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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1022**

Ismael Hernandez, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 2, 2018
Affirmed
Ross, Judge**

Polk County District Court
File No. 60-CR-12-1195

Ismael Hernandez, Faribault, Minnesota (pro se appellant)

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

A jury found Ismael Hernandez guilty of first-degree criminal sexual conduct for sodomizing a heavily intoxicated woman, and we affirmed his conviction on direct appeal over his argument that the district court abused its discretion by failing to appoint him

substitute counsel. Hernandez petitioned for postconviction relief, asserting that he received ineffective assistance of trial counsel and that the prosecutor presented perjured testimony and withheld exculpatory evidence. The district court denied his petition entirely after it held an evidentiary hearing to explore Hernandez's withholding-evidence allegation. We hold that Hernandez's ineffective-assistance-of-counsel and perjury claims are procedurally barred because he failed to raise them on direct appeal. And the evidence supports the district court's finding that the prosecutor did not withhold exculpatory evidence. We therefore affirm.

FACTS

Ismael Hernandez and Jose Soto met M.F. at a Grand Forks party in May 2012 and took her to a friend's apartment. The pair stripped M.F. naked and forced her onto a bed. Soto held M.F. down while Hernandez anally raped her. Then Hernandez left the room because Soto told him that M.F. "was [Soto's] for the rest of the night." *State v. Soto*, 855 N.W.2d 303, 306 (Minn. 2014). Soto continued to rape M.F. repeatedly. *Id.*

Before his trial for first-degree criminal sexual conduct, Hernandez told the district court that he was not satisfied with his public defender and wanted a different one. *State v. Hernandez*, No. A13-1181, 2014 WL 1660701, at *1 (Minn. App. Apr. 28, 2014), *review denied* (Minn. July 15, 2014). The district court refused to appoint substitute counsel and explained that discharging his attorney would mean that Hernandez would need to hire a private attorney, represent himself, or take his chances on standby counsel being available. *Id.* Hernandez stuck with his attorney. A jury found him guilty, and the district court sentenced him to 144 months in prison.

Hernandez argued on direct appeal that the district court erred by telling him that he would have to choose between hiring a private attorney and representing himself because the district court had not first addressed whether Hernandez was entitled to substitute counsel. *Id.* at *2. We rejected the argument. *Id.* at *2–3.

Hernandez petitioned the district court in 2017 for postconviction relief. His petition asserts that he received ineffective assistance of counsel because his attorney failed to call Soto as a trial witness and failed to adequately investigate the case, that the prosecutor committed a *Brady* violation by failing to disclose evidence of Soto’s interview with police during which Soto removed his clothes to show police that he had no scratches or bruises arising from any combat with the victim, and that the victim lied at his trial. The district court conducted an evidentiary hearing only on Hernandez’s claim that the prosecutor failed to disclose Soto’s alleged disrobing during a police interview. The interviewing officer’s hearing testimony and the video recording of the interview established that Soto never removed any clothing during the interview. And the district court also found that the prosecutor had in fact provided Hernandez with the recording.

The district court denied Hernandez’s postconviction petition. Hernandez appeals.

D E C I S I O N

We review the denial of Hernandez’s postconviction petition for an abuse of discretion. *Zornes v. State*, 880 N.W.2d 363, 368 (Minn. 2016). We review legal issues de novo and factual findings for clear error. *Id.* A postconviction court abuses its discretion when its decision rests on an erroneous application of law or is against logic and the facts

in the record. *Bobo v. State*, 860 N.W.2d 681, 684 (Minn. 2015). For the reasons that follow, we see no error of law and no abuse of discretion.

Hernandez argues that he received ineffective assistance of counsel because his trial attorney did not pursue material evidence, failed to call Soto as a witness at trial, and failed to obtain statements from the victim and Soto before trial. All issues that are raised in a direct appeal, as well as all issues that are known to the defendant but not raised, are forfeited in a later petition for postconviction relief. *Robinson v. State*, 567 N.W.2d 491, 494 (Minn. 1997). The district court rejected Hernandez's postconviction claim that his trial attorney was ineffective because Hernandez failed to raise the claim on direct appeal. Although Hernandez's direct appeal did not include a claim of ineffective assistance of trial counsel, neither Hernandez's petition nor his supporting arguments assert any alleged ineffectiveness that would have been unknown to him before he directly appealed. The district court needed no evidentiary hearing to address and reject Hernandez's postconviction claim of ineffective assistance.

Hernandez does not convincingly establish that the victim lied. A witness's false testimony may, in some cases, warrant a new trial. The district court may order a new trial because of false or perjured testimony if the court concludes that the false testimony came from a material witness; that the jury might have reached a different conclusion without the testimony; and that the party seeking the new trial was surprised by the false testimony and was either unable to challenge the testimony during trial or unaware of its falsity until after the trial. *State v. Caldwell*, 322 N.W.2d 574, 584–85 (Minn. 1982).

The state maintains that Hernandez should have known of the supposedly false testimony before his direct appeal and that he is therefore procedurally barred from challenging his conviction based on it. When a defendant “either knew or should have known of the purported perjured testimony at the time of trial” but “fail[s] to raise [a challenge based on] it on direct appeal, he is precluded from raising it” in a postconviction petition. *Hanley v. State*, 534 N.W.2d 277, 279 (Minn. 1995). Hernandez does not respond to the state’s contention that his perjured-testimony claim is procedurally barred on this ground. Because Hernandez knew or should have known of the allegedly perjured testimony at the time of his direct appeal, he may not now challenge his conviction based on it.

We add that the evidence offered by Hernandez to support the claim of perjured testimony lacked sufficient credibility to justify an evidentiary hearing. Allegations in a postconviction petition must have factual support that carries sufficient indicia of trustworthiness to justify an evidentiary hearing. *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014). Evidentiary hearings about allegedly perjured testimony are not generally held without the sworn affidavit of a recanting witness or a third party. *See, e.g., Caldwell*, 853 N.W.2d at 771; *Dobbins v. State*, 788 N.W.2d 719, 732–34 (Minn. 2010); *Opsahl v. State*, 677 N.W.2d 414, 419, 424 (Minn. 2004); *Ferguson v. State*, 645 N.W.2d 437, 446 (Minn. 2002). Hernandez did not submit an affidavit from anyone. He submitted only a handwritten letter from Soto in which Soto says he heard from others that they had heard the victim admit to lying. The unsworn letter from Soto—Hernandez’s fellow rapist who apparently falsely told Hernandez that he had removed clothes during his police

interview—is hearsay about hearsay about hearsay that purports to challenge the testimony of a victim repeatedly sexually assaulted by both Hernandez and Soto. It is difficult to imagine a less reliable source. Since post-trial recantations raise suspicions even when they are embodied in sworn affidavits and testimony, *State v. Ferguson*, 742 N.W.2d 651, 659–60 (Minn. 2007), we are satisfied that the district court rightly chose not to administer an evidentiary hearing based on Hernandez’s offering of Soto’s letter.

For related reasons we reject Hernandez’s contention that the state withheld evidence that the interviewing officer examined Soto and saw that he had no marks or bruises on his body consistent with the victim’s account. A defendant may obtain a new trial by establishing that evidence favorable to the defendant was suppressed by the state and that the suppression of this evidence prejudiced the defendant. *Strickler v. Greene*, 527 U.S. 263, 281–82, 119 S. Ct. 1936, 1948 (1999). No *Brady* violation occurs if the disputed evidence was in fact disclosed, *see Strickler*, 527 U.S. at 282, 119 S. Ct. at 1948–49, so we carefully review the record to determine whether the evidence was turned over to Hernandez before trial. *See State v. Whitson*, 876 N.W.2d 297, 307 (Minn. 2016). It was.

The district court found that the disputed evidence was neither exculpatory nor suppressed. The finding is irrefutable. The prosecutor timely disclosed the officer’s interview with Soto both by describing it in a letter and by providing a copy of the video recording. And both the recording and the officer’s testimony establish that Soto’s alleged disrobing event never actually happened. The record supports the district court’s conclusion that the disputed evidence was neither suppressed nor exculpatory.

Affirmed.