STATE OF MINNESOTA

IN SUPREME COURT

A17-0124

Hennepin County — Hudson, J.

Keith Henderson,

Appellant,

vs.

Filed: January 31, 2018
Office of Appellate Courts

State of Minnesota,

Respondent.

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota, for appellant.

Lori Swanson, Attorney General, Saint Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

1. A postconviction court must accept the facts alleged in the petition as true when deciding whether a postconviction petition may be denied without holding an evidentiary hearing.

2. The postconviction court did not abuse its discretion when it summarily denied appellant's third petition for postconviction relief because the petition did not clearly and convincingly establish appellant's innocence in order to satisfy the newly-discovered-evidence exception under Minn. Stat. § 590.01, subd. 4(b)(2) (2016).

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

HUDSON, Justice.

This case is an appeal from the denial of Keith Henderson's third petition for postconviction relief, which asserts several claims based on facts alleged in two sworn affidavits. The postconviction court summarily denied Henderson's petition because it was filed after the statute of limitations in Minn. Stat. § 590.01, subd. 4(a) (2016), expired, and failed to meet the newly-discovered-evidence exception in subdivision 4(b)(2). Because the affidavits are legally insufficient to establish that Henderson is innocent of the offenses of which he was convicted, the postconviction court did not abuse its discretion when it summarily denied the petition as untimely filed. We affirm.

FACTS

In 1998, Juwan Gatlin was killed by fellow gang members in an alleyway in Minneapolis.[1] He was shot between 13 and 15 times. Following a police investigation,

[1] The facts underlying Henderson's crimes are set forth in detail in *State v. Henderson*, 620 N.W.2d 688, 693–95 (Minn. 2001).

Henderson was indicted for first-degree premeditated murder, Minn. Stat. § 609.185(1) (2016), and a crime committed for the benefit of a gang, Minn. Stat. § 609.229 (2016). Donte Evans and Darryl McKee were also indicted for Gatlin's murder.

Henderson, McKee, Evans, and Gatlin were all members of a street gang known as the Mickey Cobras. Gatlin was killed because he gave information to police that led to the arrest of two other Mickey Cobra members for an unsolved murder. At trial, the State presented several witnesses who testified to Henderson's involvement in Gatlin's murder. The testimony of H.W., A.N., and D.J. is relevant to this appeal.

H.W., another Mickey Cobra, testified that Evans told him about Henderson's involvement in Gatlin's murder. H.W. described two conversations with Evans, one in a car and one in a hallway. H.W. said that he, his "little cousin," and Evans were in a car together when Evans said, "T, we got away with it . . . we got [Gatlin], we got [Gatlin]."[2] The "little cousin" to whom H.W. referred at trial was R.J., although the identity of the "little cousin" was not known at trial.

The other conversation, which took place in a hallway, occurred later that same day. During that conversation, Evans provided more detail about Gatlin's murder. Evans told H.W. that he, Henderson, McKee, "QC," "Rock," and "Looney" were involved in killing Gatlin. According to H.W., Evans told him that Henderson shot Gatlin first, then passed the gun to Evans, who shot Gatlin several more times. Evans also told H.W. that Gatlin said, "I'm dead, T, I'm dead."

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[2] "T" is a slang term that the Mickey Cobras use to refer to each other.

During the investigation into Gatlin's death, H.W. and R.J. were initially considered suspects. H.W. later told police what Evans had told him about the murder. H.W. testified that he went to the police because R.J. was next on the gang's "hit" list, and H.W. was afraid that he would also be killed because he was always with R.J. When asked why R.J. was on the "hit" list, H.W. testified that "[Evans] didn't ever say why they wanted to kill [R.J.]. They just said he was off his square or something like that, messing with his girlfriend," but also said that R.J. was on the "hit" list because R.J. told police that "Penny" was involved in an unrelated murder.[3]

A.N., another Mickey Cobra, testified that he went to the police several times following Gatlin's murder. He told police that he believed that D.J., Gatlin's former girlfriend and Henderson's neighbor, had information about the murder. A.N. also testified that he spoke directly to D.J. about Gatlin's death, and that A.N. and Henderson did not get along.

D.J. testified that she heard details about the murder from A.N. She also testified that Henderson told her "I did it" in reference to Gatlin's murder, but when she expressed surprise, Henderson said he was joking. D.J. had previously testified before the grand jury that Henderson told her that he shot Gatlin after pushing him in an alley, but she recanted this testimony at trial. The trial court admitted her grand jury testimony as substantive evidence of Henderson's guilt.

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[3] "Penny" appears to be a street name. The identity of this person is unknown.

Several other witnesses provided evidence of Henderson's involvement in Gatlin's murder. A.B. testified that Henderson was at the murder scene. A.B.'s mother testified that Henderson helped dispose of the gun used to kill Gatlin. A.B.'s cousin testified that Henderson told her to tell A.B. that she should tell police that Henderson was out of town at the time of the murder. P.G., one of Henderson's fellow inmates, testified that Henderson told him that he pushed a guy over in an alley and shot him in the leg, arm, and head, and the victim said, "[d]on't shoot me no more. I'm already dead."

Henderson was convicted of first-degree premeditated murder following a jury trial. We affirmed Henderson's convictions and sentences on direct appeal. *State v. Henderson*, 620 N.W.2d 688 (Minn. 2001). Between 2001 and 2004, Henderson filed two petitions for postconviction relief, both of which were denied. In 2016, Henderson filed a third petition for postconviction relief based on facts alleged in two affidavits signed by R.J. and W.S. Both affidavits are notarized.

R.J.'s affidavit is dated April 2015 and contradicts aspects of H.W.'s trial testimony. His affidavit provides three pieces of relevant information: (1) R.J. is H.W.'s "little cousin," who was present during the conversation in the car, and it was H.W., not Evans, who said "T, we got away with [killing Gatlin]"; (2) H.W. told R.J. that H.W. shot Gatlin three or four times and provided other details about the murder; and (3) it was H.W., not R.J., who told police that "Penny" was involved in an unrelated murder.

W.S.'s affidavit is dated December 2015 and relates to A.N.'s and D.J.'s trial testimony. His affidavit provides two pieces of relevant information: (1) A.N. told W.S.

that he lied to D.J. about Henderson's involvement in the murder to frame Henderson; and (2) A.N. gave the false information because he did not like Henderson.

Based on these two affidavits, Henderson filed his third petition for postconviction relief, arguing that the affidavits were newly discovered evidence and also evidence of false testimony. He additionally asserted that the newly discovered evidence was evidence of a violation of *Brady v. Maryland*, 373 U.S. 83 (1963), or alternatively, demonstrated an ineffective-assistance-of-counsel claim. Henderson requested an evidentiary hearing.

The postconviction court denied Henderson's petition without holding an evidentiary hearing, concluding that his petition was filed after the statute of limitations in Minn. Stat. § 590.01, subd. 4(a) had expired, and that his petition failed to satisfy the newly-discovered-evidence exception in subdivision 4(b)(2). The court also found that Henderson's *Brady* and ineffective-assistance-of-counsel claims lacked factual support. Henderson challenges the postconviction court's conclusion that his petition did not meet the newly-discovered-evidence exception, and its decision to deny relief without holding an evidentiary hearing, in this appeal.

ANALYSIS

"We review a denial of a petition for postconviction relief, as well as a request for an evidentiary hearing, for an abuse of discretion." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). A postconviction court does not abuse its discretion unless it has "exercised its discretion in an arbitrary or 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) (citation omitted) (internal quotation marks omitted). A petitioner is entitled

to an evidentiary hearing unless the "petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2016). "[A] postconviction evidentiary hearing is not required when the petitioner alleges facts that, if true, are legally insufficient to grant the requested relief." *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (citations omitted).

Henderson argues that the postconviction court abused its discretion when it summarily denied his petition as untimely. We disagree. Minnesota Statutes § 590.01, subd. 4 (2016), provides the framework for determining a postconviction petition's timeliness. Subdivision 4(a) provides the statute of limitations for postconviction petitions. Minn. Stat. § 590.01, subd. 4(a). A petition must be brought within 2 years of the later of: "(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of [a] petitioner's direct appeal." *Id.* If a petitioner's conviction became final before August 1, 2005, like Henderson's did, the 2-year limitations period began on August 1, 2005. *See* Act of June 2, 2005, ch. 136, art. 14, § 13, 2005 Minn. Laws 901, 1097.

Henderson's petition was undoubtedly filed after the limitations period in subdivision 4(a) had expired.[4] But a petition filed after the 2-year period in subdivision

[4] Henderson filed his third postconviction petition nearly 9 years after the deadline. His conviction became final in April 2001, 90 days after our disposition of his direct appeal. *See Berkovitz v. State*, 826 N.W.2d 203, 207 (Minn. 2013) (explaining that a decision becomes final 90 days after our decision when no petition for certiorari is filed with the Supreme Court of the United States). Because Henderson's conviction became final before August 1, 2005, he was required to file his petition within 2 years of August 1, 2005.

4(a) has expired may still be timely under one of the five exceptions in subdivision 4(b). Minn. Stat. § 590.01, subd. 4(b). A petition invoking an exception must be filed within 2 years of the date the claim under an exception arises. Minn. Stat. § 590.01, subd. 4(c). A claim arises on the date that the petitioner "knew or should have known of the claim" giving rise to the exception. *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012).[5]

Henderson argues that his petition is timely because the affidavits meet the newly-discovered-evidence exception in subdivision 4(b)(2). The newly-discovered-evidence exception requires a petitioner to show that the evidence: (1) is "newly discovered"; (2) "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the 2-year period for filing a postconviction petition"; (3) is "not cumulative to evidence presented at trial"; (4) is "not for impeachment purposes"; and (5) "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." Minn. Stat. § 590.01, subd. 4(b)(2). All five requirements must be met for this exception to apply. *Riley*, 819 N.W.2d at 168.

The postconviction court concluded that the affidavits failed the third, fourth, and fifth requirements of the newly-discovered-evidence exception, and therefore, Henderson's petition was untimely. Henderson argues that the postconviction court's conclusion was

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[5] The postconviction court did not consider whether Henderson timely invoked the exception under subdivision 4(c). Because the State does not argue that the petition is untimely under subdivision 4(c), this argument has been forfeited. *See Carlton v. State*, 816 N.W.2d 590, 601 (Minn. 2012) ("[T]he statute of limitations in Minn. Stat. § 590.01, subd. 4(c), is not jurisdictional . . . .").

erroneous. The State challenges the postconviction court's determination that Henderson met the first and second requirements of the newly-discovered-evidence exception.

We need not consider all five requirements of the newly-discovered-evidence exception here because the facts alleged in the petition are legally insufficient to establish the fifth requirement: that the evidence would establish Henderson's innocence by a clear and convincing standard. *See* Minn. Stat. § 590.01, subd. 4(b)(2). This requirement is "more stringent" than the *Rainer* standard, which applies to timely filed petitions. *Rhodes*, 875 N.W.2d at 783, 788. Thus, there must be "more than an uncertainty" about the petitioner's guilt. *Brown*, 863 N.W.2d at 787–88. A petitioner is not required to establish that the evidence *proves* his innocence, but rather must "sufficiently allege *the existence* of evidence, which, *if true*, would establish the petitioner's innocence by clear and convincing evidence." *Miles v. State*, 800 N.W.2d 778, 784 (Minn. 2011) (second alteration added). In determining whether a summary denial of a petition is appropriate, a postconviction court must determine whether the evidence would, "on its face," demonstrate the petitioner's innocence by a clear and convincing standard. *Id.* at 783.

As a preliminary matter, Henderson argues that the postconviction court erred when it assessed the credibility of the affidavits from R.J. and W.S in summarily denying his petition. We agree. When determining whether an evidentiary hearing is required—that is, when the court may deny a petition without holding a hearing—a postconviction court must accept the facts alleged in the petition "on [their] face." *Id.* at 783–84. Only if the facts alleged in the petition, accepted as true, fail to establish the petitioner's innocence by a clear and convincing standard may a court summarily deny the petition. *See* Minn. Stat.

§ 590.04, subd. 1 (stating that a petitioner is entitled to an evidentiary hearing unless the record "conclusively show[s] that the petitioner is entitled to no relief"). A petitioner is otherwise entitled to an evidentiary hearing, and the postconviction court may assess the credibility of the evidence at that stage. *See id.*

In *Gassler v. State*, when discussing the clear-and-convincing standard generally, we said that "[t]he burden of clear and convincing evidence . . . is met when the truth of the fact to be proven is 'highly probable.' " 787 N.W.2d 575, 583 (Minn. 2010) (citations omitted). We also said that "to prove a claim by clear and convincing evidence, a party's evidence should be unequivocal, intrinsically probable and credible, and free from frailties." *Id.* (citation omitted). We concluded that Gassler's alleged evidence failed to prove his innocence because other evidence of his guilt existed. *Id.* In *Miles*, we clarified that under *Gassler*, the newly discovered evidence must show the petitioner's innocence by a clear and convincing standard "on its face." 800 N.W.2d at 783–84. We reaffirm now that when determining whether to summarily deny relief, a postconviction court must accept the evidence as true. *Id.* To the extent that *Gassler* can be read to hold that a postconviction court may assess the credibility of evidence without holding an evidentiary hearing, that reading is incorrect. *See, e.g.*, *Bobo v. State*, 820 N.W.2d 511, 516 (Minn. 2012) ("An evidentiary hearing provides the postconviction court the means for evaluating the credibility of a witness." (citations omitted)); *State v. Turnage*, 729 N.W.2d 593, 598 (Minn. 2007) ("[A]bsent a[n evidentiary] hearing, the postconviction court cannot make a judgment about which story is true and which is false." (citation omitted) (internal quotation marks omitted)).

Although the postconviction court improperly assessed the credibility of the affidavits, we still affirm the postconviction court's decision. Even accepting the affidavits of R.J. and W.S. as true, the facts alleged in Henderson's petition are legally insufficient to show his innocence by a clear and convincing standard. *See Rhodes*, 875 N.W.2d at 786 (stating that an "evidentiary hearing is not required" when the alleged facts, "if true, are legally insufficient to grant the requested relief" (citations omitted)). At most, W.S.'s affidavit shows that A.N. lied to D.J. It does not call into question D.J.'s credibility or her testimony that Henderson told her he "did it" when referring to Gatlin's murder. Similarly, R.J.'s affidavit states only that H.W. was also involved in the murder.[6] It does not exculpate Henderson because multiple people were involved in Gatlin's murder.

Moreover, other evidence of Henderson's guilt remains regardless of whether the affidavits are true. *See, e.g.*, *Scott v. State*, 788 N.W.2d 497, 502 (Minn. 2010) (concluding that evidence did not establish the defendant's innocence by a clear and convincing standard because "there was still a significant amount of properly admitted evidence supporting [his] guilt"). The evidence does not affect A.B.'s testimony that Henderson was at the murder scene, A.B.'s mother's testimony that Henderson helped dispose of the gun, A.B.'s cousin's testimony that Henderson encouraged others to lie to police about his whereabouts at the time Gatlin was killed, or Henderson's inculpatory statements to P.G. about details of the murder. *See Henderson*, 620 N.W.2d at 694–95, 705.

[6] The information in R.J's affidavit regarding who told police that "Penny" was involved in a different murder equally does not show that Henderson is innocent of the crimes committed in this case.

In sum, the alleged facts do not clearly and convincingly show Henderson's innocence and therefore fail to satisfy the fifth requirement of the newly-discovered-evidence exception. Accordingly, Henderson's petition was untimely filed. Because the facts are legally insufficient to show that Henderson meets the newly-discovered-evidence exception, the district court did not abuse its discretion when it denied the petition as untimely without conducting an evidentiary hearing.[7]

CONCLUSION

For the foregoing reasons, we conclude that the postconviction court did not abuse its discretion when it summarily denied Henderson's petition for postconviction relief.

Affirmed.

[7] Because Henderson's postconviction petition is untimely, we do not reach the merits of his claims. *See, e.g.*, *Berkovitz*, 826 N.W.2d at 207 (stating that this court considers the merits only if the petitioner has first satisfied an exception in Minn. Stat. § 590.01, subd. 4(b)).