STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1995

Kor Vang, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 7, 2008
Affirmed
Shumaker, Judge

Ramsey County District Court
File No. K1-03-3953

Kor Vang, OID #209471, 970 Pickett Street North, Bayport, MN 55003-1490 (pro se appellant)

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Blvd., Suite 315, St. Paul, MN 55102 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Shumaker Judge; and Huspeni, 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

SHUMAKER, Judge

Appellant contends that the district court abused its discretion by denying his petition for postconviction relief without an evidentiary hearing on his claims that he was denied effective assistance of counsel at trial and on appeal. Because appellant's ineffective-assistance-of-counsel claims are barred by *Knaffla*, and otherwise lack merit, and because he was not entitled to an evidentiary hearing on these issues, we affirm.

FACTS

In May 2002, a jury found appellant Kor Vang guilty of two counts of second-degree murder and one count of attempted second-degree murder. He was sentenced to 326 months in prison.

Vang appealed his convictions, arguing that the district court erred by denying his motion to suppress his post-*Miranda*-warning statements and that the evidence was not sufficient to support his convictions. We affirmed the convictions in an unpublished decision. *State v. Vang*, No. C5-02-1671, 2003 WL 21385146 (Minn. App. June 17, 2003), *opinion vacated, remanded* (Minn. Apr. 28, 2004).

The supreme court vacated that opinion, however, and remanded for consideration of the admissibility Vang's post-*Miranda*-warning statements in light of *State v. Bailey*, 677 N.W.2d 380 (Minn. 2004). On remand, we again affirmed Vang's convictions. *State v. Vang*, No. C5-02-1671, 2004 WL 2521714 (Minn. App. Nov. 9, 2004), *review denied* (Minn. Jan. 26, 2005).

In July 2007, Vang filed a petition for postconviction relief alleging he had been denied effective assistance of counsel at trial and on appeal. The district court denied Vang's petition for postconviction relief without an evidentiary hearing, and this appeal followed.

D E C I S I O N

Vang contends that the postconviction court abused its discretion by denying the relief he seeks and by refusing to grant an evidentiary hearing. He claims that his trial lawyer's assistance was ineffective because she opposed the state's motion to add a charge during the trial that carried a less severe penalty than the murder charge of which he was convicted. Because of his lawyer's opposition, the trial court denied the motion. Vang urges that his lawyer on appeal was also ineffective in failing to raise the issue of his trial lawyer's ineffectiveness.

"Under Minn. Stat. § 590.01, subd. 1 (2006), a person convicted of a crime may petition for postconviction relief on the grounds that the conviction violated his rights under state or federal law." *Hathaway v. State*, 741 N.W.2d 875, 877 (Minn. 2007). "The petitioner bears the burden of establishing by a fair preponderance of the evidence facts that warrant reopening the case." *Blom v. State*, 744 N.W.2d 16, 17 (Minn. 2007).

An appellate court "will disturb the postconviction court's decision only if the court abused its discretion." *Stutelberg v. State*, 741 N.W.2d 867, 872 (Minn. 2007). "We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record" and "will not reverse those findings unless they are clearly erroneous." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). But we review

legal determinations de novo. *Stutelberg*, 741 N.W.2d at 872. 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).

Ineffective Assistance of Trial Counsel

Toward the end of his case-in-chief, the prosecutor moved to amend the complaint to add the charge of aiding an offender, as defined in Minn. Stat. § 609.495 (Supp. 2001). Among other things, this law makes it a crime to aid someone who has already committed some other crime, that is, to be an accomplice after-the-fact.

Vang's lawyer opposed the motion, arguing that the addition would prejudice Vang at that late stage of the case. The court denied the motion, and Vang was convicted of murder. Had he instead been convicted of aiding an offender, his penalty would have been far less severe.

A claim of ineffective assistance of trial counsel must be raised on direct appeal if the record is adequate for appellant review; otherwise, the claim may be raised in a petition for postconviction relief. *Townsend v. State*, 723 N.W.2d 14, 19 (Minn. 2006). The record here was adequate for review of Vang's claim because it contained the prosecutor's motion, the defense lawyer's argument in opposition, the judge's explanation of her ruling, and all of the evidence in the state's case-in-chief. Vang should have, and could have, raised this claim on direct appeal.

Vang did appeal his conviction but did not raise the issue of ineffective assistance of trial counsel. If a petitioner for postconviction relief has directly appealed his conviction, "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). The *Knaffla* bar operates as to claims the petitioner could have and should have known of at the time of the appeal. *McKenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004).

Knaffla recognizes two exceptions to its bar: (1) if the claim "is so novel that its legal basis was not reasonably available at the time of the direct appeal," or (2) if "fairness would require a review of the claim in the interest of justice and there was no deliberate or inexcusable reason for failure to raise the issue on direct appeal." *Id.* at 905-06 (quotation omitted). Vang's claim does not fit either exception.

There is nothing novel about his claim nor does it have any complexity that would have made it unlikely that its basis was not available for the direct appeal. Furthermore, Vang has not shown that there was an excusable failure to raise the claim. And, as we discuss below, review in the interest of justice is not warranted because his claim is devoid of merit.

Based on *Knaffla* and *Townsend*, Vang's claim of ineffective assistance of trial counsel is precluded from review.

Ineffective Assistance of Appellate Counsel

Vang next claims that his appellate counsel was ineffective for failing to raise, on his direct appeal, the claim that his trial counsel was ineffective and for failing to perfect his appeal under *State v. Steele*, 449 N.W.2d 157, 157 (Minn. 1999), which explains that an appellate court may grant a motion to stay or dismiss a direct appeal to allow an

appellant the opportunity to further develop an ineffective-assistance-of-counsel claim during a postconviction proceeding.

"[A] defendant who wishes to raise an ineffective assistance of *appellate* counsel claim need not do so in the very appeal where counsel is representing the defendant, but instead may raise that claim in the next postconviction petition." *Townsend*, 723 N.W.2d at 19. But the appellant must then raise the ineffective-assistance-of-appellate-counsel claim in the next postconviction petition or it is thereafter barred.

Although not procedurally barred by the *Knaffla* rule, Vang's claim that his appellate counsel was ineffective still fails on the merits. "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). Here, Vang has failed to make such a showing.

To prevail on a claim of ineffective assistance of counsel, a petitioner "must allege facts that demonstrate (1) that his counsel's performance fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's errors, the result of the . . . trial would have been different." *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). Under the first prong of the mandate, "an attorney acts within the objective standard of reasonableness when he provides his client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Dukes*, 621 N.W.2d at 252 (quotation omitted). "There is a strong presumption that an attorney acted

competently." *Id.* "Under the second prong, the defendant must show by a preponderance of the evidence that his counsel's error so prejudiced the defendant at trial that a different outcome would have resulted but for the error." *Id.* (quotation omitted).

Toward the conclusion of the state's case-in-chief, the prosecutor sought to amend the complaint to add a charge that Vang was an accomplice after-the-fact. Vang's defense lawyer objected and the court declined to allow the additional charge. Vang claims that his lawyer should not have objected and the charge should have been allowed because then he would have been convicted only of that crime and not the more serious crime of murder.

We note first that Vang erroneously suggests that aiding an offender, the charge that was proposed by the state, is a lesser-included offense of murder. It indisputably is not. A lesser-included offense is one that is necessarily proved if the main offense is proved. *State v. Carr*, 692 N.W.2d 98, 102 (Minn. App. 2005). Proof that a defendant has committed, either directly or by aiding and abetting, the crime of murder will not establish an accomplice-after-the-fact offense. Thus, aiding an offender is a related but separate and distinct crime from the crime of murder.

A "court may permit an indictment or complaint to be amended at any time before verdict or finding *if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.*" Minn. R. Crim. P. 17.05 (emphasis added); *see also State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980) (explaining that rule 17.05 "prohibits the amending of complaints to charge additional offenses after a trial has commenced"); *State v. Guerra*, 562 N.W.2d 10, 12-13 (Minn. App. 1997) ("[A]fter the

trial has begun and jeopardy has attached, an amendment is appropriate only if it does not charge an additional or different offense . . . .").

Because the law does not permit the addition of the new charge of aiding an offender, Vang's trial lawyer did not act unreasonably in objecting to the motion to add the charge. Accordingly, Vang's appellate counsel did not act unreasonably in failing to raise this issue on appeal.

We note also that Vang's argument is contradictory. In his direct appeal, he argued that the evidence was not sufficient to convict him of murder. Undoubtedly, his trial lawyer shared that viewpoint and it was prudent for her to oppose the addition of a charge of which Vang could be convicted. So, despite the prohibition against adding the new charge, his lawyer's strategy in opposing the addition was prudent and competent. *See Morgan v. State*, 384 N.W.2d 458, 460 (Minn. 1986) (concluding that defense counsel's decision not to request the submission of a lesser-included offense to the jury was a trial tactic not to be equated with attorney competence).

Because Vang has not shown ineffective assistance of trial counsel in her opposition to adding a new charge, it was not ineffective assistance of appellate counsel to fail to raise that meritless issue on appeal. *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.").

Evidentiary Hearing

A postconviction court must hold an evidentiary hearing unless "the petition and files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2006). The purpose of an evidentiary hearing is to allow the petitioner to present facts that "if proved, 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." *Wilson v. State*, 582 N.W.2d 882, 885 (Minn. 1998). As discussed above, all facts pertaining to Vang's claim respecting trial counsel's conduct were in the record on which Vang based his petition for postconviction relief. And those facts conclusively show that Vang is not entitled to relief. He has not shown what different or additional facts would be developed in an evidentiary hearing or how any such other acts would alter the application of rule 17.05.

Affirmed.