

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1409**

Gerald James Risk, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 1, 2021
Affirmed
Frisch, Judge**

Hennepin County District Court
File No. 27-CR-16-12286

Mark D. Kelly, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jordan W. Rude, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant challenges the district court's denial of an evidentiary hearing on his petition for postconviction relief, in which he alleged that he received ineffective assistance of trial and appellate counsel. We affirm.

FACTS

On May 6, 2016, appellant Gerald James Risk was charged with one count of first-degree criminal sexual conduct with victim K.T., a person under 13 years old, in violation of Minn. Stat. § 609.342, subd. 1(a) (2014). The criminal complaint contained allegations that K.T. was at Risk's home for a sleepover with her friend H.H. when Risk engaged in sexual contact with K.T. During a six-day jury trial, K.T. testified to the events as alleged in the complaint, and H.H. offered contradicting testimony and testified that nothing inappropriate occurred. The jury found Risk guilty, and the district court sentenced Risk to 144 months in prison. Risk directly appealed his conviction and argued he was entitled to a new trial because of prosecutorial misconduct. We affirmed his conviction. *State v. Risk*, No. A18-0925, 2019 WL 4009145, at *1 (Minn. App. Aug. 26, 2019), *review denied* (Nov. 19, 2019).

On June 18, 2020, Risk filed a petition for postconviction relief wherein he claimed ineffective assistance of trial and appellate counsel entitled him to a new trial. In part, the postconviction petition contains allegations that trial counsel “did not attempt to interview any of the [s]tate’s witnesses including the alleged victim(s)” prior to trial and “failed to interview any of the potential defense witnesses that were inside of the petitioner’s home

at the time of the alleged crime, including the alleged victim(s).” The petition further provides that “[i]f called to testify at trial, the numerous individuals present in the home on the night in question would have contradicted the [s]tate’s allegations and raised reasonable doubt as to the elements of the crime charged.” The district court summarily denied the postconviction petition, concluding that the petition did not “set forth sufficient facts upon which to set a hearing on his claim for a new trial.” The district court also concluded that the claim of ineffective assistance of appellate counsel failed on the merits because, in part, the petition did not set forth “specific[] facts which could lead the [c]ourt to conclude that, absent trial[] counsel[’s] ineffective assistance, the result probably would have been different.” This appeal follows.

DECISION

“We review the denial of a petition for postconviction relief, including denial without a hearing, for an abuse of discretion.” *Reed v. State*, 925 N.W.2d 11, 18 (Minn. 2019). “A postconviction court does not abuse its discretion unless 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.” *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018) (quotation omitted).

To succeed in a claim of ineffective assistance of counsel, Risk must satisfy the two-prong test set forth in *Strickland v. Washington*: (1) counsel’s performance fell below an objective standard of reasonableness, and (2) absent counsel’s unreasonable performance, the result of the proceeding likely would have been different. 466 U.S. 668, 687, 696-97 104 S. Ct. 2052, 2064, 2069 (1984). “To receive an evidentiary hearing on a postconviction

claim of ineffective assistance of appellate counsel, a defendant is required to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong test announced in *Strickland v. Washington*.” *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012). “[W]hen 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.” *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009) (alteration in original) (quotation omitted).

A petitioner seeking postconviction relief has the burden of establishing by a fair preponderance of the evidence that the facts warrant relief. If the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, a petitioner is not entitled to an evidentiary hearing. Further, allegations in a petition for postconviction relief must be more than argumentative assertions without factual support.

Erickson v. State, 725 N.W.2d 532, 534 (Minn. 2007) (quotations and citations omitted).

Risk bore the burden to allege facts in his petition sufficient to establish by a fair preponderance of the evidence that he was entitled to relief. *See id.* Mere “argumentative assertions without factual support” are insufficient to meet the threshold requirement for an evidentiary hearing on a postconviction petition. *See id.* A district court may deny an evidentiary hearing in the absence of proof supporting the allegations in the petition. *Id.* at 537.

The district court denied the request for an evidentiary hearing in part because the petition for postconviction relief did not contain sufficient allegations to support the second *Strickland* prong—that the result of the proceeding would have been different but for the ineffective assistance of trial or appellate counsel. See *Strickland*, 466 U.S. at 696-97, 104 S. Ct. at 2069. We see no abuse of discretion by the district court in reaching this conclusion. The petition contains general, nonspecific allegations that trial counsel did not interview unidentified witnesses and that if called to testify at trial, “numerous individuals” would have “contradicted the [s]tate’s allegations.” But the petition does not contain any factual basis for these assertions, does not identify any individual not interviewed or called to testify at trial, does not set forth the purported testimony of any such individual, and does not explain how the result would have been different but for counsel’s failure to obtain such witness interviews or elicit unspecified testimony. These argumentative assertions without factual support do not amount to an offer of proof and are insufficient to warrant an evidentiary hearing on a petition for postconviction relief. Risk also complains of other errors by trial counsel, such as the failure to object to evidence or argument, but again, the petition contains no allegations or evidence that, even assuming that such actions fell below an objective standard of reasonableness, the result would have been any different but for those alleged errors.

The petition contains no facts or offer of proof to establish the second *Strickland* prong, which is fatal to the claims of ineffective assistance of trial and appellate counsel. Accordingly, the district court properly exercised its discretion in concluding that Risk

offered mere argumentative assertions without facts needed to warrant an evidentiary hearing.¹

Affirmed.

¹ Because we conclude that the allegations set forth in the petition do not satisfy the *Strickland* test, we do not address the conclusion by the district court that the petition was *Knaffla*-barred or Risk's argument that the claims in the petition are subject to an exception to the *Knaffla*-bar. We also do not address the district court's conclusion that Risk's complaints about trial strategy do not amount to ineffective assistance of counsel. But we note that we generally do not review strategic decisions of trial or appellate counsel. See *State v. Vang*, 847 N.W.2d 248, 267 (Minn. 2014) (instructing that we "will not review an ineffective-assistance-of-counsel claim that is based on trial strategy," which includes deciding which defenses to raise and "the extent of counsel's investigation and the selection of evidence"); see also *Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009) (instructing that "[c]ounsel does not act unreasonably by not asserting claims that counsel could have legitimately concluded would not prevail"); *Nunn v. State*, 753 N.W.2d 657, 661 (Minn. 2008) (directing that similar deference is given to appellate counsel strategy).