STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0700

Todd Jeffery Kadel, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 24, 2012
Affirmed
Stauber, Judge

Otter Tail County District Court
File No. 56CR083842

Todd Jeffrey Kadel, Faribault, Minnesota (pro se appellant)

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

David J. Hauser, Otter Tail County Attorney, Fergus Falls, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Stauber, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

STAUBER, Judge

In this pro se postconviction appeal, appellant argues that the district court erred by denying his petition for postconviction relief because he was denied the effective assistance of trial and appellate counsel. We affirm.

FACTS

In October and November 2008, officers with the West Central Drug Task Force conducted several controlled methamphetamine buys through the use of confidential informants. Several people, including appellant Todd Jeffery Kadel, were involved in the sales transactions. Law enforcement subsequently executed a search warrant on appellant's apartment, which resulted in the seizure of methamphetamine and other items which they characterized as "indicia of drug trafficking." Consequently, appellant was charged with several crimes related to the possession and sale of controlled substances.

Appellant moved to suppress the evidence seized during the execution of the search warrant, arguing that the affidavit did not contain sufficient information to support a finding of probable cause. The district court denied the motion, and a jury found appellant guilty of possession and sale of methamphetamine. Appellant filed a direct appeal, arguing that the evidence was insufficient to sustain his convictions, that the district court committed plain error by failing to instruct the jury as to accomplice testimony, and that the district court erred by allowing evidence seized under a defective search warrant. This court affirmed appellant's convictions in an unpublished opinion.

State v. Kadel, No. A09-2053 (Minn. App. Jan. 4, 2011), *review denied* (Minn. Mar. 15, 2011).

In January 2012, appellant filed a pro se petition for postconviction relief arguing that he was denied the effective assistance of trial and appellate counsel. The postconviction court denied appellant's petition, concluding that (1) the ineffective-assistance-of-trial-counsel claim is barred by the *Knaffla* rule and (2) "[t]here is no evidence that appellate counsel's representation fell below an objective standard of reasonableness." This appeal follows.

D E C I S I O N

Appellant challenges the district court's denial of his petition for postconviction relief, dismissing his claims of ineffective assistance of trial and appellate counsel. Appellate courts "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). The decision of the postconviction court will not be reversed unless the court 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). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004).

A. Trial counsel

To prevail on a claim of ineffective assistance of counsel, "[t]he defendant must affirmatively prove that his 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.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). When considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). This court "generally will not review attacks on counsel's trial strategy." *Opsahl*, 677 N.W.2d at 421.

Appellant argues that testimony presented at trial revealed misstatements and omissions relevant to whether there was probable cause to issue the search warrant for appellant's residence. Appellant contends that based upon these "revelations," trial counsel should have renewed the challenge to the validity of the search warrant under *Franks*. *See Franks v. Delaware*, 438 U.S. 154, 155-56, 98 S. Ct. 2674, 2676 (1978) (holding that "where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request"). Appellant argues that trial counsel's failure to renew the challenge to the search warrant constituted ineffective assistance of counsel.

When a direct appeal has 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). 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 v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

Here, the district court concluded that appellant's ineffective-assistance-of-trial-counsel claim was *Knaffla* barred because it "was known to him at the time of his appeal." Appellant contends that this decision is erroneous because additional evidence was required to determine whether his ineffective-assistance-of-trial-counsel claim had merit. He argues that "a postconviction court pondering applicability of the *Knaffla* rule to such a claim must first determine whether that claim could truly have been decided on direct appeal solely upon the district court record as it then was." Appellant appears to contend that his claim could not have been decided on direct appeal because a hearing was necessary to determine why trial counsel did not renew the challenge to the search warrant during trial.

We disagree. The record reflects that additional evidence was not required to determine whether appellant's ineffective-assistance-of-counsel claim has merit. The alleged misstatements and omissions pertaining to the search warrant were revealed at trial. In fact, appellant's petition for postconviction relief contains a table containing all of the alleged misstatements and omissions relevant to the search warrant, and cites to the trial record. As a result, appellant's claim was known at the time of his direct appeal. Although appellant claims that an additional hearing was necessary to determine why

trial counsel did not renew the challenge to the search warrant during trial, such testimony is not necessary to determine whether counsel's representation fell below an objective standard of reasonableness because tactical decisions, including what motions to pursue, are left to trial counsel's discretion. *See State v. Rosillo*, 281 N.W.2d 877, 879 (Minn. 1979) (stating that decisions on "what trial motions should be made, and all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client"). Moreover, none of the exceptions to the *Knaffla* rule applies. Therefore, the district court properly concluded that appellant's ineffective-assistance-of-trial-counsel claim was barred by the *Knaffla* rule. *See Evans v. State*, 788 N.W.2d 38, 44 (Minn. 2010) (stating that 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 at time of direct appeal).

B. Appellate counsel

Appellant also contends that he received ineffective assistance of appellate counsel, claiming his appellate counsel failed to raise the issue of ineffective assistance of trial counsel. Thus, appellant argues that the district court erred by denying his petition for postconviction relief.

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). "[A]n 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. "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." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

As addressed above, appellant's ineffective-assistance-of-trial-counsel claim was premised on counsel's failure to renew the challenge to the validity of the search warrant at trial. But a decision not to file a suppression motion "does not constitute per se ineffective assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 384, 106 S. Ct. 2574, 2587 (1986). And, as the United States Supreme Court has explained, the presumption "that trial counsel was competent must be rebutted by the defendant by showing that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Id.*, 106 S. Ct. at 2588. The Supreme Court further explained that "[t]he reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of the circumstances." *Id.*

Here, the record reflects that appellant was represented by two public defenders at trial, and that his attorneys challenged the validity of the search warrant prior to trial. The validity of the search warrant was then affirmed on appeal. *Kadel*, 2011 WL 9134,

at *5. The fact that the validity of the search warrant was challenged, and that both of appellant's attorneys collectively decided not to re-challenge the district court's ruling at trial indicates that counsel's performance was reasonable in light of the circumstances. *See Kimmelman*, 477 U.S. at 384, 106 S. Ct. at 2588. Moreover, a review of the search-warrant affidavit, in conjunction with the alleged misstatements and omissions cited in appellant's petition for postconviction relief, reveals that the alleged misstatements and omissions were immaterial and were not relevant to the determination of probable cause. *See Johnson v. State*, 673 N.W.2d 144, 148 (Minn. 2004) ("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."). Therefore, appellant cannot rebut the presumption that his attorney's performance was reasonable.

Because appellant cannot demonstrate that he received ineffective assistance of trial counsel, appellant's ineffective-assistance-of-appellate-counsel claim also fails. *See Fields*, 733 N.W.2d at 468 ("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."). Accordingly, the district court did not abuse its discretion by denying appellant's petition for postconviction relief.

Affirmed.