

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0265**

John Everette Pierce, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 14, 2019
Affirmed
Randall, Judge***

St. Louis County District Court
File Nos. 69HI-CR-13-140, 69HI-CV-13-117

John Everett Pierce, Bayport, Minnesota (pro se appellant)

Keith M. Ellison, Attorney General, St. Paul, Minnesota;

Mark Rubin, St. Louis County Attorney, Duluth, Minnesota;

Karl G. Sundquist, Assistant County Attorney, Hibbing, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Bjorkman, Judge; and Randall,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL, Judge

Appellant argues that the district court abused its discretion by: (1) declining to grant him an evidentiary hearing on his motions to disqualify the judge for bias; (2) to change venue; and (3) denying his petition for postconviction relief. We affirm.

FACTS

In November 2015, we affirmed in part and vacated in part appellant John Everette Pierce's conviction for first-degree criminal sexual conduct. *State v. Pierce*, No. A14-1783, 2015 WL 7356552 (Minn. App. Nov. 23, 2015), *review denied* (Minn. Feb. 16, 2016). Pierce raised numerous arguments on direct appeal, including: (1) the chief district court judge erred by denying his motion to remove the assigned judge; (2) the court trial did not comply with the waiver requirements of Minn. R. Crim. P. 26.01; (3) the district court deprived him of his right to an adversarial proceeding; (4) the district court deprived him of his right to an impartial judge; (5) the district court erred by imposing a 50-year domestic abuse no-contact order (DANCO); (6) the district court erred by extending the harassment restraining order (HRO) against him; (7) counsel provided ineffective assistance; and (8) the district court improperly relied on *Spreigl* evidence. *See generally id.* We affirmed Pierce's conviction, but vacated the 50-year DANCO. *Id.* at *9-11.

In October 2017, Pierce petitioned for postconviction relief, raising numerous arguments and requesting an evidentiary hearing and a new trial. Pierce also moved to change venue for the postconviction proceeding and to disqualify the judge due to bias. The chief district court judge subsequently issued a "postconviction petition assignment

order” stating that, “Upon defendant’s petitions for post-conviction relief filed herein,” these matters were assigned to the same district court judge that previously handled the case “for determination of the issues raised by that petition.”

In December 2017, the district court ruled on Pierce’s petition and motions without holding a hearing. The district court determined that the issues in Pierce’s postconviction petition were previously addressed on direct appeal and denied the petition in its entirety. The district court noted that the chief judge’s assignment order was issued ten days after Pierce moved to disqualify and concluded that “[t]his by implication denie[d] [Pierce]’s request for revisiting the issue of substitution of judge.” The district court also concluded that Pierce had not “provided sufficient evidence . . . to demonstrate that dissemination of potentially prejudicial material created any reasonable likelihood that a fair disposition in this venue cannot be reached, pursuant to Minn. R. Crim. P. 25.02, subd. 3.” This appeal followed.

D E C I S I O N

Substitution of judge

Pierce argues that the district court erred by denying his motion to disqualify the judge without a hearing. “We review a denial of a petition for postconviction relief, as well as a request for an evidentiary hearing, for an abuse of discretion.” *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). “We review a postconviction court’s factual determinations under a clearly erroneous standard, and do not reverse those determinations unless they are not factually supported by the record.” *Id.* “But we review the court’s legal conclusions de novo.” *Id.* Whether to grant a motion to remove a judge for cause falls

within the district court’s discretion, and this court will reverse “only for an abuse of that discretion.” *Hooper v. State*, 838 N.W.2d 775, 790 (Minn. 2013).

Minnesota Rule of Criminal Procedure 26.03, subdivision 14(3), provides:

A judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct. A request to disqualify a judge for cause must be heard and determined by the chief judge of the district or by the assistant chief judge if the chief judge is the subject of the request.

The Code of Judicial Conduct states that “[a] judge shall disqualify himself . . . in any proceeding in which the judge’s impartiality might reasonably be questioned.” Minn. Code Jud. Conduct Rule 2.11(A).

Pierce moved to disqualify the judge on October 6, 2017. On October 16, 2017, the chief judge assigned the petition and motions to the same judge that previously handled Pierce’s case “for determination of the issues raised by that petition.” The assignment order did not suggest that it constituted a ruling on the merits of Pierce’s motion to disqualify. Because rule 26.03, subdivision 14(3), states that a request to disqualify a judge for cause “must be heard and determined by the chief judge,” we conclude that the chief judge erroneously failed to consider and rule on Pierce’s motion. *See State v. Finch*, 865 N.W.2d 696, 702 (Minn. 2015) (stating that the district court errs when it deprives a defendant of “his right under Minn. R. Crim. P. 26.03, subd. 14(3), to have the chief judge hear and determine his request”).

This error is subject to harmless error review. *See id.* at 703 (concluding that harmless error review, rather than structural error review, applies to the deprivation of the right to have the chief judge determine motions to disqualify). “Any error that does not

affect substantial rights [can] be disregarded.” Minn. R. Crim. P. 31.01. An error affects substantial rights if “the error was prejudicial and affected the outcome of the case.” *Finch*, 865 N.W.2d at 703 (quotation omitted). “[A] case involving a *potentially* disqualified judge is different. In such a case, the substantial right implicated is the right to a fair hearing before an impartial tribunal with a decision maker who does not appear to favor one side.” *Id.* (quotation omitted). Therefore, Pierce does not need to demonstrate that the outcome of the proceeding was prejudiced by the error, “but instead must show that the failure to disqualify affected his substantial right to a fair hearing before a decision maker who does not appear to favor one side.” *Id.*

Pierce moved to disqualify the assigned judge for bias on the grounds that the judge’s daughter was friends with the victim and the victim was also friends with police officers and people working in court administration. Pierce previously moved to remove the assigned judge for bias before trial, and the chief judge heard and denied that motion. *Pierce*, 2015 WL 7356552, at *2. The basis for that motion was the relationship between the judge’s daughter and the victim. *Id.* On direct appeal, this court affirmed the chief judge’s denial of Pierce’s motion to remove the assigned judge. *Id.* at *2-3.

The current motion to disqualify the assigned judge and Pierce’s prior motion rely on similar grounds. Pierce cites no evidence in the record suggesting that the victim had improper relationships with individuals working for the police or court administration. We conclude that the chief judge’s failure to consider and decide Pierce’s motion was harmless.

Change of venue

Pierce argues that the district court erred by denying his motion to change venue without a hearing. We review the district court's denial of a motion to change venue for an abuse of discretion. *State v. Fairbanks*, 842 N.W.2d 297, 302 (Minn. 2014).

Minnesota Rule of Criminal Procedure 24.03, subdivision 1, provides that a change of venue is proper if: (a) “the [district] court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending”; (b) a change is convenient for the parties and witnesses; (c) a change is in the interests of justice; or (d) pretrial publicity allows changing the venue under Minn. R. Crim. P. 25.02.¹ A motion to change venue, except on the basis of pretrial publicity, must be made prior to trial. Minn. R. Crim. P. 24.03, subd. 3.

On appeal, Pierce argues that the district court erred in denying his motion for a change of venue pursuant to Minnesota Rule of Criminal Procedure 24.03, subdivision 1(c). Pierce moved to change venue after this court ruled on his direct appeal and affirmed his conviction. Pierce is barred from moving to change venue in reliance on rule 24. Pierce fails to cite any law requiring the district court to conduct a hearing upon his motion to change venue. We conclude the district court did not abuse its discretion by denying Pierce's motion to change venue without a hearing.

¹ The district court considered Minn. R. Crim. P. 25.02, subd. 3, in denying the motion to change venue. In his notice of motion and motion to change venue as well as the title of his supporting memorandum, Pierce references Minn. R. Crim. P. 24.03, subd. 1(c), rather than rule 25.02. In the body of his memorandum, however, Pierce relies on rule 25.02, subdivisions 1 and 3.

Other arguments

Pierce argues that the district court erred in denying his petition for postconviction relief because: (1) his due-process rights were violated by the state's destruction of evidence; (2) the district court committed misconduct by undue prejudice; (3) Pierce presented newly-discovered evidence of ineffective assistance of counsel; (4) Pierce was under the influence of several prescription medications throughout the case; (5) counsel was ineffective by misleading him as to the consequences of predatory-offender registration; and (6) the state committed *Brady* violations. The state argues that, because these issues were either raised or could have been raised in Pierce's direct appeal, Pierce is barred from raising these issues in a postconviction petition.

"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. *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976) ("[W]here 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."). Pierce raised numerous arguments on direct appeal. To the extent Pierce is raising those issues again, those arguments are barred. Pierce does not address why any of his current arguments could not have been raised on direct appeal. Pierce's other arguments are statutorily barred.

Affirmed.