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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1320**

Mamady Kalifa Keita, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 5, 2013
Affirmed
Ross, Judge**

Hennepin County District Court
File No. 27-CR-09-20793

Mamady Kalifa Keita, Bayport, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Mamady Keita appeals from a district court order denying his petition for
postconviction relief from his 2009 conviction of two counts of first-degree criminal

sexual conduct and one count of first-degree burglary. Keita argues that the postconviction court erred by failing to address his ineffective assistance of appellate counsel claim, by finding that he was properly sentenced, and by holding that his other claims are procedurally barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976). Because we conclude that the district court did not abuse its discretion by denying Keita's petition for postconviction relief, we affirm.

FACTS

Mamady Keita and his friend DeAngelo Madison raped K.W. in her home on April 1, 2009. *State v. Keita*, No. A10-766, 2011 WL 978237, at *1 (Minn. App. Mar 22, 2011), *review denied* (Minn. May 25, 2011). After the rape, the men took her clothes and cellular telephone, forced her to shower, and threatened her. *Id.* Keita was charged with two counts of first-degree criminal sexual conduct and one count of first-degree burglary. *Id.* After trial, the jury convicted Keita on all counts and the district court sentenced him to 281 months in prison. *Id.*

Keita appealed from his conviction, arguing that prosecutorial misconduct robbed him of a fair trial and that he received an incorrect sentence. He also argued that the state introduced insufficient evidence, that he received ineffective assistance of trial counsel, and that the state failed to call key witnesses. *Id.* We held that Keita was fairly tried but that he had been improperly sentenced due to an incorrect criminal-history score. *Keita*, 2011 WL 978237, at *1, *4, *5. The district court resentenced Keita to consecutive prison terms of 81 months for the burglary conviction and 172 months for the criminal-sexual-conduct conviction for a total sentence of 253 months.

Keita filed a petition for postconviction relief, arguing that he was improperly sentenced, that the jury received improper instructions, that the prosecutor's misconduct deprived him of a fair trial, that there was insufficient evidence to convict him, that the trial court judge was partial, and that his appellate counsel provided him ineffective assistance. The district court denied his petition. Keita appeals.

D E C I S I O N

We review a postconviction proceeding only to determine whether sufficient evidence exists to sustain the postconviction court's findings, and we do not disturb the postconviction decision absent an abuse of discretion. *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006). We do not consider postconviction claims that were raised in a direct appeal or that should have been known and raised in that appeal. *Jones v. State*, 671 N.W.2d 743, 746 (Minn. 2003); *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976).

Keita first argues that the district court erred by failing to review his ineffective assistance of appellate counsel claim. He asserts that this claim is not barred because it was not available on direct appeal. This argument has merit only on the threshold.

Keita's 78-page memorandum accompanying his petition for postconviction relief raises his ineffective-assistance allegation vaguely:

Needless to argue that the petitioner was poorly represented both at trial and on direct appeal; evidence of ineffective of counsels nestle about all the issues addressed about this very petition for postconviction relief and memorandum of law for postconviction relief petition support.

Although Keita maintained specifically that he was “poorly represented” on “direct appeal,” the postconviction court’s order addressed only Keita’s trial-counsel claim, deeming it waived under *Knaffla*. Keita’s ineffective assistance of appellate counsel claim is not similarly waived because he “could not have known of ineffective assistance of his appellate counsel at the time of his direct appeal.” See *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007).

But the district court did not abuse its discretion by failing to address the appellate-counsel claim because Keita presented no argument or facts to support it. To succeed on an ineffective-assistance-of-counsel claim, Keita must demonstrate that his counsel’s performance fell below an objective standard of reasonableness and that his counsel’s errors affected the outcome. See *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). When a brief contains no argument or citation to legal authority in support of the allegation, we deem the argument waived. *State v. Krosch*, 642 N.W.2d 713, 719–20 (Minn. 2002). We follow the supreme court’s leading and hold that “conclusory, argumentative assertions, without factual support” are insufficient to support a petition for postconviction relief. *State v. Turnage*, 729 N.W.2d 593, 599 (Minn. 2007). Keita has made no attempt to establish that his appellate counsel’s performance fell below an objective standard of reasonableness or that the outcome of his case would have been different but for his counsel’s alleged errors. He has, for example, failed to make any argument that his appellate counsel’s judgments were incorrect or that she specifically failed to raise reasonable and dispositive arguments. For this reason, we hold that the

postconviction court's failure to address Keita's ineffective assistance of appellate counsel claim was, at most, harmless error.

Keita next argues that his sentence of 253 months is erroneous because he was sentenced under the wrong sentencing guideline and because it was inappropriate for the district court on remand to switch his prison terms from concurrent to consecutive. The interpretation of the sentencing guidelines presents questions of law, which we review *de novo*. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). The district court initially miscalculated Keita's criminal-history score and sentenced him to 281 months on terms running concurrently. But this court reviewed the sentence and remanded the case to the district court to sentence Keita using the correct criminal-history score and to determine whether the sentences should run consecutively or concurrently. The district court exercised its discretion and sentenced Keita to 253 months imprisonment on consecutive terms. The postconviction court held that this resentencing complied with the sentencing guidelines, and this holding is supported by the guidelines and caselaw. The postconviction court accurately decided that the 81-month sentence for first-degree burglary was within the 58–81 month presumptive guideline range and that the 173-month sentence for first-degree criminal sexual conduct was within the 144–173 presumptive guideline range. *See Minnesota Sentencing Guidelines II.C., IV* (2008). The postconviction court also accurately decided that the sentencing court appropriately sentenced Keita to consecutive prison terms under Minnesota Sentencing Guidelines II.F. Consecutive sentences for burglary and criminal sexual conduct do not represent a departure from the sentencing guidelines. *See State v. Coleman*, 731 N.W.2d 531, 534

(Minn. App. 2007), *review denied* (Minn. Aug. 7, 2001). The postconviction court's holding that Keita was properly sentenced was not an abuse of its discretion.

Keita offers an array of other bases to support his petition for postconviction relief, including prosecutorial misconduct, improper jury instructions, insufficient evidence, an impartial trial court, and ineffective assistance of trial counsel. The postconviction court rightly held that all of these were barred under *Knaffla* and that no exception applies since they all either previously were raised or should have been known and raised in a direct appeal. *See Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

Affirmed.