**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A12-0552**

David Allen Caroon, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 9, 2012**
**Affirmed**
**Cleary, Judge**

St. Louis County District Court
File No. 69DU-CR-06-6378

David Allen Caroon, Moose Lake, Minnesota (pro se appellant)

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

Mark S. Rubin, St. Louis County Attorney, Gary W. Bjorklund, Assistant County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Chutich, Presiding Judge; Stauber, Judge; and Cleary, Judge.

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

**CLEARY**, Judge

Following a conviction of conspiracy to commit first-degree murder and a direct appeal, appellant filed petitions and motions for postconviction relief, which the district court denied. Appellant challenges the denial of postconviction relief, arguing that: the

evidence is insufficient to support the conviction; the court erred by refusing to give the jury an accomplice instruction; the prosecution sought a conviction at any cost; and trial and appellate counsel were ineffective. We affirm the denial of postconviction relief.

## FACTS

Following a jury trial, appellant David Caroon was convicted of conspiracy to commit first-degree murder. Appealing his conviction, appellant argued that the jury instructions were in error as to the "overt act" element of conspiracy. This court affirmed the conviction, and the Minnesota Supreme Court denied review. *See State v. Caroon*, No. A07-2011, 2009 WL 112859 (Minn. App. Jan. 20, 2009), *review denied* (Minn. Mar. 31, 2009).

In January 2012, appellant filed a petition for accelerated review, petition for correction or reduction of sentence, petition for out-of-time appeal, motion for a new trial, motion to vacate judgment, motion for an evidentiary hearing, motion for acquittal, motion for appointed counsel, and motion for "extraordinary writ of extraordinary circumstances" in district court. Appellant argued that the evidence is insufficient to support his conviction; that the district court erred by failing to give the jury an accomplice instruction; and that his trial and appellate counsel were ineffective. The district court declined to hold an evidentiary hearing and denied the petitions and motions for postconviction relief. This appeal followed.

## D E C I S I O N

A petitioner who files for postconviction relief bears the burden of proving, by a fair preponderance of the evidence, facts sufficient to warrant a reopening of the case.

*See* Minn. Stat. § 590.04, subd. 3 (2010); *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004). "In order to meet that burden, a petitioner's allegations must be supported with more than mere argumentative assertions that lack factual support." *Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000). A district court need not hold a postconviction hearing if the petition, files, and records "conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010). An appellate court reviews a denial of postconviction relief for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). "A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

"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 (2010); *see also State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) ("[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief."). The *Knaffla* rule bars postconviction relief when the petitioner either knew or should have known about the claims raised in the postconviction petition at the time of the direct appeal. *Jihad v. State*, 714 N.W.2d 445, 447 (Minn. 2006). Postconviction relief is not barred by the *Knaffla* rule, however, if the defendant presents a novel legal issue or if the interests of justice require that the court consider the postconviction claims. *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011).

Additionally, no petition for postconviction relief may be filed more than two years after an appellate court's disposition of a petitioner's direct appeal. Minn. Stat. § 590.01, subd. 4(a) (2010). But a court may consider a petition for postconviction relief after expiration of the time limit if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5) (2010).

The interests-of-justice exception to a bar on postconviction relief is applied only in "exceptional situations." *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010). "To be reviewed in the interests of justice, a claim must have merit and must be asserted without deliberate or inexcusable delay." *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009). In deciding whether to grant relief in the interests of justice, a court should also consider the degree to which the parties may have been at fault for the alleged error, whether some fundamental unfairness to the petitioner needs to be addressed, and whether action by the court is necessary to protect the integrity of judicial proceedings. *Gassler*, 787 N.W.2d at 587.

Appellant argues that the evidence is insufficient to support his conviction of conspiracy to commit first-degree murder and that the district court erred by failing to give the jury an accomplice instruction. Appellant could have raised these claims during his direct appeal, but he did not do so. In fact, appellant did challenge the jury instructions on direct appeal, but he failed to make the claim that he makes now. Appellant's sufficiency-of-the-evidence and jury-instruction claims are barred by the

*Knaffla* rule. Neither claim presents a novel legal issue, and we see no reason to review these claims in the interests of justice. Therefore, we decline to address them further.[1]

Appellant's remaining claims are that he received ineffective assistance of counsel at trial and on appeal. "When a claim of ineffective assistance of trial counsel can be adjudicated on the basis of the trial record, it must be brought on direct appeal or it is barred by the *Knaffla* rule if raised in a postconviction petition." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). "But a claim of ineffective assistance of trial counsel that cannot be resolved on the trial court record alone need not be brought in a direct appeal and may be brought in a postconviction petition." *Id.* at 535–36. As discussed below, appellant argues that his trial counsel was ineffective in various ways, including by failing to properly investigate the case. This argument may not have been resolvable on the trial record alone, and therefore the *Knaffla* rule does not bar appellant's ineffective-assistance-of-trial-counsel claim. "Claims of ineffective assistance of appellate counsel on direct appeal are not barred by the *Knaffla* rule in a first postconviction appeal because they could not have been brought at any earlier time." *Id.* at 536.

Although appellant's ineffective-assistance-of-counsel claims are not barred by the *Knaffla* rule, they face another hurdle because they were not raised within two years of

[1] Appellant makes an additional claim that the prosecution sought "a conviction at any cost." Appellant provides no specific facts or legal authority to support his assertion that the state engaged in misconduct. Moreover, appellant raised claims of entrapment and violation of *Miranda* rights during his direct appeal, and this court determined that these claims were "without merit." *See Caroon*, 2009 WL 112859, at *5. Therefore, we also decline to further address this claim.

the disposition of his direct appeal, as required by Minn. Stat. § 590.01, subd. 4(a). The supreme court denied review of appellant's direct appeal in March 2009, and appellant did not file his petitions and motions for postconviction relief until January 2012. Appellant argues that this court must consider these claims in the interests of justice because his postconviction petitions and motions were delayed due to the illness and death of the attorney that he had retained to do postconviction work. Appellant claims that he was not notified until November 2010 that this attorney would not be doing the postconviction work, giving him little time to retain another attorney and file his postconviction paperwork before the two-year deadline expired. Given these circumstances, we will address the merits of appellant's ineffective-assistance-of-counsel claims in the interests of justice.

**Ineffective-Assistance-of-Trial-Counsel Claim**

Appellant argues that his trial counsel was ineffective in various ways. To show ineffective assistance of counsel, a defendant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). In Minnesota, the standard for competence is defined as "representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *State v. Gassler*, 505 N.W.2d 62, 70 (Minn. 1993) (quotation omitted). There is a strong presumption that counsel's

performance fell within the range of reasonable assistance. *State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). 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).

An appellate court "generally will not review attacks on counsel's trial strategy." *Id*. at 421. "[T]he level of investigation and whether to object are matters of trial strategy that [an appellate] court generally will not review." *Boitnott v. State*, 631 N.W.2d 362, 370 (Minn. 2001). "Which witnesses to call at trial and what information to present to the jury" are also trial tactics that lie within the discretion of trial counsel and "should not be reviewed by an appellate court." *Jones*, 392 N.W.2d at 236. Reluctance to scrutinize trial strategy is "grounded in the public policy of allowing counsel to have the flexibility to represent a client to the fullest extent possible." *Opsahl*, 677 N.W.2d at 421 (quotation omitted).

Appellant argues that his trial counsel was ineffective because she participated in an off-the-record conversation in chambers without his presence; failed to adequately investigate, research, and prepare; failed to request information and evidence; failed to make certain arguments, objections, and motions; failed to interview witnesses; and failed to be appellant's advocate and represent his interests. Appellant's allegations are vague as to what his counsel did incorrectly, what should have been done, and how the result of the trial would have been different but for any errors she allegedly committed. Additionally, appellant's allegations are an attack on trial strategy, which is not reviewed

on appeal. Appellant has not met his burden to prove that he received ineffective assistance of counsel at trial, and therefore this claim fails.

**Ineffective-Assistance-of-Appellate-Counsel Claim**

Appellant argues that his appellate counsel was ineffective because appellate counsel did not help him to investigate his claim regarding ineffective assistance of trial counsel, forcing him to hire a private attorney to pursue postconviction relief. However, as argued by appellant and as explained above, appellant raises issues under his ineffective-assistance-of-trial-counsel claim that may not have been resolvable on the trial record alone, making the claim more appropriate at the postconviction stage. *See Leake*, 737 N.W.2d at 535–36. Moreover, "When an ineffective assistance of appellate counsel claim is based on appellate counsel's failure to raise an ineffective assistance of trial counsel claim, the appellant must first show that trial counsel was ineffective." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007). Appellant has not met his burden to prove that he received ineffective assistance of counsel at trial. For these reasons, appellant has not met his burden to prove that he received ineffective assistance of counsel on appeal, and therefore this claim fails.

**Affirmed.**