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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-896**

Scott Edward Weiss, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 5, 2011
Affirmed
Shumaker, Judge**

Lyon County District Court
File No. 42-K9-05-000615

Scott Edward Weiss, Bayport, Minnesota (pro se appellant)

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

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Halbrooks, Judge; and
Schellhas, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

In this pro se postconviction appeal, appellant argues (1) he has a right to court-appointed counsel in postconviction proceedings; (2) the district court did not allow appellant adequate time to prepare for his postconviction evidentiary hearing; (3) the

district court abused its discretion by denying postconviction relief for certain claims based on the *Knaffla* procedural bar; and (4) the district court erred in its denial of postconviction relief for ineffective assistance of counsel. Because the public defender's office represented appellant on direct appeal, we hold that appellant does not have a right to court-appointed counsel in postconviction proceedings. And, because the district court did not err by denying appellant's motions for continuance, or by denying relief based on the *Knaffla* procedural bar or based on appellant's claims of ineffective assistance of counsel, we affirm.

FACTS

Appellant Scott Edward Weiss was sentenced to 540 months in prison after a jury found him guilty of three counts of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. This court affirmed Weiss's conviction and sentence on direct appeal. *State v. Weiss*, No. A07-1057, 2008 WL 4299619, at *15 (Minn. App. Sept. 23, 2008), *review denied* (Minn. Nov. 18, 2008).

Weiss later petitioned for postconviction relief, raising numerous claims, including issues he raised on direct appeal. The district court concluded that all of his claims, except for those of ineffective assistance of counsel, were procedurally barred by *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976).

After the public defender's office declined representation, the district court issued an order denying Weiss's request for court-appointed counsel. The district court concluded that because the public defender's office represented Weiss in his direct

appeal, he did not have a right to court-appointed counsel in postconviction proceedings. *See Barnes v. State*, 768 N.W.2d 359, 363 (Minn. 2009).

On February 17, 2010, the district court set an evidentiary hearing, limited to the issue of ineffective assistance of counsel, for March 12, 2010. Weiss moved for a 45-day continuance of the hearing. He also moved the district court to issue subpoenas; requested reconsideration of the denial of counsel; and moved the district court, at state expense, to allow the deposition of his trial attorney. Despite the state's objections, the district court granted Weiss's request for a continuance and continued the hearing to March 22, 2010. The district court denied Weiss's other motions.

Weiss moved for a second continuance on March 11, 2010, because his trial attorney, an essential witness given Weiss's claim of ineffective assistance of counsel, was unavailable until March 21, 2010, and because he did not have addresses for two other potential witnesses. He also stated that he was in the process of hiring a private investigator and that the investigator may need three to six months to review the matter.

The district court denied Weiss's motion, finding no evidence that Weiss had subpoenaed his trial attorney to testify at the March 22, 2010 hearing, and no evidence that, if subpoenaed, the attorney would be unavailable to testify that day. Further, the district court found Weiss had not shown that he made any significant efforts to obtain affidavits or addresses from witnesses prior to petitioning for postconviction relief and noted that Weiss had more than three months since filing his petition to prepare for the evidentiary hearing he requested.

At the evidentiary hearing, Weiss made his third request for a continuance, which the district court denied. Weiss elected to rest on his motion for continuance and did not testify or present any evidence at the hearing. As a result, the district court relied on the record for its findings and conclusions that Weiss failed to demonstrate ineffective assistance of trial or appellate counsel. The district court denied Weiss's petition for postconviction relief. This pro se appeal followed.

D E C I S I O N

In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence to support the district court's findings. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007); cf. *Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (holding that courts "extend a broad review of both questions of law and fact" when reviewing a denial of postconviction relief). Appellate courts "afford great deference to a district court's findings of fact and will not reverse the findings unless they are clearly erroneous. The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001) (citations omitted).

Postconviction Right to Counsel

Weiss challenges the district court's ruling that he does not have a right to court-appointed counsel in postconviction proceedings because he was represented by the public defender's office in his direct appeal. Weiss claims the United States and Minnesota Constitutions afford him the right to court-appointed counsel in postconviction proceedings. This claim is without merit, because it is well settled that neither

constitution affords a right to court-appointed counsel when a person has already had court-appointed counsel for first review. *See Pennsylvania v. Finley*, 481 U.S. 551, 555, 107 S. Ct. 1990, 1993 (1987) (holding that under the Equal Protection or Due Process Clauses of the United States Constitution, the right to counsel in state proceedings “extends to the first appeal of right, and no further”); *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) (holding the Minnesota Constitution guarantees the right to counsel for one review of a criminal conviction, “whether by direct appeal or a first review by postconviction proceeding”); *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007) (stating that a defendant who has been represented by counsel on direct appeal has no right to counsel in a subsequent postconviction proceeding); Minn. Stat. § 590.05 (2010) (providing that the state public defender *may* represent petitioners who have already had direct review of their convictions) (emphasis added).

Weiss was entitled to, and received, the assistance of court-appointed counsel only for his direct appeal. Therefore, the district court did not err when it denied his request for court-appointed counsel for his postconviction proceeding.

Motions for Continuance

Weiss contends the district court abused its discretion when it denied his motions for continuance because it did not allow him adequate time to prepare for his evidentiary hearing. A ruling on a request for a continuance is within the district court’s discretion, and a conviction will not be reversed for denial of a motion for a continuance unless the denial was a clear abuse of discretion. *State v. Rainer*, 411 N.W.2d 490, 495 (Minn. 1987).

In response to Weiss's first motion requesting a 45-day continuance, the district court granted him a ten-day continuance. Weiss asked for the evidentiary hearing to be delayed, at least in part, because his trial attorney would be on vacation and unavailable to testify on the original hearing date.

The district court denied Weiss's second motion for continuance because Weiss had not demonstrated that he had made any significant efforts to prepare for the evidentiary hearing. Specifically, the district court noted Weiss had not subpoenaed his trial attorney to testify at the rescheduled hearing and did not provide evidence that, if subpoenaed, the attorney would be unable to attend. Also, the district court found that Weiss was relying on his trial attorney to provide him with addresses for potential witnesses and that Weiss never made an attempt to obtain the addresses independently or by some other means. Implicit in the district court's order is the inference that, if Weiss had been making efforts to prepare for the evidentiary hearing, the district court would have granted a continuance. Because no such evidence existed, the district court reasonably denied Weiss another continuance. Weiss's third motion for continuance, made at the evidentiary hearing, was also denied.

Weiss argues he was diligent in preparing for his hearing and states: "It was very unreasonable for the district court to expect a pro se litigant in prison, with very limited time and material to have motions, witnesses, affidavits, etc. ready for a hearing in 2-4 weeks." Weiss cites to the fact that he contacted his trial attorney about testifying at the evidentiary hearing, tried to get subpoenas, and had obtained affidavits. Evidence in the record shows that he was in contact with his trial attorney, but there is no indication that

Weiss asked him to testify or even notified him of the rescheduled hearing. Also, the affidavits to which Weiss refers were dated May 10, 2010, which was almost two months *after* the evidentiary hearing was held. His explanation for the tardiness is that “[t]he affidavits were a little late but some things take a little more time.”

He also argues that he did not learn until two-and-a-half weeks before his hearing that his request for court-appointed counsel was denied. However, the district court issued orders on February 17, 2010, denying Weiss’s request for counsel and granting his request for an evidentiary hearing. Therefore, at the time Weiss learned that he was granted a hearing, he also knew he would not have court-appointed counsel. Considering the evidence before the district court, its finding that Weiss did not make significant efforts to prepare for the evidentiary hearing was not an abuse of discretion.

Additionally, Weiss contends the district court should have granted his requests for continuance because he was representing himself in the proceedings. He claims it was unfair for the district court to expect him to be able to “subpoena exculpatory witnesses, obtain affidavits, hire an investigator and completely be a pro se litigant and conduct an evidentiary hearing without having any of the witnesses in court, done within a period of 2-4 weeks.”

Weiss’s argument is unpersuasive because this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006); *Liptak v. State*, 340 N.W.2d 366, 367 (Minn. App. 1983). “The right of self-representation is not a license to capriciously upset the appellate timetable or to thwart the orderly and fair administration of justice.” *State*

v. Seifert, 423 N.W.2d 368, 372 (Minn. 1988) (quoting *Webb v. State*, 533 S.W.2d 780, 786 (Tex. App. 1976), *superseded by rule on other grounds*, Minn. R. Crim. P. 28.02, subd. 5, *as recognized in Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997)). The district court did not abuse its discretion by allegedly failing to take into account the pro se status of Weiss when deciding whether to grant a continuance.

Denial of postconviction relief based on Knaffla procedural bar

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). This court “review[s] 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). Appellate courts also “afford great deference to a district court’s findings of fact and will not reverse the findings unless they are clearly erroneous. The decisions of a postconviction court will not be disturbed unless the court abused its discretion.” *Id.*

Weiss argues that the district court abused its discretion by denying his postconviction petition and failing to grant him relief for (a) erroneous admission of prior convictions; (b) improper contact with jurors; (c) improper use of peremptory challenges during jury selection; and (d) the district court’s failure to inform Weiss of his right to challenge jurors.

The *Knaffla* rule provides that “where direct appeal has once been taken, 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. This bar also applies to claims that should have been known on direct appeal. *King*

v. State, 649 N.W.2d 149, 156 (Minn. 2002). 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,” a postconviction court may consider the claim. *Quick*, 692 N.W.2d at 439. The second prong requires that the “claim must have merit and must be asserted without deliberate or inexcusable delay.” *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009).

Weiss’s claims are all issues of which he knew, or should have known, at the time of his direct appeal. Moreover, neither of the exceptions to *Knaffla* applies. These claims do not present a novel legal issue, nor does fairness require review of them. As the supreme court recently stated: “The interests of justice exception to the *Knaffla* bar does not apply when a party simply believes an argument actually raised on direct appeal could have been more complete.” *Reed v. State*, 793 N.W.2d 725, 730 (Minn. 2010). The district court did not abuse its discretion in failing to provide postconviction relief to Weiss for these claims, because they were barred by *Knaffla*.

Ineffective assistance of counsel

Weiss’s argument that the district court erred because his claims of ineffective assistance of appellate counsel cannot be *Knaffla*-barred is misguided. The district court held that *Knaffla* barred all of Weiss’s postconviction claims *except* those for ineffective assistance of counsel and reviewed his claims for ineffective assistance of trial counsel and appellate counsel.

Weiss contends he should have been allowed to present evidence of ineffective assistance of trial counsel because appellate counsel failed to raise the issue on direct appeal. This argument fails because Weiss *was* allowed to present evidence of ineffective assistance of trial and appellate counsel. He was granted the evidentiary hearing he requested, but he failed to present any evidence or provide testimony at the hearing to support his claims. As such, the district court was compelled to rely on the record for its findings of fact and conclusions of law on the issue.

Further, “a petitioner is only entitled to an evidentiary hearing on an ineffective assistance of counsel claim if a reviewing court cannot resolve the claim based on the briefs and the record.” *Mckenzie v. State*, 707 N.W.2d 643, 644 (Minn. 2005); *see Voorhees v. State*, 627 N.W.2d 642, 653 (Minn. 2001). It appears that the district court granted Weiss an evidentiary hearing despite its finding that, even if he were able to prove the alleged errors or conduct of trial and appellate counsel, the result of the proceedings would not have been different. An appellant is not entitled to an evidentiary hearing on a postconviction claim that he received ineffective assistance of appellate counsel based on appellate counsel’s failure to raise a claim of ineffective trial counsel on direct appeal when appellant does not allege any facts in his petition that, if proved, would have entitled him to relief. *See McDonough v. State*, 675 N.W.2d 53, 56-57 (Minn. 2004). Because of the district court’s implicit conclusion that Weiss was not entitled to an evidentiary hearing, the district court’s determination of Weiss’s ineffective-assistance-of-counsel claims based on the record was not error.

To the extent that Weiss is arguing that the district court erred when it denied him relief for ineffective assistance of counsel, this claim is equally unpersuasive. 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). To have a valid claim for ineffective assistance of counsel, appellant must show “that 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.” *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694, 104 S. Ct. 2052 (1984)). The objective reasonableness prong has been described as “representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993). Counsel’s performance is presumed reasonable. *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). “What evidence to present to the jury, including which defenses to raise at trial and what witnesses to call, represent an attorney’s decision regarding trial tactics which lie within the proper discretion of trial counsel and will not be reviewed later for competence.” *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999).

In his brief on appeal, Weiss’s ineffective-assistance-of-trial-counsel claims are that (a) trial counsel’s objections regarding prosecutorial misconduct at trial and hearsay testimony were inadequate; (b) trial counsel failed to demand a speedy trial; (c) trial counsel “did not go far enough to stop” the district court from requiring Weiss to submit

to a second DNA test; (d) trial counsel failed to call favorable witnesses; (e) trial counsel was not diligent in ensuring the jury instructions were proper; and (f) sentencing errors should have been addressed more diligently by trial counsel.

Trial counsel's objections were adequate. The objections were sufficiently made as an oral motion and were not ineffective because they were not made in a written motion to exclude. Furthermore, although Weiss claims that he requested a speedy trial and his trial attorney failed to request one, there is no evidence to support this allegation. Weiss cites to a letter from his trial attorney in which the attorney stated that he did not file a speedy-trial request and that he believes there were "speedy trial (due process) violations . . . [due] to the delays." But nothing in the record shows that Weiss requested a speedy trial and Weiss did not testify he made such a demand. Finally, the remaining allegations relate to trial strategy, and are not reviewable for competency. *See id.*

A similar analysis applies to appellate counsel's decision as to what claims to assert on appeal. *See Williams v. State*, 764 N.W.2d 21, 31 (Minn. 2009) ("[A]ppellate counsel is not required to raise claims on direct appeal that counsel could have legitimately concluded would not prevail."); *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985) ("[C]ounsel has no duty to include claims which would detract from other more meritorious issues."). Weiss's ineffective-assistance-of-appellate-counsel claims are that appellate counsel (a) failed to raise a claim of ineffective assistance of trial counsel on direct appeal; (b) failed to diligently argue the sufficiency of the evidence; and (c) did not raise the issue of a second, forced, DNA test on appeal.

None of these claims prevail because appellate counsel has no duty to include claims that would detract from other more meritorious claims. Appellate counsel raised three issues on appeal and could have concluded that Weiss's ineffective-assistance-of-trial-counsel claims lacked merit in comparison. *See Weiss*, 2008 WL 4299619, at *1.

Weiss provided no evidence that either trial or appellate counsel's representation fell below an objective standard of reasonableness. Moreover, even if Weiss had provided evidence to support his allegations, there still would not have been a reasonable probability that but for counsel's unprofessional errors, the result of the trial or direct appeal would have been different. *See Fields*, 733 N.W.2d at 468. Therefore, the district court did not err when it denied Weiss's postconviction claim of ineffective assistance of counsel.

Affirmed.