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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1098**

Peter Louis John, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 5, 2018
Affirmed
Hooten, Judge**

Ramsey County District Court
File No. 62-CR-14-1708

Peter Louis John, Moose Lake, Minnesota (pro se appellant)

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

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Smith, T., Presiding Judge; Larkin, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

Appellant challenges the postconviction court's denial of his petition for postconviction relief, arguing that the *Knaffla* rule does not bar his claims. We affirm.

FACTS

A jury found appellant Peter Louis John guilty of aiding and abetting second-degree murder and the district court sentenced him to 198 months in prison. We affirmed John's conviction in 2016, and the Minnesota Supreme Court denied his petition for further review. *State v. John*, No. A15-0303, 2016 WL 1288370 (Minn. App. Apr. 4, 2016), *review denied* (Minn. June 21, 2016). A complete discussion of the underlying facts can be found in our opinion deciding John's direct appeal. *Id.* In February 2017, John filed his first petition for postconviction relief, raising four claims: (1) the district court erred by allowing several witnesses to testify while they were intoxicated; (2) the evidence at trial was insufficient beyond a reasonable doubt to prove every element of the charged offense; (3) the prosecutor's closing argument improperly and prejudicially referred to the prosecutor's personal opinion of John's guilt; and (4) his trial counsel provided ineffective assistance. The postconviction court initially denied John's motion for failure to file proof of service on the attorney general and county attorney. After correcting the service error, John filed a motion for reinstatement of his petition.

While not specifically ruling on John's motion to reinstate, the postconviction court denied John's petition on the ground that all claims were procedurally barred by *Knaffla*. John appealed. He also filed a motion requesting appointment of counsel for his appeal, which we denied because he was provided an appellate public defender for his direct appeal.

DECISION

John contends that the postconviction court abused its discretion by denying his postconviction petition. “All grounds for relief must be stated in the petition or any amendment thereof.” Minn. Stat. § 590.02, subd. 1(1) (2016). Appellate courts “review the denial of a petition for postconviction relief for an abuse of discretion.” *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). “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). Factual “findings are reviewed to determine whether there is sufficient evidentiary support in the record.” *Scherf v. State*, 788 N.W.2d 504, 507 (Minn. 2010). Postconviction courts may “deny a petition without holding a hearing if the petition, files, and records conclusively show that the petitioner is not entitled to relief.” *Hooper v. State*, 888 N.W.2d 138, 141 (Minn. 2016). Accordingly, a postconviction court may deny untimely claims or claims that are procedurally barred by the *Knaffla* rule. *Colbert v. State*, 870 N.W.2d 616, 622 (Minn. 2015).

The *Knaffla* rule is “that where 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.” *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). There are two exceptions to the *Knaffla* bar: (1) the claim “is so novel that the legal basis for it was unavailable on direct appeal”; or (2) “fairness requires review and the petitioner did not deliberately and inexcusably fail to raise the claim on direct appeal.” *McKenzie v. State*, 754 N.W.2d 366, 369 (Minn. 2008) (quotation omitted).

John's Postconviction Petition

John knew or should have known about all of the claims raised in his postconviction petition at the time of his direct appeal.

In his petition, John first alleges that two of the state's witnesses, M.H. and R.B., were incompetent to testify because they were intoxicated while testifying. *See* Minn. Stat. § 595.02, subd. 1(f) (2016) ("Persons of unsound mind and persons intoxicated at the time of their production for examination are not competent witnesses if they lack capacity to remember or to relate truthfully facts respecting which they are examined."). John argues that the witnesses were "drunk to the point that they could not stand up in court, or even talk the right way so the jury can hear them." John was present in court for the testimony of both witnesses, and both were questioned on their possible intoxication during trial. John knew or should have known of their possible intoxication at the time of his direct appeal.¹

Next, John claims that the evidence was insufficient to find him guilty beyond a reasonable doubt. John brought a motion at trial for a judgment of acquittal based on lack of credible evidence, which was denied. All of the evidence used to convict John was known to John before his direct appeal, and he knew or should have known about this claim

¹ M.H. testified he had "a couple of shots" of hard alcohol "[v]ery early that morning," around 4:30 or 5:00, and then "went back to sleep." R.B., during examination by the court regarding the waiver of his Fifth Amendment right against self-incrimination, testified that he was "not under the influence of any drugs or alcohol or anything else."

at that time.² See *Azure v. State*, 700 N.W.2d 443, 448 (Minn. 2005) (holding that postconviction court did not abuse its discretion in determining appellant’s sufficiency of evidence claim was procedurally barred because it was not raised in appellant’s direct appeal).

John further alleges that the prosecutor’s closing argument was improper and prejudicial because the prosecutor made references to his personal opinion of John’s guilt. But John was present for the prosecutor’s closing argument and knew or should have known of this claim at the time of his direct appeal. See *id.* (stating that appellant knew “what the state had asserted in its closing argument” and holding that postconviction court did not abuse its discretion in determining that appellant’s claim of prosecutorial misconduct during closing was procedurally barred because it was not raised in appellant’s direct appeal).

Finally, John claims that his trial counsel failed to provide effective representation. “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 if the claim cannot be resolved based on the trial record alone and additional evidence is required to decide the claim, the *Knaffla* bar does not apply and the claim may be brought in a postconviction proceeding. *Id.* at 535–36; *Torres v. State*, 688 N.W.2d 569, 572 (Minn.

² As part of John’s direct appeal—during a discussion of the admissibility of statements John made while in a squad car at the scene, and that any error was harmless—we commented that “the evidence strongly supported a guilty verdict.” *John*, No. A15-0303, 2016 WL 1288370, at *4.

2004). This is part of the second *Knaffla* exception, permitting review on the merits for the sake of fairness. *Torres*, 688 N.W.2d at 572.

All five of the ineffective assistance of trial counsel claims John raised in his petition could be evaluated on the basis of the trial record alone and are *Knaffla* barred. In his petition, John claims ineffective assistance of counsel for: (a) failure to object to bias and prejudice during trial; (b) failure to file a motion for lack of evidence; (c) failure to conduct a meaningful investigation; (d) failure to call witnesses on behalf of John; and (e) the combined effect of the claimed errors. John knew or should have known about these claims at the time of his direct appeal, and it was inexcusable to fail to raise them at that time. See *McKenzie*, 754 N.W.2d at 369–70 (holding that *Knaffla* barred claim of ineffective assistance of counsel based on “failure to object to testimony, the racial remarks during closing arguments, the witness statement [appellant] wished to rebut, and the evidence presented by the defense”); *Vance v. State*, 752 N.W.2d 509, 514 (Minn. 2008) (holding allegations that appellant’s “trial counsel failed to conduct an investigation, talk to any witnesses, and call any witnesses to testify are” *Knaffla* barred); cf. *Wright v. State*, 765 N.W.2d 85, 90 (Minn. 2009) (holding appellant’s insufficiency of evidence claim *Knaffla* barred); *Sessions v. State*, 666 N.W.2d 718, 722 (Minn. 2003) (holding that appellant’s two individual claims were barred, and declining to consider his claim on cumulative effect of errors).

In his briefing before this court, John also raises an ineffective assistance claim based upon the failure of appellate counsel in his direct appeal to provide him with the trial transcript in a timely manner and the failure of both his trial counsel and appellate counsel

to raise federal law issues. John also alleges that his trial counsel failed to adequately explain the charges to him so that he could understand the options available to him. John claims that because of these failures of counsel, he was denied due process and a fair trial. However, all of these claims are forfeited because they were not raised in John's petition for postconviction relief and "[a]ll grounds for relief must be stated in the petition or any amendment thereof." Minn. Stat. § 590.02, subd. 1(1) (2016); *see also Azure*, 700 N.W.2d at 447 ("Because [appellant] did not raise the claim in his postconviction petition and the postconviction court made no findings on the issue, we have no postconviction ruling to review. Accordingly, we hold that [appellant's] ineffective assistance of appellate counsel claim has been waived for the purposes of this postconviction appeal.").³

The postconviction court's order also held that John's claims of prejudicial jury instructions and ineffective assistance of trial counsel for violating attorney-client privilege were *Knaffla* barred. These claims were raised in John's brief before the postconviction court, but neither is alleged in John's postconviction petition and neither is advocated for in John's briefing before this court, and both are therefore forfeited for not being raised in the petition and waived for not being argued before this court.⁴ *See Azure*, 700 N.W.2d at 447.

³ *Azure* refers to this argument as waiver instead of forfeiture, but the Minnesota Supreme Court recently clarified that a right is forfeited when not timely asserted, and waived when voluntarily given up. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015).

⁴ John also argues that the state's brief was untimely, but we granted the state an extension of time to file its brief and the state e-filed the brief by the new deadline.

Exceptions and Challenges to *Knaffla*

John argues that both *Knaffla* exceptions apply to his claims; that *Knaffla* is unconstitutional because it does not allow his case to be heard on the merits and because he would have to be an attorney to know of the legal errors; that the state would not be prejudiced by having to re-prosecute its case against him; and that he is actually innocent.

The first *Knaffla* exception does not apply because none of John's claims present novel legal issues. John does not explain which of his claims are novel, or why they are novel, and the most recent case John cites in his briefs was decided four months before his brief was filed in his direct appeal. Because John's claims are not novel and all of them were available at the time of his direct appeal, the first *Knaffla* exception does not apply.

The second *Knaffla* exception also does not apply. Fairness does not require review of any of John's claims because he fails to present "a colorable explanation of why he failed to raise these claims previously." See *Perry v. State*, 731 N.W.2d 143, 147 (Minn. 2007). John argues that his appellate counsel failed to provide him with the trial transcript in time to allow John to file a supplemental brief in his direct appeal, and that he would have raised the issues raised in his postconviction petition in his supplemental brief if he had timely received the transcript.

A defendant has the right to file a supplemental brief to raise appellate issues on his own. See Minn. R. Crim. P. 28.02, subd. 5(13); see also *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985) (discussing value and purpose of pro se brief in ensuring all issues are raised in direct appeal). The Minnesota Rules of Criminal Procedure give a defendant the

right to access the trial transcript. Minn. R. Crim. P. 28.02, subd. 5(17)–(18). The rule states:

(17) . . . A defendant, whether or not choosing to proceed pro se, may also file with the court a supplemental brief. The supplemental brief must be filed within 30 days after the State Public Defender’s office files its initial brief.

(18) If a defendant requests a copy of the transcript, the State Public Defender’s office must confer with the defendant concerning the need for the transcript. If the defendant still requests a copy of it, one must be provided to the defendant temporarily.

Id. John admits that he did receive the transcript, but argues that he did not receive it until after we had decided his direct appeal.

Even if true, there is no violation of the rules because they do not specifically require that a defendant is to receive the transcript prior to filing a supplemental brief nor do they provide for an automatic extension of the time for the filing of a supplemental brief in the event a defendant has not been provided with a transcript. Rather, all that is required by the rules is that a defendant must be provided with a transcript if he again requests a copy after conferring with the public defender’s office.

If John did not receive the transcript in time to file his supplemental brief, his remedy was to make our court aware of this fact and ask for an extension of time to file a supplemental brief. See Minn. R. Civ. App. P. 126.02. John argues that because he is not an attorney and does not understand the law, he did not know of this option. But “[t]he rules of procedure apply the same to all litigants whether represented by counsel or not,” and a “pro se defendant will be held to the standard of an attorney in presenting his appeal.”

State v. Seifert, 423 N.W.2d 368, 372 (Minn. 1988). Because Minn. R. Crim. P. 28.02 does not grant John the option to bring unraised claims in a postconviction motion, and John took no action to make this court aware that he needed more time to file a supplemental brief in his direct appeal, fairness does not require review of John's claims.

Next, John asserts that *Knaffla* is unconstitutional because it does not allow his claims to be heard on the merits, and because it unreasonably requires him to have legal knowledge to recognize legal errors in order to have raised them in his direct appeal. "An assignment of error in a brief based on 'mere assertion' and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection." *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff'd*, 728 N.W.2d 243 (Minn. 2007). John provides no argument or authority to support his argument that *Knaffla*, by preventing his claims from being heard on the merits, is unconstitutional. Because John had the ability to bring these claims in his direct appeal, any unconstitutionality of barring him from bringing the claims now is not "obvious on mere inspection." *See id.*; *cf. Sawyer v. Whitley*, 505 U.S. 333, 338, 112 S. Ct. 2514, 2518 (1992) ("Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of . . . procedurally defaulted claims in which the petitioner failed to follow applicable state procedural rules in raising the claims." (citations omitted)).

And, John cites no relevant authority for his argument that *Knaffla* unconstitutionally requires him to have the legal knowledge to recognize legal errors in order to have raised them in his direct appeal. He relies on cases addressing civil pleading standards for prisoners in pro se civil rights actions, but cites to no authority which supports

the unconstitutionality of requiring him to raise claims he knew or should have known about in his direct appeal. Moreover, John was provided with counsel for his direct appeal, and was therefore not required to recognize all legal errors on his own.⁵

As for John's argument that the state will not be prejudiced by having to re-prosecute him, he cites no authority and fails to explain why a lack of prejudice to the state is an exception to the *Knaffla* bar. John's claim that he is actually innocent is one of the requirements to meet the newly discovered evidence exception for time-barred claims. See Minn. Stat. § 590.01, subd. 4 (2016); *Roberts v. State*, 856 N.W.2d 287, 292 (Minn. App. 2014), *review denied* (Minn. Jan. 28, 2015). However, John does not claim to have discovered new evidence and this argument is without merit.

Because all of the claims John raised in his postconviction petition are *Knaffla* barred, the postconviction court did not abuse its discretion in denying John's petition without holding a hearing.

Affirmed.

⁵ John argues that he should have counsel for this appeal as well, but we have already considered his motion for appointment of counsel and denied it.