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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0799**

Prince Antonio Jones, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 27, 2014
Affirmed
Halbrooks, Judge**

Hennepin County District Court
File No. 27-CR-10-38369

Prince Antonio Jones, Faribault, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

In this pro se postconviction appeal, appellant argues that the district court abused its discretion by summarily denying his claim of ineffective assistance of appellate counsel. We affirm.

FACTS

On August 18, 2010, two officers in a squad car noticed a group of men on a street corner. One of the men, later identified as appellant Prince Antonio Jones, had a “bulge” in his waistband and started to walk away from the group as the squad car approached. One officer observed Jones run down an alley, take out a gun from his waistband, and throw the gun onto a garage roof. The other officer also observed Jones run down the alley and throw something onto a garage roof. A third officer arrived on the scene approximately 30 seconds later, climbed onto the roof of the garage where Jones was observed to have thrown an object, and found a gun lying there.

Jones was charged with being a prohibited person in possession of a firearm in violation of Minn. Stat. § 624.713, subd. 1(2) (2010). Jones pleaded not guilty and stipulated to the fact that he was prohibited from possessing a firearm. A jury found Jones guilty of the charged offense.

Jones challenged his conviction on direct appeal by raising claims of insufficient evidence, evidentiary error, prosecutorial misconduct, and ineffective assistance of counsel. This court affirmed the conviction. *See State v. Jones*, No. A11-0651, 2012 WL 2368839 (Minn. App. June 25, 2012), *review denied* (Minn. Sept. 18, 2012).

Jones filed a petition for postconviction relief, asserting claims of ineffective assistance of appellate counsel and newly discovered evidence, in the form of a September 2012 affidavit from Jones’s friend, D.G, in which D.G. swears that he threw the gun in question onto the garage roof on August 18, 2010. The postconviction court denied relief without an evidentiary hearing. This appeal follows.

DECISION

Jones challenges the postconviction court's summary denial of his claim of ineffective assistance of appellate counsel. A summary denial of a postconviction petition is appropriate if "the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2012). Argumentative assertions without factual support do not warrant relief. *Schleicher v. State*, 718 N.W.2d 440, 444 (Minn. 2006). 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). We review a district court's summary denial of a postconviction petition for an abuse of discretion. *Finnegan v. State*, 764 N.W.2d 856, 861 (Minn. App. 2009), *aff'd*, 784 N.W.2d 243 (Minn. 2010).

To establish ineffective assistance of counsel, a defendant must show that "(1) his counsel's performances fell below an objective standard of reasonableness, and (2) that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *State v. Yang*, 774 N.W.2d 539, 564-65 (Minn. 2009). We presume that counsel provided reasonable professional assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986).

Jones argues that he received deficient representation because his appellate counsel failed to raise a claim of ineffective assistance of trial counsel based on failure to offer specific exculpatory evidence. Jones's counsel asserted several claims on direct

appeal, including a claim of ineffective assistance of trial counsel relating to a different evidentiary issue.

Jones argues that D.G.'s affidavit is newly discovered evidence that his counsel should have raised on appeal. We recognize a strong presumption that appellate counsel's judgment concerning which issues to "raise falls within the wide range of reasonable professional assistance." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). Appellate counsel has a duty to raise only the most meritorious claims and "does not act unreasonably by excluding claims that counsel could have legitimately concluded would not prevail." *Evans v. State*, 788 N.W.2d 38, 45 (Minn. 2010). To prevail on a claim of newly discovered evidence, the petitioner must establish:

(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).

Jones has failed to show that D.G.'s affidavit constitutes newly discovered evidence. Because Jones was accompanied by D.G. during the August 18 incident, the postconviction court properly concluded that, at the time of trial, Jones was aware of the substance of any testimony that D.G. might offer with respect to the incident. As such, Jones cannot establish that D.G.'s statements were unknown to him at the time of trial.

Jones has further failed to show that admission of the affidavit into evidence would likely produce an acquittal or more favorable result. Because D.G.'s statements

are contradicted by the trial testimony of three police officers and D.G.'s credibility as a witness is undermined by a prior conviction for giving a false name, we cannot conclude that a jury would likely credit D.G.'s statements. Because Jones's theory of newly discovered evidence lacks merit, appellate counsel was not ineffective for failing to raise that issue.

Finally, Jones argues that he was denied effective representation when his appellate counsel advised him orally, but not by letter, that he could raise additional issues in a pro se supplemental brief. Jones has not provided any legal citation or analysis to support his position that advising Jones in this manner rendered counsel's representation constitutionally deficient. And we detect no deficiency on review.

Because the record conclusively shows that Jones is not entitled to relief, the postconviction court did not abuse its discretion by denying the petition without a hearing.

Affirmed.