STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0955

Larcell Mack, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 24, 2008
Affirmed
Peterson, Judge

Hennepin County District Court
File No. 94018172

Bruce M. Rivers, Rivers and Associates PA, 100 North Sixth Street, Minneapolis, MN 55403 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Peterson, Presiding Judge; Minge, Judge; and Poritsky, Judge.[*]

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

PETERSON, Judge

In this appeal from the denial of his second postconviction petition challenging his 1994 conviction for second-degree murder, appellant argues that the district court abused its discretion in denying his petition without an evidentiary hearing and that he is entitled to a new trial due to newly discovered evidence. We affirm.

FACTS

Appellant Larcell Mack, accomplice Steven Anderson, the victim, and several other people were at Mack's house. Anderson suspected that the victim had stolen money from him, so Anderson and appellant made a plan to recover the money by beating the victim into unconsciousness with appellant's two .357-caliber revolvers. When the victim denied having Anderson's money, Anderson and appellant hit the victim on the head with their guns.

Anderson testified that two shots were fired, one when Anderson's gun accidentally discharged and a second by appellant. Anderson thought that the bullet from his gun went toward a curtain behind the couch. Anderson testified that appellant shot the victim in his left arm as the victim started to walk away.

An autopsy showed that the victim died from a single gunshot wound. The bullet, fired from very close range, entered his left arm and travelled through the chest cavity, puncturing the heart and right lung. A ballistics expert testified that the bullet was most likely a .38-caliber bullet, a bullet that can be fired from a .38- or .357-caliber gun. The ballistics expert could not match the bullet to a particular gun because it lacked individual

class characteristics, which happens when a bullet is undersized or the hole in a gun barrel is oversized.

Milan Busby was present when the victim was shot. When asked about the second shot, Busby initially testified that he heard it but did not see it. Busby was then confronted with his earlier statement to police, in which he reported seeing appellant fire a shot at the victim. After the prosecutor went over the earlier statement with Busby, Busby testified:

> Q: Do you feel that your life is in danger now?
> A: Yes.
> Q: Is that why you are changing your testimony now?
> A: Yes.
> Q: Who do you feel your life is in danger from?
> A: What you mean?
> Q: Who do you think is going to do something to hurt you?
> A: Anybody.
> Q: Why are you afraid to tell the truth here today?
> A: Because I feel if I get a person locked up for a lot of time, I feel that they will try to get their friends to harm me.
> Q: You're afraid that [appellant] is going to do that?
> A: Uh-huh.
> . . . .
> Q: Was what you told the police in this statement what really happened?
> A: Yes.
> Q: And that's what you are afraid to testify to today?
> A: Yes.

Busby then testified that despite his fear, he was willing to tell the truth. Busby testified that when appellant fired the gun, he was aiming toward the victim, who was running up the stairs.

A jury found appellant guilty of intentional second-degree murder and second-degree felony murder in violation of Minn. Stat. §§ 609.19, subds. 1, 2, 609.05 (1992),

and the district court sentenced him to 306 months in prison. This court affirmed appellant's conviction on direct appeal. *State v. Mack*, No. C6-94-2166 (Minn. App. Aug. 22, 1995), *review denied* (Minn. Oct. 18, 1995). Mack filed his first petition for postconviction relief in 1999. The district court summarily denied relief on grounds that most of the issues had been raised and rejected on direct appeal and that the remaining issues, including a claim of ineffective assistance of trial counsel, were known and not raised on direct appeal. This court affirmed. *Mack v. State*, No. C3-99-1253 (Minn. App. Feb. 15, 2000).

Mack filed this second petition for postconviction relief in 2007, arguing that he is entitled to a new trial based on an affidavit by Busby recanting his trial testimony.[1] In the affidavit, Busby claims that his testimony against appellant resulted from police coercion and threats by Anderson. The affidavit states, "As the argument escalated, the victim began to ascend up the stairs, [Anderson] then pulled out a gun and fired a shot. At no time did I see [appellant] with a gun nor did I see him shoot the victim."

The district court denied appellant's second postconviction petition without an evidentiary hearing. This appeal followed.

D E C I S I O N

We will not disturb the decision of the postconviction court absent an abuse of discretion. *Zenanko v. State*, 688 N.W.2d 861, 864 (Minn. 2004). Our review for an abuse of discretion on issues of fact is limited to determining whether the evidence is

[1] The affidavit attached to appellant's postconviction petition is not signed. A cover letter states that the original will be filed by mail. The district court record does not indicate that the original affidavit was filed.

sufficient to support the postconviction court's findings. *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005). But we review the postconviction court's application of law de novo. *Id.*

A petition for postconviction relief is a collateral attack on a judgment that carries a presumption of regularity. *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). The petitioner bears the burden of establishing by a preponderance of the evidence that the petitioner is entitled to relief. Minn. Stat. § 590.04, subd. 3 (2006). When the petition, files, and record show that the petitioner is not entitled to relief, the postconviction petition may be denied without a hearing. Minn. Stat. § 590.04, subd. 1 (2006).

We apply a three-prong test, known as the *Larrison* test, to determine whether a new trial based on a postconviction claim of witness recantation is warranted. *Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006). The first prong, which is mandatory, requires that the postconviction court be reasonably well satisfied that the trial testimony in question was false. *Id.*

To satisfy the first prong, it is not sufficient to rely on a "simple statement contradicting earlier testimony" or "a determination that the witness is generally unreliable." *Id.* "Courts have traditionally looked with disfavor on motions for a new trial founded on alleged recantations unless there are extraordinary and unusual circumstances. This rule is particularly relevant where possible changes in testimony have been occasioned by threats, pressure, and intimidation." *State v. Hill*, 312 Minn. 514, 523, 253 N.W.2d 378, 384 (1977) (citations omitted).

The postconviction court found:

> The statement now made by Mr. Busby cannot be considered recantation by the witness because a comparable statement was made by the witness at trial prior to his admission that the statement given was changed because he feared [appellant]. . . . In this case the jury had the opportunity at trial to hear both versions as told by Mr. Busby and assessed his credibility based upon that testimony. This matter has already been presented to the jury for its assessment.

The postconviction court also found that even if the affidavit was considered a recantation, appellant failed to establish its credibility because it was "not different from the version of events that Mr. Busby initially presented at trial which he later stated was untrue."

The affidavit states that Busby was threatened by Anderson at gunpoint before giving a statement to police. Appellant argues that the jury was not presented with this information and that no one, including appellant and his attorneys, knew that Busby had been threatened by Anderson. But on cross-examination, Busby testified that he had been threatened at gunpoint by Anderson. Appellant makes the same argument regarding police coercion. But when Busby's statement to police was addressed at trial, Busby testified, "I just went along with it when they was talking to me. . . . [T]hey was just telling me to say yes and no."

Because Busby's affidavit did not differ from his trial testimony, the postconviction court properly determined that appellant failed to satisfy the first prong of

the *Larrison* test. The district court did not err in denying appellant postconviction relief without a hearing.

Affirmed.