DA 18-0329

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 117N

RONALD LON PETERSEN,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Twentieth Judicial District,
In and For the County of Lake, Cause No. DV 18-55
Honorable James A. Manley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Ronald Petersen, self-represented, Shelby, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Katie F. Schulz, Assistant Attorney General, Helena, Montana

Steven N. Eschenbacher, Lake County Attorney, Polson, Montana

Submitted on Briefs: March 21, 2019

Decided: May 21, 2019

Filed:

Clerk

Justice Dirk Sandefur 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 Ronald Lon Petersen, *pro se*, appeals from the judgment of the Montana Twentieth Judicial District Court, Lake County, denying his second petition for postconviction relief. We affirm.

¶3 As referenced in *State v. Petersen*, 2011 MT 22, ¶ 1, 359 Mont. 200, 247 P.3d 731 (*Petersen I*), and *Petersen v. State*, No. DA 11-0403, 2012 MT 138N, ¶ 2, 2012 Mont. LEXIS 185 (*Petersen II*), Petersen is serving a 100-year commitment to the Montana State Prison (MSP) on the offense of deliberate homicide for the shooting death of Clyde Wilson in December 2007. Petersen was convicted and sentenced under a plea agreement after turning himself in to a U.S. Army investigator at his active duty station in Fort Bragg, North Carolina. Petersen admitted that, after breaking into Wilson's home, he shot and killed Wilson to settle a score based on an allegation that he sexually assaulted a 13-year-old girl. Wilson was asleep next to his girlfriend and five-month-old baby at the time of the shooting. In addition to imposing the jointly recommended 100-year base sentence, the District Court *sua sponte* tacked on an additional 10-year weapons enhancement pursuant to § 46-18-221, MCA.

¶4 On direct appeal, Petersen alleged that the District Court erroneously imposed the additional weapons enhancement and then further erred by *sua sponte* amending the sentence to correct the error rather than allowing him to withdraw his guilty plea pursuant to § 46-12-211(4), MCA (option to withdraw guilty plea on court deviation from binding plea agreement). We agreed with Petersen that the court had no authority to tack on a 10-year weapons enhancement under the circumstances and that the proper remedy to cure an illegal sentence was direct appeal. We thus vacated the District Court's amended judgment and remanded for entry of a judgment imposing a 100-year prison sentence in accordance with the binding plea agreement accepted by court. *Petersen I*, ¶¶ 13-18. Having addressed the erroneous imposition of an illegal weapons enhancement on an accepted plea agreement, we affirmed the District Court's denial of Petersen's motion to withdraw his guilty plea. *Petersen I*, ¶¶ 14-18.

¶5 Two months later, in April 2011, Petersen filed a *pro se* petition for postconviction relief alleging that he did not voluntarily plead guilty and that Wilson's killing was a justifiable use of force under Montana law. He also filed an accompanying motion to suppress his confession on the asserted ground that the confession was not voluntary. The District Court denied postconviction relief on the asserted grounds that Petersen failed to provide evidentiary support for his claims, he waived those claims by pleading guilty, and his claims were procedurally barred. The Court similarly denied Petersen's motion to suppress on the stated ground that it was untimely and further waived by his guilty plea. *Petersen II*, ¶ 6. Petersen appealed those rulings and then later filed a *pro se* "Amendment to Direct Appeal of Postconviction Relief" further alleging that his initial arrest warrant

was invalid due to procedural irregularity (falsified arrest warrant date/lack of motion and order for leave to file Information), that his brother was illegally interrogated, and that his half-brother was not a credible State's witness. *Petersen II*, ¶ 7.

¶6 By memorandum opinion filed July 2, 2012, we found seven distinct postconviction claims and related assertions of error—all procedurally barred. *Petersen II*, ¶¶ 7-13. We first held that Petersen's claimed right to withdraw his guilty plea based on a purported rejection of a binding plea agreement was barred by § 46-21-105(2), MCA (barring subsequent assertion of claims "raised on direct appeal"), and "the doctrine of res judicata." *Petersen II*, ¶ 9 (citing *Gollehon v. State*, 1999 MT 210, ¶ 51, 296 Mont. 6, 986 P.2d 395). We then held that he waived all other asserted claims and errors based on his guilty plea, a clear and unequivocal plea waiver, and § 46-21-105(2), MCA (barring subsequent assertion of claims that "could reasonably have been raised on direct appeal"). *Petersen II*, ¶¶ 10-11.

¶7 Nine days later, on July 11, 2012, Petersen filed a federal habeas petition, amended October 31, 2014, asserting three separate claims of ineffective assistance of counsel (IAC) in violation of the Sixth and Fourteenth Amendments to the United States Constitution. *Petersen v. Frink*, No. CV 12-125-M-DLC-JCL, 2015 U.S. Dist. LEXIS 176557, at *1-2 (D. Mont. Aug. 10, 2015) (*Petersen F1*). He claimed that his trial counsel was ineffective based on: (1) failure to challenge the procedural validity of the 2008 arrest warrant and resultingly tainted evidence; (2) failure to challenge the voluntariness of Petersen's incriminating statements to state law enforcement agents; and (3) alleged misrepresentation

of facts and law by counsel that allegedly induced Petersen to plead guilty. *Petersen F1*, 2015 U.S. Dist. LEXIS 176557, at *1-2.

¶8 Despite the "State's probable violation of state law in relation to the issuance of the [2008 arrest] warrant," the United States Magistrate recommended denial of the first IAC claim on the ground that the procedural irregularity would not have been a "basis for" Fourth Amendment "suppression of [Petersen's] post-arrest statements." *Petersen F1*, 2015 U.S. Dist. LEXIS 176557 at *17-24. The Magistrate recommended denial of the second IAC claim based on Petersen's failure to make a sufficient evidentiary showing that his incriminating statements to state investigators were involuntary. *Petersen v. Frink*, No. CV 12-125-M-DLC-JCL, 2015 U.S. Dist. LEXIS 175366, at *3-6 (D. Mont. Aug. 10, 2015) (*Petersen F2*). The Magistrate further recommended denial of the third IAC claim based on a similar lack of evidentiary support. *Petersen F2*, 2015 U.S. Dist. LEXIS 175366 at *6-18. In separate written orders filed January 26 and February 29, 2016, the United States District Court concurred in the Magistrate's recommendations and ultimately denied Petersen's claims for federal habeas relief. *Petersen v. Frink*, No. CV 12-125-M-DLC-JCL, 2016 U.S. Dist. LEXIS 25576 (D. Mont. Feb. 29, 2016) (*Petersen F1-A*); *Petersen v. Frink*, No. CV 12-125-M-DLC-JCL, 2016 U.S. Dist. LEXIS 8945 (D. Mont. Jan. 26, 2016) (*Petersen F2-A*). On December 9, 2016, the United States Ninth Circuit Court of Appeals denied Petersen's petition for a "certificate of appealability" of *Petersen F2-A* (IAC Claims 2-3) under 28 U.S.C. § 2253(c)(2)-(3). *Petersen v. Frink*, No. 9:12-CV-00125-DLC, 2016 WL 9776088, *1 (9th Cir. Dec. 9, 2016). On May 1, 2017,

the United States Supreme Court denied certiorari review. *Petersen v. Frink*, No. 16-8308, 2017 U.S. LEXIS 2818, at *1, 137 S. Ct. 2101.

¶9 On March 15, 2018, Petersen filed a second state court petition for postconviction relief again asserting various IAC claims against trial counsel including, *inter alia*, failure to challenge the validity of the 2008 arrest warrant and the voluntariness of his guilty plea. The District Court denied the petition on the asserted grounds that it was: (1) untimely under § 46-21-102, MCA (1-year deadline for post-appeal postconviction claims); (2) procedurally barred by § 46-21-105(2), MCA (barring subsequent assertion of claims that "could reasonably have been raised on direct appeal"); and (3) not supported by a showing of newly-discovered evidence of actual innocence. Petersen timely appeals.

¶10 On appeal of a denial of a petition for postconviction relief, we review district court findings of fact for clear error. *Ellenburg v. Chase*, 2004 MT 66, ¶ 10, 320 Mont. 315, 87 P.3d 473; *Sanchez v. State*, 2004 MT 9, ¶ 8, 319 Mont. 226, 86 P.3d 1. We review conclusions and applications of law de novo for correctness. *Ellenburg*, ¶ 10; *Sanchez*, ¶ 8.

¶11 The general deadline for filing postconviction claims is "within 1 year of the date that the conviction becomes final." Section 46-21-102(1), MCA. As pertinent here, a "conviction" is "a judgment or sentence entered upon a guilty . . . plea." Section 46-1-202(7), MCA. For purposes of postconviction relief, 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. Thus, "a conviction becomes final when a defendant's appellate remedies expire or are exhausted." *Peterson v. State*, 2017 MT 165, ¶ 8, 388 Mont. 122, 398 P.3d 259.

¶12 Here, Petersen directly appealed from his conviction on guilty plea for deliberate homicide. We ruled on the appeal by written decision filed February 15, 2011. Petersen did not seek certiorari review by the United States Supreme Court. The deadline for seeking certiorari review of a decision of this Court by the United States Supreme Court is "90 days after entry of the judgment." Rule 13(1), Rules of the Supreme Court of the United States. Thus, for purposes of § 46-21-102(1), MCA, Petersen's conviction became final on May 16, 2011. Pursuant to § 46-21-102(1), MCA, Petersen's one-year deadline for seeking postconviction relief expired on May 17, 2012.

¶13 Pursuant to § 46-21-105(1), MCA, the one-year deadline imposed by § 46-21-102(1), MCA, also applies to any second or subsequent postconviction petition. *State v. Root*, 2003 MT 28, ¶ 16, 314 Mont. 186, 64 P.3d 1035. As the narrow exception to this general rule, a petitioner may file a second or subsequent postconviction petition upon a supported showing of "newly discovered evidence that, if prove[n] and viewed in light of the evidence as a whole would establish that the petitioner" is actually innocent of "the criminal conduct for which . . . convicted." Section 46-21-102(2), MCA. The deadline for filing a postconviction petition based on newly-discovered evidence of actual innocence is the latter of one year from the date the conviction became final or one year from the date

the petitioner discovered, or reasonably should have discovered, the new evidence. Section 46-21-102(2), MCA.

¶14 Here, Petersen's second petition essentially asserts five IAC-based postconviction claims:

> (1) failure to challenge procedural irregularities with the 2008 arrest warrant (including various related ancillary claims);
>
> (2) failure to obtain and consider, or failure to challenge the State's failure to disclose, material evidence (i.e., statement of Loren Petersen, Ryon Gates report to law enforcement, forensic analysis of crime-scene shell casings, and forensic analysis of a letter to Petersen from the minor N.M.);
>
> (3) failure to move for suppression of Petersen's statements to U.S. Army investigators and a North Carolina sheriff's deputy, and failure to similarly seek suppression of the fruits of the resulting search of his barracks residence;
>
> (4) coercing Petersen to plead guilty by misrepresentation or omission regarding available evidence and the risk of State prosecution of his friends; and
>
> (5) failure of appellate counsel to challenge the legality of Petersen's 2008 arrest and the voluntariness of his post-arrest incriminating statements.

Though unclear on the *pro se* briefing, part of the basis for Petersen's continuing arrest warrant irregularity claim appears to be allegedly newly-discovered evidence—an unfiled State's motion for leave to file the original Information in his case, the proposed Information, and a proposed order granting leave to file the proposed Information. Petersen's briefing indicates that those documents came to his attention when the State suggested in the parties' 2012 federal habeas litigation that it "probably" requested the 2008 warrant based on those documents but that all were inexplicably lost without filing

except for the warrant. However, Petersen has made no supported evidentiary showing that he filed his second postconviction petition within one year of the date he discovered the possible existence of the missing documents. In addition to the initial reference to those documents in the State's earlier briefing, the U.S. Magistrate further referenced them in its August 10, 2015 order (*Petersen F1*). Petersen did not file his second postconviction petition until three years later. Petersen has further failed to demonstrate how the purported missing or undisclosed charging documents would or could indicate actual innocence in any event. Petersen's newly-discovered evidence claim is thus time-barred by § 46-21-102, MCA.

¶15 The balance of Petersen's claims are claims that he either previously raised or could have previously raised on direct appeal or in his first postconviction petition. Those claims are thus procedurally barred by § 46-21-105(1)-(2), MCA. We hold that the District Court correctly denied Petersen's second petition for postconviction relief.

¶16 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

¶17 Affirmed.

/S/ DIRK M. SANDEFUR

We concur:
/S/ MIKE McGRATH
/S/ JIM RICE
/S/ LAURIE McKINNON
/S/ INGRID GUSTAFSON