

DA 23-0021

IN THE SUPREME COURT OF THE STATE OF MONTANA

2023 MT 166N

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GREGG ALLEN ZINDELL,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

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APPEAL FROM: District Court of the Eighth Judicial District,  
In and For the County of Cascade, Cause No. CDV-14-446  
Honorable John A. Kutzman, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Gregg Allen Zindell, Self-Represented, Deer Lodge, Montana

For Appellee:

Austin Knudsen, Montana Attorney General, Bjorn Boyer, Assistant  
Attorney General, Helena, Montana

Joshua A. Racki, Cascade County Attorney, Great Falls, Montana

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Submitted on Briefs: June 28, 2023

Decided: August 29, 2023

Filed:

  
Clerk

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Justice Laurie McKinnon 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 Gregg Zindell (Zindell) appeals an order denying his second Postconviction Relief (PCR), entered in the Eighth Judicial District Court, Cascade County. We affirm.

¶3 In January 2013, Zindell was convicted by a jury of sexual intercourse without consent. Carl Jensen (Jensen) represented Zindell during trial. Following the verdict, Zindell fired Jensen and hired Meghan Lulf Sutton (Sutton) to represent him at sentencing. On August 13, 2013, Zindell was sentenced to thirty years in the Montana State Prison, with ten years suspended.

¶4 Sutton also represented Zindell on his direct appeal to this Court. However, this Court dismissed Zindell's appeal with prejudice on November 1, 2013, after Zindell and Sutton filed a motion to dismiss indicating postconviction relief, rather than a direct appeal, was the most appropriate manner to proceed. Zindell and Sutton both signed the dismissal motion.

¶5 On June 3, 2014, Zindell filed his first (PCR) claiming that Jensen was ineffective because he failed to provide Zindell with proper guidance relating to three separate plea agreements offered by the State. After receipt of Jensen's affidavit, the court denied and

dismissed Zindell's petition, finding that the record and testimony supported Jensen's claim that he adequately represented Zindell. This Court affirmed the denial of Zindell's petition. See *Zindell v. State*, 2016 MT 222N, 385 Mont. 541.

¶6 On May 30, 2017, Zindell filed his second (PCR), which included fourteen claims of error relating to Jensen's representation of Zindell and evidentiary rulings by the district court and three claims of error relating to Sutton's representation of Zindell in his first petition. However, Zindell did not properly serve the petition on the State. Two years later, Zindell filed a "Notice of Amended Petition" which raised numerous claims of error concerning Jensen's representation and assigned error to the trial court. Zindell also attached an affidavit from Ryan Dagele who claimed the victim told Dagele's sister that she had fabricated her report against Zindell. Significantly, the affidavit dated September 2017 indicated that Dagele had told Zindell of this information in 2014, while the first postconviction proceeding was pending.

¶7 Prior to the District Court ruling on his second petition, Zindell filed a pleading titled "Newly Discovered Evidence," which included an August 2021 affidavit of Chris Christensen (Christensen). Christensen, an ex-doctor who was serving a sentence for criminal endangerment and criminal distribution of dangerous drugs, opined that neither the examining doctor's report nor the forensic evidence collected from the Sexual Assault Nurse Examiner (SANE) kit corroborates the victim's report. Zindell also filed a second motion titled "Discovery of New Evidence" which referred to a note showing the jury requested the SANE report and they were denied the report since it was never submitted

into evidence. Zindell claimed that he believed Jensen had submitted the report into evidence and given it to the jury and Zindell was only alerted to this discrepancy through recent discovery of the note.

¶8 On December 15, 2022, the District Court denied Zindell’s second petition, without a hearing, because it was (1) time-barred, (2) could have been raised in his first petition, and (3) contained no newly discovered evidence. Zindell appeals and raises the following claims: that Jensen perjured himself regarding the availability of funds to hire an expert witness; Jensen did not provide effective assistance of counsel at trial; the court erred in several ways; Jensen did not receive effective assistance from Sutton in his first petition; and there was newly discovered evidence which proved he was actually innocent.

¶9 We review a district court’s denial of a PCR petition to determine if the court’s findings of fact are clearly erroneous and if its conclusions of law are correct. *Lacey v. State*, 2017 MT 18, ¶ 13, 386 Mont. 204, 389 P.3d 233.

¶10 Section 46-21-102(1), MCA, provides: “a petition for relief . . . may be filed at any time within 1 year of the date that the conviction becomes final.” Zindell was sentenced on August 13, 2013, and he dismissed his appeal on November 1, 2013. Accordingly, Zindell had until November 1, 2014, to file his petition. While Zindell timely filed his first petition, Zindell’s second petition was filed on May 30, 2017—over three years too late. Zindell’s petition is, therefore, time barred. Moreover, even assuming the asserted errors are appropriate for PCR review, all the claims of trial error or ineffective assistance of trial counsel that Zindell now raises should have been raised in his first petition. Section

46-21-105(1)(a), MCA, provides that “[a]ll grounds for relief . . . must be raised in the original or amended original petition.”

¶11 Section 46-21-102(2), MCA, provides that if “newly discovered evidence . . . would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted . . .,” the time bar may be extended to one year from the date the petitioner “discover[ed], or reasonably should have discovered, the existence of the evidence. . . .” Christensen’s affidavit containing his opinion about the SANE report is not newly discovered evidence. Rather, it is merely an additional analysis of evidence that was already available to Zindell at the time of trial. *See Crabtree v. State*, 2022 MT 133, ¶ 20, 409 Mont. 211, 512 P.3d 1187. Regarding the affidavit authored by Dagele that the victim had recanted to his sister in 2014, Zindell waited until July 2022 to file Dagele’s affidavit with the District Court. However, Zindell had one year from the time he learned of the evidence to file a (PCR). Zindell learned of the evidence in 2014 and had to bring his allegation of newly discovered evidence in 2015. Zindell waited until July 2022 to file Dagele’s affidavit with the District Court—nearly five years after the September 2017 affidavit and eight years after the purported recantation.

¶12 Finally, § 46-21-105(2), MCA, provides:

When a petitioner has been afforded the opportunity for a direct appeal of the petitioner’s conviction, grounds for relief that were or could reasonably have been raised on direct appeal may not be raised, considered, or decided in a proceeding brought under this chapter. Ineffectiveness or incompetence of counsel in proceedings on an original or an amended original petition under this part may not be raised in a second or subsequent petition under this part.

Accordingly, Zindell is prevented from raising claims against Sutton in a second PCR petition and any claim that could have been raised on direct appeal. Hence, Zindell's claims of error by the trial court should have been raised on appeal. He further may not claim ineffective assistance of counsel in a second petition by questioning Sutton's representation at the first PCR petition hearing. He additionally cannot claim Sutton was ineffective for dismissing the appeal because he could have raised such a claim in his first petition. He chose not to and retained Sutton to represent him on his first petition.

¶13 The District court did not err when it dismissed Zindell's claims raised in his second PCR petition as time-barred.

¶14 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.

¶15 Affirmed.

/S/ LAURIE McKINNON

We Concur:

/S/ MIKE McGRATH  
/S/ BETH BAKER  
/S/ DIRK M. SANDEFUR  
/S/ JIM RICE