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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-151**

David Allan Smith, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 25, 2008
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 02045506

David Allan Smith, OID 212493, 445 South Munsterman, Appleton, MN 56208 (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Hudson, Presiding Judge; Worke, 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UNPUBLISHED OPINION

WORKE, Judge

On appeal from the denial of his second postconviction petition, appellant argues that (1) a new trial is required because newly discovered evidence renders the admission of recorded statements by his father and his sister reversible error; (2) the statements were unreliable and cumulative to other evidence; and (3) the district court erred in denying his motion to disqualify the trial judge from hearing the postconviction petition because the judge was not impartial. We affirm.

DECISION

We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record. We 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) (citation omitted).

In his second postconviction petition, appellant David Allan Smith argues that the district court erred in finding that he is not entitled to a new trial based on newly discovered evidence. Appellant was convicted of first-degree criminal sexual conduct. In 2005, this court affirmed appellant's conviction but remanded for resentencing. *State v. Smith*, No. A03-1890, 2005 WL 147485 (Minn. App. Jan. 25, 2005), *review denied* (Minn. Apr. 19, 2005). Appellant's first postconviction petition resulted in the district court sentencing appellant to the guidelines sentence and appellant dismissing his ineffective-assistance-of-counsel claims. Appellant now argues that newly discovered

evidence—specifically, an April 2005 admission by his father that he sexually abused one of his granddaughters and failed to inform officers that he was under investigation for the conduct at the time of the tape-recorded statement in appellant’s case—renders the admission of recorded statements by appellant’s father and sister reversible error.

Once a defendant has directly appealed a 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). There are two exceptions to *Knaffla* that allow for postconviction relief despite the fact that the claims could have been raised on direct appeal: (1) when a novel legal issue is presented; or (2) when the interests of fairness require relief. *Washington v. State*, 675 N.W.2d 628, 630 (Minn. 2004). When fairness so requires, the petitioner must not have “deliberately and inexcusably” failed to raise the issue on direct appeal. *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004). Claims decided in the interests of justice also require that the claims have substantive merit. *King v. State*, 649 N.W.2d 149, 157 (Minn. 2002).

The admissibility of the out-of-court statements made by appellant’s father and sister was raised and addressed in appellant’s direct appeal. *See Smith*, 2005 WL 147485, at *2. Appellant does not argue that the exceptions to *Knaffla* apply here, nor does he argue that he did not know or could not have known this issue existed when he filed his direct appeal. Because appellant’s claim is *Knaffla*-barred, the district court did not abuse its discretion in denying appellant’s petition.

Even if appellant’s claim was not *Knaffla*-barred, his argument fails. A new trial based upon newly discovered evidence may be granted when a defendant proves:

(1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997) (citations omitted). As stated above, appellant does not claim that the fact that his father was being investigated for sexual abuse was not known to appellant at the time of the trial or that it could not have been discovered through due diligence before trial. Appellant also concedes that the evidence would go to witness credibility, which would be cumulative. The tape-recorded statements of appellant's father and sister were admitted for impeachment purposes because they testified at trial contrary to their tape-recorded statements. The district court correctly found that the jury was well aware that appellant's father and sister were not credible due to testimony that was directly contrary to their tape-recorded statements and that the jury was required to make credibility determinations in finding appellant guilty. Finally, appellant failed to show that the evidence would probably produce an acquittal or a more favorable result. Because appellant failed to meet even one of the elements required to be granted a new trial based on newly discovered evidence, the district court did not err in denying his postconviction petition.

Appellant also argues that the district court erred in refusing to disqualify the trial judge from the postconviction proceeding on the ground that he was biased because he admitted the tape-recorded statements of appellant's father and sister. "No judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of

Judicial Conduct.” Minn. R. Crim. P. 26.03, subd. 13(3). Still, “judges are presumed to have the ability to set aside ‘nonpersonal’ knowledge and make decisions based solely on the merits of cases before them.” *State v. Dorsey*, 701 N.W.2d 238, 249 (Minn. 2005). And “there is no automatic removal as of right in a postconviction proceeding.” *Hooper v. State*, 680 N.W.2d 89, 92 (Minn. 2004). The postconviction court correctly found that the trial judge’s “knowledge about the evidence at issue [did] not constitute ‘personal bias or prejudice concerning a party’ or ‘personal knowledge of evidentiary facts concerning the proceeding,’ as described in Minn. Code Jud. Conduct, Canon 3(D)(1)(a).” The postconviction court did not err in finding that appellant failed to present any evidence to show that the trial judge was biased.

Affirmed.