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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1634**

William Peter Lushenko, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 2, 2008
Affirmed
Stoneburner, Judge**

Beltrami County District Court
File No. K404951

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Timothy R. Faver, Beltrami County Attorney, Randall R. Burg, Assistant County Attorney, Suite 400, 600 Minnesota Avenue, Bemidji, MN 56601 (for respondent)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that the district court abused its discretion by summarily denying his ineffective-assistance-of-counsel and prosecutorial-misconduct claims as procedurally barred. We affirm.

FACTS

The facts underlying appellant William Peter Lushenko's second-degree burglary conviction are outlined in this court's opinion affirming the conviction on direct appeal. *State v. Lushenko*, 714 N.W.2d 729, 731 (Minn. App. 2006), *review denied* (Minn. Dec. 12, 2006). In that appeal, Lushenko argued that identification evidence should have been suppressed as unduly suggestive and challenged the district court's authority to conduct a separate sentencing trial for a jury determination of Lushenko's status as a career offender. *Id.* at 730. We affirmed the conviction, holding that the identification was reliable under the circumstances and that the district court had the inherent authority to conduct a sentencing trial. *Id.* at 730-31. As indicated above, the Minnesota Supreme Court ultimately denied further review.¹

In his subsequent petition for postconviction relief, Lushenko argued that ineffective assistance of trial counsel and prosecutorial misconduct deprived him of a fair

¹ The supreme court initially granted Lushenko's petition for further review, but stayed all proceedings pending its decision in *State v. Chauvin*, 723 N.W.2d 20 (Minn. 2006). Because the issue of a bifurcated trial for sentencing factors was resolved in *Chauvin*, 723 N.W.2d at 27, Lushenko's petition for further review was subsequently denied.

trial. The district court summarily denied the petition as procedurally barred under *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). This appeal followed.

D E C I S I O N

This court reviews a district court's denial of a petition for postconviction relief for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). A postconviction court may deny a petition without conducting an evidentiary hearing if the petition and the files and records "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2006).

A petitioner seeking postconviction relief has the burden of establishing by "a fair preponderance of the evidence" the facts alleged in the petition. Minn. Stat. § 590.04, subd. 3 (2006). Postconviction relief may be available if the petitioner's conviction was obtained in violation of the petitioner's rights under the Constitution or the laws of the United States or the State of Minnesota. Minn. Stat. § 590.01, subd. 1(1) (2006). But when the petitioner has previously appealed, matters raised in the appeal and all claims that were 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.

The *Knaffla* rule applies "if the defendant knew or should have known about the issue at the time of appeal." *King v. State*, 649 N.W.2d 149, 156 (Minn. 2002); *see also* Minn. Stat. § 590.01, subd. 1(2) (barring postconviction relief for claims that petitioner "could have [] raised on direct appeal"). "There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007). "Under the second exception, we

have held that a claim of ineffective assistance of trial counsel is not barred by *Knaffla* if [the issue] cannot be determined from the district court record and requires additional evidence, such as that involving attorney-client communications.’” *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006) (quoting *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004)). Therefore, the *Knaffla* rule bars a postconviction claim of ineffective assistance of trial counsel when the grounds for the claim were known but not raised on direct appeal and additional fact-finding is unnecessary. *Id.* Summary denial of a postconviction petition is not an abuse of discretion if the petition is procedurally barred by the *Knaffla* rule. *Id.* at 450.

Lushenko does not dispute that he knew of a potential ineffective-assistance-of-counsel claim at the time of his direct appeal. On a questionnaire that Lushenko completed for the public defender’s office in connection with his appeal, Lushenko noted that one of the grounds for his appeal was “attorney incompetence (?)” Lushenko has submitted affidavits from his sister and his mother indicating that, after his conviction, trial counsel suggested ineffective assistance of counsel as a basis for appeal. Despite Lushenko’s suggestion of this claim for appeal, Lushenko’s appellate counsel did not raise the issue on direct appeal nor did Lushenko raise the issue in a supplemental pro se brief on appeal.

Lushenko speculates that appellate counsel did not raise the claim because she worked in the same office as his trial counsel and had a conflict of interest in asserting the claim. Nothing in the record supports this allegation, and it is just as likely that appellate counsel rejected the claim on the merits. Nonetheless, Lushenko argues that

this court should consider his ineffective-assistance-of-counsel claim under the interests-of-justice exception to the *Knaffla* rule, because he should not be penalized for appellate counsel's failure to assert the claim on appeal.² Additionally, Lushenko asserts that an evidentiary hearing is necessary to determine trial counsel's motives for the trial strategy pursued. We disagree. Trial counsel's motives for trial strategy are irrelevant, and Lushenko's claim could have been determined on the record without an evidentiary hearing. We conclude that Lushenko's claim is procedurally barred by the *Knaffla* rule.

Even if the claim was not procedurally barred, we would reject it as without merit. Lushenko argues that his trial counsel's performance was deficient because counsel failed to: (1) call alibi witnesses; (2) request that voir dire be recorded; and (3) make an opening statement. Lushenko also contends that counsel, without his consent, conceded his presence at the scene of the crime.

When deciding an ineffective-assistance-of-counsel claim, an evaluation of the objective reasonableness of counsel's performance does not include challenges to counsel's trial strategy. *State v. Blanche*, 696 N.W.2d 351, 376 (Minn. 2005). "What evidence to present and which witnesses to call at trial are tactical decisions properly left to the discretion of trial counsel." *State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006).

Because the district court made a pretrial ruling that the state would be allowed to counter the alibi witnesses' testimony with evidence of five of Lushenko's seven prior burglary convictions, it is plain that counsel's decision not to call the alibi witnesses

² Lushenko has not argued or briefed a claim of ineffective assistance of appellate counsel.

involved non-reviewable trial strategy and not oversight or incompetence. Additionally, defense counsel's decision not to make an opening statement is strategic and not subject to review by this court. *Sanderson v. State*, 601 N.W.2d 219, 226 (Minn. App. 1999) (stating that "[t]he choice by counsel of making an opening or closing arguments should not be second-guessed"), *review denied* (Minn. Mar. 28, 2000). And Lushenko's argument that counsel's failure to demand recording of voir dire constituted ineffective assistance is unsupported by any authority. Additionally, he has failed to allege any prejudice caused by lack of an opening statement or a record of voir dire.

Lushenko argues that counsel's "most egregious error" was admitting his presence at the scene of the crime, which amounted to admitting his guilt. "[A] criminal defense attorney cannot admit his client's guilt to the jury without first obtaining the client's consent to this strategy." *State v. Wiplinger*, 343 N.W.2d 858, 860 (Minn. 1984). But the record in this case does not support Lushenko's assertion that his attorney admitted his guilt or even admitted that he was at the scene of the crime. At Lushenko's trial, counsel argued that even if the jury believed the eyewitness's identification of Lushenko at the scene, no direct evidence connected him to the burglary. And the reference to the eyewitness's identification prefaced an attack on the suggestive nature of the show-up identification procedure. As the state asserts in its brief, "[n]o reasonable person hearing the totality of defense counsel's lengthy closing argument at trial could reasonably conclude that she had conceded her client's guilt." There is no merit to Lushenko's claim that counsel admitted his presence at the scene or his guilt of the crime charged.

In addition to his meritless claim of ineffective assistance of counsel, Lushenko asserts that he is entitled to postconviction relief because the prosecutor committed prejudicial misconduct by making improper statements during closing argument that shifted the burden of proof to Lushenko and penalized him for exercising his constitutional right to remain silent. The supreme court has consistently held that claims regarding the prosecutor's closing argument are known or should have been known at the time of a direct appeal. *Pippitt v. State*, 737 N.W.2d 221, 229 (Minn. 2007) (holding that defendant knew what the prosecutor had argued in its closing when he filed his direct appeal, and therefore the district court did not abuse its discretion in concluding that defendant's postconviction prosecutorial-misconduct claim was *Knaffla* barred); *Severson v. State*, 636 N.W.2d 808, 810 (Minn. 2001) (stating that when defendant was present when the prosecutor made the closing argument, and when any misconduct would have been apparent from the transcript, a prosecutorial-misconduct claim was "clearly known" at the time of defendant's direct appeal). Lushenko failed to raise this claim on direct appeal.

Lushenko does not contend that his prosecutorial-misconduct claim presents a novel issue, but he argues that this court should review it in the interests of justice because "[he] does not have the training or experience to identify the legal issues addressed in his Post Conviction Petition." Under the interests-of-justice exception, a petitioner must demonstrate that (1) fairness requires that the district court address the issue; (2) the petitioner did not deliberately and inexcusably fail to raise the issue previously; and (3) the claim has substantive merit. *Spears v. State*, 725 N.W.2d 696,

700 (Minn. 2006) (citations omitted), *cert. denied*, 127 S. Ct. 2985 (2007). Lushenko has not demonstrated any of these factors, and the postconviction court correctly concluded that the claim is procedurally barred by *Knaffla*.

Affirmed.