STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0274

Adrian Lamont Patterson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 4, 2013
Affirmed
Hudson, Judge

Hennepin County District Court
File No. 27-CR-09-2426

Adrian Lamont Patterson, Bayport, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

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

HUDSON, Judge

Following his convictions of second-degree unintentional murder and drive-by shooting, appellant challenges the district court's summary denial of his petition for postconviction relief, arguing that he was deprived of his right to an impartial tribunal because the district court displayed judicial bias by instructing the jury sua sponte on lesser-included offenses and that he received ineffective assistance of trial and appellate counsel. Because each of appellant's claims is barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976), or lacks merit, we affirm.

FACTS

During a 2003 drive-by shooting, R.A. was killed when he was shot by a person in a white car. In 2008, when police learned additional information about the shooting, L.P. and appellant Adrian Patterson, the occupants of the white car, were indicted on two counts each of first-degree murder relating to R.A.'s death and attempted first-degree murder relating to R.A.'s surviving passenger. L.P. pleaded guilty to a lesser charge of second-degree murder and agreed to testify against appellant in exchange for a reduced sentence.

Before appellant's jury trial, the state moved to disqualify his first attorney, Eric Newmark, based on a conflict of interest because Newmark had previously represented several of the state's witnesses in relation to R.A.'s murder. Appellant waived his right to a conflict-free lawyer, but the district court granted the motion to disqualify. Appellant's second attorney withdrew from the case for reasons related to the dissolution

of his law firm. Appellant then hired attorney Barry Voss, who had represented L.P. as a defendant in a case related to R.A.'s murder. The state moved to disqualify Voss, arguing that he had a conflict of interest based on that representation, but appellant agreed to waive his right to a conflict-free attorney. L.P. stated that he did not object to Voss representing appellant as long as Voss retained an independent attorney to cross-examine him at appellant's trial. The district court denied the motion to disqualify.

At appellant's jury trial, several witnesses, including L.P., identified appellant as the passenger in the white car who fired the shots that killed R.A. The defense's theory of the case was that the state could not prove beyond a reasonable doubt that appellant was the person who shot R.A. The district court sua sponte instructed the jury on lesser-included offenses: with respect to R.A.'s death, second-degree intentional murder and second-degree unintentional murder while committing a drive-by shooting; and with respect to R.A.'s surviving passenger, attempted second-degree intentional murder and drive-by shooting. The jury found appellant guilty of second-degree unintentional murder during a drive-by shooting relating to R.A.'s death, in violation of Minn. Stat. § 609.19, subd. 1(2) (2002), and drive-by shooting relating to R.A.'s passenger, in violation of Minn. Stat. § 609.66, subd. 1e(b) (2002).

At sentencing, appellant's attorney objected to the district court's decision to give lesser-included-offense instructions. The district court stated,

> [O]n the issue of the lesser includeds, in my judgment, it was in the public interest to have this jury decide whether or not Mr. Patterson was involved with this crime. . . . I think we needed to have a trial that told us whether or not the state proved that [he] was involved in this crime and their theory

> [was that] he was the shooter. Once that decision gets made, then the jury is in the position to tell us whether or not the state proved beyond a reasonable doubt that it was premeditated or intentional or not. . . . I just don't think it was in the public interest and fair to do this roll the dice that if it's not premeditated or not intentional killing, then you walk, even though it's clearly a drive-by shooting where somebody died. So that's why I gave the lesser.

The district court sentenced appellant to concurrent sentences of 48 months for the drive-by shooting and 326 months for the second-degree unintentional murder.

On direct appeal, this court affirmed appellant's convictions, holding that the district court did not abuse its discretion by disqualifying Newmark, and the disqualification did not violate appellant's right to his counsel of choice. *State v. Patterson*, 796 N.W.2d 516, 527 (Minn. App. 2011), *aff'd*, 812 N.W.2d 106 (Minn. 2012). This court also rejected appellant's claim that he was deprived of conflict-free counsel by Voss's representation, concluding that appellant had validly waived his right to conflict-free counsel. *Id*. at 530. On review, the supreme court, addressing only Newmark's disqualification, concluded that the district court did not abuse its discretion by disqualifying Newmark because he had a serious potential conflict of interest arising from previous representation of one of the state's prospective witnesses. *State v. Patterson*, 812 N.W.2d 106, 111 (Minn. 2012).

Nine days after the supreme court affirmed his convictions, appellant's appellate public defender wrote to appellant, advising him that, because his case was not inconsistent with United States Supreme Court caselaw and did not present an issue on

which lower courts were divided, no basis existed for seeking United States Supreme Court review.

In September 2012, appellant filed a pro se postconviction petition, alleging that the district court's instruction on lesser-included offenses and related sentencing comments displayed judicial bias. He also alleged that he received ineffective assistance of trial counsel because his second attorney waived an omnibus hearing without his permission and because Voss: (1) failed to obtain a valid waiver of his right to conflict-free counsel; (2) failed to investigate possible exculpatory evidence of jail calls between L.P and a potential witness; and (3) changed trial strategies while discussing proposed jury instructions without his permission by inferring that he may be an accomplice. He also alleged that appellate counsel provided deficient representation by failing to raise the issue of ineffective assistance of trial counsel on direct appeal and failing to seek certiorari review before the United States Supreme Court.

The district court denied appellant's claims for postconviction relief without an evidentiary hearing. The district court concluded that its decision to submit an instruction on lesser-included offenses did not reflect judicial bias and was legally warranted because the jury could rationally acquit appellant on the charged offenses but find him guilty on lesser offenses. The district court also concluded that appellant's claims of ineffective assistance of trial counsel were barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737, and that, in any event, they lacked merit and therefore could not form the basis for a claim of ineffective assistance of appellate counsel. The district court also

noted that appellate counsel had no obligation to seek United States Supreme Court review. This appeal follows.

D E C I S I O N

A person who is convicted of a crime and who claims that the conviction violated his or her rights may file a petition for postconviction relief with the district court. Minn. Stat. § 590.01, subd. 1(1) (2012). Denial of a petition without a hearing 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). This court reviews a district court's summary denial of a postconviction petition for abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). "A postconviction 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*, 819 N.W.2d 162, 167 (Minn. 2012) (quotation omitted).

Once a direct appeal has been taken from a conviction, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. Appellant's claims of judicial bias and ineffective assistance of trial counsel were known to him at the time of his direct appeal. His argument that Voss provided defective representation because he did not procure a valid waiver of appellant's right to conflict-free counsel was considered and rejected by this court on direct appeal. *State v. Patterson*, 796 N.W.2d at 527–30. And these claims do not fall within the *Knaffla* exceptions of claims so novel that their legal bases were unavailable at the time of direct appeal or claims required to be

addressed in the interest of fairness. *See Ashby v. State*, 752 N.W.2d 76, 78–79 (Minn. 2008) (stating *Knaffla* rule and exceptions). Therefore, the district court did not err in concluding that they were barred under the rule in *Knaffla*.

Even if we were to consider the merits of these claims, we would reject them. Appellant's claim of judicial bias resulting from the submission of lesser-included offenses to the jury disregards the legal standard for submitting such instructions. *See State v. Dahlin*, 695 N.W.2d 588, 595 (Minn. 2005) (stating that the evidence warrants a lesser-included-offense instruction when the lesser offense is included in the charged offense and the evidence provides a rational basis for acquitting the defendant of the charged offense and a rational basis for convicting the defendant of the lesser-included offense). Here, the district court did not abuse its discretion by giving instructions on lesser-included offenses because, based on the evidence, the jury could have concluded that the state proved beyond a reasonable doubt that appellant caused R.A.'s death and attempted to cause the death of R.A.'s passenger or recklessly fired toward an occupied motor vehicle, but that the state failed to prove premeditation beyond a reasonable doubt. *See id.*; *see also Bellcourt v. State*, 390 N.W.2d 269, 273 (Minn. 1986) (stating that the decision of what, if any, lesser offense to submit to the jury rests within district court discretion). And the district court's comments at sentencing, which simply explain the judge's reasons for submitting lesser-included offenses, do not "display a deep-seated favoritism or antagonism that would make fair judgment impossible," which is required for a successful bias or partiality motion based on the judge's opinions formed on facts

introduced or events that occurred during the proceedings. *State v. Adell*, 755 N.W.2d 767, 775 (Minn. App. 2008) (quotation omitted).

Appellant's claims of ineffective assistance of trial counsel also lack merit. To prevail on an ineffective-assistance claim, appellant must show both that 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)). This court may dispose of an ineffective-assistance claim if one of these prongs is determinative. *Schleicher v. State*, 718 N.W.2d 440, 447 (Minn. 2006).

Appellant alleges that Voss was ineffective because he failed to investigate jail calls made between L.P. and another person. But "the extent of counsel's investigation is considered a part of trial strategy," which is not generally reviewed by an appellate court. *Opsahl v. State*, 677 N.W.2d 414, 421 (Minn. 2004). Further, appellant's allegations, without more, fail to establish the prejudice prong of *Strickland*: it is "not proper under *Strickland* to base a reversal on speculation that an investigation *might* have found someone who would have helped defendant's case." *Gates*, 398 N.W.2d at 563.[1] Appellant also argues that Voss improperly conceded guilt without his client's consent by

[1] Appellant also appears to argue that Voss provided ineffective assistance because L.P. failed to waive conflicts in writing with respect to Voss's representation. But this argument is *Knaffla*-barred because, on direct appeal, this court noted that appellant failed to explain how an invalid waiver from L.P. affected his own waiver and concluded that appellant validly waived his right to conflict-free counsel. *Patterson*, 796 N.W.2d at 529–30.

requesting a jury instruction on accomplice testimony. But this request, made outside the jury's presence, merely reflected trial strategy of a possible defense theory and could not have influenced the jury to convict.

Appellant finally argues that appellate counsel was ineffective because she failed to raise his claim of ineffective assistance of trial counsel on direct appeal and failed to inform him of the timing requirements of filing for certiorari review before the United States Supreme Court. Appellant's claim of ineffective assistance of appellate counsel is not *Knaffla*-barred because "[h]e could not have known of ineffective assistance of his appellate counsel at the time of his direct appeal." *Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007). But "to prevail on [an] ineffective assistance of appellate counsel claim" premised on appellate counsel's failure to raise a claim of ineffective assistance of trial counsel, appellant "must first show that his trial counsel was ineffective." *Id.* Because appellant's claim of ineffective assistance of trial counsel lacks merit, his claim of ineffective assistance of appellate counsel based on that ground must also fail. *See id.*; *see also Dobbins v. State*, 788 N.W.2d 719, 730 (Minn. 2010) (concluding that appellate counsel was not ineffective for failing to raise ineffective-assistance-of-trial-counsel claims, stating that "counsel is not ineffective where counsel fails to raise meritless claims."). We also reject appellant's argument that appellate counsel provided ineffective assistance by failing to inform him of the 90-day deadline for filing a petition for certiorari review before the United States Supreme Court. His appellate attorney wrote to him several weeks before the deadline, informing him that she believed no basis existed for seeking certiorari review; therefore, he has failed to allege facts showing the

Strickland prejudice prong. *See, e.g.*, *United States v. Eisenhardt*, 10 F. Supp. 2d 521, 523 (D. Md. 1998) (rejecting similar claim on ground that no prejudice existed because based on existing law, certiorari petition would have been denied). The district court did not abuse its discretion by summarily denying appellant's request for postconviction relief.

Affirmed.