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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1566

Brian Doyle Scherf, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 15, 2009
Affirmed
Willis, Judge*

Itasca County District Court
File No. No. 31-CR-05-3194

Marie L. Wolfe, Interim Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

John J. Muhar, Itasca County Attorney, Lori J. Flohaug, Assistant County Attorney, 123 Northeast Fourth Street, Grand Rapids, MN 55744 (for respondent)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Willis, Judge.

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

UNPUBLISHED OPINION

WILLIS, Judge

Appellant Brian Scherf argues that the district court abused its discretion by denying his petition for postconviction relief, which was based on a claim of newly discovered evidence in the form of a purported admission by his accomplice, Ryan Hughes, that Hughes committed the burglary of which Scherf was convicted. Scherf also claims that the district court abused its discretion by refusing to hold a postconviction evidentiary hearing on his petition. Because the district court did not abuse its discretion either by denying postconviction relief or by declining to hold a hearing on Scherf's petition, we affirm.

FACTS

On the morning of July 25, 2005, a burglary occurred at the Grand Rapids home of L.P., and personal property valued at $30,000 was stolen, including electronics, jewelry, and other items. L.P. suggested to police that Scherf might have committed the burglary, and several neighbors identified Scherf's vehicle, which had distinctive markings, as the vehicle that they had seen driving in and out of their sparsely populated, dead-end street during the time of the burglary.

While executing valid search warrants at Scherf's home, police retrieved some of the stolen property, and they discovered some of the jewelry, as well as two bindles of methamphetamine, in a magnetic box attached to the underside of Scherf's vehicle. The state charged Scherf with second-degree burglary, in violation of Minn. Stat. § 609.582,

subd. 2(a) (2004); theft of property valued in excess of $2,500, in violation of Minn. Stat. § 609.52, subds. 2(1), 3(2) (2004); and fifth-degree controlled-substance offense, in violation of Minn. Stat. § 152.025, subd. 2(1) (2004).

The case proceeded to trial in March 2006. Numerous witnesses testified for the state, implicating Scherf in the burglary and in the disposal of the stolen property. The jury found Scherf guilty of the burglary and theft charges and acquitted him of the controlled-substance offense. Scherf filed a direct appeal of his conviction, which this court affirmed in *State v. Scherf*, No. A06-1543, 2008 WL 170702 (Minn. App. Jan. 22, 2008), *review denied* (Minn. Mar. 18, 2008).

The state filed a separate criminal complaint charging Hughes with second-degree burglary, and he entered an *Alford*[1] plea before Scherf's trial. Hughes failed to appear for sentencing and remained at large until he was arrested on a warrant on June 4, 2006. A defense investigator was unable to locate Hughes to serve him with a subpoena to testify at Scherf's trial.

On March 25, 2008, nearly two years after Scherf's trial, Hughes signed an affidavit stating that he committed the burglary and theft alone, that he borrowed Scherf's car to commit the burglary, and that Scherf had no knowledge of the crimes. This affidavit served as the factual basis for Scherf's postconviction petition, in which he

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[1]An *Alford* plea allows a district court to accept a guilty plea, even though the defendant maintains his innocence, because the defendant concedes that the evidence is sufficient to support a guilty verdict and that the plea is voluntary. *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977); *see North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970).

claimed that newly discovered evidence existed warranting vacation of his convictions, or, alternatively, that the district court should hold an evidentiary hearing to allow him to establish the grounds for this relief. Following a hearing, the district court denied Scherf's petition and his request for an evidentiary hearing. This appeal follows.

D E C I S I O N

A defendant seeking a new trial based on a claim of newly discovered evidence must show "(1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result." *Wright v. State*, 765 N.W.2d 85, 93-94 (Minn. 2009) (quotation omitted). A claim of newly available evidence must satisfy the same test. *State v. Warren*, 592 N.W.2d 440, 450 (Minn. 1999).

When an accomplice witness refuses to testify at a defendant's trial, the defendant may not offer a posttrial affidavit signed by the accomplice that purports to exonerate the defendant as newly discovered, or newly available, evidence. *Whittaker v. State*, 753 N.W.2d 668, 671-72 (Minn. 2008). A posttrial statement of an accomplice who fails to testify at trial is not unknown for purposes of the first prong of the newly discovered evidence test "if, at the time of trial, the petitioner knew the substance of the testimony that individual might provide." *Id.* at 671. Scherf and Hughes were living together at the time of the offenses, and the evidence showed that they acted in concert in committing

the crimes. Strong evidence linked Scherf, as well as Hughes, to the offenses. Under such circumstances, Hughes may have been unavailable at the time of trial, but his testimony was not unknown. *Id.*

The prosecutor pointed out at the postconviction hearing that Hughes was in custody in the county jail, and thus accessible to the defense, for two months while charges were pending against Scherf. When Scherf pleaded guilty, on February 9, 2006, it was at a joint court appearance with Hughes. Although Hughes, who failed to appear for his sentencing, may thereafter have become unavailable to Scherf, under *Whittaker* that does not make Hughes's affidavit newly discovered evidence entitling Scherf to a new trial.

Because *Whittaker* precludes the relief that Scherf seeks, we do not need to address the other prongs of the test for newly discovered evidence. But we note that the evidence that Hughes offered claiming that he acted alone in committing the burglary was duplicative of other trial testimony and was doubtful, given Hughes's questionable credibility and the other evidence strongly linking appellant to the crimes. For these same reasons, it is unlikely that Hughes's testimony would have satisfied the fourth prong—producing an acquittal in appellant's trial or a more favorable result. *See generally Race v. State*, 504 N.W.2d 214, 218 (Minn. 1993) (affirming denial of postconviction petitioner's claim of newly discovered evidence when new evidence would not have produced more favorable result because state's evidence would have contradicted and discredited new evidence).

Scherf also argues that the district court abused its discretion by failing to hold an evidentiary hearing. But because, as in *Whittaker*, the Hughes affidavit fails to satisfy the first prong of the newly-discovered-evidence test, a hearing was not required. *See Whittaker*, 753 N.W.2d at 672.

Affirmed.