (2020). A claim is not *Knaffla*-barred, however, if “(1) the claim is novel; or (2) the interests of fairness and justice warrant relief.” *Sontoya*, 829 N.W.2d at 604. However, if a petitioner fails to argue that a claim is novel or that the interests of fairness or justice warrant relief, the postconviction court may decline to apply either exception. *Erickson v. State*, 725 N.W.2d

532, 535 (Minn. 2007). A claim of ineffective assistance of trial counsel, including ineffective trial strategy, that can be determined on the basis of the trial record must be brought on direct appeal or it is *Knaffla*-barred. *Carney v. State*, 692 N.W.2d 888, 891 (Minn. 2005).

All of the claims advanced by Moreno were known to him at the time of his direct appeal and are therefore *Knaffla*-barred. None of the claims involve a novel legal theory, and Moreno has not advanced any reason why we should consider those claims in the interests of fairness and justice. *See Carlton*, 816 N.W.2d at 607 (stating that the interests-of-justice exception is reserved for extraordinary circumstances); *Odell v. State*, 931 N.W.2d 103, 106 (Minn. 2019) (stating that the interests-of-justice exception only applies to injustices that delay filing of petition and does not relate to the substantive merits of the petition). Moreno's claims are analogous to the claims that the petitioner made in *Carney*, in which the supreme court found that the petitioner was at all times aware of what his trial counsel was doing and could have raised the issue on direct appeal. 692 N.W.2d at 892-93. Tellingly, Moreno does not allege in his postconviction petition or in his appellate brief that any new facts or evidence were discovered after the conclusion of his direct appeal that relate to trial counsel's allegedly deficient performance.

Because Moreno could have raised his claims of ineffective assistance of trial counsel on direct appeal, they are *Knaffla*-barred and not appropriately before this court.¹

¹ In his appellate brief, Moreno argues that the district court's evidentiary rulings regarding his gang affiliation and the victim's prior inconsistent statements were improper. Although Moreno frames these issues as ineffective assistance of counsel, to the extent Moreno is

2. Moreno's claims fail on the merits.

Even if Moreno's claims of ineffective assistance of trial counsel were not *Knaffla*-barred, they fail on the merits. A claim of ineffective assistance of counsel requires the claimant to show that (1) counsel's performance fell below an objective standard of reasonableness, and (2) absent counsel's unreasonable performance, the result of the proceeding likely would have been different. *Strickland v. Washington*, 466 U.S. 668, 688, 694 (1984). "A 'reasonable probability' means 'a probability sufficient to undermine confidence in the outcome.'" *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quoting *Strickland*, 466 U.S. at 694). "If a claim fails to satisfy one of the *Strickland* requirements, we need not consider the other requirement." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017). To be entitled to an evidentiary hearing on a postconviction ineffective-assistance-of-counsel claim, a petitioner must "allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test" established in *Strickland*. *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013) (quotation omitted). "A claim of ineffective assistance of counsel may not rest on the failure of an attorney to make a motion that would have been denied if it had been made." *Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004).

arguing the merits of the district court's rulings, these arguments are also *Knaffla*-barred. *Sontoya*, 829 N.W.2d at 604.

We review a postconviction court’s denial of a claim of ineffective assistance of counsel by considering the factual findings that are supported by the record, conducting a de novo review of their application, and determining whether the court abused its discretion. *Nicks*, 831 N.W.2d at 503-04. “A 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.” *Id.* (quotation omitted). A petitioner is not entitled to an evidentiary hearing if the record “conclusively show[s] that the petitioner is entitled to no relief.” Minn. Stat. § 590.04, subd. 1 (2020).

Here, each asserted claim of ineffective assistance of trial counsel was either based on objectively reasonable conduct or trial strategy, or the outcome of Moreno’s trial would not have been different had counsel acted as Moreno suggests.

First, it was not unreasonable for trial counsel to choose not to cite certain double-jeopardy cases that Moreno believes would undermine the decision of the district court to enter convictions and sentence Moreno for three separate offenses. These cases, *State v. Saxton*, 331 N.W.2d 240 (Minn. 1983), *State v. Herberg*, 324 N.W.2d 346 (Minn. 1982), *State v. Boley*, 299 N.W.2d 924 (Minn. 1980), and *Blockberger v. United States*, 284 U.S. 299 (1932),² all relate to whether a district court may enter multiple convictions based on conduct arising from a singular behavioral incident. We addressed the same

² *Blockberger* also discusses the “elements test” which is to be applied when a defendant is charged under two different statutes for the same offense. 284 U.S. at 304; *see State v. Aune*, 363 N.W.2d 741, 745 (Minn. 1985) (analyzing the *Blockberger* test). Here, Moreno was charged for three separate violations of Minn. Stat. § 609.342, subd. 1(a). Unlike the defendant in *Blockberger*, Moreno was charged with violating one statutory provision, not different statutes, and Moreno’s conduct occurred at different times.

substantive argument advanced by Moreno on direct appeal and concluded that Moreno was convicted of “three, non-overlapping, single-act counts.” *Moreno*, 2019 WL 3410036, at *8. In other words, Moreno’s convictions did not arise from a single behavioral incident. Although trial counsel did not specifically identify the cases now cited by Moreno, each of the cases relate to the same legal principle rejected on direct appeal. Thus, it was not unreasonable for trial counsel to choose not to cite these cases at sentencing.

Second, Moreno argues that trial counsel’s failure to investigate the victim’s prior relationship, purported false allegations made by the victim, and police reports related to Moreno’s initial arrest rendered the representation ineffective. “When determining whether alleged failure to investigate constitutes ineffective assistance of counsel, we consider whether the decision was based on trial strategy or whether it demonstrated that counsel’s performance fell below an objective standard of reasonableness.” *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). “We give trial counsel wide latitude to determine the best strategy for the client.” *Nicks*, 831 N.W.2d at 506.

Here, Moreno’s claims are unsupported by the record. The record shows that trial counsel did attempt to inquire about the victim’s alleged prior relationship. The district court sustained the state’s objection to this line of questioning advanced by Moreno’s counsel. In addition, the record contains no evidence that the victim ever falsely accused Moreno of sexually abusing sister. When interviewed, the victim stated that Moreno had hurt mother, not sister. Although the victim stated that she believed Moreno had done something “not as bad” to sister, the victim never directly accused him of sexually abusing sister as well. Counsel’s failure to impeach the victim with these prior statements on cross-

examination was trial strategy, which we generally do not review. *State v. Bobo*, 770 N.W.2d 129, 138 (Minn. 2009).

Moreno also argues that counsel should have investigated Moreno's initial arrest more thoroughly to acquire additional evidence to counterbalance his incriminating statements to law enforcement. A similar argument was raised on direct appeal, and we determined that Moreno suffered no prejudice. *Moreno*, 2019 WL 3410036, at *7. Even so, Moreno does not now establish that, but for counsel's allegedly deficient performance, the outcome of the trial would have been any different.

Finally, Moreno argues that trial counsel made unreasonable strategic decisions, including failing to object to the state's questions regarding Moreno's gang affiliation, failing to offer evidence of alleged prior inconsistent statements made by the victim, and failing to raise other objections. These arguments all relate to trial strategy, which we generally do not review. *Bobo*, 770 N.W.2d at 138 ("What evidence to present to the jury, what witnesses to call, and whether to object are part of an attorney's trial strategy which lie within the proper discretion of trial counsel and will generally not be reviewed later for competence."). And even if trial counsel's strategy was unreasonable, we are not convinced that the outcome of Moreno's trial would have been different had counsel employed a different strategy.

Moreno therefore fails to meet his burden to establish that his trial counsel's performance fell below an objective standard of reasonableness or that the outcome would have been any different had counsel acted differently.

B. All claims of ineffective assistance of appellate counsel fail on the merits.

Moreno argues that his appellate counsel was ineffective because appellate counsel should have (1) argued that trial counsel was ineffective and (2) raised the claims that Moreno set forth in his postconviction petition on direct appeal.

We evaluate claims of ineffective assistance of both trial and appellate counsel under the *Strickland* standard. *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). Counsel is not obligated “to include all possible claims on direct appeal, but rather is permitted to argue only the most meritorious claims.” *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (quotation omitted). “Counsel does not act unreasonably by not asserting claims that counsel could have legitimately concluded would not prevail.” *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009).

As set forth herein, appellate counsel did, in fact, raise on direct appeal many of the substantive issues identified by Moreno in his postconviction petition. In any event, all ineffective-assistance-of-trial-counsel arguments raised by Moreno lack merit. Because they lack merit, appellate counsel was not obligated to argue ineffective assistance of trial

counsel in his direct appeal.³ *Id.* Thus, we find that appellate counsel acted reasonably by only arguing meritorious claims during Moreno's direct appeal.

Affirmed.

³ It appears that Moreno also argues that appellate counsel was ineffective because the appeal did not contain an argument that the district court abused its discretion by excluding evidence of the victim's prior history. But generally, evidence of a victim's prior sexual relationships is not admissible in the absence of a court order pursuant to the procedure set forth in Minn. R. Evid. 412. Prior sexual conduct also includes prior allegations of sexual abuse. *State v. Kobow*, 466 N.W.2d 747, 751 (Minn. App. 1991). Given this authority, appellate counsel may have declined to pursue this argument on direct appeal based on a legitimate belief that the evidence was not admissible. Even if appellate counsel's choice fell below an objective standard of reasonableness, Moreno fails to establish that the outcome of his appeal would have been different and therefore fails to satisfy the *Strickland* standard.