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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1912**

James Francis Vierling, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 9, 2020
Affirmed
Bjorkman, Judge**

Steele County District Court
File No. 74-CR-15-384

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

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

Daniel A. McIntosh, Steele County Attorney, Julia A. Forbes, Assistant County Attorney,
Owatonna, Minnesota (for respondent)

Considered and decided by Bryan, Presiding Judge; Ross, Judge; and Bjorkman,
Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that
(1) the newly-discovered-evidence or interests-of-justice exceptions permit his otherwise

untimely petition and (2) the state violated its discovery obligations by failing to disclose a statement made by the complainant to police prior to appellant's acceptance of the state's plea offer. Because appellant's postconviction petition is time-barred and no exception applies, we affirm.

FACTS

The facts of this case are undisputed. In February 2015, respondent State of Minnesota charged appellant James Vierling with one count of second-degree assault and two counts of domestic assault against a complainant the parties identify as Child 1. Discovery documents provided to Vierling's attorney included a March 6 report in which Child 1 recounted an incident of sexual abuse that occurred five years earlier, when she was approximately nine years old.

On October 13, Child 1 met with the prosecutor. During the meeting, Child 1 revealed that Vierling also sexually abused her when she was five or six years old (approximately ten years earlier). The next day, the state offered Vierling the opportunity to plead guilty to second-degree assault in exchange for the state's dismissal of the domestic-assault charges and agreement to recommend a downward dispositional departure. Vierling accepted the offer and pleaded guilty to second-degree assault.

In light of the allegations against Vierling, the responsible social-services agency commenced a child-in-need-of-protection-or-services (CHIPS) proceeding. In November, law enforcement contacted Vierling's CHIPS attorney regarding the allegations Child 1 made in October. After discussing the matter with Vierling, counsel informed law

enforcement that Vierling declined to make a statement. The CHIPS case was later dismissed.

On April 28, 2016, Vierling appeared for sentencing. He did not move to withdraw his guilty plea, but asked the district court not to depart from the plea agreement because of the sexual-abuse allegations. The court imposed the agreed-to probationary sentence.

In January 2017, Vierling was charged with first-degree criminal sexual conduct based on Child 1's October 2015 report. At trial, the state offered evidence of Vierling's conduct related to the second-degree-assault conviction. Defense counsel used the evidence as part of his strategy to attack Child 1's credibility. A jury found Vierling guilty and this court affirmed his resulting conviction in *State v. Vierling*, No. A18-1948 (Minn. App. June 22, 2020), *review denied* (Minn. Sept. 29, 2020).

On May 8, 2019, Vierling petitioned for postconviction relief from his 2016 second-degree-assault conviction, arguing that the state violated Minn. R. Crim. P. 9.01 by failing to disclose Child 1's October 2015 allegation of sexual abuse. Vierling claimed that but for the prosecution's failure to comply with rule 9.01, he would not have pleaded guilty.

The district court denied Vierling's postconviction petition, concluding that the state did not violate its discovery obligations and that Vierling was unable to show prejudice. The district court also determined that Vierling's petition was untimely under Minn. Stat. § 590.01 (2018), and that no exception to the time bar applies. Vierling appeals.

DECISION

This court reviews the denial of a postconviction petition for an abuse of discretion. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016). We will “not reverse the postconviction court unless the postconviction court exercised its discretion in an arbitrary and capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015) (quotation omitted).

A postconviction petition must be filed within two years of “the entry of judgment of conviction or sentence if no direct appeal is filed.” Minn. Stat. § 590.01, subd. 4(a)(1). Vierling was sentenced on April 28, 2016, and did not appeal. Accordingly, his May 2019 petition was untimely.

Minn. Stat. § 590.01, subd. 4(b), contains five exceptions to the two-year time bar. Vierling argues that two of these exceptions—newly discovered evidence and the interests of justice—apply to permit consideration of his petition. Minn. Stat. § 590.01, subd. 4(b)(2), (5). We address each argument in turn.

The newly-discovered-evidence exception allows a court to consider the merits of an untimely petition if “the petitioner alleges the existence of newly discovered evidence” that “could not have been ascertained . . . within the two-year time period for filing a postconviction petition.” *Id.*, subd. 4(b)(2). The petitioner must also show that 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 offenses for which they were convicted. *Id.* (emphasis added).

Vierling argues that the newly-discovered-evidence exception applies because he “would not have accepted the guilty plea that was offered had he known of the new sexual abuse allegation.” We disagree for two reasons. First, the sexual-abuse allegation made in October 2015 does not establish by clear and convincing evidence that Vierling is innocent of the second-degree-assault offense. Rather, the allegation concerns conduct that is unrelated to the conduct charged in the assault case.

Second, the record reveals that Vierling was aware of the October 2015 sexual-abuse allegation well within the two-year period for seeking postconviction relief. Indeed, it is undisputed that Vierling’s attorney in the CHIPS case learned of the allegation in November 2015—six months before Vierling was sentenced. And he expressly mentioned the allegation during his sentencing hearing, urging the district court not to hold it against him. Because Vierling was aware of the evidence he now asserts is newly discovered before he was even sentenced, the newly-discovered-evidence exception does not save his untimely petition.

The interests-of-justice exception permits consideration of postconviction relief when the petition establishes that it “is not frivolous and is in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5). “A claim under the interests-of-justice exception must relate to an injustice that delayed the filing of the petition, not to the substantive merit of the petition, and applies only in exceptional and extraordinary situations.” *Fox v. State*, 938 N.W.2d 252, 256-57 (Minn. 2020) (quotation omitted) (discussing the interests-of-justice exception set forth in Minn. Stat. § 590.01, subd. 4(b)(5)).

Vierling cites no circumstances from which we could discern injustice related to his delay in seeking postconviction relief. As noted above, he was aware of the October 2015 allegation of sexual abuse *before sentencing*, yet made no attempt to withdraw his plea until more than three years *after sentencing*. And nothing in the record persuades us that this is an “exceptional and extraordinary situation[.]” in which Vierling’s delinquency should be excused. *See id.* Because Vierling’s postconviction petition was untimely and no exception to the statutory time bar applies, we need not address Vierling’s argument that the state’s purported discovery violation warrants withdrawal of his guilty plea.

Affirmed.