DA 21-0582

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 165N

KIM NORQUAY, JR.,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the Twelfth Judicial District,
In and For the County of Hill, Cause No. DV-12-093
Honorable Yvonne Laird, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Phyllis M. Quatman, Quatman & Quatman, Whitefish, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Mardell Ployhar, Assistant Attorney General, Helena, Montana

Lacey Lincoln, Hill County Attorney, Havre, Montana

Submitted on Briefs: April 26, 2023

Decided: August 29, 2023

Filed:

Clerk

Justice James Jeremiah Shea 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, 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 Kim Norquay appeals from the Twelfth Judicial District Court Order Hill County denying his petition for postconviction relief. We review the following four issues on appeal: (1) whether the District Court correctly denied his claim of actual innocence; (2) whether the District Court correctly denied his claim of prosecutorial misconduct; (3) whether the District Court correctly denied his claim of ineffective assistance of counsel; and (4) whether the District Court correctly denied his claim of cumulative error. We affirm.

¶3 A jury convicted Norquay of deliberate homicide and tampering with evidence related to the death of Lloyd Kvelstad. In 2011 this Court affirmed his conviction, and it became final.

¶4 In 2012 Norquay filed a postconviction petition which the District Court denied as legally insufficient. Due to the serious allegations in the petition, the District Court appointed a lawyer to Norquay and allowed him to refile the petition. On April 24, 2018, Norquay filed an amended original petition for postconviction relief, a 312-page memorandum, and two volumes of exhibits. The District Court struck Norquay's amended petition for violating the 20-page limit of the Twelfth Judicial District Court but allowed

him to file a 60-page combined petition and memorandum and incorporate by reference statements and facts from all his previous postconviction filings and exhibits.

¶5 On June 13, 2018, Norquay filed his Revised Amended Petition for Postconviction Relief and an accompanying memorandum. Relevant to this appeal, Norquay contended: (1) actual innocence because Kvelstad was not actually murdered; (2) prosecutorial misconduct and *Brady* violations; (3) Norquay's counsel was ineffective; and (4) Norquay is entitled to relief based on cumulative error.

¶6 The District Court held a four-day hearing at which Norquay presented evidence to prove his innocence. Norquay asserted that that he did not kill Kvelstad because Kvelstad died of hypothermia or hypoxia. Based on witness and expert testimony, body location diagrams, and blood pooling diagrams, Norquay argued that Kvelstad did not die where the crime scene photographs depicted but crawled forward two feet and succumbed to hypothermia while police were investigating the crime scene.

¶7 Norquay also claimed that the trial evidence was unreliable. One of Norquay's experts testified that the photographic evidence was altered, the crime scene video had been tampered with, and discrepancies in the crime scene photo logs evidenced intentionally missing photos. Norquay argued that these disparities proved that the police department engaged in a wide-spread conspiracy to cover-up Kvelstad's death and therefore all the trial evidence was corrupted and unreliable.

¶8 The District Court denied Norquay's petition for postconviction relief. It determined that Norquay did not produce new evidence of his innocence but just a new

theory as to how Kvelstad died; there was no indication that the police engaged in a widespread conspiracy and cover-up; the allegations of prosecutorial misconduct were not "supported by fact"; Norquay's trial counsel was not deficient; and the cumulative error doctrine did not apply.

¶9 "We review a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct." *Marble v. State*, 2015 MT 242, ¶ 13, 380 Mont. 366, 355 P.3d 742. (internal quotations and citation omitted). "Findings of fact are clearly erroneous if they are not supported by substantial evidence, the court has misapprehended the effect of the evidence, or our review of the record convinces us that a mistake has been made." *State v. Warclub*, 2005 MT 149, ¶ 23, 327 Mont. 352, 114 P.3d 254. Claims of ineffective assistance of counsel are questions of law and fact which this Court reviews de novo. *Whitlow v. State*, 2008 MT 140, ¶ 9, 343 Mont. 90, 183 P.3d 861.

¶10 As an initial procedural issue, Norquay claims that the District Court violated § 46-21-104, MCA, when it imposed page limitations from the Twelfth Judicial District Court Rules. He argues that § 46-21-104, MCA, allows him to fully develop the factual basis of his claims, and the District Court "denied him the opportunity" by striking his 312-page memorandum and requiring him to file a shorter combined petition and memorandum.

¶11 Section 46-21-101, MCA, affords a person convicted of a crime the opportunity to challenge his conviction in a postconviction proceeding. A postconviction proceeding is

commenced by filing a verified petition. Section 46-21-103, MCA. The petition must identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts. Section 46-21-104(1)(c), MCA. "The petition must be accompanied by a supporting memorandum, including appropriate arguments and citations and discussion of authorities." Section 46-21-104(2), MCA. To assist in its review of a postconviction petition, or any other filing, a district court may adopt rules so long as the rules do not conflict with the Montana Constitution or statutes. *Bessette v. Bessette*, 2019 MT 35, ¶ 29, 394 Mont. 262, 434 P.3d 894 ("[D]istrict courts have power and discretion to adopt local rules of administration, practice, and procedure" (citing §§ 3-1-112(1), 3-2-704, MCA)).

¶12 The record does not support Norquay's contention that the District Court's rejection of his 312-page memorandum deprived him of the opportunity to adequately present his claims and evidence. Section 46-21-104(2), MCA, allows a petitioner to submit a supporting memorandum—not a novel. While rejecting Norquay's memorandum, the court still went well beyond its local rule's 20-page limit and allowed Norquay to file a 60-page postconviction petition and memorandum and incorporate references from past filings. The District Court then conducted a four-day hearing to allow Norquay to present his evidence. Norquay had every opportunity to fully develop the factual basis of his claims and, as the State correctly points out, he never indicated he was unable to do so before now. The District Court did not err by limiting the length of Norquay's petition and supporting memorandum.

¶13 Norquay claims that the District Court erroneously concluded that he did not present newly discovered evidence in his postconviction petition.[1] Norquay points to "new" evidence that allegedly proves that Kvelstad was alive, crawled on the floor while police and EMTs were at the scene, and then died of hypothermia. This evidence includes witness testimony, several body location diagrams, a blood pooling diagram, the crime scene video, the coroner's report, and expert testimony positing that Kvelstad could have died from hypothermia.

¶14 To succeed on a postconviction petition based on newly discovered evidence, a petitioner must produce newly discovered evidence that, if proved, would show that he did not commit the crime for which he was convicted. Section 46-21-102(2), MCA. To determine what constitutes new evidence, a court may consider a variety of factors such as whether the evidence was discovered since the defendant's trial, whether the evidence is material to the issues at trial, and whether failure to discover the evidence sooner was not the result of the defendant's lack of diligence. *Marble*, ¶¶ 22, 36.

¶15 Norquay's alleged evidence is not "newly discovered evidence" sufficient to satisfy § 46-21-102(2), MCA. Norquay's assertion that Kvelstad crawled on the ground and died from hypothermia is not "new evidence" so much as a new theory as to how Kvelstad died, which is more appropriately argued at trial. The diagrams, witness testimony, and other

[1] Norquay also asserts the District Court's factual findings were clearly erroneous because the District Court did not find Norquay's evidence credible or persuasive. However, a careful review of the record combined with the District Court's comprehensive Order does not convince us that a mistake has been made or that the District Court misapprehended the evidence requiring a reversal. *Warclub*, ¶ 23.

reports were available to the defense both before and during Norquay's trial, and his counsel had ample opportunity to use them at that time. *See Marble*, ¶ 22. We agree with the District Court that Norquay did not offer new evidence that established he did not commit deliberate homicide.

¶16 Norquay claims that the State committed prosecutorial misconduct during the trial when it made references that indicated Norquay sexually assaulted Kvelstad. Norquay made a virtually identical claim supported by substantively similar arguments and facts in his direct appeal. *State v. Norquay*, 2011 MT 34, ¶ 45, 359 Mont. 257, 248 P.3d 817. We determined at that time that "[o]ur review of the record does not establish that the prosecutor engaged in misconduct that violated Norquay's substantial rights." *Norquay*, ¶ 46. We will not revisit that issue here. Grounds for relief that were or could reasonably have been raised on direct appeal may not be raised in a petition for post-conviction relief. Section 46-21-105(2), MCA.

¶17 Norquay claims the State committed *Brady* violations by withholding and doctoring trial evidence that would prove Norquay did not kill Kvelstad. To establish a *Brady* violation, the defendant must show that the State possessed evidence favorable to the defense; the prosecution suppressed the favorable evidence; and "had the evidence been disclosed a reasonable probability exists that the outcome of the proceedings would have been different." *State v. Ilk*, 2018 MT 186, ¶ 29, 392 Mont. 201, 422 P.3d 1219.

¶18 Norquay fails to establish that the State violated *Brady* by withholding favorable evidence. Norquay alleges that the police corrupted the crime scene photographs and

video, covered-up the corruption and doctored the evidence, and as a result, all the trial evidence was unreliable and tainted. Whether or not the trial evidence was "unreliable," as Norquay contends, is immaterial to establishing that the State withheld favorable evidence that could have changed the outcome of Norquay's trial. Norquay himself does not provide any reliable evidence in support of his contention that there was a widespread police cover-up. Norquay's *Brady* violation claim fails.

¶19 Norquay makes a one-paragraph summary claim that his trial counsel was ineffective, ostensibly based on his counsel's testimony at the postconviction hearing. To establish ineffective assistance of counsel, the defendant must show that his counsel's performance was deficient, and the deficient performance prejudiced the defendant. *Baca v. State*, 2008 MT 371, ¶ 16, 346 Mont. 474, 197 P.3d 948. Norquay fails to demonstrate how his counsel's actions were deficient or how they fell below an objective standard of reasonableness, and we will not develop legal analysis to support his position. *State v. Hicks*, 2006 MT 71, ¶ 22, 331 Mont. 471, 133 P.3d 206 (We do not "conduct legal research on [an] appellant's behalf, [] guess as to his precise position, or [] develop legal analysis that may lend support to his position." (internal quotations and citation omitted)). The District Court correctly denied Norquay's claim of ineffective assistance of counsel.

¶20 Finally, the District Court did not erroneously reject Norquay's cumulative error claim. "The cumulative error doctrine mandates reversal of a conviction where numerous errors, when taken together, have prejudiced the defendant's right to a fair trial." *State v. Smith*, 2020 MT 304, ¶ 16, 402 Mont. 206, 476 P.3d 1178 (internal quotations and citations

omitted). Norquay has not shown one error, let alone numerous errors, that requires this Court to reverse his conviction.

¶21 We affirm the District Court's denial of Norquay's petition for postconviction relief and all related claims. 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.

Justice Laurie McKinnon recused herself and did not participate in the decision of this case.

/S/ JAMES JEREMIAH SHEA

We Concur:

/S/ MIKE McGRATH
/S/ INGRID GUSTAFSON
/S/ BETH BAKER