STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0075

David Kenneth Christian, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 4, 2012
Affirmed
Kalitowski, Judge

Mower County District Court
File No. 50-K4-00-001117

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kristen Marie Nelsen, Mower County Attorney, Austin, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

KALITOWSKI, Judge

On appeal from denial of his postconviction petition, appellant David Kenneth Christian argues (1) the court abused its discretion in dismissing his petition as barred by *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), and (2) the district

court erred in summarily dismissing his petition that presented evidence of a violation of *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963). We affirm.

D E C I S I O N

A criminal defendant may seek postconviction relief if "the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1 (2010). The defendant-petitioner bears the burden of establishing facts alleged in a postconviction petition by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2010).

But if a petitioner knew or should have known of the claimed violation at the time of direct appeal, the courts generally do not consider the claim when raised in a subsequent petition for postconviction relief. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. "Similarly, a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief." *Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006). Exceptions to these rules are made for claims that present novel legal issues or if the interests of justice require review. *Id.* On appeal, this court reviews the denial of postconviction relief based on the *Knaffla* procedural bar for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

This is appellant's fourth petition for postconviction relief. In it, he seeks to have his 2001 murder and assault convictions vacated or, alternatively, a new trial, arguing that the state committed a *Brady* violation. It is undisputed that Peter Orput, the trial prosecutor, met with J.H., a key witness for the state, several days before trial to review

her testimony. During the meeting, J.H. provided statements to Orput that differed in some respects from her grand jury testimony and tended to exculpate appellant. In his postconviction petition, appellant alleges that the state violated its disclosure obligations by failing to inform him of this meeting and failing to turn over Orput's notes of J.H.'s statements. The district court dismissed appellant's petition without an evidentiary hearing, concluding that appellant's claim is meritless and barred by *Knaffla*.

Appellant asserts that he was only alerted to the disclosure violations by Orput's testimony at a September 2010 hearing on appellant's third petition for postconviction relief. At the hearing, Orput described the meeting with J.H., and stated, in response to a question about whether he took notes of the meeting, "Invariably, I did." Appellant contends that because he was unaware of the basis for his *Brady* claim until after he filed his third postconviction petition, his claim is not *Knaffla* barred. We disagree.

The district court found that appellant was aware of the relevant details concerning Orput's meeting with J.H. before trial. The record supports this finding. During pretrial motions, appellant's trial counsel, Barry Voss, informed the district court that J.H. had called him after her meeting with Orput and accused Orput of threatening her. Voss stated that he had discussed J.H.'s allegations with Orput by telephone and suggested that J.H. be examined to determine whether Orput had tampered with her testimony.

In response, Orput explained on the record that he had met with J.H. to review her testimony, that she had given answers that were inconsistent with her previous testimony to the grand jury, and that he had advised her that she would be subject to prosecution for perjury if she told him she had lied to the grand jury. He denied improperly pressuring

J.H. Orput then suggested that Voss's concerns about the meeting could be addressed on cross-examination. Voss agreed, stating, "What Mr. Orput said makes sense to me, Your Honor, because even if the [c]ourt doesn't have her come in and be examined, it is my intention to ask her when she testifies about that very meeting. I intended to do that."

Orput then disclosed additional details of the meeting during trial. On direct examination, J.H. frequently contradicted her grand jury testimony and Orput impeached her with the transcript of that testimony. Eventually, Orput offered the entire transcript of J.H.'s grand-jury testimony as substantive evidence of a prior inconsistent statement and appellant objected. During a sidebar conversation regarding the transcript's admissibility, Orput explained:

> To put this in context, [J.H.] did come down to my office and met with me. It seemed clear to me she couldn't read, and I had prepared questions for her. And as I was asking her questions, she gave me a different answer than the grand jury testimony on a few occasions. And I stopped, and that's when I said, ["][J.H.], you know, you gave this under oath[,] right?["] And she said, ["]If I said that, that's the truth, and that's what happened.["] Okay. Thank you for coming in. I left.
>
> Shortly thereafter, Mr. Voss phoned me and said that she called him complaining that I threatened her . . . and that she . . . somehow indicated that she was hostile to me, and that's when I thought I perhaps might have a problem because I didn't know what to expect.

These discussions establish that appellant was aware J.H. had met with Orput, that J.H. intended to contradict her previous testimony to the grand jury, that she was hostile to the state's position, and that she had alleged that Orput had threatened her. In light of this knowledge, appellant also would have been aware that the state had not disclosed a

written summary or notes of the meeting. Thus, even if appellant was not specifically aware that Orput likely had generated notes of the meeting, appellant had sufficient knowledge to raise a *Brady* claim on direct appeal. Because appellant failed to do so, the *Knaffla* bar applies.

An exception to *Knaffla* applies "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, 28 (Minn. 2009). Appellant argues that consideration of his claim is in the interests of justice because he could not have deliberately and inexcusably failed to raise a *Brady* claim regarding evidence he was not specifically aware of. But because appellant should have known of his *Brady* claim at the time of trial, we reject this argument and conclude that the fairness exception does not apply. Accordingly, the district court properly concluded that the petition is *Knaffla* barred.

Moreover, even if *Knaffla* does not apply, we would affirm the district court because the record establishes that there has been no *Brady* violation. "[T]he suppression by the [s]tate, whether intentional or not, of material evidence favorable to the defendant violates the constitutional guarantee of due process." *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010) (citing *Brady*, 373 U.S. at 87, 83 S. Ct. at 1196-97). To establish a *Brady* violation, a defendant must show that: (1) the evidence is favorable to the accused by being exculpatory or impeaching; (2) the evidence was suppressed by the state, either willfully or inadvertently; and (3) the evidence was material. *Id.* This is a constitutional issue, which we review de novo. *State v. Heath*, 685 N.W.2d 48, 55 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004).

The state concedes that J.H.'s exculpatory statements to Orput, and any notes memorializing those statements, would be evidence favorable to appellant under the first *Brady* prong, but contends that the remaining two prongs are not met because J.H.'s statements were not suppressed and are not material. We agree.

Appellant's *Brady* claim centers on the state's failure to disclose Orput's notes of the meeting with J.H. As an initial matter, we note that the record is not clear as to whether any notes were ever generated. Orput's testimony that he "[i]nvariably" creates notes of pretrial meetings with witnesses establishes his typical routine, but no witness testified to taking or seeing notes of this particular meeting. And appellant conceded at oral argument that appellate counsel for the state diligently searched through the state's trial file and was unable to find any such notes.

But assuming that notes were generated, appellant has failed to show the state suppressed J.H.'s exculpatory statements. As noted above, Orput disclosed to Voss the fact and substance of his meeting with J.H. before trial, including that J.H. had indicated that her testimony would differ from what she had testified to the grand jury. And the state called J.H. to testify at trial, where she provided a version of events regarding the murders that tended to exculpate appellant. She also testified about her meeting with Orput, stating that she felt pressured by Orput and police officers not to "stick up" for appellant. Because the substance of J.H.'s statements was revealed to appellant at the time of trial and was elicited in front of the jury, we conclude that the state has not suppressed this evidence.

And for the same reasons, we conclude that J.H.'s statements were not material. "Evidence is material 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000) (quoting *United States v. Bagley*, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383 (1985)). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Pederson v. State*, 692 N.W.2d 452, 460 (Minn. 2005) (quotations omitted).

Because appellant was aware of the critical details regarding J.H.'s statements to Orput, he was able to prepare to cross-examine J.H. at trial about her meeting with Orput. And J.H. ultimately provided exculpatory testimony and had to be impeached with her sworn grand jury testimony. Because any evidence contained in Orput's notes was known to appellant and was elicited at trial, the notes offered no additional evidence that reasonably could have altered the outcome. *See Walen*, 777 N.W.2d at 217 (concluding that undisclosed report was not material because it did not "contain any additional impeachment evidence [to be] used at trial"). Moreover, J.H.'s testimony was so vague, hostile, and inconsistent with her grand jury testimony, and was so repeatedly impeached, that no jury could have attached significant credibility to statements she had given to Orput. *See Christian v. State*, No A10-2166, 2011 WL 5119119, at *4 (Minn. App. Oct. 31, 2011) (rejecting appellant's claim, in his third postconviction petition, that he was convicted on false evidence, reasoning, "The likelihood that the jury would or could have found her revised testimony sufficiently compelling to change their verdict [on appellant's guilt] is virtually non-existent."), *review denied* (Minn. Jan. 17, 2012).

Appellant cites a line of cases that permit a verdict to be overturned based on discovery violations even if prejudice is not explicitly shown. *See, e.g.*, *State v. Kaiser*, 486 N.W.2d 384, 387 (Minn. 1992); *State v. Schwantes*, 314 N.W.2d 243, 245 (Minn. 1982). Because we conclude the state did not suppress evidence here, we need not reach this argument. But we note that the cases appellant cites involved flagrant abuse of discovery rules. *See State v. Jackson*, 770 N.W.2d 470, 479-80 (Minn. 2009) (distinguishing *Kaiser* and *Schwantes* on that basis). Here, there is no showing that the state acted in bad faith or that any discovery violation was egregious. Rather, the state fully disclosed the substance of J.H.'s statements to defense counsel on the record, so "our usual standard applies and . . . [the appellant] must show prejudice." *Id.* at 480. He has not done so, and his *Brady* claim therefore fails.

Because appellant's *Brady* claim lacks merit and is barred by *Knaffla*, the district court was within its discretion to summarily dismiss appellant's postconviction petition.

Affirmed.