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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0115**

Nathan Daniel Clark, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 23, 2008
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 99115263

Nathan Daniel Clark, OID No. 204290, Minnesota Correctional Facility – Rush City,
7600 525th Street, Rush City, Minnesota 55069 (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County
Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Considered and decided by Hudson, Presiding Judge; Larkin, 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.

UNPUBLISHED OPINION

HUDSON, Judge

On appeal from the postconviction court's denial of relief, appellant Nathan Daniel Clark argues that the postconviction court abused its discretion when it (1) found that appellant's postconviction petition was procedurally barred under *Knaffla*; (2) found that the record supported a durational sentencing departure beyond the double-departure limit; and (3) failed to apply the *Knaffla* exceptions. Because appellant's arguments are barred by the *Knaffla* rule, we affirm.

FACTS

In 1999, appellant was indicted by a grand jury for first-degree murder for the strangulation death of his girlfriend. Appellant pleaded guilty to second-degree unintentional murder in violation of Minn. Stat. § 609.19, subd. 2 (1998). The agreed-upon sentence was 378 months, an upward durational departure from the presumptive sentence. The district court based its departure on several factors: (1) the plea agreement was negotiated between the parties; (2) the murder took place in the victim's home; (3) appellant lied to the police rather than getting help for the victim; (4) appellant attempted to hide the fact that he committed the murder; and (5) the victim was treated with particular cruelty at the time of the homicide. At the plea hearing, appellant testified that he understood the reasons for the upward departure and he did not disagree with it. The court later asked appellant, “. . . the sentence you are agreeing to here is 378 months in prison; do you understand that” to which appellant answered, “Yes, Your honor.” Counsel for appellant then stated, “It wasn't 378.” It was clarified that though sentenced

to 378 months (31.5 years), appellant would only serve 21 years in custody assuming he “[got] good time.” After further explanation from the prosecution as to how the sentence was reached, defense counsel as well as appellant again agreed to the sentence of 378 months.

In 2002, appellant filed a motion for modification or reduction of sentence (his first petition for postconviction relief) alleging that the district court used improper factors to determine the upward departure. That motion was denied. In 2004, appellant filed his second petition for postconviction relief alleging that the plea agreement was not valid because the elements to which he pleaded were inconsistent with second-degree unintentional murder. Appellant argued that his actions were more consistent with third-degree murder with a depraved mind or first-degree manslaughter in the heat of passion. The postconviction court denied relief. Appellant sought review of that decision in this court. *Clark v. State*, A05-292, 2005 WL 3291088 (Minn. App. 2005), *review denied* (Minn. Feb. 22, 2006). There, this court examined the upward durational departure imposed by the sentencing court, determined that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), was inapplicable to appellant’s sentence, and affirmed. *Clark*, 2005 WL 3291088, at *4–*5. In August 2007, appellant filed his third motion for postconviction relief and argued that the record did not support a finding of “severe aggravating circumstances” on which the upward durational departure was based, and that failure to find and state the “severe aggravating circumstances” in the departure report was prejudicial and deprived appellant equal protection of the law. The postconviction court denied relief and specifically found that appellant’s postconviction

petition was procedurally barred under *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). This appeal follows.

DECISION

I

Appellant argues that the postconviction court abused its discretion when it found that his postconviction petition was procedurally barred under *Knaffla*. Review of a denial of postconviction relief based on the *Knaffla* procedural bar is for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005). Once a direct appeal has been filed, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. When no direct appeal has been taken, a postconviction proceeding can take the place of a direct appeal and can raise issues that could have been raised on direct appeal. *See Knaffla*, 309 Minn. at 251–52, 243 N.W.2d at 740–41 (stating that a defendant is entitled to at least one review of conviction by appellate or postconviction court).

In his 2005 appeal to this court, appellant argued that the imposition of the upward durational departure, absent a waiver of his right to a jury trial to determine the existence of aggravating factors, violated his constitutional rights under *Blakely*. This court specifically found that appellant's waiver and the upward departure were adequately supported by the facts on the record. *Clark*, 2005 WL 3291088, at *5. Here, though challenging the durational departure under a different theory, appellant again asks this court to consider the merits of the durational departure. The *Knaffla* rule applies "if the

defendant knew or should have known about the issue at the time of appeal.” *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002). Because appellant’s argument here involves the same departure as was challenged in his 2005 argument, we conclude that he knew or should have known about his present argument at that time, and accordingly, the postconviction court did not abuse its discretion in denying relief. Under *Knaffla* and its progeny, appellant is barred from relitigating this issue.¹

II

Appellant argues that the postconviction court abused its discretion when it failed to apply either of the two exceptions to the *Knaffla* rule, which permit further postconviction review even when a petitioner has previously appealed a matter. These exceptions apply (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 the failure to raise the issue on direct appeal.” *McKenzie v. State*, 687 N.W.2d 902, 905–06 (Minn. 2004) (quoting *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004)).

Novel legal issue

Appellant argues that a determination of whether the facts on the record support an upward durational departure under the sentencing guidelines is a novel legal issue. We disagree. A “novel legal issue” has been characterized by this court as an issue of first impression. *Kunza v. St. Mary’s Reg’l Health Ctr.*, 747 N.W.2d 586, 590 (Minn. App.

¹ Because appellant’s claims regarding the durational departure are procedurally barred, we need not determine whether any omission from the departure report was prejudicial.

2008). *See also State v. Richardson*, 670 N.W.2d 267, 285 (Minn. 2003) (reducing appellant’s prison term because the district court failed to establish aggravating circumstances necessitating durational departure); *State v. Misquadace*, 629 N.W.2d 487, 492 (Minn. App. 2001) , *aff’d*, 644 N.W.2d 65 (Minn. 2002) (holding that district court must disclose substantial and compelling circumstances that support the departure even when appellant agrees to the departure); *State v. Mortland*, 399 N.W.2d 92, 94 n.1 (Minn. 1987) (examining requirement of aggravating circumstances in regard to upward durational sentencing departure).

Interests of justice

Appellant argues that the interests of justice require review of his case. But here, we conclude that (1) appellant knowingly, intelligently, and voluntarily entered into the plea agreement with the state (as previously determined by this court); (2) the district court supported the durational departure with a finding of severe aggravating circumstances; and (3) appellant has filed several postconviction petitions and has previously appeared before this court with a similar argument. On this record, we conclude that appellant inexcusably failed to raise his present arguments in his first appeal and the interests of justice do not require further review. The postconviction court did not abuse its discretion in denying relief.

Affirmed.

Dated: _____

Judge Natalie E. Hudson