STATE OF MINNESOTA
IN COURT OF APPEALS
A11-167

Leroy Oliver Ruddock, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 3, 2011
Affirmed
Kalitowski, Judge

Scott County District Court
File No. 70-CR-07-14895

Leroy Oliver Ruddock, Chaska, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Assistant County Attorney, Shakopee, Minnesota (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Johnson, Chief Judge; and Stoneburner, Judge.

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

KALITOWSKI, Judge

Petitioner Leroy Oliver Ruddock challenges the district court's denial of his petition for postconviction relief. We affirm.

D E C I S I O N

We review the denial of postconviction relief for abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). The decision of the postconviction court will not be reversed unless it 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. *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010). We review issues of law de novo. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003).

A jury found petitioner guilty of third- and fifth-degree criminal sexual conduct. The district court adjudicated petitioner guilty of the third-degree criminal-sexual-conduct charge and imposed the presumptive sentence of 48 months in custody. Petitioner appealed his conviction, arguing that the prosecutor committed misconduct. We affirmed the conviction. *State v. Ruddock*, No. A08-1085, 2009 WL 2225546, at *1 (Minn. App. July 28, 2009), *review denied* (Minn. Sept. 16, 2009). Petitioner sought postconviction relief based on 12 different claims, including ineffective assistance of trial and appellate counsel. The district court concluded that all but petitioner's ineffective-assistance-of-appellate-counsel claim were barred by *State v. Knaffla* and that the claims did not satisfy one of the *Knaffla* exceptions. The district court denied petitioner's appellate-counsel claim without a hearing. Petitioner renewed all of his claims on appeal.

Under *Knaffla*, "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." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). All claims that should have been known on direct appeal are also barred

under this rule. *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002). There are two exceptions to the *Knaffla* bar: "(1) if the claim presents a novel legal issue or (2) if fairness requires review of the claim and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal." *Quick*, 692 N.W.2d at 439. For a court to consider a claim under the second exception, the "claim must have merit and must be asserted without deliberate or inexcusable delay." *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009).

A claim of ineffective assistance of trial counsel is *Knaffla* barred if the claim is based solely on the trial record and the claim was known or should have been known on direct appeal. *Evans v. State*, 788 N.W.2d 38, 44 (Minn. 2010). But *Knaffla* does not bar an ineffective-assistance-of-counsel claim if additional evidence is required to determine whether the allegation has merit. *Barnes v. State*, 768 N.W.2d 359, 364 (Minn. 2009). "Similarly, an ineffective-assistance-of-*appellate*-counsel claim is not subject to the *Knaffla* bar when it cannot be said that the defendant knew or had a basis to know about the claim at the time of direct appeal." *Reed*, 793 N.W.2d at 732.

Minn. Stat. § 590.04, subd. 1 (2010), requires the postconviction court to grant a hearing on a petition unless the petition, files, and record "conclusively show that petitioner is entitled to no relief." *See also Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). A hearing "is not required unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990).

Petitioner argues that his trial counsel was ineffective by allowing or committing the following errors: (1) the admission of a BCA lab report without the testimony of the preparer; (2) the admission of a "pre-Miranda" statement; (3) trial counsel's concession of defendant's guilt; (4) the use of incorrect jury instructions; (5) the police's failure to advise him of his rights under the Vienna Convention; (6) petitioner's conviction of two charges based on the same conduct; (7) inadequate advice about a plea offer; (8) the violation of his right to a speedy trial; and (9) the exclusion of admissible evidence. Petitioner also argues that he is entitled to relief based on the cumulative effect of these errors.

Because the district court record is sufficient to determine the merits of these claimed errors, petitioner's claim that trial counsel was ineffective can be determined from the district court record. Further, the claims were known but not raised at the time of direct appeal. Thus, petitioner's ineffective-assistance-of-trial-counsel claim and the claims of error on which it is based are barred by *Knaffla*.

But because petitioner claims that his appellate counsel was ineffective, in part for not raising the ineffective-assistance-of-trial-counsel claim on direct appeal, we address the merits of both ineffective-assistance claims. *See Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) ("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 appellant must first show that trial counsel was ineffective.").

To prevail on his ineffective-assistance claim, petitioner 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." *Fields*, 733 N.W.2d at 468 (quotations omitted). "[A]ppellate counsel is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail." *Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009). And "counsel has no duty to include claims which would detract from other more meritorious issues." *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985).

Admission of BCA Lab Report

Petitioner claims that the admission of the BCA lab report without testimony from its preparer violated his rights under the Confrontation Clause. But petitioner personally stipulated to the admission of the DNA and fingerprint evidence. This stipulation was consistent with his defense that the sexual contact was consensual. Consequently, petitioner waived his rights to confront the preparer.

Admission of "pre-Miranda" Statement

Petitioner argues that a statement should have been suppressed because custodial interrogation should be recorded where feasible and his statement was not. But because petitioner's argument that his statement should have been suppressed is not supported by sufficient facts or legal authority, we do not address this claim. *See State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (holding that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

Alleged Concession of Guilt

Next, petitioner asserts that his trial counsel conceded his guilt when he cross-examined the complainant. We disagree. Trial counsel did not concede petitioner's guilt of criminal sexual conduct; rather he stated that there was evidence of sexual contact with petitioner. Petitioner's defense was consent, and trial counsel's statement about the physical evidence of sexual contact was in the context of questioning complainant on her delay in reporting the incident.

Petitioner also argues that his counsel conceded his guilt when he stated that the prosecutor "makes a big deal out of my client potentially lying to the police." But trial counsel was arguing that the circumstances surrounding petitioner's arrest accounted for his confusion and misstatement. The challenged statement was part of trial counsel's effort to rebut the prosecutor's argument that petitioner was not credible.

Finally, petitioner challenges his trial counsel's statement in closing argument that "[i]f we were going to try and prepare a case that would not involve his credibility as a witness, he probably would not tell you the things that went on that evening." This statement was part of counsel's argument that the jury should credit his testimony because he was forthcoming about facts that did not necessarily reflect favorably upon him. Again, the statement was part of trial counsel's overall effort to argue why the jury should find petitioner, and not the complainant, credible; it was not a concession of guilt.

Jury Instruction

Petitioner claims that the district court erred by including the word "intentionally" in the jury instructions. The district court told the jurors that to find the defendant guilty

they must find beyond a reasonable doubt that "the defendant intentionally sexually penetrated" the complainant. Petitioner's defense was that he and the complainant engaged in consensual sexual intercourse; he was not arguing that the sexual contact was not intentional. Thus, petitioner's argument is without merit.

Failure to Advise on Vienna Convention

The Vienna Convention on Consular Relations provides that upon arrest a foreign national has the right to contact the consular post of his home country, and that the arresting authorities must inform the detainee of that right. Vienna Convention on Consular Relations art. 36, ¶ 1(b), Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261. The defendant has the burden of establishing prejudice from the alleged violation of the Vienna Convention to prevail. *Arredondo v. State*, 754 N.W.2d 566, 576 (Minn. 2008).

Petitioner argues that a consular officer "would have provided the trial court . . . with [petitioner's] history as a Jamaican national. [And] [t]he jury would have learned that [petitioner] had contributed most of his life working for non-profit organizations while volunteering his time to the least fortunate." But this character evidence is irrelevant to the question of whether petitioner committed criminal sexual conduct. *See* Minn. R. Evid. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."), 404 ("Evidence of a person's character . . . is not admissible for the purpose of proving action in conformity therewith . . . except [e]vidence of a *pertinent* trait of character offered by an

accused . . . ." (emphasis added)). Consequently, petitioner has not alleged facts that show he was prejudiced by not being informed of this right.

Conviction of Two Charges Based on the Same Acts

Petitioner argues that he was convicted of two charges based on the same behavioral incident. But petitioner was only adjudicated guilty of the third-degree criminal-sexual-conduct charge and he was sentenced on this charge alone. Thus, the district court followed the proper procedure and there is no need to vacate the other charge on which the jury found him guilty. *See State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating that the proper procedure for multiple convictions based on the same act "is for the court to adjudicate formally and impose sentence on one count only").

Inadequate Advice on Plea Offer

Contrary to petitioner's assertion in his postconviction petition, the record shows that the petitioner was advised of the terms of the offer and that it was being revoked after petitioner rejected it and asserted his right to a jury trial.

Violation of Right to Speedy Trial

Petitioner argues that his right to a speedy trial was violated when his trial was rescheduled from September 25, 2007, to January 23, 2008. He asserted his demand for a speedy trial on August 7, 2007. Petitioner claims the September trial date was converted to a settlement conference. But even assuming petitioner's trial counsel should have raised a speedy-trial issue, petitioner would still have to show that there was a reasonable likelihood that the outcome would have been different if trial counsel had raised the

claim. *See Fields*, 733 N.W.2d at 468 (stating the two-prong test for ineffective-assistance claims). And petitioner has not shown how he was prejudiced by the delay. An assertion of prejudice without factual allegations is insufficient. *McKenzie v. State*, 754 N.W.2d 366, 370 (Minn. 2008) (rejecting an ineffective-assistance claim based on "simple argumentative assertions, for which he offers no factual support and no argument as to why they constitute ineffective assistance of counsel"). Thus, petitioner's appellate counsel could have legitimately concluded that the claim of ineffective assistance of trial counsel would not prevail on this basis.

Exclusion of Admissible Evidence

Petitioner challenges the exclusion of e-mails he says that he received from the complainant approximately one month before the incident and shortly before trial. The e-mails were allegedly sent from an address that included a sexual reference. The prosecutor opposed admission of the e-mail address, stating that "[t]here's no relevance other than character assassination, and it's protected [under the rape shield law]." The district court excluded that evidence under Minn. Stat. § 609.347, subd. 3 (2008), which prohibits admission of evidence of the complainant's previous sexual conduct. Trial counsel was permitted to ask complainant about sending the e-mails but could not introduce the printouts which included the e-mail address.

Petitioner's trial counsel sought admission of the e-mails and therefore was not ineffective on this basis. And on appeal, exclusion of this evidence would have been reviewed for abuse of discretion and petitioner would have had the burden of showing that any error was prejudicial. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

Because the complainant's e-mail address is sexual and the defense was able to question the complainant about sending the e-mails, appellate counsel "could have legitimately concluded [that the claim] would not prevail." *Williams*, 764 N.W.2d at 31.

Because the record shows that the alleged errors petitioner argues demonstrate ineffective assistance of trial counsel were either not errors or were claims appellate counsel could have legitimately concluded would not prevail, petitioner's appellate counsel was not ineffective for deciding not to raise the ineffective-assistance-of-trial-counsel claim. Additionally, because these allegations of trial-counsel error are without merit, the exception to the *Knaffla* bar is inapplicable. *See Wright*, 765 N.W.2d at 90 (stating that for the fairness exception to apply the "claim must have merit"). And the district court did not abuse its discretion by summarily denying relief for all but petitioner's appellate-counsel claim.

Petitioner makes two additional arguments as to why his appellate counsel was ineffective: (1) by categorizing a statement as "[i]nflaming the [j]ury[']s [e]motions" instead of "[d]enigrating the [d]efense" on appeal and (2) by failing to claim that the prosecutor had committed misconduct in arguing petitioner's guilt to the jury.

But in petitioner's direct appeal, this court considered whether the prosecutor committed misconduct by stating, "[E]ither the defendant is guilty of criminal sexual conduct or this woman lays down on a table and has to partake in a vaginal exam, recount the story and come in here, and what? Lie to you folks? Why? For what? That is ridiculous, lady and gentlemen." *Ruddock*, 2009 WL 2225546, at *2. And we concluded that the statement did not constitute prosecutorial misconduct. *Id.* at *3. Appellate

counsel's denomination of the statement is irrelevant to our determination of whether it constituted misconduct. The merits of this claim were considered on direct appeal and the claim is now barred by *Knaffla*.

Petitioner also contends that appellate counsel should have argued that the prosecutor committed misconduct by stating in his closing argument that "[t]he defendant is guilty." Prosecutors cannot interject their own personal opinion or the state's opinion of a defendant's guilt into the case. *State v. Blanche*, 696 N.W.2d 351, 375 (Minn. 2005) (stating that the rule prevents "exploitation of the influence of the prosecutor's office" (quotation omitted)). But here, the prosecutor did not say that he personally believed that petitioner was guilty or that the state would not have pursued prosecution if it did not believe petitioner was guilty. Instead, he argued a legal conclusion from the evidence presented. *See State v. Gulbrandsen*, 238 Minn. 508, 511, 57 N.W.2d 419, 422 (1953) (holding that the prosecutor "may state conclusions and inferences which the human mind may reasonably draw from the facts in evidence").

The files and record show that petitioner was not entitled to relief on his ineffective-assistance-of-appellate-counsel claim. Thus, the district court did not abuse its discretion by denying the petition for postconviction relief without an evidentiary hearing.

Affirmed.