STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0233

James Jean Austin, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 13, 2012
Affirmed
Crippen, Judge[*]

Olmsted County District Court
File No. 55-CR-08-7358

James Jean Austin, Moose Lake, Minnesota (pro se appellant)

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Crippen, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

CRIPPEN, Judge

Appellant James Austin disputes the determination of the postconviction court that his petition for relief had insufficient merit to warrant an evidentiary hearing. We affirm because appellant has shown no prejudice from either of the errors he asserted and because neither is shown to have substance.

FACTS

In March 2009, appellant was convicted on one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subds. 1(b) and 1(g) (2006), and two counts of first-degree burglary in violation of Minn. Stat. § 609.582, subds. 1(a) and (c) (2006). He subsequently was sentenced to 122 months in prison. Appellant brought a direct appeal to this court, which determined that his crime was one of specific intent, and we affirmed on all counts. *State v. Austin*, 788 N.W.2d 788 (Minn. App. 2009), *review denied* (Minn. Dec. 14, 2010).

In October 2011, appellant petitioned the district court for postconviction relief. He claims that his trial counsel was ineffective because he failed to sufficiently address the state's position on the required intent for the charge of second-degree criminal sexual conduct and failed to call at least two additional witnesses for the defense. In addition, appellant claims that his appellate counsel was ineffective for failing to address the errors of trial counsel.

The facts of this case involve appellant's visit to the apartment of the victims and his sexual contact with the seven-year-old victim, G.J., which included touching and an

attempt to remove his clothing. The case at trial involved a dispute as to consent to be in the apartment for purposes of sexual contact with the victim's aunt, L.M.

D E C I S I O N

A district court may deny a petition for postconviction relief without an evidentiary hearing if "the files and records of the proceedings conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2010); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008). The court may also summarily deny a postconviction petition if it raises issues previously decided by this court or the supreme court. Minn. Stat. § 590.04, subd. 3. As a general rule, this court applies an abuse-of-discretion standard of review to a postconviction court's denial of relief. *State v. Miller*, 754 N.W.2d 686, 707 (Minn. 2008). Questions of law are reviewed de novo, and questions of fact are reviewed to determine whether the postconviction court's findings are supported by sufficient evidence. *Sanchez-Diaz v. State*, 758 N.W.2d 843, 846 (Minn. 2008). "The petitioner bears the burden of establishing by a fair preponderance of the evidence facts that warrant reopening the case." *McKenzie v. State*, 754 N.W.2d 366, 368-69 (Minn. 2008).

1.

Appellant asserts that the postconviction court erred by denying relief on appellant's claim that trial counsel failed to familiarize himself with the law and correct prosecutor's misstatements regarding intent, and also failed to properly investigate and prepare for trial. We analyze claims of ineffective assistance under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687–88, 104 S. Ct. 2052, 2064-65

(1984). *See Sanchez-Diaz*, 758 N.W.2d at 847. In order to prevail, a petitioner must first prove that counsel performed "below an objective standard of reasonableness." *Id.* at 848. Second, a petitioner must demonstrate that "a reasonable probability exists that the outcome would have been different but for counsel's errors." *Id.* When considering a claim of ineffective assistance of counsel, there is a strong presumption that counsel's performance was reasonable. *State v. Rhodes*, 657 N.W.2d 823, 844 (Minn. 2003). We may address the *Strickland* prongs in any order and may resolve a claim without addressing the other prong if one is dispositive. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

In rejecting appellant's claim on intent-related arguments, the postconviction court reasoned that the intent element presented a complex legal issue that required considerable efforts of the district court, the state, and appellant's trial counsel. Moreover, this court adequately addressed the intent issue on direct appeal, finding that the crime required specific intent. *Austin*, 788 N.W.2d at 792. This court also applied the concept of transferred intent to the charge of criminal sexual conduct, noting that it had failed to find any published cases in any jurisdiction on that issue. *Id.* at 793-94. Given that both parties and the trial judge struggled with the issue of intent, it is difficult to see how trial counsel's familiarity with the law in this respect fell below an objectively reasonable standard. This court's published decision declaring new law supports this conclusion; trial counsel could not have been more familiar with the law because at the time, the law had not been established. Appellant's claim fails to overcome the strong

presumption that counsel's performance was reasonable. *See Rhodes*, 657 N.W.2d at 844.

Although we need only conclude that one of the *Strickland* prongs is not satisfied to dismiss an ineffective-assistance-of-counsel claim, *see Schleicher*, 718 N.W.2d at 447, appellant's initial claim also fails because he has failed to show prejudice. The postconviction court concluded that appellant's argument regarding trial counsel's alleged failures in handling the intent issue did not prejudice him.

That district court conclusion is supported by this court's opinion on direct appeal. After correcting the theories of both the district court and the state, clarifying that the crime required specific intent, and establishing the doctrine of transferred intent in criminal sexual conduct cases, this court affirmed appellant's conviction in full. *Austin*, 788 N.W.2d at 795. Appellant appears to argue that this court erred in its intent analysis, but the postconviction stage is not the proper venue for such arguments. Even if trial counsel did make errors in failing to either familiarize himself with the law on intent or correct the prosecutor's misstatements of the law, appellant has not suggested how this would have changed the outcome of the case, and he has failed to satisfy the second prong of *Strickland*.

In order to be entitled to an evidentiary hearing on his claims regarding trial counsel's investigation of the case and preparation for trial, a petitioner must "allege facts that, if proven, would entitle him to the requested relief." *Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). The allegations must be "more than argumentative assertions without factual support." *Id.* (quotations omitted).

Appellant claims that if trial counsel had done a proper investigation, he would have discovered and called appellant's family members as witnesses to corroborate his own testimony, rebut the state's evidence, and impeach the state's witnesses. Yet, appellant has not submitted any evidence to support his claims of trial counsel's deficiencies or the willingness of his family members to testify.

As the postconviction court noted, appellant failed to offer anything "but his own claim" as to what the purported witnesses would have testified to. The testimony appellant claims was wrongfully omitted would have required the witnesses to admit to drug and prostitution crimes under oath. Appellant has failed to show that these witnesses would testify in these circumstances. Appellant has failed to satisfy the first prong of *Strickland* because he has offered only argumentative assertions rather than factual support for his allegations.

As to the second prong, appellant argues that the purported testimony of family members would have altered the weight of critical evidence on the allegation that he engaged in criminal sexual conduct toward G.J. on the night in question.

The postconviction court observed, reflecting on its weighing of evidence at trial, that the testimony of family members, insofar as it affected the believability of appellant or L.M., would have affected the weight of evidence that appellant did not have consent for sexual activity when he entered the apartment occupied by the victim. Moreover, the court observed that the testimony of family members had no bearing on the testimony of G.J., who described the sexual crime. Appellant has not enunciated any error of the district court in its analysis on the effect of the purported family-member evidence.

Most centrally, even credible testimony that L.M. had exchanged sex for drugs or money in the past would not have contradicted the credible testimony of G.J. that appellant sexually touched him. Appellant does not claim that any other witnesses had personal knowledge of what occurred in the apartment. The testimony of family members could not have persuaded the fact-finder that G.J.'s testimony was not credible. Appellant's claim of ineffective assistance of trial counsel fails the second prong of *Strickland*, as well as the first, because the outcome of appellant's trial would not have been different absent trial counsel's alleged failure to call other witnesses.

The parties also dispute whether appellant's ineffective-assistance-of-trial-counsel claim is barred by *Knaffla* because it was known at the time of direct appeal. Given that appellant has not shown either substantive merit or prejudice, the postconviction court did not err in deciding appellant's claim on the merits. Accordingly, we have no occasion to decide whether *Knaffla* bars his claim.

2.

Appellant also asserts that the postconviction court erred by denying postconviction relief based on his claim of ineffective assistance of appellate counsel. Appellant bases this claim entirely on appellate counsel's failure to raise the issue of ineffective assistance of trial counsel on direct appeal.

As with a claim of ineffective assistance of trial counsel, a petitioner alleging ineffective assistance of appellate counsel must show that appellate counsel's performance was objectively unreasonable and that a reasonable probability exists that the outcome would have been different but for counsel's errors. *Arredondo v. State*, 754

N.W.2d 566, 571 (Minn. 2008). "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 failed to show that his trial counsel's performance fell below an objectively reasonable standard or that his trial would have resulted in a different outcome absent trial counsel's deficiencies. Thus, appellant's claim for ineffective assistance of appellate counsel was properly dismissed because there is no merit to his ineffective-assistance-of-trial-counsel claim.

Affirmed.