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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1674**

Demetreus Anthony McGinnis, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 25, 2018
Affirmed
Peterson, Judge**

Stearns County District Court
File No. 73-CR-14-2166

Demetreus Anthony McGinnis, Faribault, Minnesota (pro se appellant)

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from the summary denial of his petition for postconviction relief, appellant argues that the district court erred in failing to order an evidentiary hearing on his various claims, including ineffective assistance of appellate counsel. We affirm.

FACTS

Following an incident in which M.G. was shot and killed at around noon on March 13, 2014, appellant Demetreus Anthony McGinnis gave a statement to police at 2:35 p.m. In the statement, McGinnis told police that he met with two guys in a car to sell them something. One of the guys got into McGinnis's car, handed McGinnis fake money, and then started to leave the car. When McGinnis grabbed the guy's arm, the guy turned around, hit McGinnis in the face, and started running. McGinnis chased him, and the guy pulled out a gun before hitting McGinnis some more. The two wrestled, and the second guy joined the fray; both guys were kicking and kneeing McGinnis. The gun went off twice, and after it went off the second time, one of the guys said "somethin' like oh, s--t." Then he grabbed the gun, which was lying on the ground, pointed it at McGinnis, and the gun just clicked. After that, the two guys drove away. During the police interview, McGinnis said, "I know that he got hit." When McGinnis told the officer who was taking his statement that he did not want to talk anymore, the officer stopped asking questions about the shooting incident.

McGinnis was indicted on six counts: (1) first-degree intentional murder, (2) second-degree intentional murder, (3) second-degree unintentional felony murder, (4) third-degree unintentional murder, (5) prohibited person in possession of a firearm, and (6) third-degree witness tampering. During a six-day jury trial, a redacted copy of the statement that McGinnis gave to police was entered into evidence. The parties stipulated to redactions of parts of the statement, including McGinnis's invocation of his right to

remain silent. Statements that McGinnis made before invoking his right to silence were included in the statement admitted into evidence.

The jury found McGinnis guilty of second-degree unintentional felony murder, third-degree murder, and witness tampering. The district court imposed a 210-month executed sentence for the second-degree-murder offense.

McGinnis filed a direct appeal, arguing that the jury's verdicts were inconsistent, the evidence was insufficient to support the third-degree-murder and witness-tampering convictions, the jury instructions were erroneous, the prosecutor committed misconduct, and he received ineffective assistance of trial counsel. This court affirmed. *State v. McGinnis*, No. A15-1043 (Minn. App. July 11, 2016), *review denied* (Minn. Sept. 28, 2016).

McGinnis filed a pro se petition for postconviction relief, arguing that the prosecutor engaged in prejudicial misconduct, the evidence was insufficient to support his convictions, the jury instructions were overbroad and vague, he was denied effective assistance of trial and appellate counsel, and he has newly discovered evidence. The petition included the following claims of ineffective assistance of appellate counsel, (1) "Because appellate counsel did not receive either discovery or exhibits from trial counsel, he could not have known the facts surrounding the most meritorious claims available to Petitioner," and (2) "Because appellate counsel did not provide Petitioner with his trial transcripts before his direct appeal was complete, Petitioner could not have found issues himself and filed an effective supplemental brief." McGinnis twice moved to amend his petition to (1) clarify

his claim of insufficient evidence and (2) address newly discovered evidence that appellate counsel “failed to obtain Petitioner’s unredacted statement to police.”

Without specifically granting McGinnis’s motions to amend, the postconviction court addressed the merits of the proposed amendment motions and denied the petition without an evidentiary hearing. This appeal followed.

DECISION

An appellate court reviews the denial of a petition for postconviction relief for an abuse of discretion. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). “A postconviction court abuses its discretion when its decision is based on an erroneous application of the law or is against logic and the facts in the record.” *Nunn v. State*, 868 N.W.2d 230, 232 (Minn. 2015).

“A petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence.” Minn. Stat. § 590.01, subd. 1 (2016); *see also Colbert*, 870 N.W.2d at 626 (reiterating “*Knaffla*¹ rule” that “once a direct appeal has been taken, all claims raised in the direct appeal and all claims that were known or should have been known but were not raised in the direct appeal are procedurally barred” (emphasis omitted)).

In his postconviction petition, McGinnis raised claims of prosecutorial misconduct, insufficient evidence, improper jury instructions, ineffective assistance of trial counsel, ineffective assistance of appellate counsel, and newly discovered evidence. The district

¹ *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976).

court concluded that most of these claims are procedurally barred either because McGinnis raised them in his direct appeal or because McGinnis knew or should have known of the claims when he filed his direct appeal. We agree that, with one exception, McGinnis's claims are procedurally barred because the claims are based on events that occurred during McGinnis's trial, and, therefore, McGinnis knew or should have known of the claims when he filed his direct appeal. But McGinnis's claim that his appellate counsel was ineffective is based on events that occurred after his trial, and it is at least arguable that McGinnis could not have known about the claim when he filed his direct appeal. We will, therefore, address the claim.

“The Sixth Amendment guarantees a defendant the effective assistance of counsel at critical stages of a criminal proceeding.” *Lee v. U.S.*, 137 S. Ct. 1958, 1965 (2017) (quotation omitted).

To establish ineffective assistance of appellate counsel, the petitioner bears the burden of showing both that counsel's performance was not objectively reasonable and, but for counsel's errors, the result of the proceeding would have been different. The petitioner must overcome the presumption that counsel's performance fell within a wide range of reasonable representation.

Wright v. State, 765 N.W.2d 85, 91 (Minn. 2009) (quotation and citation omitted); *see also* Minn. Stat. § 590.04, subd. 1 (2016) (stating that postconviction court is not required to hold an evidentiary hearing if “the files and records of the proceeding conclusively show that the petitioner is entitled to no relief”).

McGinnis argues that he invoked his right to remain silent when he was questioned by police, and the prosecutor committed misconduct when he used McGinnis's post-arrest

silence in the state's case-in-chief, as substantive evidence of guilt, and to impeach McGinnis. Although the prosecutor's alleged misconduct occurred at trial, McGinnis contends that the misconduct was not raised as an issue in his direct appeal because his appellate counsel failed to obtain the entire criminal file from his trial counsel. McGinnis contends that, because his appellate counsel never obtained the entire file, counsel had only the redacted copy of his statement to police that was introduced at trial, and, without the unredacted copy that was in the file, appellate counsel did not know that McGinnis had invoked his right to remain silent during the police questioning. Consequently, appellate counsel did not argue that the prosecutor committed misconduct by improperly referring to his silence.

The postconviction court concluded that "there is no substantive merit to petitioner's new claims of prosecutorial misconduct. As petitioner cannot show that the results of his appeal would have been different if his appellate counsel had obtained the entire file, his appellate counsel did not perform deficiently." Although it is not clear from the record why appellate counsel did not obtain the entire file from trial counsel, even if we assume that appellate counsel's performance was deficient, we agree with the postconviction court that McGinnis is not entitled to relief because he failed to show that the results of his appeal would have been different if appellate counsel had obtained the entire file.

The United States Supreme Court has held "that the use for impeachment purposes of petitioners' silence, at the time of arrest and after receiving *Miranda* warnings, violated the Due Process Clause of the Fourteenth Amendment." *Doyle v. Ohio*, 426 U.S. 610, 619, 96 S. Ct. 2240, 2245 (1976). In *Doyle*, two men were arrested following an alleged

marijuana sale, and, after receiving *Miranda* warnings, they said nothing about the alleged sale. *Id.* at 611-16, 96 S. Ct. at 2242-44. At their separate trials for the alleged illegal sale, both men testified that they had been framed and gave an exculpatory explanation for the events that police observed. *Id.* at 612-13, 96 S. Ct. at 2242. During cross-examination of each man at his trial, the prosecutor asked why the man had not told the frame-up story to the police officer when he arrested them. *Id.* at 613, 96 S. Ct. at 2242. The Supreme Court held that the cross-examination was impermissible and explained that the warnings mandated by *Miranda v. Arizona*, 384 U.S. 436, 467-73, 86 S. Ct. 1602, 1624-27 (1966),

require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these *Miranda* rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-18, 96 S. Ct. at 2244-45 (footnote omitted) (citation omitted).

McGinnis's postconviction claim that he received ineffective assistance of appellate counsel is based on the premise that he invoked his right to remain silent when police interviewed him approximately two hours after the shooting. But, unlike the two defendants in *Doyle*, who said nothing about the alleged drug sale after they were arrested and received *Miranda* warnings, McGinnis gave police a statement about the events

surrounding the shooting. Then, at trial, McGinnis testified about events that occurred during the two hours between the shooting and his arrest that he had not described in his statement to police.

At various times during McGinnis's trial, the prosecutor referred to McGinnis's failure to include these events in his statement to police. McGinnis argues that, when he failed to include the events in his statement to police, he was exercising his right to remain silent about the events, and the prosecutor's references were misconduct because they impermissibly used his post-arrest silence as substantive evidence of guilt and to impeach him.

But, as the postconviction court concluded, the Supreme Court rejected a similar argument in *Anderson v. Charles*, 447 U.S. 404, 100 S. Ct. 2180 (1980). In *Anderson*, the defendant was arrested while driving a stolen car and, after receiving a *Miranda* warning, told police "that he stole the car in Ann Arbor from the vicinity of Washtenaw and Hill Streets, about two miles from the local bus station." 447 U.S. at 404-05, 100 S. Ct. at 2180. The defendant was charged with murdering the car's owner, and, on direct examination at his trial, testified "that he took [the] unattended automobile from the parking lot of Kelly's Tire Co. in Ann Arbor." *Id.*

During cross-examination, the defendant agreed that Kelly's Tire Company and the bus station could be seen from the window of the Washtenaw County Jail and that, during the time he spent in the jail, he had plenty of opportunity to look out and see Kelly's Tire and the bus station and that he saw cars being parked there. *Id.* at 405, 100 S. Ct. at 2181. The prosecutor then asked the defendant whether that was where he got the idea to come

up with the story that he took the car from that location, and the defendant denied it. *Id.* The prosecutor then asked whether the defendant thought it was odd that, if his story at trial was the truth, he did not tell anybody that story when he was arrested. *Id.* at 406, 100 S. Ct. at 2181. The defendant was convicted, and, after an unsuccessful appeal, sought a writ of habeas corpus in federal court. *Id.* The federal district court withheld the writ, but the court of appeals reversed, holding “that ‘the prosecutor’s questions about [respondent’s] post-arrest failure to tell officers the same story he told the jury violated due process’ under the rule of *Doyle v. Ohio*.” *Id.* at 406-07, 100 S. Ct. at 2181 (alteration in original) (quoting *Charles v. Anderson*, 610 F.2d 417, 422 (6th Cir. 1979)).

On further review, the Supreme Court reversed and explained that the cross-examination, taken as a whole, did not refer to the defendant’s exercise of his right to remain silent, but, instead, asked the defendant why, if his trial testimony was true, he did not tell the police that he stole the car from the parking lot instead of telling them that he took it from the street. *Id.* at 408-09, 100 S. Ct. at 2182-83. The Supreme Court determined that “[t]he questions were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement.” *Id.* at 409, 100 S. Ct. at 2182. The Supreme Court then concluded

that *Doyle* does not apply to the facts of this case. Each of two inconsistent descriptions of events may be said to involve “silence” insofar as it omits facts included in the other version. But *Doyle* does not require any such formalistic understanding of “silence,” and we find no reason to adopt such a view in this case.

Id.

We conclude that, like the cross-examination in *Anderson*, the prosecutor's references to McGinnis's failure to include certain events in his statement to police were not designed to draw meaning from silence, but to elicit an explanation for a prior inconsistent statement. Thus, the prosecutor did not commit misconduct by referring to the omissions from McGinnis's statement to police, and McGinnis has failed to show that the result of his appeal would have been different if appellate counsel had obtained an unredacted copy of his statement to police and argued that the prosecutor improperly referred to McGinnis's post-arrest silence.

The postconviction court did not abuse its discretion in summarily rejecting McGinnis's postconviction petition without a hearing.

Affirmed.