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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1150**

Thomas John Rassmussen, Jr., petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 4, 2019
Affirmed; motion denied
Bratvold, Judge**

Wright County District Court
File No. 86-CR-15-563

Thomas J. Rassmussen, Jr., Faribault, Minnesota (pro se appellant)

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

Thomas N. Kelly, Wright County Attorney, Greg T. Kryzer, Assistant County Attorney,
Buffalo, Minnesota (for respondent)

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

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges the district court's order summarily denying his petition for postconviction relief. Appellant contends that the postconviction court erroneously determined that his claims of ineffective assistance of trial counsel and insufficiency of the

evidence are procedurally barred, and that his claim of ineffective assistance of appellate counsel fails on the merits. Because appellant raised his claims of ineffective assistance of trial counsel and insufficient evidence in his direct appeal, and because appellate counsel's representation did not fall below the objective standard of reasonableness, we affirm.

FACTS

In November 2014, a fire damaged appellant Thomas Rassmussen's townhouse. After an investigation, the state charged Rassmussen with first-degree arson. A jury found Rassmussen guilty in January 2016, and the district court sentenced Rassmussen to 48 months in prison. Represented by counsel, Rassmussen appealed his judgment of conviction and raised one issue in his principal brief—whether the state's evidence was insufficient to prove his guilt beyond a reasonable doubt. Additionally, Rassmussen filed a pro se supplemental brief arguing that his trial attorney failed to provide effective assistance of counsel.

This court affirmed the judgment. *State v. Rassmussen*, No. A16-1215, 2017 WL 3013212, at *4 (Minn. App. July 17, 2017) (*Rassmussen I*), review denied (Sept. 19, 2017). First, we determined that the circumstantial evidence “taken as a whole, is consistent with Rassmussen intentionally setting fire to his townhouse, and insufficient to support any other rational hypothesis as to the cause of the fire.” *Id.* at *3. Second, we rejected his pro se argument that his trial counsel was constitutionally ineffective. *Id.* at *4. Rassmussen, still represented by appellate counsel, petitioned for further review, which the supreme court denied.

Rasmussen petitioned for postconviction relief in March 2018 and raised a number of issues, including ineffective assistance of trial and appellate counsel as well as insufficiency of the evidence. The district court summarily denied Rasmussen’s petition for postconviction relief in April 2018. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in determining that Rasmussen’s claims of ineffective assistance of trial counsel and insufficiency of the evidence are procedurally barred.

This court reviews a summary denial of a postconviction petition for an abuse of discretion. *Anderson v. State*, 913 N.W.2d 417, 422 (Minn. 2018). Additionally, we review a postconviction court’s decision to deny an evidentiary hearing or a new trial for an abuse of discretion. *See Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014) (evidentiary hearing); *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000) (new trial). In reviewing the postconviction court’s decision to deny relief, we review legal conclusions de novo and underlying factual findings for clear error. *Caldwell*, 853 N.W.2d at 770.

When a direct appeal is not available, a person convicted of a crime may petition for postconviction relief if he claims a violation of his constitutional rights. Minn. Stat. § 590.01, subd. 1 (2018). But Minnesota caselaw recognizes that some postconviction claims are procedurally barred. For example, all matters raised on direct appeal, and all claims known but not raised, “will not be considered upon a subsequent petition for postconviction relief.” *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). The *Knaffla* bar has two exceptions. First, novel issues will be considered if their legal basis “was not reasonably available at the time of the direct appeal.” *Quick v. State*, 757 N.W.2d 278, 280

(Minn. 2008). Second, an issue may be considered “in the interest of justice—when fairness so requires and the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal.” *Id.*; see also Minn. Stat. § 590.04, subd. 3 (2018) (providing that a postconviction court may deny “a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition when the issues raised in it have previously been decided” by an appellate court in “the same case”).

Here, the postconviction court determined that Rassmussen’s claims of ineffective assistance of trial counsel and insufficient evidence are *Knaffla*-barred. The postconviction court also concluded that an evidentiary hearing was not warranted. On appeal, Rassmussen relies mainly on the second exception to the *Knaffla* bar and “requests that his case be reviewed in its entirety in the interests of justice.”¹

¹ After Rassmussen filed his brief and addendum in this appeal, the state moved to strike both Rassmussen’s brief and addendum. The motion was considered at special term, and this court in an order denied the state’s motion to strike Rassmussen’s brief, but referred to the panel whether to strike materials in the addendum. The state’s motion argued that five pages in the addendum are not in the district court record. We rely only on the district court record to decide an appeal, and parties may not add to that record merely by including extraneous material with their appeal submissions. See Minn. R. Civ. App. P. 110.01 (“The documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.”); Minn. R. Civ. App. P. 130.01, subd. 1 (providing an appellant may append only portions of the record to his brief). Here, the district court record includes Rassmussen’s correspondence with appellate counsel, which Rassmussen filed along with his postconviction petition. We therefore consider the correspondence in this appeal. We disregard the materials from Rassmussen’s addendum that are not in the record. We deny the state’s motion as unnecessary because our opinion rests only on the record.

A. *Ineffective assistance of trial counsel*

Rasmussen acknowledges that he raised his ineffective-assistance-of-trial-counsel claim in his direct appeal, but argues that this court did not fully consider the issue. In *Rasmussen I*, this court granted the state's motion to strike evidence in Rasmussen's prose appendix because it contained documents that were not in the trial record. 2017 WL 3013212, at *4 n.2. Rasmussen contends that he is entitled to a postconviction evidentiary hearing that includes evidence not admitted at trial, including testimony from trial counsel.

The general rule is that ineffective-assistance-of-trial-counsel claims must be raised on direct appeal if the record is sufficiently developed to consider the claim, and, when the same claim is raised in a subsequent postconviction petition, *Knaffla* bars it. *Zornes v. State*, 880 N.W.2d 363, 369 (Minn. 2016). An evidentiary hearing in postconviction court is warranted when a petitioner alleges facts that, if proven, would "entitle him to relief under the two-pronged *Strickland* test." *Id.* at 370 (citations omitted). First, the defendant must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Fields v. State*, 733 N.W.2d 465, 468 (Minn. 2007) (quoting *Strickland v. Washington*, 466 U.S. 668, 687-88; 104 S. Ct. 2052, 2064 (1984)). Second, the defendant must prove that but-for counsel's errors, there is a reasonable probability that the "result of the proceeding would have been different." *Id.* (quoting *Strickland*, 466 U.S. at 694; 104 S. Ct. at 2068). Tactical decisions to call certain witnesses or present specific evidence at trial are within trial counsel's discretion and "do not prove that counsel's performance fell below an objective standard of reasonableness." *State v. Nissalke*, 801 N.W.2d 82, 111

(Minn. 2011); *see also State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986) (holding that tactical decisions are within trial counsel’s discretion).

In his direct appeal, we decided that Rassmussen’s claim of ineffective assistance of trial counsel failed under the first *Strickland* prong. *See Rassmussen I*, 2017 WL 3013212, at *4. Rassmussen’s pro se supplemental brief argued that his trial attorney had failed to contact alibi witnesses, stating that this was not “sound trial strategy” and that trial counsel “should have investigated further.” He also argued that trial counsel did not introduce certain evidence, such as phone texts. In *Rassmussen I*, we concluded these alleged failures “stem from decisions made by his trial counsel about whether to present evidence and witnesses that could confirm Rassmussen’s alibi or could rebut the state’s evidence about his financial situation at the time of the fire.” *Id.* Because the alleged failures were tactical decisions within trial counsel’s discretion, we rejected Rassmussen’s claim of ineffective assistance of trial counsel. *Id.*

In Rassmussen’s appeal from the order denying postconviction relief, Rassmussen again argues that his trial attorney “failed to challenge . . . testimony,” “failed to call” certain witnesses, and “failed to cross-examine” witnesses in a certain way. Rassmussen’s postconviction allegations, which are based entirely on trial counsel’s tactical and strategic decisions, cannot support a claim of ineffective assistance of trial counsel. *See Jones*, 392 N.W.2d at 236 (“Such trial tactics should not be reviewed by an appellate court.”). Moreover, all of Rassmussen’s allegations were based on the trial record and were raised or known at the time of the direct appeal. Thus, we conclude that the second exception to

the *Knaffla* bar does not apply, and the postconviction court did not abuse its discretion in summarily denying Rassmussen’s claim of ineffective assistance of trial counsel.

B. Insufficiency of the evidence of conviction

Rassmussen generally argues that the state relied on “negative corpus” evidence² to prove his guilt and this is insufficient to sustain for his conviction.³ He claims that “negative corpus” is a novel scientific evidence and he “requests a reversal or a new trial in the interest of justice.” By using the terms “novel” and “interest of justice,” Rassmussen appears to argue that both *Knaffla* exceptions apply.

We conclude that neither exception applies for two reasons. First, the “negative corpus” method for determining a fire’s ignition source is not a novel legal issue and, in fact, was available and argued in Rassmussen’s direct appeal. Second, the interests of justice do not require further review of this issue.

During Rassmussen’s jury trial, the prosecutor and defense attorney extensively argued the “negative corpus” issue and offered evidence through expert witnesses who

² In *Rassmussen I*, we noted that “negative corpus” was defined by the National Fire Protection Association (NFPA) as “[t]he process of determining the ignition source for a fire, by eliminating all ignition sources found, known, or believed to have been present in the area of origin.” *Rassmussen I*, 2017 WL 3013212, at *2 (quoting NFPA, *NFPA 921: Guide for Fire and Explosion Investigations*, § 19.6.5, at 203 (2014)).

³ In his brief, Rassmussen also contends that “negative corpus” evidence is unduly prejudicial because it “had a significant effect on the verdict.” In doing so, he repeats the argument for insufficient evidence from his direct appeal, thus, the claim is *Knaffla*-barred. For example, he states that there “was absolutely no evidence to support” that he set the fire and that there was an “absence of any supporting evidence.” Even if Rassmussen raises a new claim, it is still barred. *Knaffla*, 243 N.W.2d at 741 (barring claims “known but not raised” in the direct appeal).

were fire inspectors. The jury evaluated this evidence before reaching its verdict. In his direct appeal, Rassmussen challenged the sufficiency of the evidence based on the validity of “negative corpus” evidence. We determined that a lack of evidence of an accidental or natural cause cannot be used as “definitive proof that a fire was intentionally set,” but an expert can still testify to the lack of such evidence. *Id.* at *2. We also reasoned that the state can build its case with circumstantial evidence to “support the inference that the fire was intentionally set.” *Id.* This issue drew a special concurring opinion.⁴

Based on this record, we conclude that Rassmussen has litigated this claim in his jury trial and on direct appeal. Thus, we conclude that *Knaffla* bars Rassmussen’s postconviction claim for insufficiency of the evidence.

II. The district court did not abuse its discretion by denying postconviction relief for Rassmussen’s claim that appellate counsel was constitutionally ineffective.

Rassmussen’s claim of ineffective assistance of appellate counsel is not *Knaffla*-barred in this, his first postconviction appeal, “because [it] could not have been brought at any earlier time.” *Leake v. State*, 737 N.W.2d 531, 536 (Minn. 2007). Claims of ineffective assistance of counsel present mixed questions of law and fact. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). This court reviews a district court’s legal conclusions on claims of ineffective assistance of counsel de novo. *Id.*

⁴ The special concurrence “urge[d] caution” in using “negative corpus” evidence in future arson cases. *Id.* at *4 (Kirk, J., concurring specially). The concurring opinion concluded that any error was harmless because of the “overwhelming nature” of supporting circumstantial evidence establishing Rassmussen’s guilt. *Id.* at *5.

To prove his claim of ineffective assistance of appellate counsel, Rassmussen must satisfy the *Strickland* test and demonstrate that (1) appellate counsel's representation fell below an objective standard of reasonableness, and (2) but-for appellate counsel's error, the outcome would have been different. *Fields*, 733 N.W.2d at 468. "There is a strong presumption that a counsel's performance falls within the wide range of reasonable professional assistance." *Wilson v. State*, 582 N.W.2d 882, 885 (Minn. 1998) (quotation omitted). Appellate counsel "does not act unreasonably by not asserting claims that counsel could have legitimately concluded would not prevail." *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009). "Counsel appealing a criminal conviction has no duty to raise all possible issues." *Dent v. State*, 441 N.W.2d 497, 500 (Minn. 1989).

According to the correspondence that Rassmussen filed along with his postconviction petition, he asked his appellate counsel in his direct appeal to raise the issue of ineffective assistance of trial counsel. Appellate counsel did not believe that Rassmussen's trial counsel was constitutionally ineffective, and expressed this opinion on more than one occasion. For example, in a February 2017 letter, appellate counsel stated that he did "not believe that the conduct of [Rassmussen's trial] counsel was constitutionally ineffective and this was [his] reason for declining to pursue postconviction relief in [Rassmussen's] case." Appellate counsel went on to provide additional advice:

I would encourage you to raise your claims for the ineffective assistance of counsel in a pro se supplemental brief, so that you may pursue separate postconviction relief on those issues once this appeal has concluded. Alternatively, as noted before, you may discharge our office from representation and obtain a stay of the appeal on your own.

Rasmussen filed a pro se supplemental brief later in February 2017, arguing that his trial counsel was ineffective. As discussed above, in *Rasmussen I*, this court rejected Rasmussen's claim of ineffective assistance of trial counsel. 2017 WL 3013212, at *4.

Rasmussen now argues that the postconviction court erred in determining that his ineffective-assistance-of-appellate-counsel claim lacked merit. Rasmussen contends that his appellate counsel did not advise him that a claim for ineffective assistance of trial counsel may be barred if it is not "presented in a postconviction motion prior to a direct appeal." Rasmussen contends that if he had received this advice, he would have stayed his direct appeal and proceeded with his ineffective-assistance claim in a postconviction petition.

Our caselaw recognizes two categories of ineffective-assistance-of-trial-counsel claims. First, when it is clear that a claim can be decided based on the trial court record, it "must be brought on direct appeal and is procedurally barred when raised in a postconviction petition." *Torres v. State*, 688 N.W.2d 569, 572 (Minn. 2004). Second, when additional evidence is required to make a claim, then it should generally be brought in a postconviction petition before appeal to develop the record. *Id.* at 572, 572 n.1; see also *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997) (noting that when testimony from counsel may be relevant, it is appropriate to raise the claim in postconviction court). When it is not clear whether additional evidence would be relevant, the best procedure for raising a claim of ineffective assistance of trial counsel is generally "to file a petition for postconviction relief before appeal." *Torres*, 688 N.W.2d at 572 n.1.

In *Hale v. State*, the Minnesota Supreme Court considered whether appellate counsel was ineffective for failing to advise the appellant that raising ineffective assistance of trial counsel on direct appeal could prevent raising the issue in future proceedings. 566 N.W.2d 923, 926-28 (Minn. 1997). The appellant had argued in a pro se brief on direct appeal that trial counsel was ineffective. *See id.* at 926. When he lost the direct appeal, appellant petitioned for postconviction relief, alleging ineffective assistance of trial and appellate counsel. *Id.* The postconviction court denied relief, and the appellant argued to the supreme court that appellate counsel was ineffective for failing to “advise him that if he included [his] claims in his pro se brief, [he] could be prevented from trying to assert the claim in a postconviction setting.” *Id.* at 927. The supreme court held that appellant’s ineffective-assistance-of-appellate-counsel claim was without merit because, at the time of the direct appeal, appellant “knew all the issues surrounding his ineffective assistance of trial counsel claims.” *Id.* If appellate counsel had advised appellant not to raise such claims in the direct appeal, and if the appellant had followed that advice, he “still would likely have been barred from doing so in subsequent proceedings.” *Id.*⁵

⁵ Rassmussen relies on several United States Supreme Court decisions to support his argument that appellate counsel did not provide effective assistance. *See Evitts v. Lucey*, 469 U.S. 387, 389-91, 105 S. Ct. 830, 832-33 (1985); *Entsminger v. Iowa*, 386 U.S. 748, 750, 87 S. Ct. 1402, 1403 (1967); *Anders v. California*, 386 U.S. 738, 742-43, 87 S. Ct. 1396, 1399-400 (1967). *Evitts*, *Entsminger*, and *Anders* are all distinguishable. Each case involved the complete failure of counsel to engage in the adversarial process or a procedural violation. Unlike the attorneys in the cited cases, Rassmussen’s appellate counsel was engaged in the adversarial process—he timely filed an appellate brief, moved for Rassmussen to obtain more time for his supplemental pro se brief, and responded to Rassmussen’s concerns. Also, while Rassmussen complains that appellate counsel gave him bad advice, he does not assert that appellate counsel committed a procedural violation.

Here, the facts are similar and support the same outcome for Rassmussen’s claim of ineffective assistance of appellate counsel. First, appellate counsel provided Rassmussen with objectively reasonable advice. Rassmussen’s claim was based on trial strategy, and he “knew all the issues” on direct appeal based on the trial court record. *See id.* It is therefore likely that Rassmussen *had* to raise his claim on direct appeal, which is what appellate counsel advised him to do. *See Torres*, 688 N.W.2d at 572. Second, appellate counsel encouraged Rassmussen to pursue the issue that counsel believed would be most likely to succeed. Appellate counsel did not agree with the option of staying the direct appeal and filing a postconviction petition regarding ineffective assistance of trial counsel. Appellate counsel also explained in a letter to Rassmussen that he could discharge his attorney and move to stay the appeal for postconviction proceedings in district court. The fact that appellate counsel did not encourage Rassmussen to pursue a legal strategy that counsel believed was unlikely to succeed does not show that appellate counsel’s advice was unreasonable. *See Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985) (“[A]n effective appellate lawyer does not dilute meritorious claims with frivolous ones.” (quotation omitted)).

Because Rassmussen’s claim fails the first *Strickland* prong, we need not discuss the second prong. Even so, we observe that, had Rassmussen discharged appellate counsel, then successfully moved to stay his first appeal, and filed a pro se postconviction petition, we cannot conclude that the outcome would have been any different. This court rejected the ineffective-assistance-of-trial-counsel claim in his direct appeal because Rassmussen

challenged his counsel's trial strategy. We fail to see why a postconviction court would have concluded any differently about that same claim.

In sum, we conclude that Rassmussen's claims of ineffective assistance of trial counsel and insufficiency of the evidence are procedurally barred under *Knaffla* and that the district court did not abuse its discretion in summarily denying postconviction relief without an evidentiary hearing. Additionally, we conclude that Rassmussen's claim of ineffective assistance of appellate counsel fails on the merits.

Affirmed; motion denied.