

DA 17-0362

IN THE SUPREME COURT OF THE STATE OF MONTANA

2018 MT 105N

JAMES BUCCELLI,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2013-691
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

James Buccelli, Self-Represented, Deer Lodge, Montana

For Appellee:

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

Leo J. Gallagher, Lewis and Clark County Attorney, Helena, Montana

Submitted on Briefs: April 4, 2018

Decided: May 1, 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 James Buccelli (Buccelli) appeals pro se from a First Judicial District Court order denying his petition for postconviction relief. We affirm.

¶3 Buccelli was arrested on July 3, 2011, after Peter and Christine Brown (the Browns) encountered Buccelli inside their home, fled, and called 911. On January 25, 2012, a jury found Buccelli guilty of burglary and criminal possession of drug paraphernalia. Buccelli was subsequently sentenced to forty years in the Montana State Prison as a persistent felony offender for burglary, and a concurrent six months in the Lewis and Clark County detention center for possession of drug paraphernalia. Buccelli appealed his conviction to this Court. On February 6, 2013, we dismissed Buccelli's appeal. *State v. Buccelli*, No. DA12-0357, Or. (Mont. Feb. 6, 2013).

¶4 On September 25, 2013, Buccelli filed a motion for appointment of counsel for purposes of pursuing a postconviction action. The District Court denied the motion on December 3, 2013. On October 26, 2016, Buccelli filed a petition for postconviction relief pro se. The District Court denied the petition on May 31, 2017, because it was time-barred pursuant to § 46-21-102, MCA. Buccelli 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. Buccelli did not appeal his conviction to the United States Supreme Court. Therefore, Buccelli’s conviction was final on May 7, 2013. Buccelli filed the current petition over three years later in October 2016, clearly outside the one-year time limitation. Buccelli’s petition for postconviction relief is statutorily time-barred.

¶7 However, a petitioner may be granted more time to file if newly-discovered evidence establishes that the petitioner did not engage in the criminal conduct for which he or she 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). Buccelli alleges that he has discovered new evidence, showing that he could not have committed the burglary in 2011. Buccelli argues that the clothing he was wearing at the time of his arrest was different from the clothing that the Browns reported he was wearing in the Browns' home. Buccelli also argues it would have been impossible for him to climb through a window into the Browns' home and chase Mr. Brown up a set of stairs because Buccelli suffers from a knee injury.

¶8 However, the evidence asserted by Buccelli is not newly discovered. Even if it was newly discovered, this evidence does not establish Buccelli'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."). At trial, the jury heard testimony from the Browns regarding their identification of Buccelli and the clothes he was wearing the night of the burglary. The jury also heard testimony that Buccelli attempted to kick out a window in the back seat of the patrol car following his arrest, alluding to the fact that his knee was functioning adequately. The evidence that Buccelli claims is newly discovered was acknowledged at trial and fails to prove that he did not actually commit the offenses of which he was found guilty.

¶9 The District Court was correct when it denied Buccelli's petition for postconviction relief because the petition is time-barred and because Buccelli has not

satisfied the requirements of § 46-21-102(2), MCA. The District Court did not abuse its discretion when it dismissed Buccelli'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/ LAURIE McKINNON
/S/ JAMES JEREMIAH SHEA
/S/ DIRK M. SANDEFUR
/S/ JIM RICE