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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2115**

Tarun Solorzano-O'Brien, a/k/a Mario Patino, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 15, 2013
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-06-74377

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's denial of his postconviction claim of ineffective assistance of counsel as procedurally barred under *State v. Knaffla*, 309 Minn.

246, 243 N.W.2d 737 (1976). Because that issue was previously raised and considered on direct appeal, we affirm.

FACTS

In 2006, appellant Tarun Solorzano-O'Brien a/k/a Mario Patino and four co-defendants were indicted by a grand jury on charges of first-degree murder and first-degree murder for the benefit of a gang. At the commencement of trial, Solorzano-O'Brien orally moved for a probable-cause hearing and dismissal of the indictment, arguing that the indictment was not supported by probable cause. The district court denied the motion for a probable-cause hearing and did not expressly address the motion to dismiss. The state and Solorzano-O'Brien entered into a plea agreement the following day. Pursuant to that agreement, Solorzano-O'Brien pleaded guilty to aiding and abetting an offender after the fact for the benefit of a gang in exchange for the state's dismissal of the first-degree murder charges and an agreed-upon sentence of 176 months' imprisonment.

Subsequent to this plea, the district court dismissed the indictment against one co-defendant for lack of probable cause. Solorzano-O'Brien moved to withdraw his guilty plea and to dismiss the indictment for lack of probable cause. The district court denied the motion for plea withdrawal, but did not address the motion to dismiss for lack of probable cause. Solorzano-O'Brien was later sentenced to 176 months in prison.

In 2009, Solorzano-O'Brien appealed his conviction, challenging the district court's denial of his motion to withdraw his plea and the severity level assigned to his offense. *See State v. Patino*, No. A08-1005, 2009 WL 2225440 (Minn. App. July 28,

2009), *review denied* (Minn. Oct. 20, 2009). He also raised several pro se issues, including whether he “suffer[ed] from ineffective counsel.” With respect to that claim, Solorzano-O’Brien argued that the issue was not ripe for review, was being investigated, and might be valid at a later date. We considered Solorzano-O’Brien’s pro se claims, including his assertion that he had ineffective assistance of counsel, and concluded that they were without merit. *Id.* at *3. We affirmed the district court’s denial of the plea-withdrawal motion but remanded the matter for findings on the offense-severity level. *Id.* at *1. The district court made those findings on remand.

Solorzano-O’Brien appealed the district court’s decision following remand and, again, raised several pro se issues including a claim of ineffective assistance of counsel. *See State v. Solorzano-O’Brien*, No. A10-1514, 2011 WL 1237554 (Minn. App. Apr. 5, 2011). We affirmed Solorzano-O’Brien’s sentence but declined to consider his pro se claims because they were procedurally barred. *Id.* at *2.

In April 2012, Solorzano-O’Brien filed a postconviction petition, claiming that he was denied effective assistance of counsel because his trial counsel “did not demand the district court to rule on his motion to dismiss the indictment prior to entering a guilty plea.” The postconviction court denied relief, concluding that Solorzano-O’Brien’s claims are barred because they were raised and addressed on direct appeal in 2009. The postconviction court concluded, alternatively, that his claims are without merit. This appeal follows.

DECISION

Procedural Bar

Solorzano-O'Brien challenges the postconviction court's denial of his claim of ineffective assistance of counsel as procedurally barred under *Knaffla*. The rule announced in *Knaffla* bars postconviction review of all claims raised or known but not raised when a direct appeal has been taken. 309 Minn. at 252, 243 N.W.2d at 741; *see also Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005) ("*Knaffla* also bars claims that should have been known at the time of direct appeal."). The *Knaffla* bar applies to ineffective-assistance claims. *Hale v. State*, 566 N.W.2d 923, 926 (Minn. 1997). We review the denial of postconviction relief for an abuse of discretion. *Quick*, 692 N.W.2d at 439.

Solorzano-O'Brien argues that *Knaffla* is inapplicable to his ineffective-assistance claim because the issue was neither raised nor considered on direct appeal. He argues that he merely noticed the issue for some later time. But on direct appeal in 2009, Solorzano-O'Brien's pro se brief asserted an ineffective-assistance claim, and we fully considered that claim, concluding it lacked merit. Likewise, when Solorzano-O'Brien subsequently appealed the district court's decision following remand, in which he again asserted an ineffective-assistance claim, we declined to consider that claim because it was raised and considered on direct appeal.

Because Solorzano-O'Brien raised an ineffective-assistance claim on direct appeal and because we fully considered the merits of that claim, postconviction review of that

issue is barred pursuant to *Knaffla*. As such, the postconviction court did not abuse its discretion by denying Solorzano-O'Brien's postconviction petition.

Merits of the claim

Having determined that Solorzano-O'Brien's ineffective-assistance claim is procedurally barred, we need not address his arguments in support of that claim. Yet we are compelled to note that when Solorzano-O'Brien raised that issue on direct appeal he did so without articulating the basis for the claim or presenting any supportive argument. Because he does so now, for the first time, we have elected to consider those arguments and have determined that they are without merit.

To succeed on a claim of ineffective assistance of counsel, the defendant must prove:

First, . . . that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Deficient representation means "objectively unreasonable" performance by counsel. *Carter v. State*, 787 N.W.2d 675, 678 (Minn. App. 2010). Prejudice occurs only if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

“There is a strong presumption that a counsel’s performance falls within the wide range of reasonable professional assistance.” *Hale*, 566 N.W.2d at 927.

Solorzano-O’Brien’s theory of ineffective counsel posits that, because it is “unclear” how the district court would have ruled on his motion to dismiss, he could not have known what rights he was bargaining away by pleading guilty. And because his attorney did not demand a ruling on that motion, he received constitutionally deficient representation. We agree with the postconviction court’s conclusion that Solorzano-O’Brien was fully aware that the district court had not ruled on his pending motion when he decided to enter into a plea agreement with the state and the parties “made a mutual decision to engage in a plea bargain when there was . . . risk to both sides.”

Solorzano-O’Brien’s argument that he did not understand the consequences of his plea is further defeated by his own admission that “[t]he premise of [his] guilty plea in this matter was to avoid the risk of a potential conviction [of first-degree murder] by pleading guilty to an amended charge . . . in exchange for a specifically agreed upon sentence.” The fact that Solorzano-O’Brien knowingly bargained away his right to a trial while a dispositive motion was pending, in order to gain the benefit of avoiding the risk of a first-degree-murder conviction, does not demonstrate either deficient representation or prejudice.

Furthermore, Solorzano-O’Brien’s pending motion was not only meritless, it was moot. In denying a probable-cause hearing, the district court found sufficient probable cause to proceed to trial. The postconviction court highlighted this point: “The answer to whether there was probable cause to support Mr. Solorzano-O’Brien’s indictment is

implicit in the court's denial of the motion[] for a [probable-cause] hearing. . . . Therefore, an explicit ruling on [the motion to dismiss the indictment for lack of probable cause] was not necessary." Defense counsel's failure to demand an explicit ruling on the motion which had been rendered moot was neither unreasonable nor prejudicial. Consequently, Solorzano-O'Brien has not met his burden under *Strickland*.

Affirmed.