STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0627

Mitchell Gabrelcik,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 20, 2008
Affirmed
Klaphake, Judge

Anoka County District Court
File No. KX-99-7806

Mitchell L. Gabrelcik, 1542 Marion Street, Apt. 205, St. Paul, MN 55117 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, 7th Floor, Anoka, MN 55303 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and Crippen, 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

KLAPHAKE, Judge

This pro se appeal is from a district court order denying appellant Mitchell Gabrelcik's postconviction petition. Appellant was convicted on January 6, 2000, of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subds. 1(b), 2 (1998). Appellant filed a direct appeal, and this court affirmed his conviction, rejecting his challenge to evidence procured by means of a search warrant. He now argues that the district court made numerous errors, that he was represented by ineffective trial and appellate counsel, and that new exculpatory evidence mandates a new trial. Because appellant's claims are procedurally barred or lack merit, we affirm.

D E C I S I O N

When reviewing a denial of postconviction relief, this court reviews legal issues de novo and reviews "factual findings to determine if there is sufficient evidence in the record to sustain the findings." *Cooper v. State*, 745 N.W.2d 188, 190-91 (Minn. 2008). This court will not disturb the decision of a postconviction court absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). A petitioner is entitled to an evidentiary hearing only if the petitioner alleges facts that, if proved, would entitle the petitioner to the relief requested. *Spann v. State*, 740 N.W.2d 570, 572 (Minn. 2007); Minn. Stat. § 590.04, subd. 1 (2006).

1. Procedurally Barred Claims

Appellant alleges numerous trial errors, including (1) invalidity of a search warrant, (2) violation of a motion in limine order during testimony about a storage locker,

(3) perjury by a detective during his trial testimony, (4) witness misconduct by a detective for talking with a juror, and (5) an erroneous jury instruction. The postconviction court denied appellant's petition on the grounds that the claims raised were barred by the rule of *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (Minn. 1976). We agree.

Once a defendant has taken a direct appeal, a postconviction court is barred from considering any claim that the defendant raised previously and any claim known by the defendant but not raised in a direct appeal. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. Two exceptions to the *Knaffla* rule permit review when "(1) a claim is so novel that the legal basis for the appeal was not available on direct appeal, or (2) the interests of justice require review." *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007); *see also* Minn. Stat. § 590.01, subd. 4 (2006) (codifying similar requirements).

Appellant's challenge to the validity of the search warrant has already been rejected by this court in his direct appeal. *State v. Gabrelcik*, No. C6-00-766; 2000 WL 1869569 (Minn. App. May 2, 2000) (concluding that the district court did not err in denying appellant's motion to suppress this evidence). As such, we decline to review this issue again, and appellant provides no grounds under which we may do so.

Further, appellant could have raised each of his remaining claims of trial error in his direct appeal, but he did not. Because appellant knew the legal grounds for these claims at the time of the direct appeal and offers no reason why these claims would fall within either exception to *Knaffla*, we conclude the postconviction court did not abuse its discretion in finding these claims barred. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741;

see Quick v. State, 692 N.W.2d 438, 439 (Minn. 2005) (applying abuse of discretion standard to denial of postconviction relief based on *Knaffla*).

2. Ineffective Assistance of Counsel Claims

Appellant also argues that he was denied effective assistance of counsel because defense counsel (1) erroneously elicited a stipulation from appellant that he was ineligible to possess a firearm within the meaning of the statute; (2) failed to object to a jury instruction; (3) did not allow appellant to testify; (4) did not present defense witnesses; (5) did not present any evidence of appellant's longstanding conflict with his brother, including "*Spreigl* evidence" that he claims demonstrates that his brother had repeatedly tried to "set him up"; (6) failed to request video surveillance tapes of the storage locker; and (7) failed to use the original storage locker lock as an exhibit.

An appellant must raise a claim of ineffective assistance of trial counsel on direct appeal if the reviewing court can decide it by reference to the trial record; otherwise, an appellant may raise the claim in the first postconviction petition. *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004); *see Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (holding ineffective assistance of counsel claim may be reviewed in the interests of justice if additional factfinding is required to evaluate the merits of the claim). Appellant attached to his petition additional evidence—letters from his trial counsel setting forth trial strategy decisions and reasons she chose not to introduce certain evidence—that were not part of the trial record. Therefore, the postconviction court could evaluate the ineffective assistance of counsel claim on the merits as long as the additional evidence

alleged, if proved, would entitle appellant to the requested relief. *Spann*, 740 N.W.2d at 572.

When evaluating an ineffective assistance of counsel claim, this court applies the two-prong *Strickland* test. A defendant must prove that (1) the lawyer's representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different but for the lawyer's errors. *Cooper*, 745 N.W.2d at 193 (following rule in *Strickland v. Washington*, 466 U.S. 668, 687-94, 104 S. Ct. 2052 (1984)). "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quotations omitted).

Here, appellant failed to establish either prong under *Strickland.* With respect to several of appellant's contentions, he simply misstates or misconstrues the law. For example, appellant mistakenly argues he should not have stipulated to the charge of being "ineligible" to possess firearms because his earlier conviction occurred more than 10 years prior to the current offense. In fact, Minn. Stat. § 624.713 provides that a person previously convicted of a crime of violence may not possess a firearm for a period of 10 years from the time "a sentence expired," including probation time. Here, appellant's sentence from his prior conviction did not expire until 1996, when he completed probation. Thus, at the time of the offense, appellant fell within the 10-year prohibition to possessing firearms under Minn. Stat. § 624.713. Appellant also mistakenly argues that the jury instructions should have included an element that he "knowingly" possessed a firearm, citing a federal statute; but appellant was not charged under federal law. In

Minnesota, the elements of the offense of being a person ineligible to possess a firearm do not include knowledge. Minn. Stat. § 624.713 subds. 1(b), 2. Thus, neither of these grounds for claiming ineffective assistance of counsel has merit.

Appellant's remaining claims of ineffective assistance of counsel are based on his counsel's strategic decisions—whether to introduce evidence, to have defendant testify, to call certain witnesses, to introduce *Spreigl* evidence to show appellant's conflict with his brother, or to stipulate that appellant was ineligible to possess a firearm. These are all trial strategy decisions, which are generally not subject to appellate review for attorney competency. *See Opsahl v. State,* 677 N.W.2d 414, 421 (Minn. 2004) (stating that appellate courts generally will not review claims of ineffective assistance of counsel based on trial strategy), *aff'd on other grounds,* 710 N.W.2d 776 (Minn. 2006). While appellant may have disagreed with the strategy employed by defense counsel, he has not established that these decisions fell below an objective standard of reasonableness or that he was prejudiced by defense counsel's performance such that the outcome would have been different but for his counsel's errors. Therefore, appellant has not alleged facts that would establish that he was denied effective assistance of counsel.

Appellant also complains that his appellate counsel failed to file a petition for postconviction relief alleging ineffective assistance of trial counsel rather than filing a direct appeal. When a claim for ineffective assistance of trial counsel has no legal merit, an appellant may not base a claim of ineffectiveness of appellate counsel on the failure to raise the claim. *Zenankov. State,* 688 N.W.2d 861, 865 (Minn. 2004); *Sutherlin v. State,* 574 N.W.2d 428, 435 (Minn. 1998). Accordingly, this contention also fails.

3. Newly Discovered Evidence

Finally, appellant claims for the first time in this appeal that "new evidence" entitles him to relief. He contends that a new witness, Steve May, "heard a Marc Gabrelcik [appellant's brother] tell him that in fact he 'set' Mitch your appellate [sic] up by placing the guns in a storage locker & calling police." A petitioner is entitled to postconviction relief based on newly discovered evidence if he establishes:

> (1) that the evidence was not known to him or his counsel at the time of trial, (2) that his failure to learn of it before trial was not due to lack of diligence, (3) that the evidence is material, and (4) that the evidence will probably produce either an acquittal at a retrial or a result more favorable to the petitioner.

Rhodes v. State, 735 N.W.2d 315, 317 (Minn. 2007) (quotation omitted).

Appellant failed to offer this new evidence in his petition for postconviction relief, and this court need not consider it on appeal. *See Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995). Nor has appellant established that the new evidence was not known to him at the time of trial or that with due diligence he could not have learned of it before trial. Appellant provided only a name and partial address and his own statement of what the witness purportedly said and failed to provide any reliable evidence of the witness's statement, such as a notarized affidavit. Accordingly, appellant has failed to establish that he is entitled to postconviction relief based on newly discovered evidence.

Because none of the arguments in appellant's petition for postconviction relief required an evidentiary hearing and because those arguments that are not barred by the *Knaffla* rule lack merit, we conclude that the postconviction court did not abuse its

discretion when it denied appellant's petition for postconviction relief without an evidentiary hearing.

Affirmed.