STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0882

Kenny Lee Reed, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 30, 2019
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-99-102206

Kenny Lee Reed, Berlin, New Hampshire (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Sean P. Cahill, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

LARKIN, Judge

Appellant challenges the postconviction court's summary denial of his second petition for postconviction relief. We affirm.

FACTS

In December 1999, appellant Kenny Lee Reed pleaded guilty to second-degree assault stemming from a September 1999 incident in which R.J.T. was shot.[1] During the plea hearing, Reed admitted that he "got into a fight with somebody" and shot that person in the leg with a firearm. Reed did not know the person he shot, but when asked by the state, he did not dispute that R.J.T. was the victim of the shooting. Reed assured the district court that he had had enough time to speak with his attorney and that he was not "mak[ing] any claim that [he was] not the person who did the shooting." The district court accepted Reed's guilty plea and sentenced him to serve 36 months in prison consecutive to two additional second-degree assault sentences from another case, for a total of 108 months of imprisonment.

Reed did not file a direct appeal, but in 2017, he petitioned for postconviction relief, seeking to withdraw his guilty plea to the 1999 second-degree assault as unintelligent. *Reed v. State*, No. A18-0691, 2018 WL 6837094, at *1-2 (Minn. App. Dec. 31, 2018), *review denied* (Minn. Mar. 19, 2019). The postconviction court concluded that Reed's claim was not time-barred because of "unusual and exceptional circumstances," considered

[1] Appellant is also known as Gordon David Reese.

Reed's petition on the merits, and denied relief. *Id.* at *1. Reed appealed, this court affirmed the postconviction court's decision, and the supreme court denied further review. *Id.* at *1, *3.

In March 2019, Reed filed a second petition for postconviction relief, arguing that he should be allowed to withdraw his guilty plea because he had newly discovered evidence that proved his innocence. In support of his petition, Reed submitted an affidavit from R.J.T. R.J.T.'s affidavit stated that Reed was at the party where the shooting occurred, that R.J.T. "was familiar with [Reed] and knew [Reed]," that "[Reed] did not shoot [him]," and that R.J.T. "didn't recognize the guy that shot [him]." R.J.T.'s affidavit also stated that he "made it clear" to the police that Reed did not shoot him and that he "didn't press charges against [Reed] . . . because [Reed] wasn't the person who shot [him]." Reed also submitted his own affidavit, in which he claimed that he would not have pleaded guilty if he had known that "the victim told the cops that [he] wasn't the shooter."

The postconviction court denied Reed's petition for relief as untimely. Reed appeals.

D E C I S I O N

A person convicted of a crime who claims that the conviction violates his rights under the Constitution or laws of the United States or Minnesota may petition for postconviction relief unless direct appellate relief is available. Minn. Stat. § 590.01, subd. 1 (2018). The petition must include "a statement of the facts and the grounds upon which the petition is based and the relief desired." Minn. Stat. § 590.02, subd. 1(1) (2018). A petitioner is entitled to a 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 (2018).

A petition for postconviction relief must be filed within two years after "the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a) (2018). But a petition filed after the two-year time limit may be considered if it satisfies one of several statutory exceptions. *See id.*, subd. 4(b) (2018) (listing exceptions). Under the newly-discovered-evidence exception to the statutory time bar, a court may hear a petition for postconviction relief if:

> [T]he petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted[.]

Id., subd. 4(b)(2). All criteria in subdivision 4(b)(2) must be satisfied to obtain relief. *Roberts v. State*, 856 N.W.2d 287, 290 (Minn. App. 2014), *review denied* (Minn. Jan. 28, 2015).

In determining whether an evidentiary hearing is required, a postconviction court "considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017). But the postconviction court may summarily deny a petition as untimely. *See Riley v. State*, 819 N.W.2d 162, 170-71 (Minn. 2012) (affirming postconviction court's summary denial of

petition because petitioner failed to demonstrate an exception applied). "[Appellate courts] review a postconviction court's summary denial of a petition for postconviction relief for an abuse of discretion." *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). "A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted).

As the state points out, "[t]o be timely, [Reed] needed to file his petition for postconviction relief related to his 1999 plea no later than July 31, 2007 (two years after the statutory time limit was enacted)."[2] Reed recognizes that his petition was untimely, but he contends here, as he did in district court, that his petition falls under the newly-discovered-evidence exception to the statutory time bar. Reed argues that the postconviction court abused its discretion by denying his petition because R.J.T.'s affidavit presented newly discovered evidence that could not have been discovered by the exercise of due diligence within the two-year period for filing a postconviction petition.

The postconviction court reasoned that R.J.T.'s affidavit "clearly does not constitute newly discovered evidence warranting a hearing because the new evidence could have been ascertained by the exercise of due diligence by [Reed] or [Reed's] attorney within the two-year time period for filing a post-conviction petition." (Footnote omitted.) The postconviction court explained:

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[2] The 2005 amendment to Minn. Stat. § 590.01, subd. 4, enacting the two-year statutory time bar for postconviction petitions became "effective August 1, 2005" and provided that "[a]ny person whose conviction became final before August 1, 2005, shall have two years after the effective date of this act to file a petition for postconviction relief." 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097-98.

> [Reed] and the Victim knew each other, so there is no claim here of a previously unidentified witness. Moreover, the Victim says he always maintained [Reed's] innocence, so this supposedly exculpatory evidence was available before [Reed] pleaded guilty. Finally [Reed] thought his attorney had interviewed the Victim, and there is no claim that the Victim was not cooperative.
>
> Since the newly discovered evidence could have been ascertained by the exercise of due diligence by [Reed] or [Reed's] attorney, the Petition fails to meet the requirements of Minn. Stat. § 590.01, subd. 4(b)(2) and should be denied.

(Footnote omitted.)

For the reasons that follow, Reed fails to persuade us that the postconviction court abused its discretion. First, Reed concedes that, before he pleaded guilty, he knew that R.J.T. was the victim of the shooting. Yet, he did not present R.J.T.'s affidavit as a basis for relief until approximately 19 years after his conviction. Reed does not describe any efforts that he or his attorney took to obtain the exonerating statement from R.J.T. earlier. *See Saiki v. State*, 375 N.W.2d 547, 549 (Minn. App. 1985) (concluding that petitioner had not shown that newly discovered witness could not have been discovered earlier through due diligence where record did "not show what efforts were made to locate the witness"), *review denied* (Minn. Dec. 19, 1985).

Second, as the postconviction court noted, because Reed was present at the scene of the shooting, Reed is imputed with knowledge of the substance of the testimony R.J.T. might have provided at trial. *See State v. Caldwell*, 803 N.W.2d 373, 389 (Minn. 2011) (explaining that "testimony is not unknown to the petitioner when a potential witness is present at the scene of the crime with the petitioner, and the petitioner knows the substance of the testimony that the witness might provide").

As the postconviction court reasoned, because R.J.T. "always maintained [Reed's] innocence" and "this supposedly exculpatory evidence was available before [Reed] pleaded guilty," R.J.T.'s affidavit "clearly does not constitute newly discovered evidence warranting a hearing because [it] could have been ascertained by the exercise of due diligence . . . within the two-year time period for filing a post-conviction petition." (Footnote omitted.)

In sum, Reed has not met his burden to establish that the purported newly discovered evidence could not have been discovered with due diligence. *See Pippitt*, 737 N.W.2d at 226 (stating that a postconviction petitioner "has the burden of showing that he is entitled to relief"). Thus, the postconviction court did not abuse its discretion by concluding that the newly-discovered-evidence exception to the statutory time bar is inapplicable.

Reed raises several other issues on appeal. He argues that the interests-of-justice exception to the statutory time bar applies, that the state violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963), and that the state engaged in prosecutorial misconduct. Because Reed did not raise those issues in the underlying postconviction proceeding, we do not consider them. *See Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) ("It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." (quotation omitted)).

Affirmed.