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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0521**

David Gherity, petitioner,
Respondent,

vs.

State of Minnesota,
Appellant.

**Filed March 24, 2009
Affirmed
Larkin, Judge**

Dakota County District Court
File No. T6-05-067444

David J. Gherity, 12600 Parkwood Drive, #206, Burnsville, MN 55337 (pro se respondent)

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

Elliott Knetsch, Alina Schwartz, Campbell Knutson Professional Association, 317 Eagandale Office Center, 1380 Corporate Center Curve, Eagan, MN 55121 (for appellant)

Considered and decided by Larkin, Presiding Judge; Minge, Judge; and Stauber,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

In this appeal from a postconviction order, the state claims that the district court abused its discretion by granting respondent's petition for postconviction relief after a direct appeal had already been taken. The state argues that respondent's ineffective-assistance-of-counsel and newly-discovered-evidence claims are *Knaffla*-barred. The state also assigns error to the district court's determination that newly discovered evidence warrants a new trial. Because the district court did not abuse its discretion by concluding that appellant's ineffective-assistance-of-counsel claim is not procedurally barred, and the state does not challenge the district court's determination on the merits of the ineffective-assistance-of-counsel claim, we affirm.

FACTS

On July 5, 2005, Burnsville Police Officers TerMeer and Yakovlev were dispatched to an apartment in Burnsville to perform a welfare check. When they arrived at the apartment, respondent David Gherity met them at the door. *See State v. Gherity*, No. A06-184, 2007 WL 1598743, at *1 (Minn. App. June 5, 2007), (discussing the facts underlying Gherity's arrest), *review denied* (Minn. Aug. 7, 2007). An altercation ensued after Gherity told the officers that he would not allow them to enter his apartment to conduct a welfare check without a warrant. After a short physical struggle, the officers arrested Gherity and issued him a citation for obstruction of legal process, in violation of Minn. Stat. § 609.50, subd. 1 (2004). Following a jury trial, Gherity was convicted. Gherity appealed his conviction, and this court affirmed. *See id.*

Both officers recorded the July 5 incident. But Officer Yakovlev activated his recording device prior to Officer TerMeer. Thus, the recording made by Officer Yakovlev is longer than the recording made by Officer TerMeer and includes the entire conversation and interaction between Gherity and the officers. Officer TerMeer testified, and his recording was received as evidence and played for the jury. Officer Yakovlev did not testify at trial, and his recording was not introduced as evidence. Gherity contends that Officer Yakovlev's recording is exculpatory evidence.

After his direct appeal, Gherity filed a petition for postconviction relief, arguing that a new trial was warranted based on the following grounds: (1) prosecutorial misconduct and a discovery violation (the state's failure to provide Gherity with a copy of Officer Yakovlev's recording); (2) ineffective assistance of trial counsel (multiple grounds); and (3) ineffective assistance of appellate counsel (failure to bring a motion to stay Gherity's appeal pending postconviction proceedings).

On January 22, 2008, the district court issued findings and an order granting Gherity's request for a new trial. The state moved the district court to reconsider and/or clarify the order. The district court issued a second set of findings and an order on April 8, 2008, affirming its January 22 order but clarifying its findings. The district court found that Gherity did not receive the Yakovlev recording until after he filed his appellate brief, but that the state did not intentionally fail to disclose the recording to Gherity. The district court found that the Yakovlev recording was not obtained due to confusion on the part of Gherity's attorneys. Gherity's first attorney failed to request a copy of the audiotape and his second attorney, hired immediately prior to trial, failed to make

discovery requests. The district court concluded that counsel's failure to engage in effective discovery practice was so serious as to deprive Gherity of a fair trial.

The district court also found that Gherity's second attorney, who represented Gherity at trial and on appeal, failed to raise or pursue issues regarding Officer Yakovlev's recording at trial and in the direct appeal, and failed to raise any issues concerning ineffective assistance of counsel in the direct appeal. Noting that the same attorney represented Gherity at trial and on appeal, the district court concluded that Gherity could not have raised his ineffective-assistance-of-counsel claim in his direct appeal and that the claim was not procedurally barred by Minn. Stat. § 590.01, subd. 1 (2008). The district court also concluded that the contents of the Yakovlev recording constitute newly discovered evidence. The district court ordered a new trial in "the interests of justice." This appeal follows.

D E C I S I O N

"This court will reverse a postconviction decision only for an abuse of discretion, and while we give de novo review to its legal determinations, we will reverse its factual findings only if clearly erroneous. The district court abuses its discretion if it misinterprets or misapplies the law." *State v. Jedlicka*, 747 N.W.2d 580, 582 (Minn. App. 2008) (citation and quotation omitted); *see also Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005) (stating that appellate courts review *Knaffla* decisions for abuse of discretion).

The district court granted Gherity's request for relief on two grounds: (1) ineffective assistance of trial and appellate counsel, and (2) newly discovered

evidence. The state argues that both grounds are procedurally barred and that the district court erred by determining that the Yakovlev recording constitutes newly discovered evidence.

“A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence.” Minn. Stat. § 590.01, subd. 1(2) (2008); *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976).

The *Knaffla* rule is subject to two exceptions: (1) if a claim is known to a defendant at the time of the direct appeal but is not raised, it will not be barred by the rule if the claim’s novelty was so great that its legal basis was not reasonably available when direct appeal was taken; and (2) even if the claim’s legal basis was sufficiently available, substantive review may be allowed when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal.

Sanchez-Diaz v. State, 758 N.W.2d 843, 846-47 (Minn. 2008); see Minn. Stat. § 590.01, subd. 4 (2008) (codifying rule).

The district court concluded that Gherity could not have raised his ineffective-assistance-of-counsel claim on appeal because his trial and appellate counsel were the same. This court recently held in *Jama v. State* that “where trial and appellate counsel are the same, . . . for purposes of *Knaffla*, failure to raise claims of ineffective assistance of trial counsel is presumptively neither deliberate nor inexcusable and that, in fairness, further review should not be barred.” 756 N.W.2d 107, 112 (Minn. App. 2008). And a claim of ineffective assistance of appellate counsel may be brought in a first petition for postconviction relief after disposition of the direct appeal, because the claim could not be

known at the time of the appeal. *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Finally, ineffective-assistance-of-counsel claims that cannot be decided on the district court record are not barred by *Knaffla* when raised in a first petition for postconviction relief. *Cf. Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (stating an exception to the *Knaffla* rule exists where the district court needs to conduct additional fact finding to consider such a claim on the merits). Thus, we conclude that the district court did not abuse its discretion by concluding that Gherity's ineffective-assistance-of-counsel claim was not *Knaffla* barred.

The district court found that Gherity's second attorney failed to raise or pursue issues related to Officer Yakovlev's recording at trial and in the direct appeal. The district court concluded that "[t]he failure of counsel to engage in effective discovery practice was so serious as to deprive [Gherity] of a fair trial." The state does not challenge the district court's determination of the merits of Gherity's ineffective-assistance-of-counsel claim. Thus, we affirm the district court's order granting postconviction relief in the form of a new trial based on the ineffective-assistance-of-counsel claim. It is, therefore, unnecessary to address the state's remaining arguments.

Affirmed.

Dated:

The Honorable Michelle A. Larkin
Minnesota Court of Appeals