STATE OF MINNESOTA
IN COURT OF APPEALS
A10-103

Todd William Grams, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed March 8, 2011
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-06-60262

Robert D. Miller, Robert Miller Law Office, Minneapolis, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges the district court's summary denial of his postconviction petitions seeking a new trial based on newly discovered evidence. We affirm.

FACTS

On the evening of August 29, 2006, appellant Todd William Grams and a woman he was dating, J.O., were involved in an incident leading to Grams being charged with kidnapping and fifth-degree assault. Grams's neighbor, C.W., witnessed portions of the incident from her front door, and gave a statement to the police as part of the investigation. At a bench trial, J.O. testified that an argument with Grams escalated when Grams "forced" J.O. into her own vehicle, assaulted her, and drove her around against her will. C.W. did not testify at the trial. The district court convicted Grams of the charged offenses, and Grams did not appeal.

On January 8, 2008, C.W. testified about the incident during an arbitration hearing regarding Grams's employment status. When Grams obtained a copy of the hearing transcript, he filed a postconviction petition requesting a new trial on the basis that a previously unavailable witness would impeach the victim's trial testimony. The postconviction court summarily denied relief, stating that Grams "fail[ed] to name the alleged neighbor witness" and did not "explain if this person was ever subpoenaed for the trial or why this person was unavailable to testify." Grams appealed. On May 10, 2010, Grams moved to stay the appeal in order to reopen postconviction proceedings. We granted the stay, and Grams moved to reopen the postconviction proceeding for an evidentiary hearing. Grams named C.W. as a "critical" eyewitness and alleged that C.W.'s sworn testimony at the arbitration hearing contradicted J.O.'s testimony at trial that Grams "forced her into his car."

The postconviction court again denied Grams's petition without an evidentiary hearing. The court concluded that C.W.'s arbitration testimony "does not contradict or impeach the victim's testimony nor does it contradict the witness' initial statement to the police" and that Grams "could have discovered this evidence prior to trial with due diligence." We dissolved the stay and reinstated this appeal.

D E C I S I O N

A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). In postconviction proceedings, the petitioner has the burden of proving by a fair preponderance of the evidence that he is entitled to the requested relief. Minn. Stat. § 590.04, subd. 3 (2010). The court must conduct an evidentiary hearing unless the petition, files, and the record "conclusively show that the petitioner is entitled to no relief." *Id.*, subd. 1 (2010). To warrant an evidentiary hearing, the petitioner must allege facts that, if proved, would entitle him to the requested relief. *Doppler v. State*, 771 N.W.2d 867, 871 (Minn. 2009). The allegations must be more than argumentative assertions without factual support. *Id.* But "[a]ny doubts about whether an evidentiary hearing is necessary should be resolved in favor of the party requesting the hearing." *Id.*

Grams argues that the information provided in C.W.'s arbitration testimony constitutes newly discovered evidence that entitles him to a new trial. To obtain a new trial on this basis, a defendant must show that (1) at the time of trial, the evidence was not known to the defendant or counsel; (2) the evidence could not have been discovered before trial through due diligence; (3) the evidence is not doubtful, cumulative, or

impeaching; and (4) the evidence would probably produce an acquittal or more favorable result for the defendant. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). Grams contends that C.W.'s testimony meets this four-prong test.

With respect to the first prong, Grams argues that he "had no way of knowing" about C.W.'s testimony at the time of trial because the arbitration hearing did not occur until five months after the trial. But Grams was aware that C.W. witnessed the incident and concedes that his attorney received a copy of her statement prior to trial. Grams also admits deciding "not to call her" as a witness, because "her statement contained information that was adverse" to him. Thus, Grams knew of this evidence prior to trial, and C.W.'s testimony does not meet the first prong.

As to the second prong, the postconviction court determined that Grams "could have discovered this evidence prior to trial with due diligence," also noting that he "still fails to explain" the circumstances surrounding C.W.'s unavailability for trial and why he did not seek a continuance or otherwise notify the district court of this issue. We agree. Indeed, the only reason Grams cites for not pursuing C.W. as a trial witness is that her "initial statement was not favorable to the defense." There is no evidence that Grams sought more detailed information from C.W. prior to trial or attempted to secure her trial testimony through a subpoena.

Grams argues that favorable evidence from C.W.'s arbitration testimony could not have been discovered prior to trial because the testimony is substantially different than the information she provided to the police. We disagree. In her two-page police statement, C.W. describes looking out her front door and seeing J.O.'s vehicle parked

"almost sideways in the street" with both the driver- and passenger-side doors "wide open." She observed Grams and J.O. "yelling [and] gesturing with their hands" and Grams "walking aggressively towards" J.O. C.W. overheard J.O. asking for her phone, and saying, "you'll never lay hands on me again." The "heated exchange" continued with Grams attempting to "walk around the vehicle towards [J.O.]" as she "would circle the other way." Grams eventually entered the driver's seat and started the vehicle. The door was still open when J.O. "approached" and "[e]ither Todd pulled her into the vehicle from that side or he moved over, but she went into the vehicle."

C.W.'s arbitration hearing testimony, while more extensive, tracks her police statement. She describes looking out and seeing a vehicle "facing the wrong direction," "parked at an angle," with both front doors "wide open." She recalls overhearing J.O. asking for her phone and saying, "you'll never lay hands on me again" and remembers seeing Grams and J.O. "[c]ircling the vehicle." In the end, C.W. testified that Grams entered the driver's side of the vehicle and started the engine, while J.O. "walked right over to the side, got in." C.W. explained: "I think I said on my witness statement, whether she was dragged in or climbed in or whatever, I couldn't necessarily ascertain. But she did—she just walked right over there calmly and got in. I could not tell who was driving. The dome light was not working." We discern no material information from this testimony that Grams and his counsel could not have obtained prior to trial by using due diligence. Accordingly, we conclude that C.W.'s testimony does not meet the second prong of the *Rainer* test.

As to the third prong, C.W.'s testimony would not be "cumulative, impeaching, or doubtful." Therefore, we conclude that Grams meets this prong.

Grams argues that the evidence obtained from C.W.'s arbitration testimony "would probably produce an acquittal or a more favorable result" at a new trial. *See Rainer*, 566 N.W.2d at 695. Grams contends that there are "stark contradictions" between the testimony of C.W. and the victim and that C.W.'s "neutral status" would contribute to a more favorable outcome. He emphasizes C.W.'s use of the word "calmly" in her testimony of how J.O. approached the vehicle. We disagree. C.W.'s lack of precision in describing how J.O. ultimately entered the vehicle is present in both her police statement and her testimony. And nothing in C.W.'s testimony directly contradicts J.O.'s testimony that Grams "forced" her into the vehicle. We also note that the testimony of J.O. and four other witnesses supports the district court's verdict. On this record, we conclude that it is unlikely that C.W.'s testimony would produce an acquittal or more favorable result at a new trial, and the evidence does not meet the fourth prong of the *Rainer* test.

In sum, C.W.'s arbitration testimony is not new evidence that was unavailable through her police statement or further diligent inquiry prior to trial. Grams has not met his burden to present facts that would warrant an evidentiary hearing. The petitions, files, and the record conclusively show that he is not entitled to relief and the postconviction court did not abuse its discretion in summarily denying his petitions.

Affirmed.