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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-478**

Tedd Leroy Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed December 29, 2009
Affirmed
Kalitowski, Judge**

Scott County District Court
File No. 70-2003-17371

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(for respondent)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Tedd Leroy Johnson challenges the district court's denial of his petition for postconviction relief on his wiretapping charge, arguing that the district court abused its discretion because: (1) appellant received inadequate assistance of counsel; (2) the factual basis for his guilty plea was insufficient; and (3) the district court allowed him to withdraw his guilty plea on another charge, and the two guilty pleas were interrelated. Because appellant's claims are time barred and procedurally barred, we affirm.

DECISION

Appellant pleaded guilty to unlawful disclosure of wire communications, in violation of Minn. Stat. § 626A.02, subd. 1(c) (2002), fully acknowledging his guilt and the factual basis for the charge. He also pleaded guilty to a domestic assault charge, not at issue in this appeal, as part of a plea agreement. Following appellant's third petition for postconviction relief, the district court allowed appellant to withdraw his guilty plea on the domestic assault charge, determining that appellant raised a novel legal theory that overcame timeliness considerations, but denied his request to withdraw his guilty plea on the wiretapping charge because it was untimely.

When reviewing a district court's denial of postconviction relief, appellate courts review issues of law de novo, and findings of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). This court reviews a district court's denial of postconviction relief for abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

I.

Timeliness Bar

The district court concluded that appellant's third postconviction petition was barred as untimely. Minn. Stat. § 590.01, subd. 4(a) (2008), requires that a petition for postconviction relief be filed within "two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." A defendant whose conviction became final before this limitations period became effective on August 1, 2005, was granted two years from the effective date of the limitations period to file a postconviction petition. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. Because appellant's conviction became final before August 1, 2005, he had until August 1, 2007, to file his postconviction petition. Because appellant's petition for postconviction relief was filed June 30, 2008, the district court held that the petition was untimely and barred by the statute of limitations.

The statute provides exceptions to the general timeliness bar for, among other things, newly discovered evidence and nonfrivolous petitions that are in the interests of justice. Minn. Stat. § 590.01, subd. 4(b)(2), (5) (2008). Although appellant fails to cite the statute or these exceptions, his argument appears to rely on these two exceptions.

Newly Discovered Evidence

Minn. Stat. § 590.01, subd. 4(b)(2), provides that in order for newly discovered evidence to provide an exception to the timeliness rule, it must not have been ascertainable by the exercise of due diligence within the two-year time limit, and it must establish by a clear and convincing standard that a petitioner is innocent of a crime for

which he was convicted. The district court determined this exception did not apply. The allegedly new evidence appellant presented is his discovery of the fact that his attorney had been placed on probation with the Lawyer's Professional Responsibility Board in June of 2007, following a previous discipline for a wiretapping issue. Appellant claims this information did not become available to him until after October 2007.

We conclude that the district court properly determined that evidence of appellant's attorney's placement on probation and previous admonishment by the lawyer's board does not support appellant's claims of ineffective assistance of counsel or conflict of interest. In support of his conflict-of-interest claim, appellant cites his attorney's actions of allowing appellant to admit to wiretapping in court, and playing the wiretapped conversations in court. But these facts were both alleged in an earlier postconviction petition and ascertained at the time of trial, long before the statute of limitations expired.

Moreover, as the district court correctly noted, the allegedly newly discovered evidence does not absolve appellant of culpability. Appellant admitted on the record that he put a recording device on his estranged wife's phone and taped her conversations. This admission provides a factual basis that appellant violated Minn. Stat. § 626A.02, subd. 1(c), by intentionally intercepting and disclosing the wire communications of another. Any evidence about appellant's attorney's accountability, assistance, or advice does not establish appellant's innocence by clear and convincing evidence. Thus, we conclude that the district court did not abuse its discretion in concluding that this exception did not apply.

Interests of Justice

Appellant fails to properly invoke the interests-of-justice exception to the timeliness rule. That exception provides that the time limit for a postconviction petition does not apply if “the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5). Appellant does not cite this exception, and fails to explain why it would be in the interests of justice to allow him to circumvent the timeliness requirements under the postconviction statute. Caselaw interpreting the postconviction statutes requires more specific pleading. In *Nestell v. State*, this court mandated strict pleading requirements for petitions based on any exception to the statute. 758 N.W.2d 610, 614 (Minn. App. 2008) (holding that petitions must “expressly [] identify the applicable exception” to avoid dismissal as untimely); *see also Stewart v. State*, 764 N.W.2d 32, 34 (Minn. 2009) (holding that a postconviction petition was untimely when petitioner, whose conviction became final on April 19, 2001, did not file until April 30, 2008, and “did not assert or establish” any of the statutory exceptions).

Appellant’s petition for postconviction relief was untimely, and he did not assert or establish any exceptions to the timeliness rule. We therefore conclude that the district court did not abuse its discretion in denying appellant’s petition to withdraw his guilty plea for failing to meet the timeliness requirements.

Procedural Bar

Appellant’s third petition for postconviction relief was procedurally barred because the issues were known or should have been known at the time of his earlier

postconviction petitions, but appellant failed to raise them. It is well settled that all matters raised, or known but not raised on direct appeal will not be considered in a later petition for postconviction relief. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Further, matters raised or known but not raised in an earlier postconviction petition will generally not be considered in subsequent postconviction petitions. *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007).

Appellant alleges that his attorney had a conflict of interest because his attorney failed to alert appellant that wiretapping was illegal. This issue was raised and disposed of in appellant's previous postconviction petition. Appellant also argues that his attorney played the tapes at trial and thus was actually the party guilty of wiretapping. But, as discussed above, appellant knew all of these facts at the time of his earlier petitions. Similarly, appellant's claim that his guilty plea had an inadequate factual basis was known or should have been known at that time as well. Because appellant could have asserted these claims in his earlier, timely petitions for postconviction relief, the claims are procedurally barred pursuant to *Knaffla*.

Further, appellant has not shown that his claims fall within the narrow exception to the *Knaffla* rule where the interests of justice demand appellate review despite the procedural bar. To be reviewed in the interests of justice, a claim must have substantive merit and must be asserted without deliberate or inexcusable delay. *Spears v. State*, 725 N.W.2d 696, 701 (Minn. 2006). In *Powers*, the supreme court held that the interests of justice did not require review where the defendant could have made his arguments previously, and did not present a colorable explanation of his failure to do so. 731

N.W.2d at 502. Here all the issues raised in appellant’s third postconviction petition existed at the time he filed his first and second petitions, and appellant has not explained or excused the delay. We therefore conclude that appellant’s claims are *Knaffla* barred.

II.

Finally, appellant argues that because the district court allowed him to withdraw his guilty plea on the domestic assault charge, he should be permitted to withdraw his guilty plea on the wiretapping charge as well. Appellant contends that when a plea agreement is reached that settles multiple charges as part of a “package deal,” withdrawal of a guilty plea to one count should negate the entire agreement. For this proposition, appellant cites Minn. R. Crim. P. 15.01, subd. 14, which provides:

[I]f the plea of guilty is for any reason not accepted by the court, or is withdrawn by the defendant with the court’s approval, or is withdrawn by court order on appeal or other review, [] the defendant will stand trial on the original [] charges . . . (which would include any charges that were dismissed as a result of the plea agreement)

The argument that the plea agreement was a package deal was not raised to the district court. Thus, it may not be considered on appeal. *See State v. Merrill*, 274 N.W.2d 99, 109 (Minn. 1978) (limiting appeal to consideration of issues raised below). Appellant claims that “[a]ppellant’s attorney argued and there was discussion about the fact that [a]ppellant’s two cases were resolved as part of a global agreement.” But appellant fails to cite to the record, and we can find no evidence that this issue was raised below. In addition, appellant knew or should have known of the issue of his plea

agreement being a package deal at the time of his first and second postconviction petitions. Thus we conclude that this issue is *Knaffla* barred.

Moreover, even if we were to consider the merits of appellant's argument, appellant has not shown that any prejudice has resulted from the district court allowing him to withdraw his guilty plea for one charge but not another. There is nothing in the record to suggest that the state has revived the other counts against appellant that were dismissed as a part of the plea agreement. Thus, appellant's claim does not fall within the *Knaffla* exception that allows appellate review in the interests of justice.

We conclude that the district court did not abuse its discretion in denying appellant's petition for postconviction relief for his wiretapping charge as untimely and procedurally barred.

Affirmed.