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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1170**

Jermaine Sylvester Watkins, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 2, 2018
Affirmed
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-CR-13-16209

Mark J. Miller, Mark J. Miller, P.A., Minneapolis, Minnesota; and Daniel S. Adkins, North Star Criminal Defense, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Bjorkman, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

In this appeal from the denial of postconviction relief, appellant argues that newly discovered evidence and ineffective assistance of counsel by his trial and former appellate

attorneys entitle him to a new trial. Because the postconviction court did not abuse its discretion in denying relief without an evidentiary hearing, we affirm.

FACTS

This case stems from an aggravated robbery and kidnapping that occurred on May 1, 2013. The victim eventually escaped his captors and identified appellant Jermaine Sylvester Watkins as one of the two assailants. Watkins was charged with two counts of felony aiding and abetting first-degree aggravated robbery and one count of felony aiding and abetting kidnapping. At trial in the summer of 2014, the victim testified that he could not remember most of what had happened on May 1 and could no longer identify Watkins as one of his assailants. The jury found Watkins guilty of all three counts.

With new appellate counsel, Watkins directly appealed his convictions to this court in October 2014, arguing that the district court erred in admitting the victim's out-of-court statements as substantive evidence and that he was entitled to a new trial because the state had known of the victim's memory loss weeks before trial but failed to disclose that information. *State v. Watkins*, No. A14-1772, 2016 WL 1174825, at *2, *5 (Minn. App. Mar. 28, 2016). While his appeal was pending, Watkins filed a petition for postconviction relief, asserting that his trial counsel had failed to convey a settlement offer to him before his trial began. This court stayed the direct appeal to permit resolution of the postconviction petition. In July 2015, the postconviction court denied Watkins's petition, noting that he had failed to request specific relief or allege facts entitling him to any sort of relief. Watkins's appeal was then reinstated. Watkins did not add the denial of his

petition for postconviction relief to his appeal. In March 2016, this court affirmed his convictions. *See id.*

In February 2017, Watkins, with the assistance of yet another set of lawyers, filed the petition for postconviction relief at issue here. He asserted four grounds for relief, which he identified by Roman numerals I through IV:

- I. Watkins's co-defendant's guilty plea was newly discovered evidence showing that the co-defendant was solely responsible for the crime;
- II. The state concealed knowledge of the victim's amnesia, which led to an unfair trial;
- III. A settlement offer was not communicated to Watkins until after the trial had started; and
- IV. Watkins's trial and appellate counsel had both been ineffective.

In support of his petition, Watkins submitted an affidavit stating that he was unaware of the victim's memory issues and the state's settlement offer prior to trial and that he would have proceeded differently had he known of them.

In mid-June, after the state filed its response to Watkins's petition, his counsel sent the postconviction court a letter stating that, in the interest of "streamlining the issues," it was Watkins's position that two issues remained unresolved: the discovery of new evidence in the form of his co-defendant's plea, and whether a plea offer was effectively communicated to him.

Two weeks later, the postconviction court filed its order denying an evidentiary hearing and denying Watkins's petition for postconviction relief. The postconviction court

explained that it understood the letter from Watkins’s counsel to be narrowing the issues to only the discovery of new evidence regarding his co-defendant’s guilty plea (issue I in the petition) and whether the settlement offer was timely communicated (issue III), and to be waiving Watkins’s other two arguments (issues II and IV). Analyzing the newly-discovered-evidence claim, the postconviction court concluded that Watkins had failed to meet his burden of establishing his claim. As to the failure-to-communicate-settlement-offer claim, the court concluded that this issue should have been raised in Watkins’s direct appeal and thus was procedurally barred.

Watkins appeals.

D E C I S I O N

We review the denial of a postconviction petition, including the denial of relief without an evidentiary hearing, for an abuse of discretion. *See State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). We review legal issues de novo and factual issues by considering whether there is sufficient evidence to support the postconviction court’s findings. *See Vance v. State*, 752 N.W.2d 509, 512 (Minn. 2008). We resolve all doubts about whether an evidentiary hearing is necessary in favor of the petitioner. *See Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012).

“The postconviction court may summarily 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). A hearing is not required “[w]hen a petitioner alleges facts that, even if true, are legally insufficient to entitle him to the requested relief.” *Hughes v. State*, 851 N.W.2d 49, 52 (Minn. 2014). For instance, no

hearing is required if the petition is procedurally barred. *Colbert v. State*, 870 N.W.2d 616, 622 (Minn. 2015). Once a direct appeal has been taken, “all matters raised therein, and all claims known but not raised,” are procedurally barred and will not be considered on a subsequent petition for postconviction relief. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976).

I. Watkins failed to assert a sufficient claim for relief based on newly discovered evidence.

Watkins argues he is entitled to a new trial due to “recently discovered evidence indicating that the State adopted two conflicting theories in conjunction with prosecuting the case against [Watkins as] . . . a participant in a group of perpetrators, but then adopting the theory that a single person, [Watkins’s co-defendant], perpetrated the charged offense without any assistance.” The postconviction court rejected Watkins’s newly-discovered-evidence claim on the merits.

To obtain an evidentiary hearing on a timely postconviction claim of newly discovered evidence, a petitioner must “allege facts that, if proven by a fair preponderance of the evidence, would satisfy the four-prong test set forth in *Rainer v. State*, 566 N.W.2d 692 (Minn. 1997).” *Bobo*, 820 N.W.2d at 517. Under *Rainer*, a petitioner is entitled to a new trial if the petitioner establishes:

- (1) the evidence was not known to the petitioner or counsel at the time of trial; (2) the failure to learn of the evidence before trial was not due to a lack of diligence; (3) the evidence is material, not merely impeaching, cumulative, or doubtful; and (4) the evidence would probably produce either an acquittal or a more favorable result.

Roby v. State, 808 N.W.2d 20, 26 n.5 (Minn. 2011) (citing *Rainer*, 566 N.W.2d at 695). A petitioner bears the burden of establishing each of the four *Rainer* prongs in order to be entitled to relief. *Miles v. State*, 840 N.W.2d 195, 201 (Minn. 2013).

At the outset, we observe that, although the postconviction court thoroughly analyzed each *Rainer* prong in its order denying postconviction relief, Watkins does not mention the *Rainer* test in the argument section of his brief or argue any alleged errors in the court's analysis. Watkins has thus arguably waived the newly-discovered-evidence claim altogether by not adequately briefing it. See *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997) (issues not briefed are not properly before the appellate court), *review denied* (Minn. Aug. 5, 1997).

Yet, even on the merits, Watkins fails to allege facts that, even if true, would satisfy *Rainer*. On the basis of the fourth prong alone—that the evidence would probably produce an acquittal or a more favorable result—Watkins's assertions are insufficient. He identifies as newly discovered evidence the fact that his co-defendant pleaded guilty in connection with the crime for which Watkins was charged. He argues that the co-defendant, by pleading guilty, acknowledged that he was (in Watkins's words) the “sole perpetrator” of the crime and asserts that the state employed two “conflicting theories” in prosecuting Watkins and his co-defendant. But Watkins's co-defendant pleaded guilty to aiding and abetting aggravated robbery. As the postconviction court observed, “[B]y definition, aiding and abetting requires at least one other person's involvement in the commission of the crime.” The co-defendant's plea thus did not establish the co-defendant's sole responsibility for the crime, and the state did not pursue two conflicting theories in

prosecuting both Watkins and his co-defendant for aiding-and-abetting crimes. Moreover, it is doubtful that the new information would probably produce a more favorable result, given, as described by the postconviction court, the “copious amount of evidence connecting [Watkins] to this crime.” This evidence included a previous lineup identification of Watkins by the victim and co-defendant as well as DNA evidence recovered from the crime scene. Even without reviewing the other *Rainer* prongs, we conclude the postconviction court did not abuse its discretion in denying Watkins’s petition on the basis of newly discovered evidence without an evidentiary hearing.

II. Watkins failed to assert a sufficient basis for relief on his ineffective-assistance-of-counsel claims.

Watkins argues that, “completely unbeknownst to him, an offer of settlement was made to his trial counsel which was not communicated to Appellant himself until after the trial had started.” Watkins asserts that this failure was “per se ineffective assistance of counsel.” Watkins also argued in his postconviction petition, as a separate issue, that his appellate and trial counsel were generally ineffective. The postconviction court concluded that the ineffective-assistance-of-counsel claims were waived by a letter from his counsel and that the plea-offer-communication claim was procedurally barred because it was “the sole issue cited in his first petition” and could have been brought when Watkins’s direct appeal was reinstated.

Because Watkins previously raised an ineffective-assistance-of-counsel claim regarding his trial attorney’s failure to communicate a plea offer in his initial postconviction petition, that claim is barred by *Knaffla*. See *Knaffla*, 309 Minn. at 252,

243 N.W.2d at 741. However, because it cannot be raised on direct appeal, an ineffective-assistance-of-appellate-counsel claim is not barred by *Knaffla*. See *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). We must necessarily consider, on a subsequent petition for postconviction relief, whether trial counsel was ineffective as part of our review of whether Watkins's appellate counsel was ineffective for not pursuing the plea-communication claim in the direct appeal. See *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) ("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.").

However, the postconviction court interpreted Watkins's June letter clarifying the postconviction issues as waiving any ineffective-assistance-of-appellate-counsel claims.

The letter stated:

Based on the State's response to our pending motion, and in the interest of streamlining the issues before the Court, it is Mr. Watkins's position that the remaining unresolved issues for the Court to consider in this matter would be: 1) the discovery of new evidence, specifically the factual basis provided in the co-defendant's plea; and 2) whether a plea offer was effectively conveyed, given the lack of any record and the purported timing of its communication.

There is no longer a dispute that an offer was made, one for substantially fewer months than the one imposed, and which would also have avoided the amended complaint and resulting consecutive time. However, we continue to assert that the offer was not known meaningfully by Mr. Watkins as the trial started, and that lack of knowledge is consequential. To that end, we continue to seek a hearing, however brief, to establish these claims more fully.

This letter identified two issues for resolution, which had been identified as issues I and III in the petition. Excluded from the letter were the two other issues Watkins raised in his petition: that the state concealed knowledge of the victim's amnesia (issue II) and that Watkins was deprived of effective trial and appellate counsel (issue IV). Considering that Watkins identified his ineffective-assistance-of-counsel claims separately from his plea-communication claim in his petition, and considering that the letter affirmatively stated that there were only two unresolved issues for the postconviction court to consider, we conclude that the postconviction court did not abuse its discretion in construing the letter as waiving those claims initially raised in the petition but *not* identified as remaining unresolved, including the ineffective-assistance-of-appellate-counsel claim.

However, even if the postconviction court had considered Watkins's ineffective-assistance-of-counsel claim regarding the plea communication on its merits, Watkins was still not entitled to relief. "To prove ineffective assistance of counsel, a defendant must show that (1) his attorney's performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different, but for counsel's errors." *State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017) (quotations omitted); *see also Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984). As to the first prong, while it likely would have been objectively unreasonable for Watkins's attorney to fail to disclose a plea offer altogether, Watkins admits in his affidavit that he did learn of the offer, albeit during the trial, and does not explain how he came to know this information; it is unclear whether his attorney did in fact communicate the offer. As to the second prong, Watkins's affidavit fails to sufficiently

assert prejudice; Watkins does not allege that he ever attempted to accept the offer after learning of it, nor does he suggest that the offer was unavailable to him at trial. Because Watkins's assertions in his affidavit, even if true, are insufficient to establish a *Strickland* violation, the postconviction court did not abuse its discretion in denying relief on this basis without an evidentiary hearing.¹

Affirmed.

¹ In his brief to this court, Watkins asserted another basis for reversal, arguing that the state improperly failed to disclose the victim's amnesia prior to trial. At oral argument, however, Watkins conceded that this claim is *Knaffla* barred. It is. In his direct appeal, Watkins argued that the prosecution's alleged failure to disclose the victim's memory loss prior to trial was prosecutorial misconduct that amounted to a *Brady* violation. *Watkins*, 2016 WL 1174825, at *5; see *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963) ("[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."). Watkins cannot raise the same claim again in a petition for postconviction relief. See *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.