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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2110

Marcus Deon Champs, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 16, 2012
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-07-119816

Marcus D. Champs, Waupun Correctional Institution, Waupun, Wisconsin (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Andrew M. LeFevour, Assistant County Attorneys, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Johnson, Chief Judge; and Willis, Judge.*

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

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

LARKIN, Judge

Appellant challenges the district court's summary denial of his request for postconviction relief. Because appellant's postconviction claims are either procedurally barred or fail on the merits, we affirm.

FACTS

In 2008, a jury found appellant Marcus Deon Champs guilty of second-degree murder. Champs appealed his conviction to this court. While the appeal was pending, Champs petitioned the district court for postconviction relief. This court stayed Champs's appeal pending completion of postconviction proceedings. *State v. Champs*, No. A08-1140, 2010 WL 606192, at *1 (Minn. App. 2010), *review denied* (Minn. Apr. 28, 2010). After the district court denied Champs's petition for postconviction relief, this court reinstated his appeal and affirmed his conviction.

After Champs's first appeal was complete, he filed a second petition for postconviction relief in the district court, claiming that he was denied effective assistance of trial and appellate counsel. Champs also filed a supplemental petition for postconviction relief, claiming that his Sixth Amendment confrontation right had been violated. The district court summarily denied Champs's second and supplemental petitions for postconviction relief. This appeal follows.

D E C I S I O N

"We will reverse a decision of a postconviction court only if that court abused its discretion." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). "However, we review

issues of law de novo." *Id.* "Postconviction courts are required to hold an evidentiary hearing and make findings of fact and conclusions of law unless the petition and the files and records of the proceedings conclusively show that the petitioner is entitled to no relief." *Id.* (quotation omitted). "Allegations in a postconviction petition must be more than argumentative assertions without factual support, and an evidentiary hearing is unnecessary if the petitioner fails to allege facts that are sufficient to entitle him or her to the relief requested." *Id.* (quotation and citation omitted).

"Once a direct appeal has been taken, all claims raised in that appeal, all claims known at the time of that appeal, and all claims that should have been known at the time of that appeal will not be considered in a subsequent petition for postconviction relief." *Id.* (citing *Black v. State*, 560 N.W.2d 83, 85 (Minn. 1997); *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976)). "Similarly, a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief." *Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006). But there are two exceptions to these rules. *Leake*, 737 N.W.2d at 535. "First, if a claim is known to a defendant at the time of direct appeal but is not raised, it will not be barred by the rule if the claim's novelty was so great that its legal basis was not reasonably available when direct appeal was taken." *Id.* "Second, even if the claim's legal basis was sufficiently available, substantive review may be allowed when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal." *Id.* (quotations omitted).

"When a claim of ineffective assistance of trial counsel can be adjudicated on the basis of the trial record, it must be brought on direct appeal or it is barred by the *Knaffla* rule if raised in a postconviction petition." *Id.* "But a claim of ineffective assistance of trial counsel that cannot be resolved on the [district] court record alone need not be brought in a direct appeal and may be brought in a postconviction petition." *Id.* at 535-36. "Claims of ineffective assistance of appellate counsel on direct appeal are not barred by the *Knaffla* rule in a first postconviction appeal because they could not have been brought at any earlier time." *Id.* at 536.

"To receive an evidentiary hearing on an ineffective assistance of counsel claim, a petitioner must allege facts that would affirmatively show that his attorney's representation fell below an objective standard of reasonableness, and that but for the errors, the result would have been different." *Id.* (quotation omitted). "An attorney's performance is substandard when the attorney does not exercise the customary skills and diligence that a reasonably competent attorney would exercise under the circumstances." *Id.* (quotation omitted). "Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts." *Id.* "Appellate counsel need not raise all possible claims on direct appeal, and a claim need not be raised if appellate counsel could have legitimately concluded that it would not prevail." *Id.* (quotation omitted).

I.

On appeal, Champs argues that he received ineffective assistance of trial counsel because counsel failed to (1) challenge the constitutionality of the automatic-certification

statute; (2) object to the submission of an accomplice-liability jury instruction at trial; and (3) object to improper remarks made by the prosecutor during closing arguments. The district court concluded that Champs's claim of ineffective assistance of trial counsel was procedurally barred to the extent it was based on trial counsel's failure to challenge the constitutionality of the automatic-certification statute and to object to improper remarks made by the prosecutor during closing arguments. The district court also concluded that trial counsel's failure to object to the accomplice-liability jury instruction did not constitute ineffective assistance of counsel.

Champs's claim of ineffective assistance of trial counsel is procedurally barred in its entirety. The claim was known and should have been raised in Champs's first appeal or in his first postconviction proceeding, which occurred while his appeal was stayed. The *Knaffla* exceptions do not apply: the supreme court has held that an ineffective-assistance-of-counsel claim is not novel, *Schleicher v. State*, 718 N.W.2d 440, 447-48 (Minn. 2006), and Champs does not argue for application of the fairness exception. Because Champs's claim of ineffective assistance of trial counsel is procedurally barred, the district court did not abuse its discretion in summarily denying postconviction relief.[1]

Champs argues that his claim of ineffective assistance of trial counsel is not procedurally barred and must be addressed on the merits because it was "also raised in the context of ineffective assistance of appellate counsel." *See Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) ("When an ineffective assistance of appellate counsel

[1] Because the claim is procedurally barred, it is not necessary to review the district court's decision regarding the substantive merits of the claim.

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."). Champs cites *Schneider v. State*, 725 N.W.2d 516 (Minn. 2007), for support. The supreme court in *Schneider* acknowledged that a claim of ineffective assistance of appellate counsel is not barred by *Knaffla* because an appellant "could not have known of ineffective assistance of his appellate counsel at the time of his direct appeal." 725 N.W.2d at 521. But Champs's petition for postconviction relief did not assert that appellate counsel was ineffective because she failed to raise a claim of ineffective assistance of trial counsel. "It is well settled that claims raised for the first time on appeal are forfeited for purposes of the appeal." *Brocks v. State*, 753 N.W.2d 672, 676 (Minn. 2008) (quotation omitted). As a result, Champs's argument is not properly before this court, and we do not address it. *See Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007) (declining to consider postconviction appellant's argument that was not raised in the postconviction court); *Azure v. State*, 700 N.W.2d 443, 446-47 (Minn. 2005) (declining to consider postconviction appellant's claim of ineffective assistance of appellate counsel as not properly before the court when it was raised for the first time on appeal from a postconviction court's denial of relief).

II.

Champs also argues that he received ineffective assistance of appellate counsel, because appellate counsel failed to (1) raise a claim of ineffective assistance of trial counsel regarding the accomplice-liability jury instruction; (2) cite federal constitutional law in support of the prosecutorial-misconduct claim in Champs's first appeal;

(3) include a prosecutorial-misconduct claim in Champs's petition for review to the supreme court; (4) challenge the ruling of the district court regarding the admissibility of autopsy photographs in his first appeal; and (5) challenge the constitutionality of the automatic-certification statute in the district court before attempting to raise it on direct appeal.

As noted above, Champs's postconviction petition did not assert that appellate counsel rendered ineffective assistance by failing to raise ineffective assistance of trial counsel. We therefore do not consider Champs's argument that his appellate counsel was ineffective in failing to raise a claim of ineffective assistance of trial counsel regarding the accomplice-liability jury instruction. *See Brocks*, 753 N.W.2d at 676 ("It is well settled that claims raised for the first time on appeal are forfeited for purposes of the appeal." (quotation omitted)).

Champs's argument that appellate counsel was ineffective because she failed to challenge the constitutionality of the automatic-certification statute in the district court before attempting to raise it on direct appeal is without merit. The supreme court has upheld the constitutionality of the automatic-certification statute in the face of procedural-due-process, substantive-due-process, and equal-protection challenges. *State v. Behl*, 564 N.W.2d 560, 567-69 (Minn. 1997). Appellant's reliance on recent United States Supreme Court caselaw to suggest that this court should depart from Minnesota Supreme Court precedent is not persuasive because the cases that Champs relies on are distinguishable. Unlike *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005), which holds that the execution of individuals who are under 18 years of age at the time of their

capital crimes is prohibited by the constitution, this is not a capital case. *Graham v. Florida*, 130 S. Ct. 2011, 2033 (2010), which holds that the constitution prohibits a sentence of life without parole for a juvenile offender who did not commit murder, is likewise inapposite because Champs was convicted of murder and was not sentenced to life imprisonment. In sum, Champs presents no persuasive reason to revisit the supreme court's holding in *Behl*, and Champs's claim that his appellate counsel was ineffective for failing to challenge the constitutionality of the automatic-certification statute in the district court therefore fails on the merits.

Champs's remaining arguments, that appellate counsel rendered ineffective assistance because she failed to cite federal constitutional law in support of Champs's prosecutorial-misconduct claim on direct appeal, failed to raise the prosecutorial-misconduct claim in Champs's petition for review to the supreme court, and failed to challenge the district court's admission of autopsy photographs at trial, are similarly without merit. As with a claim of ineffective assistance of trial counsel, a petitioner alleging ineffective assistance of appellate counsel must show that counsel's performance was objectively deficient and that a reasonable probability exists that the outcome would have been different absent counsel's errors. *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008). "The petitioner must overcome the presumption that counsel's performance fell within a wide range of reasonable representation." *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009) (quotation omitted). Moreover, "[c]ounsel appealing a criminal conviction has no duty to raise all possible issues." *Dent v. State*, 441 N.W.2d 497, 500 (Minn. 1989). "When an appellant and his counsel have divergent opinions as

to what issues should be raised on appeal, his counsel has no duty to include claims which would detract from other more meritorious issues." *Id.* (quotation omitted).

We first observe that appellate counsel raised several challenges to the prosecutor's trial conduct on direct appeal, including that the prosecutor improperly stated that Champs had lost the presumption of innocence, vouched for the state's evidence, disparaged Champs's defense, and implied that Champs had a burden of proof. This court extensively reviewed the prosecutor's conduct and discerned no error. *Champs*, 2010 WL 606192, at *6-9. Nonetheless, Champs argues that appellate counsel's challenges were ineffective because they were based on state precedent, rather than federal constitutional law. But Champs fails to show that the outcome of the appeal would have been different had appellate counsel based her arguments on federal constitutional law. *See Arredondo*, 754 N.W.2d at 571 (stating that a petitioner alleging ineffective assistance of appellate counsel must show that counsel's performance was objectively deficient and that a reasonable probability exists that the outcome would have been different absent counsel's errors).

We next observe that the record shows that appellate counsel's failure to include a prosecutorial-misconduct claim in Champs's petition for review to the supreme court was a strategic decision. As support for his postconviction petition, Champs submitted a letter from appellate counsel to Champs regarding his directive that the prosecutorial misconduct issue be raised in his petition for further review. The letter reads, in relevant part:

> I didn't address the factual matter you mentioned in your letter (about whether the prosecutor actually vouched for the witnesses) because the court of appeals has already ruled on this issue and reasonable people can disagree on what constitutes vouching. I raised the two broad legal issues that I thought the supreme court was most likely to be interested in.

This letter reflects the strategic nature of appellate counsel's decision. And because it was a strategic decision, it does not constitute ineffective assistance of appellate counsel. *See Dent*, 441 N.W.2d at 500 ("When an appellant and his counsel have divergent opinions as to what issues should be raised on appeal, his counsel has no duty to include claims which would detract from other more meritorious issues." (quotation omitted)).

We last observe that "[p]hotographs of a homicide victim's body are admissible where they are (1) accurate and (2) helpful as an aid to a verbal description of objects and conditions which are relevant to some material issue." *State v. Walen*, 563 N.W.2d 742, 748 (Minn. 1997) (quotation omitted). Even though Champs concedes that autopsy photographs are generally admissible in homicide cases, he argues that appellate counsel was ineffective in failing to challenge the admission of the photos on appeal. But Champs presented no evidence to support this argument in the postconviction proceeding. The argument therefore fails. *See Leake*, 737 N.W.2d at 535 ("Allegations in a postconviction petition must be more than argumentative assertions without factual support.").

III.

Although Champs's statement of the case indicates that his appeal is from the district court's denial of his supplemental petition for postconviction relief, his brief does not address the issue raised in his supplemental petition. Nor does his brief assign error to the district court's decision on the issue. We therefore affirm the district court's denial of Champs's supplemental petition without addressing the legal issue raised therein. *See State v. Butcher*, 563 N.W.2d 776, 780-81 (Minn. App. 1997) (stating that issues not briefed on appeal are waived), *review denied* (Minn. Aug. 5, 1997).

In conclusion, the district court did not abuse its discretion by summarily denying Champs's second and supplemental petitions for postconviction relief.

Affirmed.