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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0567**

Dane Joseph Riley, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 11, 2019
Affirmed
Ross, Judge**

Cass County District Court
File No. 11-CR-12-1586

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

Keith Ellison, Attorney General, Noah A. Cashman, Assistant Attorney General, St. Paul, Minnesota; and

Benjamin Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and Slieter, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Two witnesses heard gunshots and a man screaming Dane Riley's name immediately before one saw Riley beating the man, who was never again seen alive. Police

found the man's dismembered, burned, and buried body in the woods near Riley's home. A jury found Riley guilty of second-degree intentional murder, mutilating the body with intent to conceal evidence, and illegally possessing a gun. The district court sentenced him to 45 years in prison. Riley appealed his convictions, challenging the district court's jury instructions and the district court's refusal to suppress evidence. We affirmed the convictions. Riley petitioned for postconviction relief, arguing that his trial and appellate counsel were ineffective and that trial evidence about his criminal history unfairly prejudiced him. The postconviction court denied his petition. Because Riley's attorneys were not ineffective and his evidentiary challenge is procedurally barred, we affirm.

FACTS

A jury found Dane Riley guilty of second-degree murder and related charges after it heard evidence outlined in this court's opinion addressing Riley's direct appeal. *See State v. Riley*, No. A14-0815, 2015 WL 3822631 (Minn. App. June 22, 2015), *review denied* (Minn. Aug. 11, 2015). We merely summarize the circumstances here without detailing all of the evidence presented.

Riley and his girlfriend were at a party with M.H. consuming drugs and alcohol. After Riley and his girlfriend returned to Riley's trailer home, Riley became angry over losing his backpack, which contained a gun, and he suspected that someone had taken it. He got a call from M.H. and left to give him a ride from the party.

Riley's girlfriend awoke in the middle of the night to the sound of two gunshots. She went outside and saw Riley straddling M.H. and punching him repeatedly to M.H.'s cries, "Stop, Dane, I won't tell anybody!" Riley ordered his girlfriend, "Go the f--king back

inside, you are not supposed to see me like this!” She complied. Riley went inside later and made his girlfriend promise not to tell anyone what she had seen. Riley’s hands were black, and his finger was deeply cut.

M.H.’s mother reported M.H. missing, and police investigated. A neighbor described hearing gunshots followed by a man repeatedly yelling, “Dan, no!” Police searched and found M.H.’s burned, dismembered body in two shallow graves in a wooded area near Riley’s home, along with items linking Riley to the body. Those items were a Graco Pack ‘n Play carry bag and a blue fitted sheet, which witnesses had recently seen in Riley’s trailer and in the bed of a pickup truck that Riley moved shortly after beating M.H. M.H.’s DNA was found in the bed of that truck.

After the jury found Riley guilty, the district court sentenced him to 540 months in prison and one year in jail. Riley unsuccessfully appealed his convictions to this court, arguing that the search warrant that led to the evidence against him was not supported by probable cause and that the district court improperly instructed the jury on the standard for circumstantial evidence. *Riley*, 2015 WL 3822631 at *1, *3–*4.

Riley later petitioned the district court for postconviction relief. He argued that his trial attorney was ineffective for failing to investigate leads and that his appellate attorney was ineffective for failing to raise the issue of trial counsel’s ineffectiveness on direct appeal. He also argued that the district court should have excluded criminal-history evidence. And he maintained that newly discovered evidence pointed to an alternative perpetrator, explained why M.H.’s DNA was found in the bed of the pickup truck, and showed that he did not own a fitted sheet like the one that wrapped some of M.H.’s body

parts. The district court denied the petition, finding that the evidence of Riley's guilt was so overwhelming that there was no reasonable likelihood that the result would have been different but for the alleged attorney deficiencies or newly discovered evidence.

Riley appeals.

D E C I S I O N

Riley challenges the denial of his petition for postconviction relief. We review the legal conclusions supporting the denial de novo and the factual findings for clear error. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). Riley makes two legal arguments. He argues first that the district court erred by denying his claims of ineffective assistance of counsel. He argues second that the district court erred by deeming the unobjected-to evidence about his criminal history harmless. The arguments fail.

I

Riley argues that his trial counsel rendered ineffective assistance, violating his Sixth Amendment right to representation, by failing to investigate possible lines of defense (and that, relatedly, his appellate counsel was likewise ineffective for failing to raise his trial counsel's alleged deficiency on direct appeal). The state objects on procedural grounds.

The state urges us not to reach the merits of the ineffective-assistance argument, contending that Riley, who made an ineffectiveness claim in his supplemental brief on direct appeal, is barred from raising the claim in his postconviction petition. The general rule is that "[o]nce an appeal has been taken, all issues raised and all issues known but not raised will not be considered upon a subsequent petition for postconviction relief." *Robinson v. State*, 567 N.W.2d 491, 494 (Minn. 1997). This procedural bar applies to

ineffective-assistance claims unless the claim would require the reviewing court to receive additional facts to explain the attorney's conduct. *Id.* This exception to the procedural bar applies here even though Riley in fact raised the issue of his trial attorney's effectiveness in his first appeal. This is because the procedural bar prevents an appellant's claim that was "previously raised, litigated, and decided on direct appeal." *Lynch v. State*, 749 N.W.2d 318, 319 (Minn. 2008). Here, although Riley did raise the issue in his supplemental brief on direct appeal, he did so in cursory fashion and without the assistance of his appellate counsel, leaving us to reject the claim only on the ground that he "provide[d] no citations to the record supporting the allegations." *Riley*, 2015 WL 3822631, at *4. In this circumstance, we will treat the issue as never having been raised and decided on the merits in the direct appeal. We turn to the merits of Riley's claim of ineffective assistance.

Riley's ineffective-assistance claim fails on the merits as to both his trial and appellate counsel. His criticism of his appellate counsel depends on his criticism of his trial counsel. We can therefore resolve both claims at once. To prevail, Riley must show that his trial counsel's representation was constitutionally deficient. *Zenanko v. State*, 688 N.W.2d 861, 865 (Minn. 2004). He can do this by establishing that the representation "fell below an objective standard of reasonableness." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998) (citing *Strickland v. Washington*, 466 U.S. 668, 688, 104 S. Ct. 2052, 2064 (1984)). If he had established this, we would address a second requirement, which is that he also show "that a reasonable probability exists that the outcome would have been different but for counsel's errors." *Id.* But Riley's claim does not meet the first criterion.

Riley contends that his trial attorney failed to investigate leads that could have revealed exculpatory information and strengthened his defense. Mere trial strategy that might be second-guessed in retrospect is not the same as constitutionally deficient representation. *See State v. Nicks*, 831 N.W.2d 493, 506 (Minn. 2013) (listing cases deferring to counsel’s choice of trial strategy). Riley argues that we should not defer to trial counsel’s choice among strategies, citing *Wiggins v. Smith*, 539 U.S. 510, 123 S. Ct. 2527 (2003). *Wiggins* does not expressly or implicitly diminish the oft-repeated distinction between plausible trial strategy and constitutionally deficient representation. In that death-penalty case, the Court measured trial counsel’s allegedly deficient failure to expand their investigation into mitigating facts against “the professional standards that prevailed” in the state at the time of the defense. *Wiggins*, 539 U.S. at 524, 123 S. Ct. at 2536. In doing so, the Court considered evidence of “standard practice in Maryland in capital cases” as well as “the standards for capital defense work articulated by the American Bar Association,” to which the Supreme Court had “long . . . referred as guides to determining what is reasonable.” *Id.* at 524, 123 S. Ct. at 2536–37 (quotation omitted). By sharp contrast here, Riley has not pointed to any recognized standard of representation against which his counsel’s performance allegedly failed.

Riley says his attorney should have investigated and developed the defense further on three circumstances: an alleged incident in which M.H.’s brother shot at and threatened to kill M.H. a week before his death; photographs that show that M.H. had been previously injured in dirt-bike activity; and the possibility that Riley lost possession of the blue fitted sheet before the murder based on the assertion that someone had previously stolen the sheet

from Riley. The choice not to pursue a defense based on these alleged circumstances is clearly a matter of strategy, not deficiency. Any reasonable attorney would have questioned whether attempting to build a case on these tangential circumstances would have done more to diminish than to bolster the defense. It is true that the incident between M.H. and his brother might have suggested that someone in addition to Riley was interested in harming M.H. But in light of uncontradicted evidence that Riley pummeled a defenseless M.H. contemporaneously with two gunshots the night M.H. was murdered, offering thin evidence of some other potential assailant from an incident occurring well before the killing might be seen as merely desperate and therefore inculpatory. To the limited extent M.H.'s previous dirt-bike injury might explain how his DNA ended up in the truck, it adds almost nothing to the defense because other witnesses, including Riley, said that M.H. previously had been in the pickup bed. And we think most attorneys would find it quite difficult to craft a plausible story of an unknown person stealing a fitted sheet and then killing M.H. and burying part of his body near Riley's home using the same sheet many months after the theft. Riley does not convince us that pursuing these theories would have been reasonable strategy, let alone establish how investigating them was constitutionally required.

The state points out accurately that the evidence of Riley's guilt was overwhelming. But because Riley has not established that his trial counsel's performance was constitutionally deficient, we need not answer whether the alleged deficiency prejudiced his defense. And because his ineffective-assistance claim fails as to his trial counsel, it also fails as to his appellate counsel.

II

Riley next argues that the prosecutor elicited improper character evidence. Riley did not object to the two passing observations by prosecution witnesses that their investigation turned to Riley because of his “history.” Because Riley did not object to this testimony, at most, we would review his claim only for plain error. *See State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002). But Riley’s character-evidence argument fails to overcome a threshold obstacle because he failed to raise it in his direct appeal. Once a defendant takes a direct appeal, “all claims known but not raised” are lost so as not to be considered in a later petition for postconviction relief. *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). This rule similarly bars all claims a petitioner “should have known” at the time of the direct appeal. *Fox v. State*, 913 N.W.2d 429, 435 (Minn. 2018). Riley knew or should have known about the alleged improper character evidence at the time of his direct appeal. We therefore will not address the argument further.

Affirmed.