

*This opinion is nonprecedential except as provided by  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  
A22-0201**

John Thomas Owen, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed September 6, 2022  
Affirmed in part and remanded  
Worke, Judge**

Blue Earth County District Court  
File No. 07-CR-16-3607

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Gaïtas, Judge; and Smith,  
John P., Judge.\*

---

\* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## NONPRECEDENTIAL OPINION

**WORKE**, Judge

Appellant challenges the district court's denial of his petition for postconviction relief. Most of appellant's claims fail as time- or procedurally barred, and, in any event, fail on the merits. However, appellant's claim that trial counsel failed to communicate a plea offer requires additional fact-findings and meets an exception to the time bar to postconviction claims. We affirm in part and remand.

### FACTS

In 2016, then 16-year-old N.D.<sup>1</sup> visited her sister at college for the weekend and began drinking alcohol with her sister and some friends. N.D. became intoxicated and experienced "black spots" or "blackout spots," during which she does not remember anything. N.D. went to bed in her sister's friend's dorm room.

N.D. testified that, at some point in the night, she remembers that she was lying down on a futon with an unknown male sitting next to her. The unknown male was later identified as appellant John Thomas Owen. N.D. remembers kissing Owen, but then experiencing a "blackout spot." Owen began to remove his pants, but N.D. said, "[N]o, no, no, I can't." Owen asked her why not, but N.D. did not "remember the conversation after that" because she had another "blackout spot." N.D. next remembers Owen

---

<sup>1</sup> Throughout the record, the initials T.D. and N.D. are used interchangeably to refer to complainant. The initials N.D. represent the abbreviation of complainant's legal name and are used herein.

penetrating her vagina with his penis. N.D. recalls that Owen “did two strokes,” then stopped. N.D. cannot remember what took place after that.

The next morning, N.D. told her sister what happened. N.D. and her sister reported the incident to police and went to the hospital for a sexual-assault examination.

After police contacted him, Owen told police that he had sex with N.D. even though he knew she was “too drunk.” Owen stated that while he was on the futon with N.D., he “proceeded to kiss” her and that N.D. kissed him back. Owen also stated that N.D. never expressed her consent to have intercourse, but that N.D. “gave [him] that look and then she . . . lifted her butt to where it’s easier to take her pants off.” Owen told investigators that “[N.D.] put [his penis] inside of her,” but that after a couple of seconds they both decided to stop.

Owen was charged with third-degree criminal sexual conduct—sexual penetration of a physically helpless complainant—in violation of Minn. Stat. § 609.344, subd. 1(d) (2016), fourth-degree criminal sexual conduct—sexual contact of a physically helpless complainant—in violation of Minn. Stat. § 609.345, subd. 1(d) (2016), and fifth-degree criminal sexual conduct—nonconsensual sexual contact—in violation of Minn. Stat. § 609.3451, subd. 1(1) (2016).

After a jury trial, Owen was convicted of all charges. The district court denied Owen’s motion for a downward dispositional or durational departure and imposed a sentence of 48 months in prison for third-degree criminal sexual conduct.

Owen appealed the convictions, arguing that (1) the record was insufficient to support his third- and fourth-degree criminal-sexual-conduct convictions, (2) the district

court abused its discretion by admitting certain evidence, (3) there was prosecutorial misconduct, (4) the district court erred by entering multiple convictions, and (5) the district court abused its discretion by denying his motion for a downward departure. *State v. Owen*, No. A18-0318, 2018 WL 6273120, at \*1 (Minn. App. Dec. 3, 2018), *rev. denied*, (Minn. Feb. 19, 2019). This court affirmed on most issues but reversed Owen’s convictions of fourth- and fifth-degree criminal sexual conduct as included offenses<sup>2</sup> of third-degree criminal sexual conduct and remanded to the district court to vacate those convictions. *Id.* In February 2019, the supreme court denied Owen’s petition for further review. *State v. Owen*, No. A18-0318 (Minn. Feb. 19, 2019) (order).

In September 2021, Owen petitioned the district court for postconviction relief requesting an evidentiary hearing, arguing that (1) newly discovered evidence requires a new trial, (2) he received ineffective assistance of trial counsel, and (3) he received ineffective assistance of appellate counsel. The district court denied Owen’s petition for postconviction relief and an evidentiary hearing. This appeal followed.

## DECISION

The denial of a petition for postconviction relief is reviewed for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). We review legal issues “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.” *Id.* (quotation omitted). The district court “abuses its discretion when its decision is based on an erroneous view of the law or

---

<sup>2</sup> Minn. Stat. § 609.04, subd. 1 (2016) (prohibiting a criminal defendant convicted of one offense from also being convicted of any included offenses).

is against logic and the facts in the record.” *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013) (quotation omitted).

On appeal, Owen argues that the district court abused its discretion by failing to (1) properly apply the newly-discovered-evidence exception to the time bar for postconviction claims, (2) address his ineffective-assistance-of-trial-counsel claims, and (3) address his ineffective-assistance-of-appellate-counsel claim. As discussed below, we conclude that Owen’s claims are time-barred, that most of his claims would nevertheless fail on the merits, and that the newly-discovered-evidence exception does not apply. However, Owen’s claim that his trial counsel failed to communicate a plea offer to him requires additional fact-finding and meets the interests-of-justice exception to the time bar.

“A petitioner is not entitled to relief and no hearing is required if a petition is untimely under the postconviction statute of limitations.” *Odell v. State*, 931 N.W.2d 103, 105 (Minn. 2019) (quotation omitted). A postconviction petition must be filed no more than two years after an appellate court’s disposition of a direct appeal, if one took place, unless the petitioner meets a statutory exception. *See* Minn. Stat. § 590.01, subd. 4(a)(2), (b) (2021).

Owen’s direct appeal was decided on December 3, 2018, and the supreme court denied Owen’s petition for further review on February 19, 2019. *Owen*, No. A18-0318, 2018 WL 6273120, at \*1. If an appellant does not petition the U.S. Supreme Court for certiorari, “the appellant’s conviction becomes ‘final’ 90 days after” the Minnesota Supreme Court makes its decision. *Berkovitz v. State*, 826 N.W.2d 203, 207 (Minn. 2013).

Owen did not petition the U.S. Supreme Court for certiorari, therefore, he had until May 20, 2021, to file a timely postconviction petition. *See id.* Here, Owen’s petition for postconviction relief was filed on September 22, 2021; therefore, Owen’s petition is time-barred unless he can establish that an exception to the limitations period applies.

### ***Newly discovered evidence***

Owen argues that newly discovered evidence from an expert witness regarding “whether [N.D.] was physically helpless” entitles him to review of his claim based on the newly-discovered-evidence exception to the postconviction statute of limitations. *See* Minn. Stat. § 590.01, subd. 4(a), (b)(2) (2021).

“Notwithstanding the 2-year limitations period, a [district] court may hear an untimely petition if the petitioner has alleged facts that, if true, would meet one of the five exceptions.” *Odell*, 931 N.W.2d at 106. One such exception is the newly-discovered-evidence exception. Minn. Stat. § 590.01, subd. 4(b)(2). For this exception to apply, Owen must prove, by the clear and convincing standard, “that the evidence (1) is newly discovered; (2) could not have been ascertained by the exercise of due diligence . . .; (3) is not cumulative . . .; (4) is not for impeachment purposes; and (5) establishes by the clear and convincing standard that petitioner is innocent of the” underlying offense. *Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012). “All five criteria must be satisfied to obtain relief.” *Id.*

Here, Owen’s claim that the expert testimony should be considered under the newly-discovered-evidence exception fails for two reasons. First, as the district court noted, Minnesota courts generally do not consider “expert testimony” to be newly discovered

evidence. *Wieland v. State*, 457 N.W.2d 712, 714 (Minn. 1990) (stating that “generally expert testimony does not constitute newly discovered evidence warranting a new trial” (alteration omitted) (quotation omitted)). Second, Owen’s expert witness relied on 14 publications related to alcohol intoxication, 12 of which existed prior to trial. Therefore, the information in the expert’s affidavit was known, or should have been known, at the time of trial through the “exercise of due diligence.” *See* Minn. Stat. § 590.01, subd. 4(b)(2). Because Owen’s claim fails the first two criteria of the newly-discovered-evidence exception test, we need not address the remaining criteria. *See Riley*, 819 N.W.2d at 168. We conclude that the district court did not abuse its discretion by concluding that Owen’s claim of newly discovered evidence was time-barred.

### ***Ineffective assistance of counsel***

Owen claims that his trial attorney was ineffective because counsel: (1) failed to present newly discovered evidence to the jury, (2) declined to make an opening statement, (3) prevented him from having an attorney-client relationship, (4) denied his constitutional right to testify, and (5) did not communicate a proposed plea offer to him. He also argues that his appellate counsel was ineffective for failing to present certain arguments on appeal. We considered each of Owen’s ineffective-assistance-of-counsel claims individually.

Under the federal and state constitutions, a criminal defendant is entitled to the assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. I, § 6. This right means the right to *effective* assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 2063 (1984). Appellate courts apply the two-prong *Strickland* test in determining whether a defendant received ineffective assistance of counsel. *Peltier v.*

*State*, 946 N.W.2d 369, 372 (Minn. 2020). The *Strickland* test requires Owen to prove that: (1) his “counsel’s representation fell below an objective standard of reasonableness”; and (2) “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Zumberge v. State*, 937 N.W.2d 406, 413 (Minn. 2019) (quotation omitted). If an ineffective-assistance-of-counsel claim fails to satisfy one of the *Strickland* prongs, we need not consider the other prong. *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013).

The district court must hold an evidentiary hearing “[u]nless 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 (2021). To be entitled to an evidentiary hearing on a postconviction ineffective-assistance-of-counsel claim, a petitioner must “allege facts that, if proven by a fair preponderance of the evidence, would satisfy the two-prong [*Strickland*] test.” *Nicks*, 831 N.W.2d at 504 (quotation omitted). When we review the district court’s denial of postconviction relief based on a petitioner’s ineffective-assistance-of-trial-counsel claim, “we will consider the 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.” *Id.* at 503-04.

### ***1. Expert testimony***

Owen argues that trial counsel should have presented evidence to the jury regarding the impact of “blackout drunkenness” as it relates to the element of third-degree criminal sexual conduct. The first *Strickland* prong—whether counsel’s performance fell below an

objective standard of reasonableness—is generally met if the attorney demonstrates a level of “customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (quotation omitted). There is “a strong presumption that counsel’s performance was reasonable.” *Andersen*, 830 N.W.2d at 10. The selection of evidence to present at trial is a matter of trial strategy. *Id.* “Matters of trial strategy lie within the discretion of trial counsel and will not be second-guessed by appellate courts.” *Leake*, 737 N.W.2d at 536.

Although trial counsel did not call the specific expert witness Owen relies on for postconviction relief, trial counsel did call and question witnesses, including expert witnesses. We will not second guess trial counsel’s selection of witnesses. *See id.* Therefore, Owen has not demonstrated that his trial counsel’s “representation fell below an objective standard of reasonableness.” *See Strickland*, 466 U.S. at 688, 104 S. Ct. at 2064. Because Owen has not satisfied the first *Strickland* prong, we need not consider prong two. *Andersen*, 830 N.W.2d at 10.

## **2. Opening statement**

Owen argues that trial counsel was ineffective for failing to present an opening statement. But the decision to make an opening statement is also a matter of trial strategy. *See Sanderson v. State*, 601 N.W.2d 219, 226 (Minn. App. 1999) (stating that “[t]he choice by counsel of making an opening . . . arguments should not be second-guessed”), *rev. denied* (Minn. Mar. 28, 2000); *Leake*, 737 N.W.2d at 536. Owen cannot show that the outcome of the proceeding would have been different had trial counsel made an opening statement; therefore, Owen cannot satisfy the second *Strickland* prong. Because Owen has

not satisfied the second *Strickland* prong, we need not consider prong one. *Andersen*, 830 N.W.2d at 10.

### ***3. Attorney-client relationship***

Owen claims that his “limited contact” with trial counsel prevented an attorney-client relationship. But the Sixth Amendment does not guarantee a meaningful relationship between a party and counsel. *Morris v. Slappy*, 461 U.S. 1, 13-14, 103 S. Ct. 1610, 1617-18 (1983) (holding that two meetings between defendant and counsel were insufficient grounds for an ineffective-assistance-of-counsel claim); *State v. Caldwell*, 803 N.W.2d 373, 387 (Minn. 2011) (stating that “the number of attorney-client consultations does not alone demonstrate inadequate representation”).

The record shows that Owen consulted with his attorney several times, including a meeting in March 2017, discussing whether to sign a waiver of extradition, and discussing whether to testify at trial. Owen has not shown, and the record does not indicate, any deficiency in his relationship with trial counsel that would show that “counsel’s representation fell below an objective standard of reasonableness.” *Zumberge*, 937 N.W.2d at 413 (quotation omitted). And even if it did, Owen has not shown that more contact with trial counsel would have changed the result of his trial. *See id.* Owen has failed to satisfy either *Strickland* prong here.

### ***4. Testimony in one’s own defense***

Owen claims that trial counsel denied him the opportunity to testify in his own defense. A criminal defendant has a constitutional and a statutory right to testify. U.S. Const. amend. XIV, § 1; Minn. Const. art. 1 § 7; Minn. Stat. § 611.11 (2021); *see State v.*

*Ihnot*, 575 N.W.2d 581, 587 (Minn. 1998) (stating that right to testify is protected by the Fourteenth Amendment of the United States Constitution and Minnesota state law). “[T]he right to testify in one’s own defense is a personal right which counsel does not have the ultimate authority to waive.” *State v. Rosillo*, 281 N.W.2d 877, 878 (Minn. 1979). A defendant’s personal waiver of the right testify “should be voluntary and knowing.” *State v. Walen*, 563 N.W.2d 742, 751 (Minn. 1997). The defendant bears the burden of proving that the waiver of his right to testify was not voluntary and knowing. *Id.* If trial counsel denies a defendant’s right to testify, a new trial must be granted “regardless of the probable result in a subsequent proceeding.” *Id.* at 750.

Owen’s trial counsel addressed whether Owen intended to testify on the record:

COUNSEL: Your Honor, at this time we’ll make a record with our client about his decision to not testify.

....

COUNSEL: Mr. Owen, this is the point in the trial where I’ve told you that you need to make a decision about whether or not you’re going to testify. Do you understand that?

....

OWEN: Yes.

COUNSEL: You and I have been talking about that decision for months and months, is that correct?

OWEN: Correct.

COUNSEL: And I’ve explained to you at all relevant times that the only person that gets to make that decision is you. Is that correct?

OWEN: Correct.

....

COUNSEL: Have you made a decision about whether or not you want to testify?

OWEN: Yes.

COUNSEL: What is that decision?  
OWEN: I decided not to testify.

The record shows that Owen voluntarily and knowingly waived his right to testify in his own defense. Owen has not shown that trial counsel's representation "fell below an objective standard of reasonableness" on this point. *Zumberge*, 937 N.W.2d at 413 (quotation omitted). Because Owen has not satisfied the first *Strickland* prong, we need not consider prong two. *Andersen*, 830 N.W.2d at 10.

### ***5. Appellate counsel***

Owen claims that he received ineffective assistance of appellate counsel because appellate counsel should have presented evidence on appeal from an expert witness regarding the impact of "blackout drunkenness." An ineffective-assistance-of-appellate-counsel claim must also satisfy both prongs of the *Strickland* test. *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012) (quotation omitted). In determining whether appellate counsel's performance was reasonable, we ask whether counsel demonstrated a level of "customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Leake*, 737 N.W.2d at 536 (quotation omitted). "Appellate counsel does not have a duty to raise all possible issues, and may choose to present only the most meritorious claims on appeal." *Bobo*, 820 N.W.2d at 516. "[T]here is a strong presumption that appellate counsel's judgment about which issues to raise falls within the wide range of reasonable professional assistance." *Id.*

On direct appeal, appellate counsel presented the following issues: (1) the record was insufficient to support Owen's third- and fourth-degree convictions, (2) the district

court abused its discretion by admitting evidence of Owen’s college training on consent, (3) the prosecutor committed prejudicial misconduct, (4) the district court erred by entering multiple convictions, and (5) the district court abused its discretion by denying Owen’s motion for a downward durational departure. *Owen*, 2018 WL 6273120, at \*1. Here, Owen has not overcome the “strong presumption” that appellate counsel exercised reasonable and professional judgment in raising five issues on appeal to the exclusion of another. *Bobo*, 820 N.W.2d at 516. Therefore, Owen’s claim cannot satisfy the first *Strickland* prong and we need not consider prong two. *Andersen*, 830 N.W.2d at 10.

In sum, with one exception discussed below, Owen’s claims of ineffective assistance of counsel fail not only because they are time-barred but because they lack merit.

#### **6. *Plea offer***

Owen claims that trial counsel failed to communicate a plea offer from the state. Owen contends that he was not made aware of the state’s plea offer until “current counsel obtained his file in July 2019.”

As discussed above, Owen’s claims, including this one, are time-barred. Additionally, under what is known as the *Knaffla* rule, “[a] petition for postconviction relief after a direct appeal has been completed may not be based on grounds that could have been raised on direct appeal of the conviction or sentence.” Minn. Stat. § 590.01, subd. 1 (2021); *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). However, an exception to both bars exists for claims that are “in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5) (2021); *Erickson v. State*, 725 N.W.2d 532, 535 (Minn. 2007). We apply this exception as to why Owen’s postconviction petition was not timely and not based on the merits of

Owen’s ineffective-assistance-of-trial-counsel claim. Owen’s claim, if true, would establish that he could not have known of the claim’s existence prior to appellate counsel’s receipt of Owen’s file. Therefore, the application of the time-bar to this claim would be unjust. Further, “an ineffective-assistance-of-trial-counsel claim brought in a postconviction proceeding following a direct appeal is not *Knaffla*-barred if review of the claim requires consideration of facts outside those in the [district] court record.” *Zornes v. State*, 880 N.W.2d 363, 369 (Minn. 2016).

The record shows that the state offered to dismiss the third-degree criminal-sexual-conduct charge in exchange for Owen pleading guilty to fourth-degree criminal sexual conduct. In March, trial counsel emailed the state indicating that she anticipated “a trial.” The state replied, stating that the offer would remain “open until March 17.” On March 15, trial counsel emailed the state stating that she would meet with Owen and his family “tomorrow afternoon,” but remained “fairly certain that we will be going forward with the trial.” The record shows that trial counsel knew the details of the state’s offer, including the terms and the date the offer would expire.

Owen’s postconviction petition included affidavits from Owen and his mother.<sup>3</sup> In Owen’s affidavit, he stated that the first time he “heard of the offer was when [current

---

<sup>3</sup> We note that the district court “may not find an affiant unreliable without first holding a hearing to assess the affiant’s credibility.” *See Chavez-Nelson v. State*, 948 N.W.2d 665, 672 n.4 (Minn. 2020); *see also State v. Powell*, 578 N.W.2d 727, 732 (Minn. 1998) (stating that “because [plea] negotiations . . . usually take place in private and attorney-client privilege would normally constrain the court’s access . . . the [district] court did not abuse its discretion in relying on the affidavits of the attorneys involved to establish that the offers were in fact communicated”).

counsel] brought it to [Owen's] attention in . . . July 2019.” And in her affidavit, Owen's mother stated that she does “not recall [trial counsel] ever telling [her] about a specific plea offer . . . [or] ever speaking with [Owen] about a . . . plea offer.”

On this record, we cannot determine whether trial counsel in fact communicated the plea offer to Owen. *Robinson v. State*, 567 N.W.2d 491, 495 (Minn. 1997) (requiring evidentiary hearing to determine whether in fact trial counsel communicated a plea offer). Assuming Owen is correct that trial counsel failed to communicate the plea offer to him, trial counsel's representation fell below an objective standard of reasonableness because attorneys are ethically bound to communicate plea offers to their clients. Minn. R. Prof. Conduct 1.4, cmt. 2. Thus, Owen has alleged facts which would satisfy the first *Strickland* prong. *Nicks*, 831 N.W.2d at 504 (quotation omitted).

As to the second *Strickland* prong, “the defendant must show that there was a reasonable probability that, but for counsel's errors, the result of the proceedings would have been different.” *Peltier*, 946 N.W.2d at 372. For trial counsel's failure to communicate a plea bargain to a client to be considered ineffective assistance, “the defendant must show a reasonable probability that [he] would have accepted the plea (or, here, agreed to plead), the plea offer would have been presented to the court, and the court would have accepted its terms.” *Id.* (quotation omitted). Minnesota courts require these showings “to demonstrate a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.” *Id.* (quotation omitted).

In his affidavit, Owen stated that “[h]ad [trial counsel] informed [him] of that plea offer at the time it was made, [he] would have accepted it.” The presumptive sentence for fourth-degree criminal sexual conduct would have been a stayed sentence of 24 months. Minn. Sent. Guidelines 4.B (2016). Owen was sentenced to 48 months in prison for third-degree criminal sexual conduct. *Id.* Had Owen accepted the state’s offer and pleaded guilty to fourth-degree criminal sexual conduct, the state was prepared to dismiss the third-degree criminal-sexual-conduct charge. *See Peltier*, 946 N.W.2d at 372 (stating that a defendant must show “a reasonable probability that the end result of the criminal process would have been more favorable” because of a plea agreement).

After carefully reviewing the record, we conclude that a fact question remains whether trial counsel communicated the state’s plea offer to Owen. Because more information from outside the record is needed, the claim is not *Knaffla*-barred. *Zornes*, 880 N.W.2d at 369. And we are satisfied “that the petition is not frivolous and is in the interests of justice,” thus meeting an exception to the time bar. Minn. Stat. § 590.01, subd. 4(b)(5); *see Erickson*, 725 N.W.2d at 535.

Because Owen’s ineffective-assistance-of-trial-counsel claim for failure to communicate a plea offer is not *Knaffla*-barred and meets the interests-of-justice exception to the time-bar, we remand to the district court for an evidentiary hearing as to whether trial counsel communicated the state’s plea offer. *Robinson*, 567 N.W.2d at 495.

**Affirmed in part and remanded.**