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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0641**

Tyrese Thomas, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 18, 2020
Affirmed
Florey, Judge**

Chippewa County District Court
File No. 12-CR-14-79

Christopher J. Perske, Bloomington, Minnesota (for appellant)

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

Matthew Haugen, Chippewa County Attorney, Chris Reisdorfer, Assistant County
Attorney, Montevideo, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Larkin,
Judge.

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

FLOREY, Judge

In this appeal from the order denying his petition for postconviction relief, appellant Tyrese Thomas argues (1) he received ineffective assistance of counsel from the attorney who represented him at the evidentiary hearing held on his first petition for postconviction

relief in November 2018; (2) the prosecution committed misconduct during trial by eliciting false and prejudicial testimony from its witnesses; (3) he was denied a fair trial through the suppression of exculpatory evidence; (4) the district court erred in admitting written reports of a law-enforcement witness at the probable-cause hearing and at trial due to a lack of foundation; (5) the district court erred in denying him relief and in applying the *Knaffla* bar; and (6) he received ineffective assistance of trial counsel. We affirm.

FACTS

Appellant Tyrese Thomas was charged with one count of criminal sexual conduct in the first degree, one count of criminal sexual conduct in the second degree, and one count of criminal sexual conduct in the third degree in February 2014. The charges were based on allegations that in 2012, then-34-year-old Thomas engaged in sexual contact with K.R.P., who was then 12.

A pretrial hearing was held in October 2014. During that hearing, the parties informed the district court that they had engaged in plea negotiations, and the state made a settlement offer. Thomas was represented by counsel who requested that the pretrial hearing be continued so that he could discuss the plea offer with Thomas. Later that month, at the continued pretrial hearing, the plea offer was placed on the record. In exchange for a guilty plea to the second-degree criminal-sexual-conduct charge, the state offered to recommend the bottom of the presumptive sentencing range, which was 119 months, concurrent with the time Thomas was then serving for an unrelated offense. Thomas declined the plea agreement on the record during the pretrial hearing.

A two-day jury trial was held. Thomas testified at the trial and denied engaging in any sexual contact with K.R.P. The jury found Thomas guilty of criminal sexual conduct in the first and second degree, but found him not guilty of criminal sexual conduct in the third degree. Thomas was sentenced to 306 months in prison for the first-degree criminal-sexual-conduct conviction. The district court did not impose a separate sentence for the second-degree conviction, but it did enter a conviction.

In March 2015, Thomas filed a direct appeal to this court to challenge his convictions. He argued that he was deprived of a fair trial because of a biased juror and that the district court erred by adjudicating him guilty of the second-degree criminal-sexual-conduct conviction because it was a lesser-included offense and the same behavior on which the first-degree conviction was based. Thomas did not raise an ineffective-assistance-of-counsel argument on appeal.

In March 2016, this court affirmed Thomas's conviction for first-degree criminal sexual conduct. This court remanded the case to vacate the conviction of second-degree criminal sexual conduct. The district court vacated Thomas's conviction for second-degree criminal sexual conduct in April 2016. Thomas filed a petition for further review of this court's decision, which was denied on June 21, 2016.

In June 2017, Thomas filed a postconviction petition arguing ineffective assistance of both trial and appellate counsel. The postconviction petition was denied in July 2017. The district court concluded that Thomas's ineffective-assistance-of-counsel argument was barred under *Knaffla* because it was not raised on direct appeal. Regardless, the district court analyzed Thomas's claim under the *Strickland* test and concluded that, even if

Thomas's counsel had done what he had claimed, the outcome of the trial would not have been different.

In August, 2017, Thomas filed an appeal with this court, seeking review of the denial of his postconviction petition. This court dismissed the appeal on October 5, 2017, because Thomas failed to file a statement of the case.

Thomas attempted to file a second postconviction petition in June 2018, which consisted of a mere cover sheet. The petition was rejected on June 7, 2018.

In July, 2018, Thomas filed his second postconviction petition alleging ineffective assistance of counsel. Thomas also requested leave to retroactively accept the plea deal offered to him during the pretrial proceedings.

The district court held an evidentiary hearing on the petition in November 2018. The district court denied the postconviction petition on March 27, 2019. Thomas appeals.

D E C I S I O N

“We review the denial of a petition for postconviction relief for an abuse of discretion. A district court abuses its discretion when it has 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. Legal issues are reviewed de novo, but our review of factual issues is limited to whether there is sufficient evidence in the record to sustain the district court's findings. Put differently, we do not reverse the district court's findings unless they are clearly erroneous.” *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (citation, quotations, and alterations omitted).

As a preliminary matter, we note that Thomas raises several new issues on this appeal, including ineffective assistance of counsel¹ by the attorney who represented him at the evidentiary hearing held on his first petition for postconviction relief in November 2018, prosecutorial misconduct, a *Brady* violation, and that the district court erred in admitting written reports of a law-enforcement witness at the probable-cause hearing and at trial due to a lack of foundation. These arguments were not raised in Thomas’s direct appeal, or in either of his subsequent postconviction petitions. Accordingly, they are not properly before this court, and we deem them forfeited. Additionally, with the exception of the ineffective-assistance-of-counsel claim against the attorney representing him at the evidentiary hearing, these new arguments are *Knaffla*-barred because they could have been raised on direct appeal. *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). Similarly, these arguments are barred pursuant to Minn. Stat. § 590.01, subd. 1 (2019), because they could have been raised on direct appeal.

The district court noted that Thomas’s ineffective-assistance-of-trial-counsel claims are likely barred by *Knaffla* because all of the issues raised could have been brought on direct appeal. We agree that the ineffective-assistance-of-counsel claims in Thomas’s first and second petitions are *Knaffla*-barred because they could be decided solely on the basis of the trial record. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013) (“When a claim of

¹ In one of his postconviction petitions, Thomas asserts that he should be allowed to retroactively accept the pretrial plea offer, arguing that he only rejected it due to advice from counsel, which he now claims was ineffective. Because Thomas has not shown that he is entitled to postconviction relief on the grounds of ineffective assistance of counsel, we decline to consider his requested relief.

ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal or it is *Knaffla*-barred.”).

Finally, Thomas asserts that the district court abused its discretion by denying his petition for relief on the basis of ineffective assistance of appellate counsel. Thomas argues that his appellate counsel was ineffective because counsel failed to raise the argument of ineffective assistance of trial counsel. But appellate attorneys are “not required to raise all possible claims on direct appeal, and counsel need not raise a claim if they ‘could have legitimately concluded that it would not prevail.’” *Arredondo v. State*, 754 N.W.2d 566, 571 (Minn. 2008) (citation omitted). Here, it is clear that an appellate attorney could have legitimately concluded that an ineffective-assistance-of-counsel claim would not succeed. The district court did not abuse its discretion by concluding that Thomas’s mere assertion that his appellate counsel was ineffective is not sufficient to overcome the *Strickland* test. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984). Accordingly, we affirm the district court’s denial of Thomas’s petitions for postconviction relief.

Affirmed.