

DA 17-0146

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 115N

BRIAN D. SMITH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Fourth Judicial District,
In and For the County of Missoula, Cause No. DV-16-698
Honorable Leslie Halligan, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Brian D. Smith, Self-Represented, Shelby, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, C. Mark Fowler, Assistant
Attorney General, Helena, Montana

Kirsten H. Pabst, Missoula County Attorney, Suzy Boylan, Deputy
County Attorney, Missoula, Montana

Submitted on Briefs: April 4, 2018

Decided: May 8, 2018

Filed:



Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Brian Smith (Smith) appeals pro se from a Fourth Judicial District Court order denying Smith's petition for postconviction relief. We affirm.

¶3 On April 3, 2011, Smith assaulted his girlfriend with a hammer, resulting in permanent damage. Following his arrest, an attorney was appointed to represent him. Ultimately, Smith pled guilty to aggravated assault, a felony, and signed a standard Plea of Guilty and Waiver of Rights Form. On May 21, 2012, the District Court sentenced Smith to twenty years in the Montana State Prison, without parole.

¶4 On June 1, 2012, Smith filed a motion to withdraw his guilty plea. The District Court denied the motion on July 26, 2012. Smith requested a hearing before the Sentence Review Board. Shortly after a hearing was scheduled, it was cancelled because Smith informed the Board that he was in the process of filing for postconviction relief. It was not until years later, on August 16, 2016, that he filed a petition for postconviction relief. The District Court denied Smith's petition on February 14, 2017, because it was time-barred pursuant to § 46-21-102, MCA. Smith appeals, arguing he is entitled to

postconviction relief because although his petition was not timely, he has discovered new evidence in his case.

¶5 This Court reviews a district court’s denial of a petition for postconviction relief to determine whether the district court’s findings of fact are clearly erroneous and its conclusions of law are correct. *Robinson v. State*, 2010 MT 108, ¶ 10, 356 Mont. 282, 232 P.3d 403. We review discretionary rulings in postconviction relief proceedings, including rulings related to whether to hold an evidentiary hearing, for an abuse of discretion. *Heath v. State*, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118.

¶6 A postconviction relief petition is time-barred if it is not filed within one year of the date that the conviction becomes final. Section 46-21-102(1), MCA. A conviction becomes final when (1) the time for appeal to the Montana Supreme Court expires; (2) if an appeal is taken to the Montana Supreme Court, the time for petitioning the United States Supreme Court for review expires; or (3) if review is sought in the United States Supreme Court, on the date that that court issues its final order in the case. Section 46-21-102(1), MCA. Smith did not appeal his conviction to this Court. Therefore, his conviction was final in July of 2012. Smith filed the current petition over four years later in August 2016, clearly outside the one-year time limitation. The petition for postconviction relief is statutorily time-barred.

¶7 However, a petitioner may have more time to file if newly-discovered evidence establishes that the petitioner did not engage in the criminal conduct for which he was convicted. Section 46-21-102(2), MCA; *see State v. Rosales*, 2000 MT 89, ¶ 7, 299 Mont. 226, 999 P.2d 313 (holding that the “miscarriage of justice exception” applies to

postconviction claims if the defendant alleges newly-discovered evidence that establishes the defendant did not commit the offense). Smith alleges that he has discovered new evidence in his case. In his opening brief, Smith states that he received proof on January 13, 2017, that his trial counsel never obtained the medical record pertaining to Smith's first suicide attempt, which occurred before he committed the assault and would support an affirmative defense of mental incapacity. Smith alleges that he would have requested a jury trial and not pled guilty had he known about the possibility of pursuing a mental incapacity defense.

¶8 The evidence asserted by Smith is not newly discovered. Further, this evidence does not establish Smith's actual innocence. *See State v. Graham*, 2002 MT 237, ¶ 12, 311 Mont. 500, 57 P.3d 54 (holding that "For a petitioner to prove actual innocence he must do more than show that a reasonable doubt exists in the light of the new evidence, but rather that no reasonable juror would have found the defendant guilty."). Smith does not assert that he did not know of the existence of his medical record. The record that he alleges is new pertains to his own medical treatment and evaluation; he would have known of its existence prior to the date he made his guilty plea. The fact that Smith was unaware that his attorney never saw all 275 pages of a medical report does not constitute newly-discovered evidence. The information contained in the medical report was known to Smith.

¶9 The District Court was correct when it denied Smith's petition for postconviction relief, because the petition is time-barred and he has not satisfied the newly-discovered

evidence requirements of § 46-21-102(2), MCA. The District Court did not abuse its discretion when it dismissed Smith's petition without holding an evidentiary hearing.

¶10 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶11 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

/S/ DIRK M. SANDEFUR

/S/ INGRID GUSTAFSON