STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0577

Faron Wayne Ruel, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed February 4, 2019
Affirmed
Halbrooks, Judge

Polk County District Court
File No. 60-CR-12-2741

Faron Ruel, Moose Lake, Minnesota (pro se appellant)

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, First Assistant County Attorney, Crookston, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

Appellant, who is self-represented, challenges the denial of his petition for postconviction relief on the grounds that the postconviction court erroneously determined that issues he raised are procedurally barred by *Knaffla* and erroneously denied his (1) ineffective-assistance-of-appellate-counsel claim and request for a separate evidentiary hearing on the issue, (2) request for legal assistance at the postconviction evidentiary hearing, (3) request for subpoenas, and (4) *Brady* violation claim. We affirm.

FACTS

In 2012, appellant Faron Wayne Ruel and his coworker sexually assaulted a woman while she was physically helpless due to intoxication. The state charged Ruel with aiding and abetting third-degree criminal sexual conduct, and a jury found him guilty. The district court sentenced Ruel to 180 months in prison and ten years of conditional release.

In 2015, Ruel appealed his conviction. In his direct appeal, his counsel argued that the district court abused its discretion in ruling that Ruel's prior convictions were admissible for impeachment purposes and by constructively amending the complaint. Ruel also filed a pro se supplemental brief that raised a number of claims. He argued that the state failed to provide sufficient evidence to corroborate accomplice testimony, that use of a recorded phone call violated his *Miranda* rights and right to counsel, that the state should have been precluded from presenting DNA evidence from which Ruel and the accomplice could not be excluded, that the prosecution improperly submitted an investigator's testimony based on a recorded statement without introducing the complete statement as evidence, and that the testimony of the investigator and an officer was false.

We affirmed the conviction, concluding that admission of impeachment evidence was not error, the complaint was not constructively amended, and that each of Ruel's pro se arguments lacked merit. The supreme court denied review. *State v. Ruel*, No. A15-0152, 2016 WL 363407 (Minn. App. Feb. 1, 2016), *review denied* (Minn. Apr. 19, 2016).

Ruel petitioned for postconviction relief, challenging a number of the district court's rulings and requesting an evidentiary hearing. Ruel, who is self-represented, argued that (1) the district court denied him a fair trial by refusing to admit evidence of an alternative perpetrator and by failing to strike allegedly biased jurors for cause, (2) the prosecutor committed misconduct by arguing facts not in evidence and improperly shifting the burden of proof to him, (3) the evidence was insufficient to support the conviction, and (4) he was denied effective assistance of trial counsel for numerous reasons, including counsel's failure to strike biased jurors from the pool. Ruel asked the postconviction court to grant him an evidentiary hearing to examine the following grounds for reversal: newly discovered evidence that the state's witnesses testified falsely, newly discovered substantive evidence, evidence of a *Brady* violation based on a plea deal, misconduct by the state's agents, ineffective assistance of trial counsel, and appellate counsel's error in never reviewing the voir dire transcript, which precluded him from challenging the effectiveness of trial counsel. He also asserted a "catch-all" claim that his rights under the United States and Minnesota Constitutions were violated.

Ruel received a notice that a hearing was scheduled on the matter. A week before the hearing date, the postconviction court summarily denied Ruel's petition, unaware that a hearing date had been set. Ruel requested reconsideration, bringing the inconsistency to the postconviction court's attention. The postconviction court subsequently stayed the order denying postconviction relief, and an evidentiary hearing was granted. Ruel requested that the court appoint him counsel and requested subpoenas for the evidentiary hearing. The postconviction court denied both requests, explaining that the sole issue before the court at the evidentiary hearing was Ruel's ineffective-assistance-of-counsel claim and the only witness required was his trial counsel.

Following the evidentiary hearing, the postconviction court denied Ruel's petition, carefully addressing each of his claims. The postconviction court ruled that most of Ruel's claims are procedurally barred because his conviction and sentence were affirmed on direct appeal to this court. The postconviction court reasoned that because claims brought in Ruel's postconviction petition were raised on direct appeal or were not raised, but were known or should have been known at the time, Ruel's claims are procedurally barred and cannot be a basis for postconviction relief. *See* Minn. Stat. § 590.01, subd. 1 (2018); *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). The postconviction court compared Ruel's claims raised on direct appeal to the claims raised in his postconviction petition and found that most are procedurally barred, including the claim that the district court refused to admit alternative perpetrator evidence, Ruel's sufficiency-of-the-evidence claim, and his claim that the state's witnesses provided false testimony. The postconviction court also determined that Ruel's ineffective-assistance-of-trial-counsel claim is procedurally barred because he actually raised most of his complaints regarding trial counsel on direct appeal, and all his complaints should have been brought on direct appeal because he was present at trial and should have known about any alleged errors. Although it ruled that the ineffective-assistance claim is *Knaffla*-barred, the postconviction court also determined that trial counsel's testimony was credible and that his strategic and tactical decisions at trial were reasonable. The postconviction court also addressed each of Ruel's "catch-all" claims.

Finally, the postconviction court addressed Ruel's complaint regarding his appellate counsel. Ruel claimed that his appellate counsel erred by failing to review the voir dire transcript prior to the appeal, which he claimed would have revealed that five of the jurors were biased. Because Ruel was present for voir dire and reviewed the juror questionnaires but failed to raise the issue in his pro se appellate brief, the postconviction court reasoned that the issue is likely *Knaffla*-barred. Nevertheless, the postconviction court addressed the ineffective-assistance-of-appellate-counsel claim on the merits, as well as whether Ruel was entitled to a separate evidentiary hearing on that claim. The postconviction court determined that appellate counsel's failure to review the voir dire transcript was objectively unreasonable but that there is no reasonable probability that Ruel's direct appeal would have been decided differently had appellate counsel challenged trial counsel's failure to strike certain jurors. As a result, the postconviction court denied all relief that Ruel requested. This appeal follows.

D E C I S I O N

Ruel contends that the postconviction court erred by denying his petition. We review the denial of a postconviction petition for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). We review legal issues de novo and factual issues by considering whether the postconviction court's findings are supported by sufficient evidence. *Vance v. State*, 752 N.W.2d 509, 512 (Minn. 2008).

I.

Ruel generally argues that the postconviction court erred by denying his petition based on its determination that most of his claims are procedurally barred by *Knaffla*. Once a direct appeal has been taken, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Knaffla*, 243 N.W.2d at 741; *see also* Minn. Stat. § 590.01, subd. 1. Minnesota courts "have extended the *Knaffla* rule to claims that were, or should have been, raised in a previous postconviction petition." *Lussier v. State*, 853 N.W.2d 149, 152 (Minn. 2014). There are two exceptions to the *Knaffla* rule: "(1) if a novel legal issue is presented, or (2) if the interests of justice require review." *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006).

While Ruel generally challenges the postconviction court's ruling that most of his claims are *Knaffla*-barred, he only specifically challenges the postconviction court's ruling on his claim that the state presented false trial testimony. Ruel argued on direct appeal that an investigator and an officer perjured themselves at his trial, and this court "reject[ed] Ruel's unsupported assertion that both the investigator and an officer who interviewed the complainant committed perjury." *Ruel*, 2016 WL 363407, at *5. Ruel asserted the same argument in his postconviction petition. The postconviction court ruled that this issue is *Knaffla*-barred because Ruel raised it on direct appeal to this court. Because matters raised in a direct appeal are not reconsidered upon postconviction review, the postconviction court properly determined that Ruel may not raise the same claim again. *See Knaffla*, 243 N.W.2d at 741.

II.

We next address Ruel's ineffective-assistance-of-counsel claims. Ruel challenges the postconviction court's denial of both his ineffective-assistance-of-trial-counsel and ineffective-assistance-of-appellate-counsel claims. First, Ruel argues that the postconviction court erred by ruling his ineffective-assistance-of-trial-counsel claim is barred by *Knaffla*. Second, he argues that the postconviction court erred by denying his ineffective-assistance-of-appellate-counsel claim based on his trial counsel's failure to strike allegedly biased jurors and his appellate counsel's failure to raise an ineffective-assistance-of-trial-counsel claim on direct appeal. We address both arguments.

When a "direct appeal has once been taken, all matters raised therein . . . will not be considered upon a subsequent petition for postconviction relief." *Id.* And a claim of ineffective assistance of trial counsel must be brought in a direct appeal if it can be determined without further development of the record, or it is *Knaffla*-barred. *Zornes v. State*, 903 N.W.2d 411, 421 (Minn. 2017) (*Zornes II*). The postconviction court ruled that Ruel's claim was barred because most of his complaints about his trial counsel "relate to alleged failures to do certain things at trial (such as make objections, present arguments or evidence, cross examine witnesses, etc), and Mr. Ruel was present at trial when these alleged failures occurred." His complaints regarding trial counsel therefore should have been known to Ruel and raised on direct appeal, and accordingly are *Knaffla*-barred. The postconviction court also noted that Ruel had already raised some complaints about his trial counsel in his pro se direct appeal so the court reasoned that Ruel knew of this claim at the time of direct appeal. We agree.

Ruel also contends that the postconviction court erred in denying his ineffective-assistance-of-appellate-counsel claim. An ineffective-assistance-of-appellate-counsel claim is "properly raised in a first postconviction petition, because the petitioner could not have known of such a claim at the time of direct appeal." *Zornes v. State*, 880 N.W.2d 363, 370-71 (Minn. 2016) (*Zornes I*). "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 [petitioner] must first show that trial counsel was ineffective" in order to prevail. *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007).

The postconviction court rejected Ruel's claim that jury selection was improperly handled by his trial counsel. Upon review of a denial of relief on a claim of ineffective assistance of counsel, we consider the postconviction court's "factual findings that are supported in the record, conduct a de novo review of the legal implication of those facts on the ineffective assistance claim, and either affirm the court's decision or conclude that the court abused its discretion because postconviction relief is warranted." *Nicks*, 831 N.W.2d at 503-04.

Ruel contends that the postconviction court erred when it failed to grant him a separate evidentiary hearing regarding his ineffective-assistance-of-appellate-counsel claim. The supreme court has held that in order to receive an evidentiary hearing on an ineffective-assistance claim, the petitioner is "required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland*." *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). The *Strickland* test requires that the defendant prove that (1) counsel's representation went below an objective standard of reasonableness and (2) there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Nicks*, 831 N.W.2d at 504 (citing *Strickland v. Washington*, 466 U.S. 668, 687-96, 104 S. Ct. 2052, 2064-69 (1984)). The *Strickland* test applies to both trial and appellate ineffective-assistance-of-counsel claims. *Zornes I*, 880 N.W.2d at 371. A reasonable probability means "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068.

Here, the postconviction court denied Ruel a separate evidentiary hearing on the issue of whether his appellate counsel was ineffective. It found that Ruel satisfied the first prong of the *Strickland* test because appellate counsel failed to review the voir dire transcript. But in addressing the second *Strickland* prong, the postconviction court held that there was no reasonable probability that the outcome of Ruel's conviction would have been different had appellate counsel raised trial counsel's failure to strike certain jurors, as the postconviction court had already heard trial counsel's testimony, found him credible, and determined that his strategic and tactical choices at trial were reasonable.

We give strong deference to counsel's strategic decisions in matters of jury selection. *State v. Geleneau*, 873 N.W.2d 373, 382 (Minn. App. 2015), *review denied* (Minn. Mar. 29, 2016). A trial attorney makes tactical decisions during jury selection that rely heavily on the attorney's experiences and perception of and rapport with potential jurors. *Jama v. State*, 756 N.W.2d 107, 113 (Minn. App. 2008). Failure to challenge certain jurors alone cannot establish an ineffective-assistance-of-counsel claim. *Id.* In *Dunn v. State*, the supreme court held that trial counsel's decision not to strike or challenge a prospective juror was not unreasonable considering that counsel questioned the juror about potential bias and, concluding that no bias existed, did not challenge the juror. 499 N.W.2d 37, 38 (Minn. 1993). In *State v. Anderson*, the appellant argued that his trial counsel was ineffective by failing to challenge nine jurors who had been past victims of similar crimes. 603 N.W.2d 354, 357 (Minn. App. 1999), *review denied* (Minn. Mar. 14, 2000). We concluded that, because those jurors testified that their previous experiences with crime would not affect their impartiality, there was no reasonable probability that, but for counsel's alleged errors, the outcome at trial would have been different. *Id.* In this matter, the postconviction court's denial of Ruel's ineffective-assistance-of-appellate-counsel claim based on trial counsel's tactical decisions in jury selection is supported by the record and the law.

III.

Ruel argues that the postconviction court abused its discretion by denying his request for legal representation at the evidentiary hearing. The right to counsel in criminal "proceedings extends to the first appeal of right, and no further." *Deegan v. State*, 711 N.W.2d 89, 96 (Minn. 2006) (quotation omitted). The right to assistance extends to one review, either by direct appeal or a first review of a postconviction proceeding. Minn. Stat. § 590.05 (2018); *State v. Eason*, 906 N.W.2d 840, 842 (Minn. 2018). And "a defendant who has been represented by counsel on direct appeal, has no right to counsel in a subsequent postconviction proceeding." *Barnes v. State*, 768 N.W.2d 359, 364 (Minn. 2009). Because Ruel was represented in his direct appeal to this court, he was not entitled to counsel in the subsequent postconviction proceeding. Therefore, the postconviction court correctly denied Ruel's request for assistance of counsel at the postconviction evidentiary hearing.

IV.

Ruel argues that the district court abused its discretion by denying his motion to subpoena five witnesses for the postconviction evidentiary hearing. Criminal defendants have the right to subpoena favorable witnesses at trial. U.S. Const. amend. VI; Minn. Const. art. I, § 6. In *Burrell v. State*, the supreme court held that this right does not apply to postconviction proceedings. 858 N.W.2d 779, 786 (Minn. 2015). The *Burrell* court acknowledged that, even if that right were extended to postconviction proceedings, the petitioner failed to "at least make some plausible showing of how [the] testimony would have been both material and favorable to his defense." *Id.* (quotation omitted).

The only issue before the postconviction court at the evidentiary hearing was Ruel's ineffective-assistance-of-appellate-counsel claim, and his requests for five subpoenas were unrelated to that claim. Ruel provided nothing to the postconviction court to indicate how the testimony of the five witnesses supported his argument that his appellate counsel was ineffective. The postconviction court required Ruel's trial counsel to testify at the evidentiary hearing, as his testimony was reasonably related to the only issue before it. Because Ruel did not have an undeniable right to subpoena witnesses to the evidentiary hearing and because he did not demonstrate how the testimony would be material and favorable to him, the postconviction court did not abuse its discretion by denying Ruel's subpoena requests.

V.

Ruel contends that the postconviction court erred by denying his *Brady* violation claim because he discovered new evidence that his accomplice was offered a deal by the prosecution in order to testify against him. The test for determining if a *Brady* violation has occurred has three elements:

> (1) the evidence must be favorable to the defendant because it would have been either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) the evidence must be material—in other words, the absence of the evidence must have caused prejudice to the defendant.

Walen v. State, 777 N.W.2d 213, 216 (Minn. 2010). "[T]he remedy for a *Brady* violation is a new trial." *State v. Hunt*, 615 N.W.2d 294, 299 (Minn. 2000).

Under *Brady*, evidence is material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Zornes II*, 903 N.W.2d at 418 (quotation omitted). "A reasonable probability is one that is sufficient to undermine confidence in the outcome." *Id.* (quotation omitted). Evidence that would have been "possibly useful," but "unlikely to have changed the verdict" is not material under this prong. *Id.* (quotation omitted). We "make a materiality determination by considering the effect the undisclosed evidence would have had in the context of the whole trial record." *Walen*, 777 N.W.2d at 216.

The postconviction court determined that there was no *Brady* violation because the accomplice's "various and inconsistent statements, as well as the plea agreement he entered into, were brought out before the jury at trial and were used to impeach his testimony."

Because Ruel offered no new information that would have reasonably affected the outcome of the case, the postconviction court properly exercised its discretion by excluding the evidence.

Affirmed.