

STATE OF MINNESOTA

IN SUPREME COURT

A19-1140

Washington County

Lillehaug, J.

Thomas J. Fox,

Appellant,

vs.

Filed: February 5, 2020
Office of Appellate Courts

State of Minnesota,

Respondent.

Thomas J. Fox, Stillwater, Minnesota, pro se.

Keith Ellison, Attorney General, Saint Paul, Minnesota; and

Peter J. Orput, Washington County Attorney, and Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota, for respondent.

S Y L L A B U S

The district court did not abuse its discretion by denying appellant's second petition for postconviction relief because all of his claims are barred by the 2-year statute of limitations in Minnesota Statutes § 590.01, subd. 4(a) (2018).

Affirmed.

Considered and decided by the court without oral argument.

OPINION

LILLEHAUG, Justice.

A Washington County jury found Thomas Fox guilty of first-degree premeditated murder and first-degree felony murder for the stabbing death of his girlfriend, Lori Baker. The district court convicted Fox and sentenced him to life imprisonment without the possibility of release. On direct appeal, we affirmed the district court on all issues. The district court denied Fox's first petition for postconviction relief, which we also affirmed. We now review the district court's denial of Fox's second petition for postconviction relief, in which he requests a new trial based on four theories of ineffective assistance of appellate counsel.

FACTS

Following the fatal stabbing of Lori Baker, the State charged Fox with first-degree premeditated murder and first-degree felony murder.¹ Police discovered Baker's body covered by a comforter soaked with blood in her apartment, and found that her car and debit card were missing. Surveillance video revealed Fox driving what appeared to be Baker's car, and showed that Fox was involved in at least several of the 48 subsequent transactions on Baker's debit card. One of the State's witnesses testified that Fox told him that "he was having problems with [Baker]," and that "she gave him an ultimatum."

¹ A full recitation of the facts is found in *State v. Fox (Fox I)*, 868 N.W.2d 206, 211–13 (Minn. 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 509 (2015).

Another witness testified that Fox told him his girlfriend had wanted him to leave, that he killed her, and that “he didn’t mean to do in his platinum piece” (referring to Baker).

The trial testimony of two other witnesses, S.C. and T.G., is relevant to this petition. S.C., who lived below Baker, testified that she heard stomping noises and then repetitive, loud screaming that lasted about 10 minutes coming from Baker’s apartment on the night of the murder. T.G. testified that Fox came to her house and asked her if she was “ready for him because he got rid of his girlfriend.” She testified further that Fox said that “[h]e f—ed up” and that “he did her in.”

The jury found Fox guilty on both counts. On May 31, 2013, the district court sentenced him to life imprisonment without the possibility of release on the conviction for first-degree premeditated murder. Fox timely appealed. Fox argued that the district court erred because: (1) it denied his motion to suppress his statements to law enforcement; (2) it failed to use Fox’s proposed jury instruction on circumstantial evidence; and (3) the State offered insufficient evidence to support his convictions. In a pro se supplemental brief, Fox also asserted that: (4) law enforcement unconstitutionally obtained his statements; (5) the State committed prosecutorial misconduct; (6) the district court erred by sentencing him to life without the possibility of release; (7) the district court erred by not offering the jury a lesser-included offense instruction; (8) his indictment included the wrong date of the offense and was not supported by probable cause; (9) the prosecutor committed misconduct by unduly tainting the grand jury proceedings; and finally, (10) he received ineffective assistance of counsel.

We decided that all of Fox's arguments lacked merit and affirmed the district court. *State v. Fox (Fox I)*, 868 N.W.2d 206 (Minn. 2015), *cert. denied*, ___ U.S. ___, 136 S. Ct. 509 (2015). The United States Supreme Court denied certiorari on November 16, 2015. *Id.* Fox filed his first petition for postconviction relief one year later, which the district court denied without an evidentiary hearing.

We expressly discussed and rejected the following arguments on Fox's first postconviction appeal: (1) the State's evidence was insufficient to support his conviction; (2) he received ineffective assistance of trial and appellate counsel; (3) the State violated his due process rights by failing to preserve exculpatory evidence; (4) the search warrant for his DNA and fingernail samples violated his Fourth Amendment rights and went unaddressed in his direct appeal; (5) *Brady* violations violated his due process and Sixth Amendment rights, including his right to confront witnesses; and (6) he received ineffective assistance of trial counsel when his attorney failed to challenge an order for restitution. *Fox v. State (Fox II)*, 913 N.W.2d 429, 431 (Minn. 2018). We affirmed the district court, holding that each claim was either procedurally barred or failed as a matter of law. *Id.*

Fox filed his second petition for postconviction relief, now before us, on January 11, 2019. He raises four theories of ineffective assistance of appellate counsel, each based on appellate counsel's alleged failure on direct appeal to recognize trial counsel's mistakes.

First, Fox argues that trial counsel failed to complete adequate discovery because counsel did not seek T.G.'s medical records and S.C.'s cell phone records. He contends

that T.G.'s medical records would have undermined her testimony, and that S.C.'s cell phone records would have offered an alternative perpetrator by demonstrating that Fox was not in the apartment during the altercation. Second, Fox argues that, although trial counsel informed him that the State had offered him a plea deal that would have resulted in a 40-year sentence, counsel did not advise him on whether to take it. Third, Fox contends that trial counsel was ineffective for failing to object when the district court entered convictions for two first-degree murder counts for the same incident with the same victim and for failing to request a lesser-included offense instruction.

Fourth, Fox argues that the cumulative effects of multiple, alleged errors denied him a fair trial. His first series of alleged errors include that trial counsel failed to: (1) complete adequate discovery; (2) advise him on the State's plea offer; (3) request lesser-included offenses; (4) request DNA testing that could have supported a different perpetrator; and (5) impeach the State's witnesses (T.W., T.G., D. L., J.N., A.M., P.T., and J.B.). He also asserts that the prosecutor engaged in misconduct in his closing argument by: (1) drawing inappropriate inferences from facts not in evidence (including that Baker found unfavorable information about Fox on the internet, that Fox had cleaned himself after the murder, and that a kitchen drawer was ajar); (2) telling the jury that the State's witness was "scared" to say that Fox killed Baker; (3) referring to Fox's alleged motive without presenting evidence to support it; (4) intentionally misstating evidence (including that Fox took Baker's car by force and that Fox was missing a duffel bag), and providing personal opinions—namely that Fox's statements were unlikely to be true, that J.B. was believable because he had a family, and that T.W. was believable as Fox's nephew; and (5) inflaming

the jury, including with statements that Fox “would blow up” and that is “just who he is,” that his statements were “self-serving nonsense,” that Fox “used [Baker] up after three months,” and that he had “caught Fox lying” when referring to inconsistencies in his timeline.

The district court denied Fox’s petition because, among other things, it concluded that his claims were time-barred under Minnesota Statutes § 590.01, subd. 4(a) (2018). Fox appealed.

ANALYSIS

We review the district court’s denial of a postconviction petition for an abuse of discretion. *Fox II*, 913 N.W.2d at 433. A district court abuses its discretion when 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.” *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010).

A petitioner must allege facts that, if true, are legally sufficient to warrant relief. *See Rossberg v. State*, 932 N.W.2d 6, 9 (Minn. 2019). Because time-barred claims do not legally entitle a petitioner to relief, a district court does not abuse its discretion by denying such claims. *Id.* Unless an exception applies, a claim is time-barred if it is filed more than 2 years after “an appellate court’s disposition of petitioner’s direct appeal.” Minn. Stat. § 590.01, subd. 4(a)(2).

Here, the United States Supreme Court denied certiorari review of our decision affirming Fox’s convictions on November 16, 2015. *Fox I*, 868 N.W.2d 206, ___ U.S. ___, 136 S. Ct. 509. Fox’s window to timely file a petition for postconviction review closed 2

years later, on November 16, 2017. Accordingly, in the absence of an exception, all of Fox's claims are time-barred.

Fox alleges that his otherwise time-barred claims meet the interests-of-justice exception under Minnesota Statutes § 590.01, subd. 4(b)(5). Subdivision 4(b)(5) requires the petitioner to demonstrate that the petition is “not frivolous” and that it “is in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5) . This exception only applies if a petitioner “allege[s] that an injustice occurred that prevented him from timely petitioning for postconviction relief.” *Odell v. State*, 931 N.W.2d 103, 106 (Minn. 2019).

“A claim under [the interests-of-justice] exception must relate to an injustice that delayed the filing of the petition, not to the substantive merit of the petition, and applies only in exceptional and extraordinary situations.” *Id.* at 106 (citations omitted) (internal quotation marks omitted). If the exception applies, a petitioner must still file the claim “within two years of the date the claim arises.” Minn. Stat. § 590.01, subd. 4(c).

Fox asserts that he meets the “interests of justice” exception under subdivision 4(b)(5) because, for a period of time, he lacked necessary access to his appellate counsel and Minnesota case law to work on his petition.² But as the State notes, Fox filed his first petition for postconviction relief—on November 28, 2016—well within the 2-year statute

² Fox asserts that the Department of Corrections placed him in administrative segregation for 6 months beginning on May 31, 2013 and then transferred him to a Virginia correctional facility. Although the record does not provide the specific date on which Fox returned to Minnesota, it appears that he returned at some point in May 2017. He claims that this alleged period of injustice ended when the Department of Corrections transferred him back to Minnesota.

of limitations and *during* his alleged period of injustice. Fox does not explain why the impact of this alleged lack of access to legal resources was different for his second postconviction petition than for his first postconviction petition. Viewing the alleged facts in the light most favorable to Fox,³ he has not demonstrated an injustice that delayed his ability to file his second petition. The interests-of-justice exception, therefore, does not apply here.

Because Fox's second petition for postconviction relief was filed more than 2 years after the Supreme Court denied certiorari, and because Fox does not meet the interests-of-justice exception to the 2-year time bar, the district court did not abuse its discretion when it denied Fox's petition.

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.

³ Although inmates have a constitutional right to access the courts, *Lewis v. Casey*, 518 U.S. 343, 350–51 (1996), Fox does not establish that he lacked this access. He notes only that he accessed Minnesota legal resources using the Minnesota Law Library Services to Prisoners, but that “[e]ach request would take up to three weeks” and that many of his requests were “inadequate or unuseable [sic]” because he did not know which materials he should request without an attorney. But Fox was not constitutionally entitled to an attorney's assistance at this point. *Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) (“We hold that a defendant's right to the assistance of counsel under Article 1, section 6 of the Minnesota Constitution extends to one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding.”).