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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2057**

David Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 1, 2011
Affirmed
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-04-002659

David Johnson, Stillwater, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Hudson, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant challenges the district court's summary denial of his petition for postconviction relief. We affirm.

FACTS

In January 2004, appellant David Johnson was charged with kidnapping or aiding and abetting kidnapping and attempted first-degree murder or aiding and abetting attempted first-degree murder. *State v. Johnson (Johnson I)*, No. A05-1028, 2006 WL 2347795, at *1 (Minn. App. Aug. 8, 2006), *review denied* (Minn. Dec. 13, 2006). The charges stemmed from appellant's role in a November 6, 2003 abduction, beating, and close-range shooting in Minneapolis. *Id.* Johnson maintained that he was not in Minneapolis at the time of the offenses, but the complainant, J.R., and appellant's co-defendants R.C. and K.D. testified to appellant's participation in both offenses. A jury found appellant guilty of aiding and abetting kidnapping and aiding and abetting attempted first-degree murder, and after the sentencing phase of appellant's trial, the jury found three aggravating factors that were related to both offenses. *Id.* The district court imposed a 240-month sentence for each conviction, with the sentences to be served consecutively. *Id.*

Appellant challenged the convictions and the sentences on direct appeal. *Id.* We affirmed the convictions but reversed and remanded for resentencing because the district court had incorrectly calculated appellant's criminal-history score. *Id.* at *1, *17. The district court imposed the same sentences on remand, and appellant challenged the sentences in his second appeal. *State v. Johnson (Johnson II)*, No. A07-1480, 2008 WL 2966825, at *1 (Minn. App. Aug. 5, 2008), *review denied* (Minn. Oct. 1, 2008). We affirmed. *Id.* Appellant subsequently filed his first postconviction petition, which the district court summarily denied. *State v. Johnson (Johnson III)*, No. A09-1628, 2010 WL

2485653, at *1 (Minn. App. June 22, 2010). We affirmed because all of appellant's claims were either procedurally barred or had not been presented to the district court. *Id.* at *2–*4.

In September 2010, appellant filed a second postconviction petition. Appellant argued that (1) a newly-discovered Google map showed that appellant could not have traveled from Grand Forks, North Dakota to Minneapolis in time to participate in the kidnapping and shooting of J.R.; (2) a newly-discovered affidavit from B.T. establishes that B.T. was intimidated by the district court into refusing to testify during the sentencing phase of appellant's trial; and (3) newly-discovered affidavits from appellant's co-defendants demonstrate that they falsely testified to appellant's participation in the crimes. The district court found that appellant's arguments were procedurally barred and that, even if they could be considered, they did not meet the relevant criteria for newly-discovered evidence. This appeal follows.

D E C I S I O N

The district court must hold an evidentiary hearing on a petition for postconviction relief unless the petition, files, and records conclusively show that no relief is warranted. Minn. Stat. § 590.04, subd. 1 (2010). The allegations in a postconviction petition must amount to “more than argumentative assertions without factual support,” and an evidentiary hearing is unnecessary unless the petitioner alleges facts “sufficient to entitle [petitioner] to the relief requested.” *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007) (quotation omitted). In reviewing the denial of a postconviction petition, this court

reviews questions of law de novo and findings of fact for an abuse of discretion. *Arredondo v. State*, 754 N.W.2d 566, 570 (Minn. 2008).

If a conviction has been directly appealed, all claims that were raised, or could have been raised, are procedurally barred and may not be considered in a petition for postconviction relief. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). But two exceptions to the *Knaffla* bar exist: “an issue may be considered (1) if it is so novel that its legal basis was not reasonably available at the time of the direct appeal, or (2) when fairness so requires and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal.” *Williams v. State*, 764 N.W.2d 21, 27–28 (Minn. 2009).

I

Appellant initially contends that he is entitled to postconviction relief because a newly-discovered Google map shows that a Minneapolis police officer falsely testified to the distance and travel time between Grand Forks and Minneapolis. At trial, the officer testified that he had consulted an Expedia map that showed the distance between Grand Forks and Minneapolis as 234 miles and the driving time as 3 hours and 25 minutes. But in support of his postconviction petition, appellant produced a Google map that shows the distance between Grand Forks and Minneapolis as 315 miles and the driving time as 5 hours and 9 minutes. And appellant points out that, according to both the Expedia and Google maps, the distance between Fargo and Minneapolis is 234 miles, while the distance between Grand Forks and Minneapolis is 315 miles. Appellant appears to be correct in his assertion that the police officer erroneously testified that the distance

between Grand Forks and Minneapolis is 234 miles, when, in fact, the distance is 315 miles.

Nonetheless, the district court concluded that appellant's claim was barred under *Knaffla* because he could have raised this argument on direct appeal. Appellant responds that, because he did not learn of the Google maps program until he attended a postsecondary program in June 2010, his claim is not barred. Appellant's ignorance of the Google maps program, however, does not justify his failure to locate and present evidence regarding the distance and travel time between Grand Forks and Minneapolis prior to this second postconviction petition. As the state points out, appellant could have consulted a number of sources—including a map or an atlas—to ascertain this information. The district court did not err in determining that this claim was *Knaffla*-barred.

The district court also concluded that, even if appellant's claim were not *Knaffla*-barred, the Google map did not meet the criteria for newly-discovered evidence. A defendant is entitled to a new trial based on newly-discovered evidence upon a showing that (1) at the time of trial, the evidence was not known to the defendant or counsel; (2) the evidence could not have been discovered before trial through due diligence; (3) the evidence is not doubtful, cumulative, or impeaching; and (4) the evidence would probably produce an acquittal or more favorable result for the defendant. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). In his brief on appeal of the denial of postconviction relief, appellant admits that, at trial, he was "surprised" by the officer's testimony regarding the distance and travel time between Grand Forks and Minneapolis. At that

time, appellant could have used a map or atlas to determine the true distance between Grand Forks and Minneapolis, and he could have impeached the officer with that evidence. He failed to do so, and he cannot use this postconviction proceeding to belatedly impeach the officer's testimony. And even if the Google map were considered, it would be unlikely to produce a more favorable result for the defendant: J.R. testified that she knew appellant before the incident, he "stomped" her head, and he held her while another person shot her. The Google map would not undermine this testimony. For these reasons, the district court did not err in determining that the Google map did not meet the requirements for newly-discovered evidence.

II

Appellant also contends that he is entitled to postconviction relief based on an affidavit from B.T., which indicated that B.T. was intimidated by the district court into not testifying on appellant's behalf. In his affidavit, B.T. stated that neither he nor appellant went to R.C.'s house after returning from Grand Forks, nor were they involved in harming J.R. B.T. also asserted that he did not testify because of pressure from the district court.

At the outset, it is important to clarify that B.T. was not permitted to testify during the guilt phase of the trial, but he was permitted to testify during the sentencing phase of the trial, although he decided not to do so. *Johnson I*, 2006 WL 2347795, at *6–*7. On direct appeal, appellant challenged the district court's decision not to allow B.T. to testify during the guilt phase. *Id.* We affirmed, concluding that the district court did not err in prohibiting B.T. from testifying during the guilt phase because he was not listed on

appellant's witness list, so the state was not provided proper notice of his testimony. *Id.* To the extent that appellant is attempting to revisit this issue, we agree with the district court that his argument is *Knaffla*-barred. *See id.*

Additionally, on direct appeal, appellant argued that because the district court improperly pressured B.T. into invoking his privilege against self-incrimination during the sentencing phase of the trial, B.T.'s failure to testify should not have been used to show that he would have similarly refused to testify during the guilt phase of the trial. *Id.* at *7. Appellant's argument on direct appeal indicates that he was aware of—but did not raise—his claim of judicial intimidation on direct appeal. *Id.* The district court properly determined that it was also barred by *Knaffla*. *See id.*

Finally, the district court found that B.T.'s affidavit fails to meet the requirements for newly-discovered evidence under *Rainer*. Appellant did not obtain B.T.'s affidavit until August 2010, after his direct appeal and his first postconviction appeal. But appellant witnessed the exchange between the district court and B.T. during the trial, and he could have challenged any alleged witness intimidation on direct appeal. Appellant has also failed to show how B.T.'s testimony—which was cumulative of appellant's own testimony—would have had any effect on the sentencing jury's finding of the three aggravating factors related to both offenses. For these reasons, B.T.'s affidavit does not appear to meet the requirements for newly-discovered evidence under *Rainer*. *See* 566 N.W.2d at 695.

III

Appellant also contends that he is entitled to postconviction relief because R.C. and K.D. have recanted their trial testimony. In affirming the denial of appellant's first postconviction petition, this court already determined that appellant's claims with regard to R.C.'s testimony were *Knaffla*-barred and that his claims with regard to K.D.'s testimony failed to meet the standard for recantation evidence. *Johnson III*, 2010 WL 2485653, at *2–*3. Therefore, the district court did not err in concluding that these claims were barred by *Knaffla*.

IV

On appeal, appellant contends that he is also entitled to postconviction relief based on (1) the state's failure to disclose evidence regarding the distance and travel time between Grand Forks and Minneapolis; (2) the district court's failure to order the disclosure of said evidence; and (3) the misrepresentations of the investigating officer and the prosecutor. Appellant did not raise any of these arguments in his second postconviction petition, but we have carefully reviewed them and concluded that, because they could have been raised on direct appeal, they are also barred by *Knaffla*.

Affirmed.