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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1806**

Joseph Duane Gustafson, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 23, 2018
Affirmed
Peterson, Judge**

Hennepin County District Court
File No. 27-CR-11-5352

Joseph Duane Gustafson, Jr., Moose Lake, Minnesota (pro se appellant)

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

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

Considered and decided by Peterson, Presiding Judge; Kirk, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from an order summarily denying his pro se petition for
postconviction relief, appellant argues that his convictions should be reversed based on

ineffective assistance of appellate counsel and various other grounds that could have been raised on direct appeal. We affirm.

FACTS

In 2012, a jury found appellant Joseph Duane Gustafson not guilty of one count of second-degree assault and guilty of racketeering, terroristic threats, kidnapping, three counts of controlled-substance offenses, two counts of ineligible person in possession of a firearm, and four counts of theft by swindle. The district court sentenced Gustafson to 210 months, based on a criminal-history score of four and a severity-level assignment of X for the unranked racketeering conviction.¹ Gustafson appealed his convictions and his sentence, alleging insufficiency of the evidence, prejudicial evidentiary rulings, assignment of an improper sentencing severity level, and errors in his criminal-history score. *State v. Gustafson (Gustafson I)*, No. A12-1293, 2013 WL 4404241, at *1-6 (Minn. App. Aug. 19, 2013), *review denied* (Minn. Oct. 23, 2013). Gustafson also filed a pro se supplemental brief in which he asserted the following errors: (1) denial of due process arising out of the addition of two charges after he posted bail; (2) ineffective assistance of trial counsel; (3) the state failed to disclose evidence in a timely manner; (4) false witness testimony; (5) bad faith by police officers during the investigation; (6) Confrontation Clause violations; and (7) prosecutorial misconduct. *Id.* at *7-8. This court affirmed Gustafson's

¹ The crime of racketeering did not have a severity-level ranking under the Minnesota Sentencing Guidelines. Minn. Sent. Guidelines V (2008). A sentencing judge establishes the appropriate severity level for an unranked offense by considering the gravity of the conduct and the similarity to other ranked offenses. Minn. Sent. Guidelines IIA & cmt. II.A.04 (2008).

convictions and rejected his pro se claims, but reversed and remanded his sentence for correction of his criminal-history score. *Id.* at *3-8.

The district court resentenced Gustafson on May 4, 2014, using a criminal-history score of three, rather than four, but sentenced him again to 210 months because this sentence was still within the correct guidelines-sentence range. Gustafson appealed to this court, which affirmed the sentence. *State v. Gustafson*, No. A14-1098 (Minn. App. Mar. 9, 2015), *review granted* (Minn. May 19, 2015) *and order granting review vacated* (Minn. Sept. 15, 2015).

On May 18, 2017, Gustafson filed a pro se postconviction petition raising 12 claims: (1) ineffective assistance of trial and appellate counsel; (2) prosecutorial misconduct in opening and closing statements; (3) *Brady* violations; (4) perjured testimony; (5) vindictive prosecution; (6) failure to disclose an expert witness; (7) speedy-trial violations and police misconduct; (8) erroneous admission of hearsay evidence; (9) erroneous admission of *Spreigl* testimony; (10) judicial bias; (11) cumulative error; and (12) lack of personal jurisdiction.

Without an evidentiary hearing, the district court concluded that all but one of Gustafson's claims were barred by Minn. Stat. § 590.01, subd. 1 (2016), and that Gustafson had not established any of the exceptions to the *Knaffla*² rule. The district court considered Gustafson's allegation of ineffective assistance of appellate counsel, determined that he had not established a claim warranting relief, and concluded that Gustafson had not alleged

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

disputed material facts that warranted an evidentiary hearing. Gustafson appeals from the postconviction order.

DECISION

We review the district court’s summary denial of a postconviction petition for an abuse of discretion. *Dikken v. State*, 896 N.W.2d 873, 876 (Minn. 2017). In doing so, we review questions of law de novo and factual findings for clear error. *Id.* We will reverse the district court’s decision if the court “exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Id.* (quotation omitted). The petitioner has the burden of alleging facts that, if proved, would entitle him to relief. *Carridine v. State*, 867 N.W.2d 488, 492 (Minn. 2015).

A defendant may challenge his conviction through a postconviction petition when direct appellate relief is not available. Minn. Stat. § 590.01, subd. 1. But “[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 a conviction.” *Id.*; see also *Hooper v. State*, 888 N.W.2d 138, 143 (Minn. 2016) (explaining procedural bar known as the *Knaffla* rule); *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741 (establishing 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”).

“An unraised claim is not *Knaffla*-barred, however, if (1) the claim is novel or (2) the interests of fairness and justice warrant relief.” *Griffin v. State*, 883 N.W.2d 282,

286 (Minn. 2016) (quotation omitted).³ Under the second exception, “a viable claim must have substantive merit and must be asserted without deliberate or inexcusable delay.” *Id.* (quotation omitted). A claimed exception must be based on more than “an argumentative assertion without factual support”; otherwise, “it fails as a matter of law.” *Zornes v. State*, 903 N.W.2d 411, 421 (Minn. 2017).

Of the 12 issues that Gustafson raised in his postconviction petition, 11 were either raised in his direct appeal, known at the time of the appeal, or should have been known at the time of the direct appeal. *See Ouk v. State*, 884 N.W.2d 392, 394 (Minn. 2016). None of these 11 claims is novel, and Gustafson has not alleged facts that show that failing to assert any of the claims in his direct appeal was neither deliberate nor inexcusable.

The sole issue that could not have been raised in Gustafson’s direct appeal and, therefore, is not barred under section 590.01, subdivision 1, or the *Knaffla* rule, is whether Gustafson’s appellate counsel was ineffective. *See Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (stating that a defendant alleging ineffective assistance of counsel must show that counsel’s representation fell below an objective standard of reasonableness and there is a reasonable probability that the result of the proceeding would have been different but for counsel’s errors); *McDonough v. State*, 675 N.W.2d 53, 56 (Minn. 2004) (applying same rule to analysis of ineffective assistance of appellate counsel).

³ The supreme court has not definitively ruled on whether the *Knaffla* exceptions are still valid despite amendments to the postconviction statute in 2005. The supreme court continues to acknowledge the existence of the exceptions, and this court continues to apply them. *See Hooper v. State*, 838 N.W.2d 775, 787 n.2 (Minn. 2013).

Gustafson argues that his appellate counsel was ineffective because “[a]ppellate counsel flat out refused to argue that the state failed to provide [Gustafson] with effective assistance of counsel for his trial.” In *State v. Mosley*, 895 N.W.2d 585, 592 (Minn. 2017), the supreme court rejected a claim of ineffective assistance of appellate counsel based on defendant’s allegation that appellate counsel refused to raise a claim of ineffective assistance of trial counsel. “[A]ppellate counsel is not required to raise a claim if counsel could have legitimately concluded it would not prevail.” *Mosley*, 895 N.W.2d at 592 (quotation omitted).

Although Gustafson’s appellate counsel did not argue that Gustafson received ineffective assistance of trial counsel, Gustafson argued in his pro se supplemental brief filed in his direct appeal that trial counsel was ineffective. *Gustafson I*, 2013 WL 4404241, at *7. This court rejected Gustafson’s argument, concluding that all of the claimed instances of ineffective assistance were matters of trial strategy, none of which “indicate[d] representation below an objective standard of reasonableness.” *Id.*; see also *Mosley*, 895 N.W.2d at 592 (stating that “decisions about objections at trial are matters of trial strategy, which [an appellate court] will not review” (quotation omitted)); *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (defining “trial strategy” to include investigation and selection of evidence). Gustafson’s postconviction claim of ineffective assistance of appellate counsel is based on ineffective-assistance-of-trial-counsel claims that this court rejected in

Gustafson’s direct appeal.⁴ The postconviction court’s conclusion that Gustafson failed to establish ineffective assistance of appellate counsel because he failed to establish ineffective assistance of trial counsel is not an erroneous interpretation of law, and its decision to deny Gustafson’s postconviction petition was not an abuse of discretion.

A postconviction court may refuse to schedule an evidentiary hearing 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 (2016). “[T]he postconviction court may summarily deny a petition that is untimely or procedurally barred.” *Hooper*, 888 N.W.2d at 141 (quotation omitted). All but one of Gustafson’s claims are procedurally barred under section 590.01, subdivision 1, and the *Knaffla* rule because he raised them, or could have raised them, in his direct appeal. The sole exception is Gustafson’s claim of ineffective assistance of appellate counsel, which we have concluded is without merit. The postconviction court did not abuse its discretion by declining to schedule an evidentiary hearing.

Affirmed.

⁴ Gustafson appears to raise a constitutional challenge to the *Knaffla* bar. We do not consider pro se claims on appeal that are not supported by argument or legal authority. *State v. Bartylla*, 755 N.W.2d 8, 22 (Minn. 2008).