**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A19-1132**

Jermaine Octavious Stansberry, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 20, 2020**
**Affirmed**
**Jesson, Judge**

Hennepin County District Court
File No. 27-CR-02-070442

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, 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 Rodenberg, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

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

**JESSON**, Judge

Nearly 16 years after a jury found him guilty of second-degree murder, first-degree aggravated robbery, and unlawful possession of a firearm, appellant Jermaine Octavious

Stansberry seeks postconviction relief, including a new trial. Notwithstanding his previous appeals, Stansberry now offers what he claims is newly discovered evidence of his innocence. But because his petition is time-barred and does not satisfy any exception to the rule, the district court did not abuse its discretion in summarily denying him relief. Accordingly, we affirm.

## FACTS

On a Saturday night in August 2002, appellant Jermaine Octavious Stansberry was out with friends (including R.H.) in downtown Minneapolis. As bars were closing, Stansberry and his friends got into an argument on the sidewalk with D.H., a University of Minnesota football player. Stansberry ripped off a gold chain necklace that D.H. was wearing, and then Stansberry and his friends "jumped" D.H. They punched him, kicked him, and stomped on him when he fell to the ground. Once he was unconscious, they rifled through his pockets, stealing his phone and money, before fleeing as the police approached. D.H. declined medical assistance and was able to get up, but had cuts and scrapes from the attack.

Upset that the attackers stole his necklace, D.H. told his friends, many of whom were also university football players. Word spread quickly. Several people came downtown to make sure that D.H. was okay and to try to get his chain back.

After the initial assault, the two groups—Stansberry and his friends and D.H. and his friends—ran into each other at least twice more, resulting in more fights. The police sprayed mace into the crowd downtown to try to get people to stop fighting and go home. Many witnesses described the scene as chaotic.

After learning that D.H. was attacked, his teammate B.H. went downtown. At some point, B.H. and his friends encountered Stansberry, R.H., and their friends near the intersection of Hennepin Avenue and Third Street. And during this final confrontation, Stansberry shot B.H. in his left arm and chest area. B.H. staggered and eventually collapsed, where a crowd formed around him. Police tried to save him, but he later died at the hospital. Stansberry was arrested shortly after the shooting.

The state charged Stansberry with second-degree intentional murder of B.H., first-degree aggravated robbery of D.H., and unlawful possession of a firearm. The case was tried to a jury. Several witnesses testified, including police officers and investigators, friends of the victims, and others.

Many witnesses testified that they observed, in some fashion, Stansberry shoot B.H. Some testified that they saw a "flash" come from Stansberry's hand. Some testified that they did not see the shot but turned after they heard it and saw Stansberry lower his extended arm as if he had just fired a gun. One witness testified that after she heard the shot, she saw Stansberry make a "throwing" motion and heard something metallic hit the ground. And a gun was found in a place consistent with the direction of the throw. Many witnesses also identified Stansberry by his clothes[1] and his stocky body type and, when questioned by police, several witnesses picked him out of photo lineups. And witnesses testified that, earlier in the night, they heard Stansberry say, "you guys must be looking to get shot tonight" or that he had "heat," meaning a gun.

[1] That night, Stansberry was wearing a white Wizards jersey with the number 23 on it and R.H. was wearing a white t-shirt.

Stansberry testified that he was not the aggressor in the robbery—his friends were. And according to Stansberry, he "[n]ever touched that gun" and did not shoot B.H. but his friend R.H. did.

The jury found Stansberry guilty of all counts. The district court sentenced him to 306 months in prison for second-degree murder, 116 months for first-degree aggravated robbery, and 60 months for unlawful possession of a firearm. The terms of imprisonment for murder and robbery were consecutive, while the term for unlawful possession was concurrent.

About four years later, Stansberry filed his first postconviction petition challenging his sentence under *Blakely v. Washington*[2] and, among other issues, alleging ineffective assistance of counsel and newly discovered evidence. The postconviction court granted the portion of Stansberry's petition seeking a *Blakely* trial regarding his sentence for aggravated robbery. But the court denied his petition in all other respects, finding the claims had no merit. Stansberry appealed, and this court affirmed. *Stansberry v. State*, No. A08-0183, 2009 WL 366323, at *5 (Minn. App. Feb. 17, 2009).

Nearly three years after the appeal had passed without his *Blakely* trial, Stansberry filed a request with the court. Noticing the error in the delay, the district court held a *Blakely* trial and the jury found eight aggravating factors present. And the district court sentenced Stansberry to 160 months in prison for aggravated robbery. Stansberry appealed

[2] In the United States Supreme Court case, *Blakely v. Washington*, 542 U.S. 296, 305, 124 S. Ct. 2531, 2538 (2004), the Court held that a criminal defendant has a right to a jury trial on departures from the sentencing guidelines beyond the statutory maximum penalty based on aggravating factors.

his sentence to this court, which affirmed. *State v. Stansberry*, No. A13-1662, 2014 WL 3799897, at *3 (Minn. App. Aug. 4, 2014), *review denied* (Minn. Oct. 14, 2014).

Finally, more than four years after this decision, Stansberry filed his second postconviction petition. The postconviction court denied the petition without a hearing, concluding that his claims were time-barred and procedurally barred. Stansberry appeals.

**D E C I S I O N**

Stansberry contends that the district court erred by concluding that his postconviction petition is time-barred. There is no dispute that he filed this postconviction petition far beyond the two-year time limit. *See* Minn. Stat. § 590.01, subd. 4 (2018). Accordingly, the central issue before us is whether an exception to the time-bar is established, or whether Stansberry raised issues at least meriting an evidentiary hearing. The two exceptions Stansberry asserts are for newly discovered evidence and the interests of justice.[3] We review a postconviction court's denial of both a postconviction petition and a request for an evidentiary hearing under an abuse-of-discretion standard. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017); *Caldwell v. State*, 853 N.W.2d 766, 770 (Minn. 2014).

[3] Stansberry also claims that his trial counsel was ineffective. But because he raised this claim in his previous postconviction appeal, he is procedurally barred from raising it here. *See Townsend v. State*, 723 N.W.2d 14, 18 (Minn. 2006) (noting that courts will not consider claims that were raised in an earlier petition for postconviction relief). We decline to address this argument's merits further.

We turn, first, to Stansberry's claim of newly discovered evidence. Under Minnesota law, a court may hear a postconviction petition after the two-year time period has passed if:

> the petitioner alleges the existence of [1] newly discovered evidence, including scientific evidence, that [2] 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 [3] the evidence is not cumulative to evidence presented at trial, [4] is not for impeachment purposes, and [5] establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted.

Minn. Stat. § 590.01, subd. 4(b)(2). But this exception is not without limit. "Any petition invoking an exception . . . must be filed within two years of the date the claim arises." *Id.*, subd. 4(c).

For his newly discovered evidence, Stansberry offers an affidavit from an individual that states that, in 2003, the affiant overheard a conversation in the jail "bullpen." The conversation was between R.H. and Stansberry, in which R.H. said that he would "carry his own weight" and "admit that Jermaine Stansberry was not the person who shot the football player if he was asked." The affidavit is dated February 26, 2019.

According to Stansberry, he did not know that other people had overheard R.H.'s statement and that someone was willing to attest to it until the affiant provided him the affidavit. But, as the district court pointed out, the affiant swore that Stansberry was present for the conversation. Thus, it appears that Stanberry knew of R.H.'s statement in 2003, which means it is not newly discovered within two years of his petition.

Still, Stansberry maintains that, while he knew he was innocent, "he had no admissible evidence upon which to base a petition for postconviction relief" until he received the affidavit. But this does not remedy the problem that the affidavit itself demonstrates that he *did* know others overheard R.H.'s statement—made in a jail bullpen—in 2003. *See Whittaker v. State*, 753 N.W.2d 668, 671-72 (Minn. 2008) (concluding that testimony was not unknown if the petitioner was present during the events the witness described). And more importantly, Stansberry knew that R.H.—the speaker of the allegedly exculpatory statement—was present at the shooting. *See Evans v. State*, 788 N.W.2d 38, 49 (Minn. 2010) (stating that "[o]ur precedent recognizes that if the source of the newly discovered evidence was with the defendant at the scene of the crime," it is not newly discovered evidence (quotation omitted)). Stansberry's knowledge of these facts compels us to conclude that the affidavit is not newly discovered evidence.

Because the evidence was not newly discovered, it fails to satisfy even the first element of the exception to the time-bar. And Stansberry must meet all five elements of the test to overcome the bar. Therefore, the district court did not abuse its discretion by determining that this claim is time-barred and fails to satisfy the newly-discovered-evidence exception.

Second, we consider Stansberry's assertion that he satisfies the interests-of-justice exception to the time-bar. This exception requires that he establish "to the satisfaction of the court that [his] petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). This exception is only met in "exceptional and extraordinary situations." *Carlton v. State*, 816 N.W.2d 590, 607 (Minn. 2012) (quotation omitted). To

aid courts in this analysis, the Minnesota Supreme Court has provided the following analytical framework. When assessing whether to grant relief under the interests-of-justice exception, "a claim must have substantive merit and the defendant must not have deliberately and inexcusably failed to raise the issue on direct appeal." *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010).[4] In addition, "courts should weigh the degree to which the party alleging error is at fault for that error, the degree of fault assigned to the party defending the alleged error, and whether some fundamental unfairness to the defendant needs to be addressed." *Id.* at 587.

Applying these factors to Stansberry's claims, we agree with the postconviction court that this case does not fall into the category of exceptional and extraordinary cases that meet this exception. Stansberry fails to provide a reasonable excuse as to why he did not raise this evidence in one of his previous appeals. And he does not explain when he learned that the affiant overheard R.H.'s statement, how he came to have the affidavit, why he did not seek out the affiant or other witnesses to R.H.'s statement earlier, and why he did not seek a statement from R.H. or subpoena him to testify at trial. This failure also goes to the factors about Stansberry's degree of fault.[5]

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[4] We note that *Gassler* was partially abrogated on other grounds. *See Henderson v. State*, 906 N.W.2d 501, 507 (Minn. 2018) ("To the extent that *Gassler* can be read to hold that a postconviction court may assess the credibility of evidence without holding an evidentiary hearing, that reading is incorrect.").

[5] Stansberry acknowledges that he raised issues with his trial counsel's lack of investigation earlier in a pro se supplemental brief during his postconviction appeal. But this court concluded that his "counsel's representation neither fell below an objective standard of reasonableness nor prejudiced" him. *See Stansberry*, 2009 WL 366323, at *4. While this demonstrates his effort, it also reveals that he was aware of the claims earlier and raised them already.

While courts assume that the facts asserted in a postconviction petition are true, *Andersen v. State*, 913 N.W.2d 417, 422-23 (Minn. 2018), Stansberry still bears the burden to establish facts that entitle him to relief by more than mere argumentative assertions without factual support. *See Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). And by failing to provide additional factual information with his petition, as described above, he failed to meet that burden. Thus, when reviewing the relevant requirements and factors, we conclude that Stansberry does not satisfy the high bar of the interests-of-justice exception.[6]

In sum, Stansberry failed to satisfy either exception to the time-bar. The contents of the affidavit do not present us with newly discovered evidence. And Stansberry failed to demonstrate that he meets the high standard set forth in the interests-of-justice exception. Accordingly, the postconviction court did not abuse its discretion in denying Stansberry's petition.

**Affirmed.**

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[6] Stansberry also claims that the district court abused its discretion in denying his request for an evidentiary hearing. An evidentiary hearing is necessary unless "the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Andersen*, 913 N.W.2d at 422 (quotation omitted). Because the record is clear that Stansberry's claims do not satisfy either exception to the time-bar and he is not entitled to postconviction relief, no evidentiary hearing is necessary.

Stansberry also requested a new trial on appeal. But because we conclude that his petition does not merit even an evidentiary hearing, a new trial is not warranted. *See State v. Beecroft*, 813 N.W.2d 814, 846 (Minn. 2012) (noting that reversal and remand for a new trial "in the interests of justice is limited to exceptional circumstances" (quotation omitted)).