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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0909**

Deontray Vershon Tate, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 4, 2019
Reversed and remanded; motion granted
Cleary, Chief Judge**

Hennepin County District Court
File No. 27-CR-13-22120

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

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

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

Considered and decided by Worke, Presiding Judge; Cleary, Chief Judge; and Slieter, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Deontray Vershon Tate petitioned for postconviction relief, asserting that appellate counsel was ineffective for failing to raise an ineffective-assistance-of-trial-

counsel claim. The postconviction court, without an evidentiary hearing, denied the petition. Tate now argues that because the record does not conclusively show that he was entitled to no relief, he should be granted an evidentiary hearing. We agree and reverse and remand.

FACTS

In June 2013, D.R. was sitting in the driver's seat of a vehicle while A.D. and D.H. stood outside the vehicle talking. A.D.'s two children, including four-year-old J.B., were seated in the back of the vehicle. A.D. spotted Tate approaching the vehicle, gun in hand. She ran toward the vehicle to tell D.R. to drive away, but stopped and took cover when a second man appeared and began shooting. When Tate reached the vehicle, D.R. grappled with him, attempting to take the gun away. D.R. then heard shots coming from another location, and he turned back toward the children in the vehicle. Tate then shot D.R. twice and J.B. once.

Shortly after the incident, Tate was charged with three counts of assault. The parties engaged in plea negotiations, but those negotiations were unsuccessful, and the matter was set for trial. On the morning of trial, the state gave oral notice of its intent to amend the complaint and seek an aggravated sentence based on the vulnerability of J.B. and the presence of a second child in the vehicle. Although the state failed to give written notice of its intent to seek an aggravated sentence, as required by Minn. R. Crim. P. 7.03, it claimed that it had provided oral notice to trial counsel that it would be seeking an aggravated sentence based on these factors. The court then asked trial counsel if he had been verbally notified of the state's intent to seek an aggravated sentence. Trial counsel

responded that the state mentioned it was going to file amendments and seek an aggravated sentence “orally and probably in an email or so,” but counsel did not receive formal written notice. In discussing how to proceed, the district court instructed the attorneys to look at the rules of procedure and make sure the proper procedures were being followed.

After jury selection, the court returned to the issue of amending the complaint to seek an aggravated sentence.

Court: My reading of the rules – the defense concedes that she – that the State gave adequate notice of [the grounds for departure].

Trial Counsel: I think we concede that we didn’t get the formal notice, but we were certainly put on notice that that was something that they were intending to do if it wasn’t resolved.

Court: I mean, are you contesting that somehow your client’s prejudiced by the way notice was given or –

Trial Counsel: No, Your Honor.

A jury convicted Tate of two counts of first-degree assault and acquitted him of second-degree assault. The jury also specifically found the aggravating factors requested by the state: J.B. was four years old at the time of the offense; J.B. was in the backseat of a vehicle with the doors closed when Tate shot him; and Tate shot D.R. in the presence of children. The court adjudicated Tate guilty and sentenced him on both counts. For the assault on J.B., Tate was sentenced to 206 months, an upward departure from the presumptive range of 74-103 months. The court based this departure on the vulnerability of J.B., as found by the jury. The district court declined to depart upward for the assault

on D.R. and sentenced Tate to 103 months. The court imposed the sentences to run consecutively, for a total of 309 months.

Through new counsel, Tate filed a direct appeal. On Tate's request, that appeal was stayed and remanded for postconviction proceedings. Tate argued on remand that the district court denied his right to present a complete defense in excluding alternative-perpetrator evidence, and that he received ineffective assistance of counsel when trial counsel did not properly introduce the alternative-perpetrator evidence. The postconviction court denied Tate's petition without an evidentiary hearing, and the appeal was reinstated.

In the appeal, Tate argued that he was denied the right to present a complete defense by the exclusion of relevant evidence and trial counsel was ineffective for failing to properly introduce that evidence; the evidence was insufficient to prove "great bodily harm"; the district court erred by permitting a doctor to testify that a gunshot wound is a serious injury; the prosecutor committed misconduct during closing argument; and the district court abused its discretion by imposing an upward departure and consecutive sentences. In an unpublished opinion, this court affirmed. *State v. Tate*, A14-1339, 2016 WL 952444 (Minn. App. Mar. 14, 2016), *review denied* (Minn. May 31, 2016). Throughout the direct appeal and postconviction proceeding, Tate was represented by the same appellate counsel.

After both the Minnesota and United States Supreme Courts denied review, Tate filed a second postconviction petition with the assistance of new counsel. He argued that appellate counsel was ineffective for failing to "raise any claims related to the prosecution

failing to give timely notice of its intent to seek an aggravated sentence and trial counsel's failure to object to the lack of proper notice"; trial counsel was ineffective for failing to object to the lack of proper notice of the state's intent to seek an aggravated sentence; and Tate's due process rights were violated when he was not given proper notice of the state's intent to seek an aggravated sentence. Although written as separate grounds for relief, Tate presented his claims as one argument—Tate's appellate counsel was ineffective for failing to make an ineffective-assistance-of-trial-counsel claim when trial counsel did not object to the lack of proper notice by the state of its intent to seek an upward departure. Tate argued that the lack of objection was unreasonable because the state could not show good cause for the late notice. He also argued that he was prejudiced because had counsel objected, the state would have been unable to seek an upward departure. He asserted that because his ineffective-assistance-of-trial-counsel claim would be successful, it was ineffective for appellate counsel to neglect to raise the issue. In his accompanying affidavit, Tate claimed that he was never told what aggravating factors were or how they could affect the length of his sentence. He also claimed that if he had known that his potential sentence could be upward of 400 months, he would have taken the state's plea deal.

The postconviction court denied Tate's motions for an evidentiary hearing and postconviction relief. In doing so, the postconviction court found that although the state provided notice outside the requirement of Minn. R. Crim. P. 7.03, trial counsel agreed that there was no prejudice to the defense in allowing the state to seek an aggravated sentence. Further, the postconviction court found that because Tate has continued to maintain his innocence, it would be unreasonable to expect that Tate would have pleaded guilty if he

had received written notice rather than oral notice of the state’s intent to seek an aggravated sentence. The postconviction court concluded that because trial counsel admitted that the defense was not prejudiced and Tate was unlikely to change his plea, he was not prejudiced by any error. For the same reasons, the postconviction court concluded that Tate did not rebut the presumption that trial counsel’s performance fell outside the range of reasonable assistance. The postconviction court concluded that, because Tate’s ineffective-assistance-of-trial-counsel claim failed, so did his ineffective-assistance-of-appellate-counsel claim. The postconviction court also found that Tate’s ineffective-assistance-of-trial-counsel claim is *Knaffla*-barred because Tate knew or should have known of the claim at the time of his direct appeal. The postconviction court determined that Tate’s appellate-counsel claim was merely his trial-counsel claim re-characterized, and it too was *Knaffla*-barred.

D E C I S I O N

As a preliminary matter, we address the state’s motion to strike a portion of Tate’s reply brief. The state moves to strike the portion of Tate’s reply brief in which he references a letter “Received April 24, 2015.” This letter was not filed with the postconviction court and is outside the record. See Minn. R. Crim. P. 28.02, subd. 8 (“The record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcripts of the proceeding, if any.”). We grant the state’s motion and decline to consider the letter in our decision. *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001) (“A reviewing court cannot base its decision on matters outside the record on appeal and any matters not part of the record must be stricken.” (quotation omitted)).

Turning to the issues raised by Tate, a petitioner is entitled to an evidentiary hearing “unless 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 (2018). We review the denial of a request for an evidentiary hearing for an abuse of discretion. *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018). A postconviction court abuses its discretion if it “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). When deciding whether to grant an evidentiary hearing, a postconviction court must take the facts alleged in the petition as true and construe them in the light most favorable to the petitioner. *Andersen v. State*, 913 N.W.2d 417, 422-23 (Minn. 2018). If the petitioner’s alleged facts, taken as true, are legally insufficient to grant relief, then an evidentiary hearing is not required. *Henderson*, 906 N.W.2d at 505. But doubts as to the necessity of an evidentiary hearing “should be resolved in favor of the party requesting the hearing.” *State v. Rhodes*, 627 N.W.2d 74, 86 (Minn. 2001).

Tate argues that the district court abused its discretion in finding that his claim was procedurally barred. Under the *Knaffla* rule, “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.” *Colbert v. State*, 870 N.W.2d 616, 626 (Minn. 2015) (emphasis omitted). Claims that were raised, or could have been raised, in a previous postconviction petition are also procedurally barred. *Id.* When an ineffective-assistance-of-counsel claim can be determined on the basis of the trial record, it must be brought on direct appeal or it is *Knaffla*-barred. *Andersen v. State*, 830

N.W.2d 1, 10 (Minn. 2013). But when the claim requires the court to consider evidence outside the trial record, it is not *Knaffla*-barred. *Id.*

We agree with the postconviction court that, to the extent that Tate makes an ineffective-assistance-of-trial-counsel claim, his claim is *Knaffla*-barred. At the time of the direct appeal, he knew trial counsel did not object to the state seeking an upward departure based on aggravating factors. He also knew that his sentence contained an upward departure. Even if his claim required the court to consider evidence outside the record, Tate had the opportunity to develop that record when his appeal was stayed and remanded for postconviction proceedings.

However, we conclude that the postconviction court abused its discretion when it found—without holding an evidentiary hearing—that Tate’s claim for ineffective assistance of appellate counsel was *Knaffla*-barred. The record is silent as to what Tate knew regarding his appellate-counsel-ineffectiveness claim. And it does not appear from the record that Tate could have known that his appellate counsel was ineffective at the time of his direct appeal. *See Schneider v. State*, 725 N.W.2d 516, 521 (Minn. 2007) (“This claim is not barred by *Knaffla* because Schneider could not have known of ineffective assistance of his appellate counsel at the time of his direct appeal.”).

The postconviction court cites to *Doppler v. State* to support its finding that Tate’s ineffective-assistance-of-appellate-counsel claim is *Knaffla*-barred. 660 N.W.2d 797 (Minn. 2003). But *Doppler* is distinguishable. In that case, Doppler claimed appellate counsel was ineffective for failing to raise trial counsel’s decision to not call three witnesses as a basis for ineffective assistance of counsel. *Id.* at 800. The postconviction

court held an evidentiary hearing in which Doppler testified that he often spoke with appellate counsel about trial counsel's failure to call the witnesses, he reviewed the postconviction memorandum submitted by his appellate counsel, and, during the evidentiary hearing, he had the opportunity to discuss trial counsel's failure to call the witnesses. *Id.* The supreme court concluded that this testimony supported a finding that Doppler knew of the basis of the ineffective-assistance-of-appellate-counsel claim at the time of his direct appeal. *Id.* at 802. Here, the record does not indicate what Tate discussed with appellate counsel, whether he was aware counsel failed to bring the claim, or if he had the opportunity to discuss the claim. Accordingly, the record does not conclusively show that Tate's claim is *Knaffla*-barred.

This, however, does not end our inquiry because the postconviction court also declined to grant an evidentiary hearing on the basis that Tate's petition lacks substantive merit. To receive an evidentiary hearing on a postconviction claim of ineffective assistance of counsel, a petitioner is required to allege facts that would show that counsel's representation fell below an objective standard of reasonableness and there was a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *State v. Nicks*, 831 N.W.2d 493, 504 (Minn. 2013). Ultimately, we review the denial of an evidentiary hearing on postconviction relief for an abuse of discretion. *Id.* at 503. But because claims of ineffective assistance of counsel are mixed questions of law and fact, the postconviction court's legal conclusions on these questions are reviewed de novo. *Id.*

In order to establish that appellate counsel was ineffective, Tate must first show that trial counsel was ineffective. *Griffin v. State*, 883 N.W.2d 282, 285 (Minn. 2016). Consequently, we begin our analysis by examining whether Tate has alleged facts that, if proven, show (1) his trial counsel’s performance fell below an objective standard of reasonableness, and (2) a reasonable probability exists that the outcome would have been different but for counsel’s errors. *Nicks*, 831 N.W.2d at 504.

Tate argues that he has alleged sufficient facts to show that trial counsel’s performance fell outside an objective standard of reasonableness when he failed to object to the state’s attempt to seek an aggravated sentence. We agree.

If the state intends to seek an aggravated sentence, it “must give written notice at least 7 days before the Omnibus Hearing.” Minn. R. Crim. P. 7.03. But if the state does not provide timely written notice, the court may allow late notice “on good cause and on conditions that will not unfairly prejudice the defendant.” *Id.* It is uncontested that the state failed to provide timely written notice. Accordingly, in order to seek an aggravated sentence the state had to show good cause and that Tate would not be prejudiced.

Tate alleges that when the state sought to seek an aggravated sentence, it did not argue that it had good cause, and the district court did not find good cause. Despite the state’s lack of good cause, trial counsel failed to object. If, as Tate alleges, the state did not argue and could not show good cause, then it was outside the objective standard of reasonableness for counsel to fail to object. Trial counsel had an obligation to understand the rules of procedure. *See In re Welfare of M.P.Y.*, 630 N.W.2d 411, 417 (Minn. 2001) (“[A] defense attorney has an obligation to understand the basic rules of discovery.”).

Further, trial counsel was given the opportunity to review the rules of procedure and still failed to make an objection. *See State v. Ellis-Strong*, 899 N.W.2d 531, 539 (Minn. App. 2017) (“An attorney’s ‘mistake of law’ because of a failure to look up a statute may amount to an objectively unreasonable performance.”). It does not appear from the record that there was a strategic reason for failing to object to the state’s failure to show good cause. Taking Tate’s allegations as true, trial counsel’s performance fell outside the wide range of reasonable assistance.

Tate must also sufficiently allege that, but for trial counsel’s error, there is a reasonable probability that the result would have been different. *Nicks*, 831 N.W.2d at 504. Taking Tate’s allegations as true, the district court would have to sustain an objection because the state could not meet the requirements for late notice. This would prevent the state from seeking an aggravated sentence, and the maximum sentence Tate could have received would have been 206 months, with consecutive sentencing on the two counts of first-degree assault. Instead, Tate received a 309-month sentence with a 103 month upward departure on the assault on J.B. Accordingly, Tate has sufficiently alleged that, but for trial counsel’s unreasonable performance, there is a reasonable probability the result would be different.

Having concluded that Tate has sufficiently alleged that trial counsel was ineffective, we must now consider if appellate counsel was ineffective for failing to challenge trial counsel’s lack of objection to the aggravated sentence. Appellate counsel is not required to raise all possible claims on appeal, and “a claim need not be raised if appellate counsel could have legitimately concluded that it would not prevail.” *Leake v.*

State, 737 N.W.2d 531, 536 (Minn. 2007) (quotations omitted). But there is nothing in the record that suggests Tate’s ineffective-assistance-of-trial-counsel claim would fail. As a result, it cannot be said with any certainty that Tate’s appellate counsel could have legitimately concluded that the claim had no reasonable likelihood of succeeding. *See id.* at 541. And because the ineffective-assistance-of-trial-counsel claim is viable, there is a reasonable possibility that the result would be different had appellate counsel raised the issue. Accordingly, the postconviction court erred in finding that the record conclusively showed that Tate was entitled to no relief and denying an evidentiary hearing. We reverse and remand for an evidentiary hearing.

Reversed and remanded; motion granted.