STATE OF MINNESOTA
IN COURT OF APPEALS
A10-978

Jamie Michael Carlson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 15, 2011
Affirmed
Hudson, Judge

Clay County District Court
File No. 14-K8-06-002660

Jamie Michael Carlson, OID #136236, Rush City, Minnesota (pro se appellant)

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

Brian Melton, Clay County Attorney, Heidi M.F. Davies, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

In this pro se postconviction appeal, appellant argues that the district court abused its discretion by (1) failing to address seven issues in his postconviction petition as *Knaffla*-barred; (2) denying his claim of ineffective assistance of appellate counsel; and

(3) denying an evidentiary hearing based on newly discovered evidence. Because the district court did not err by concluding that six of appellant's arguments were barred under *Knaffla* and did not abuse its discretion by denying appellant's request for a hearing on his three additional arguments, we affirm the district court's denial of postconviction relief.

FACTS

A jury convicted appellant Jamie Michael Carlson of second-degree controlled-substance crime—sale of methamphetamine, in violation of Minn. Stat. § 152.022, subd. 1(1) (2006). During appellant's trial, the state introduced evidence that appellant sold methamphetamine to a confidential informant in a "controlled buy" arranged by a police detective. The state presented evidence of taped conversations between appellant and two informants, which were made after the purchase and contained statements tending to confirm the sale.

Carlson appealed his conviction, arguing that the district court erred by allowing the police detective's testimony interpreting the taped conversations, and that the prosecutor committed misconduct by vouching for a witness and arguing facts not in evidence. Appellant also filed a pro se supplemental brief alleging that the district court erred by allowing the jury to view transcripts when it listened to audio recordings of the conversations and that the evidence was insufficient to support his conviction because there was no corroboration of accomplice testimony. Appellant also filed a second pro se supplemental brief raising the issue of ineffective assistance of counsel, but it was stricken as untimely filed. This court affirmed appellant's conviction, and the Minnesota

Supreme Court denied review. *State v. Carlson*, No. A08-0126, 2009 WL 1311324 (Minn. App. May 12, 2009), *review denied* (Minn. July 22, 2009).

Appellant filed an initial pro se petition for postconviction relief under Minn. Stat. § 590.01, subd. 1 (2008), but he voluntarily dismissed that petition. He then filed another pro se petition, alleging that (1) trial counsel was ineffective; (2) the state's witnesses committed perjury; (3) the district court abused its discretion by failing to grant a pretrial defense motion to dismiss on the basis of inadequate corroboration of accomplice testimony; (4) the taped conversations were irrelevant and improperly influenced the jury to convict him; (5) the prosecutor committed misconduct; (6) the evidence was insufficient to convict appellant because it was based solely on accomplice testimony; (7) the state failed to prove the required element that the crime was committed in Clay County; (8) appellate counsel was ineffective; and (9) an e-mail sent to one of the state's witnesses provided newly discovered exculpatory evidence.

In support of his postconviction petition, appellant submitted a letter he had sent to appellate counsel, which indicated his dissatisfaction with trial counsel's strategy, including the failure to impeach one of the state's witnesses with additional recorded conversations not submitted as evidence. Appellate counsel replied that, given the high volume of impeachment evidence admitted, it would have been difficult to show the second prong of an ineffective-assistance claim, and whether to play the additional tapes would be considered trial strategy, which was not reviewable on an ineffective-assistance claim. Appellate counsel indicated that if appellant chose to stay his appeal for postconviction proceedings, he would be choosing to represent himself and reinstate his

appeal pro se. Finally, counsel stated that ineffective-assistance claims were usually made in postconviction actions after a direct appeal.

The district court denied appellant's petition without a hearing, concluding that seven of appellant's nine claims were barred because they were known or could have been known at the time of his direct appeal. *See State v. Knaffla*, 309 Minn. 247, 252, 243 N.W.2d 737, 741 (1976). The district court also denied appellant's request for a hearing on his two additional claims—ineffective assistance of appellate counsel and newly discovered evidence—concluding that appellant failed to provide sufficient fact-based allegations relating to these claims which would, if proven, entitle him to relief. This appeal follows.

D E C I S I O N

A defendant who is convicted of a crime may file a petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2010). This court generally reviews the denial of a postconviction petition for an abuse of discretion. *Roby v. State*, 531 N.W.2d 482, 483 (Minn. 1995). In doing so, the 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 the petition, files, and records conclusively show that no relief is warranted, a postconviction court may deny the petition without an evidentiary hearing. Minn. Stat. § 590.04, subd. 1 (2010). Allegations in a postconviction petition must amount to "more than argumentative assertions without factual support." *Hodgson v. State*, 540 N.W.2d 515, 517 (Minn. 1995) (quotation omitted).

The district court denied appellant's claims for postconviction relief without a hearing, concluding that seven of his nine claims were barred under *Knaffla* and that appellant failed to provide sufficient factual support for his allegations on the other two claims, so that an evidentiary hearing was not warranted.

Knaffla-barred claims

Claims that have been raised on direct appeal, or that could have been raised when the direct appeal was taken, may not be considered in a petition for postconviction relief. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. "The *Knaffla* bar is subject to two exceptions: 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).

We have carefully considered appellant's arguments on each of the seven claims rejected as *Knaffla*-barred, and we conclude that the district court correctly determined that six of those claims were barred by *Knaffla*, either because appellant raised them on direct appeal or because they were known to appellant and could have been raised at that time. *Id.* We further agree with the district court that neither of the *Knaffla* exceptions applies to those claims: the issues are not so novel that their legal basis was indiscernible during appellant's direct appeal, and fairness does not require their consideration. *Id.* Therefore, the district court did not abuse its discretion by failing to hold a hearing on these issues.

Appellant does raise a colorable claim that his seventh argument—ineffective assistance of trial counsel—falls within the second *Knaffla* exception: fairness requires its consideration, and he did not deliberately and inexcusably fail to raise the issue on appeal. Appellant correctly points out that the letter from appellate counsel advised him that ineffective-assistance claims were usually raised in postconviction proceedings rather than on direct appeal, and therefore it was unfair for the district court to rule that this issue was barred by *Knaffla* in this postconviction proceeding.

Nonetheless, even though the district court erred by determining that appellant's claim was *Knaffla*-barred, we conclude that the district court did not abuse its discretion by failing to hold an evidentiary hearing on this issue. A defendant who asserts that counsel was ineffective "must show that his counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that, but for his counsel's unprofessional errors, the result of the proceedings would have been different." *Davis v. State*, 784 N.W.2d 387, 391 (Minn. 2010) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). Appellant's postconviction petition alleges that trial counsel committed several alleged errors, including failing to introduce additional evidence to impeach the state's witnesses and making remarks at closing argument that vouched for the state's witnesses and attacked appellant's character. But decisions on what evidence to present are matters of trial strategy, which are not properly the subject of an ineffective-assistance claim. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004); *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). And the closing statements appellant alleges are improper include statements that

the police officer was "a good cop," and that "none of these people are particularly likeable . . . but that isn't the issue." These statements do not rise to the level of objectively unreasonable representation. Therefore, the record conclusively shows that appellant was not entitled to relief on his claim for ineffective assistance of trial counsel, and the district court properly denied an evidentiary hearing on that claim. *See* Minn. Stat. § 590.04, subd. 1.

Ineffective assistance of appellate counsel

The district court addressed appellant's two additional claims—ineffective assistance of appellate counsel and newly discovered evidence—but concluded that appellant had not shown facts sufficient to warrant an evidentiary hearing on these issues.

Postconviction denial of a claim of ineffective assistance of counsel raises questions both of law and fact; on undisputed facts we review the district court's determination de novo. *Opsahl*, 677 N.W.2d at 420. As with ineffective-assistance-of-trial-counsel claims, a petitioner alleging ineffective assistance of appellate counsel must show that counsel's performance was objectively deficient and that a reasonable probability exists that the outcome would have been different absent counsel's errors. *Arredondo*, 754 N.W.2d at 571. "The petitioner must overcome the presumption that counsel's performance fell within a wide range of reasonable representation." *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009) (quotation omitted).

Appellant argues that appellate counsel misinformed him: (1) that ineffective-assistance-of-counsel claims were generally brought in postconviction proceedings, rather than on direct appeal, and (2) that if appellant wished to stay his appeal to assert a

claim that his trial counsel was ineffective, it was appellate counsel's advice not to pursue that option, and if appellant wished to do so, his choice would be to discharge counsel and proceed pro se. Appellant argues that he was prejudiced by this incorrect advice when the district court ruled that his claim for ineffective assistance of trial counsel was *Knaffla*-barred because it could have been raised in his direct appeal.[1]

In its postconviction order, the district court found that appellate counsel's letter was sent in response to appellant's letter listing several ineffective-assistance claims that he wished to assert, which could have referred either to the services of trial counsel or appellate counsel. The district court stated that, even if appellate counsel improperly advised appellant that ineffective-assistance claims should be made after direct appeal, appellant has asserted that it was counsel's additional statement—that appellant would be without counsel if he chose to file a postconviction petition before a direct appeal—that caused appellant to keep his attorney and not to stay his appeal. The district court also noted that appellate counsel's explanation that appellant would need to proceed pro se correctly stated the availability of a public defender after discharge based on a disagreement as to strategy. The district court noted that appellate counsel's decision to pursue a direct appeal may not have been unreasonable in the face of appellant's mere allegations as to ineffective assistance of counsel, and the court agreed with appellate counsel that the allegations related to trial strategy and the additional issues cited would not have changed the outcome of appellant's case.

[1] Appellant attempted to raise an ineffective-assistance-of-trial-counsel claim on direct appeal in a pro se supplemental brief, which was rejected as untimely filed. *Carlson*, 2009 WL 1311324, at *4.

Appellant's postconviction petition asserts that "[a]ppellate counsel['s] . . . advice concerning the proper time and procedure for filing a postconviction petition . . . was incorrect and caused [appellant] to not file a petition prior to [appellant's] direct appeal." We agree with the district court that, to the extent that this statement may refer to appellate counsel's advice that ineffective-assistance claims are generally asserted in postconviction proceedings, counsel may have incorrectly informed appellant that such claims are not appropriate on direct appeal. *See Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004) (stating that "not all ineffective assistance of trial counsel claims are alike" and that the appropriate mechanism for bringing the claim—a direct appeal or a postconviction petition—depends on whether necessary evidence is in trial court record). But we also agree that, to the extent that the statement refers to the advice that appellant would be proceeding without counsel if he chose to assert an ineffective-assistance claim on direct appeal, appellate counsel accurately stated the relevant law. *See Fields v. State*, 733 N.W.2d 465, 471 (Minn. 2007) (concluding that appellate counsel was not ineffective, based on counsel's decision to pursue a direct appeal rather than postconviction relief and counsel's advice to defendant that, if he wished to seek postconviction relief instead, he could fire her and proceed with postconviction petition pro se). And appellate counsel did not have a duty to assert an ineffective-assistance claim on direct appeal if he believed other issues were more meritorious. *See Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985) (stating that "[w]hen an appellant and his counsel have divergent opinions as to what issues should be raised on appeal, his counsel has no duty to include claims which would detract from other more meritorious issues").

"[T]o prevail on a claim of ineffective assistance of appellate counsel grounded on a claim that trial counsel was ineffective, [appellant] must first show that trial counsel was ineffective." *Brocks v. State*, 753 N.W.2d 672, 676 (Minn. 2008) (quotation omitted). Appellant's allegations relating to trial counsel's ineffectiveness simply do not show a lack of objectively reasonable representation. *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. Therefore, the district court did not abuse its discretion by failing to hold an evidentiary hearing on this issue.

Newly discovered evidence

Appellant also argues that a newly discovered e-mail sent by one of the state's witnesses constitutes newly discovered evidence that entitles him to a new trial. To obtain a new trial based on newly discovered evidence, a defendant must show 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 a more favorable result for the defendant. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

Appellant's alleged newly discovered e-mail, dated about three weeks after the drug sale, refers to a previous discussion about providing a car for appellant. The district court concluded that this e-mail failed the first, second, and fourth prongs of the *Rainer* test because (1) there was no basis to assume that it was not known to appellant at the time of trial; (2) appellant did not allege that it could not have been discovered by due

diligence before trial; and (3) admission of the e-mail would not likely have produced a more favorable result for appellant because other evidence linked him to the crime.

We agree with the district court. Even if the newly discovered e-mail had met the first two prongs of the *Rainier* test, appellant has not asserted facts sufficient to warrant an evidentiary hearing on the fourth prong of that test—that its admission would likely have produced a result more favorable to appellant. *See id.* Appellant argues that the e-mail, if admitted, would show that one of the taped conversations in evidence did not relate to drug sales, but rather to discussions about a car, and that the record would have lacked evidence to corroborate accomplice testimony that he committed the charged crime. But as the district court noted, an exhibit of instant messages also referred to discussions about a car; the taped conversations themselves provided corroborating evidence; and the jury weighed contradicting stories as to the meaning of the conversations in arriving at their verdict. Therefore, the district court did not abuse its discretion by determining that appellant did not provide a sufficient factual basis for holding an evidentiary hearing on this issue and by denying appellant's petition for postconviction relief.

Affirmed.