STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0061

Dante Christopher Horton, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 27, 2021
Affirmed
Slieter, Judge

Hennepin County District Court
File No. 27-CR-13-21926

Frederick J. Goetz, Goetz & Eckland P.A., Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Sarah J. Vokes, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this appeal from an order denying postconviction relief, appellant argues that the district court erred by concluding that his petition was time-barred pursuant to Minn. Stat. § 590.01, subd. 4 (2020). Appellant contends that the newly discovered evidence could

not have been ascertained by the exercise of due diligence within the statutory two-year time period. However, appellant's newly discovered evidence was discovered within the statutory two-year time period. As a result, we do not reach his argument that the claim did not arise until he obtained "all the evidence necessary" to support his claim for relief. We affirm.

FACTS

The facts underlying this appeal stem from a 2013 shooting during which the victim, D.T., identified to law enforcement appellant Dante Christopher Horton as the person who shot him. *State v. Horton*, No. A15-0736, 2016 WL 2842828, at *1 (Minn. App. May 16, 2016), *rev. denied* (Minn. July 19, 2016). On the day of the shooting, D.T.'s sister identified to law enforcement appellant entering D.T.'s apartment building immediately before D.T. was shot. *Id.* D.T. and his sister testified consistent with these statements during appellant's jury trial.

Respondent State of Minnesota charged appellant with first-degree and second-degree attempted murder and felony possession of a firearm. *Id.* The jury found appellant guilty of each charge and he was sentenced to 60 months' imprisonment for unlawful possession of a firearm and 230 months' imprisonment for attempted first-degree murder. *Id.*

This court affirmed his convictions in May 2016 and the Minnesota Supreme Court denied review. *Id.* Appellant filed a petition for a writ of *certiorari* to the United States Supreme Court, which was denied on February 21, 2017. *Id.*

In May or June of 2017, appellant learned from prison inmates who "[appellant] didn't know . . . personally" that D.T. was considering recanting his identification of appellant as the shooter. In August or September of that year, appellant heard this "same information" from other prison inmates whom "[he] knew a little bit better." In December 2017, appellant's family hired a private investigator who interviewed D.T. in February 2018, though no results from that interview are in the record. In August of 2018, appellant's family obtained counsel for appellant. Appellant's counsel "informed [appellant] that the investigation . . . was insufficient" and counsel obtained a new private investigator in September 2018 for the purpose of obtaining a sworn affidavit from D.T.

The new investigator had difficulty maintaining contact with D.T. but was ultimately able to meet and interview D.T. on November 7, 2018. After this interview, the investigator prepared an affidavit. D.T. signed the affidavit on November 9, 2018, affirming that "[he] never saw the individual who shot [him]."

After obtaining D.T.'s signature, the investigator "was instructed" by counsel to speak with D.T.'s sister so as to confirm her "knowledge or testimony." The investigator tried to contact D.T. in order to obtain his sister's contact information but again had "difficulty reaching him." After eventually obtaining her contact information, the investigator also had difficulty communicating with D.T.'s sister, despite repeated efforts. The investigator learned on February 19, 2019 that she "didn't want to be involved in any way."

On July 29, 2019, appellant filed his petition for postconviction relief alleging newly discovered evidence based upon victim recantation. The district court held an evidentiary

hearing limited to the issue of whether appellant's petition was time-barred. The district court concluded that appellant's postconviction petition was time-barred because it was filed beyond the statutory deadline. This appeal follows.

DECISION

A petition for postconviction relief must be filed within two years of the entry of judgment of conviction or the final appellate disposition of a defendant's appeal, whichever occurs last. Minn. Stat. § 590.01, subd. 4. Postconviction relief beyond that date is time-barred unless one of five statutory exceptions is met. *Id.*, subd. 4(b)(1)-(5).

Appellate courts review the denial of a postconviction petition for an abuse of discretion. *Colbert v. State*, 870 N.W.2d 616, 621 (Minn. 2015). We review legal issues *de novo* and factual findings for clear error. *Id.* A district 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." *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013) (quotation omitted).

The district court determined appellant's statutory time period for seeking postconviction relief expired on February 21, 2019, and that appellant's postconviction petition—filed on July 29, 2019—was untimely. The district court stated that "there is little excuse suggested for the delays within the two-year period," and that appellant did not timely act to obtain the affidavits from D.T.

Appellant does not dispute that his petition was filed more than two years after the final appellate disposition of his case. He relies on the newly-discovered-evidence exception to the two-year time bar in Minn. Stat. § 590.01, subd. 4(b)(2). The newly-discovered-evidence exception allows a district court to consider the merits of an untimely

petition for postconviction relief if "the petitioner alleges the existence of newly discovered 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." *Id.*

Appellant contends that the evidence upon which his newly-discovered-evidence claim is based could not have been ascertained through due diligence before February 21, 2019. This evidence, appellant argues, is necessary *to succeed* on his petition and it includes both D.T.'s recantation and his "sister's basis of knowledge placing [a]ppellant at the scene of the shooting and her corroboration of the identification of [him] as the shooter." Because, appellant argues, the affidavit of appellant's sister was not ascertainable with due diligence within the statutory two-year period, his petition is timely.

Appellant further contends that the district court erred by failing to discuss the *Larrison* test[1] as applied by the supreme court in *State v. Turnage*, 729 N.W.2d 593 (Minn. 2007). Pursuant to the *Larrison* test, a petition is entitled to a new trial due to a trial witness recanting their testimony if: (1) the court is "reasonably well-satisfied that the testimony given by a material witness was false," (2) the jury might reach a different conclusion without the testimony, and (3) the petitioner seeking a new trial was "taken by surprise when the false testimony was given and was unable to meet it or did not know of its falsity until after the trial." *Id.* (quotations omitted).

[1] Minnesota applies the *Larrison* test to claims of witness recantation, even though *Larrison v. United States*, 24 F.2d 82, 87-88 (7th Cir. 1928), has been overruled. *Martin v. State*, 825 N.W.2d 734, 739 n.6 (Minn. 2013).

Appellant's arguments are rebutted by case law and we first address appellant's argument regarding the *Larrison* test as it was applied in *Turnage*. First, unlike in this matter, the *Turnage* case does not involve an exception to the statutory timelines because the postconviction petition under review in that matter was timely filed. *Id.* Second, and contrary to appellant's argument, a postconviction petition is "not required to satisfy the *Larrison* test" in order "[t]o obtain a postconviction evidentiary hearing." *Martin*, 825 N.W.2d at 743. To obtain an evidentiary hearing, a petitioner is "simply required to present competent material evidence that, if found to be true following an evidentiary hearing, could satisfy the *Larrison* test." *Id.* Instead, appellant erroneously conflates the amount of evidence necessary to *succeed* following an evidentiary hearing with "competent material evidence necessary" to obtain an evidentiary hearing.

The newly-discovered-evidence exception requires an allegation of "newly discovered evidence . . . that could not have been ascertained by the exercise of due diligence . . . within the two-year time period for filing a postconviction petition." Minn. Stat. § 590.01, subd. 4(b)(2). By November 2018—three months before the statutory time expired—appellant possessed an affidavit from D.T. recanting his identification of appellant as the shooter. No one other than D.T. (notably including D.T.'s sister), saw the shooting. Appellant's newly-discovered-evidence was, therefore, ascertained within the two-year time period for filing a postconviction petition which means he is not entitled to relief pursuant to the newly-discovered-evidence exception established by section 590.01, subdivision 4(b)(2). Appellant's claim is time-barred unless he filed his postconviction petition within two years of the United States Supreme Court's denial of his direct appeal.

Because appellant's postconviction petition was filed more than two years after the United States Supreme Court's denial, his postconviction petition is thus barred under section 590.01, subdivision 4(a). Because appellant's claim fails pursuant to Minn. Stat. § 590.01, subd. 4(b)(2), we do not consider appellant's argument that his claim for postconviction relief did not arise until he obtained "all the evidence necessary" to bring a meritorious claim for relief. *See* Minn. Stat. § 590.01, subd. 4(c).

The district court did not abuse its discretion by concluding that appellant's postconviction petition did not satisfy the newly-discovered-evidence exception.

Affirmed.