STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0829

Michael Frederick Schmidt, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 1, 2019
Affirmed
Johnson, Judge

Dakota County District Court
File No. 19HA-CR-10-1575

Rory Patrick Durkin, Giancola-Durkin, P.A., Anoka, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Jesson, Judge.

U N P U B L I S H E D   O P I N I O N

JOHNSON, Judge

In 2010, a Dakota County jury found Michael Frederick Schmidt guilty of first-degree criminal sexual conduct. The conviction was affirmed on direct appeal. In 2018, Schmidt filed a petition for post-conviction relief, asserting a claim of newly discovered evidence. The post-conviction court denied the petition for two reasons: Schmidt could not satisfy the requirements of a newly-discovered-evidence claim, and his petition was untimely because it was filed more than two years after his conviction became final. We conclude that Schmidt's petition is untimely and that he cannot satisfy an exception to the two-year statute of limitations. Therefore, we affirm.

FACTS

In May 2010, the state charged Schmidt with first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008). The complaint alleged as follows:

> On Saturday, April 24, 2010, a nine-month-old girl was brought to an emergency room in Hastings by her maternal aunt. The girl had injuries to her vaginal and anal areas. Due to the severity of the injuries, the girl was transported by ambulance to St. Paul Children's Hospital, where her injuries were surgically repaired. The aunt's husband, fully identified as Michael Frederick Schmidt, . . . told medical personnel that he and his wife had been babysitting their niece at their home in Hastings, which is in Dakota County, Minnesota. Schmidt stated that he had been changing the girl's diaper on their living room couch. She had defecated in her diaper. He stated that he had turned away briefly, and the girl appeared to be rolling off the couch, so he grabbed at her to keep her from falling. The girl's vaginal and anal areas were slippery, he said, from diaper wipes, and he thought he had a hangnail on one of his fingers that perhaps cut her. He told his wife what had happened, and due to the severity of the bleeding, which did not lessen, the aunt drove the girl to the emergency room. The parents of the girl reported that the girl had been with her aunt and uncle since about 3 p.m. that day. . . . The surgeon reported that the injuries to the girl included superficial tears in her anal sphincter, and a tear which gaped widely at the girl's perineum, and extended through the girl's hymen, continuing the length of her vagina to her cervix. Doctors have advised that the nature and extent of the injury is highly inconsistent with Schmidt's explanation of how it was caused.

The case was tried to a jury on six days in August and September of 2010. The state called 12 witnesses, including medical providers and parents and other relatives of the victim.

As part of its case-in-chief, the state introduced other-acts evidence pursuant to rule 404(b) of the rules of evidence and *State v. Spreigl*, 139 N.W.2d 167 (Minn. 1965), for the limited purpose of proving the absence of a mistake or accident. Specifically, the state introduced evidence of a 1994 incident in which an infant boy sustained injuries to his genital area while in Schmidt's care. The infant in that case was the son of T.S., whom Schmidt later married. At the time of the 1994 incident, Schmidt maintained that the injuries were accidental, but medical personnel reported that the boy's injuries were caused by direct blunt-force trauma.

The state's *Spreigl* evidence included two photographs depicting the boy's injuries and testimony from three witnesses. A physician testified that the injuries depicted in the photographs were consistent with extensive blunt-force trauma and inconsistent with the infant being dropped. T.S. testified that Schmidt was drunk at the time of the 1994 incident and told her then that he did not know how the injury occurred but that it may have resulted from his bouncing the infant on his knee. T.S. also testified that she told doctors that Schmidt was drunk and fell on top of the boy as he was getting him out of his crib. Kristin Johnson, a social worker who investigated the 1994 incident, testified that Schmidt told her that he had come home after a night of drinking, played with the boy for a few minutes, and fell as he put the boy back in his crib, causing the boy to hit the side of the crib.

Schmidt testified that he caused his niece's injuries but that he did so accidentally. Schmidt did not testify about the 1994 incident involving T.S.'s son. Schmidt did not call any other witnesses.

The jury found Schmidt guilty of committing first-degree criminal sexual conduct against his nine-month-old niece. The district court imposed a sentence of 324 months of imprisonment, which is an upward departure from the presumptive guidelines sentence.

Schmidt pursued a direct appeal. He argued, in part, that the district court erred by admitting the state's *Spreigl* evidence. This court affirmed the conviction and the sentence. We declined to determine whether the *Spreigl* evidence was erroneously admitted. Rather, we reasoned that "even if the district court erred by admitting the *Spreigl* evidence, any error was harmless in light of the strong evidence of guilt." *See State v. Schmidt*, No. A11-453, 2012 WL 1149327, at *1 (Minn. App. Apr. 9, 2012) (*Schmidt I*), *review denied* (Minn. June 27, 2012).

In July 2013, Schmidt filed a petition for post-conviction relief. He asserted a claim of ineffective assistance of counsel, alleging that his trial attorney did not consult with or retain an expert and did not otherwise attempt to refute the testimony of the state's medical providers who stated that his niece's injuries were not the result of an accident. The post-conviction court denied the petition on the ground that the decision to not retain an expert was a matter of trial strategy and that, even if Schmidt's trial attorney was deficient in her representation, Schmidt was not prejudiced in light of his failure to prove that there was a reasonable probability that the outcome of the trial would have been different if his attorney had consulted with an expert. Schmidt appealed, and this court affirmed. *See Schmidt v.*

State, No. A13-2253, 2014 WL 3801011, at *1 (Minn. App. Aug. 4, 2014) (*Schmidt II*), *review denied* (Minn. Oct. 14, 2014).

In February 2018, Schmidt commenced this case by filing a second petition for post-conviction relief. He asserts a claim of newly discovered evidence. Specifically, he alleges that, in 1994, he did not engage in the conduct that was described by the state's *Spreigl* evidence. In support of his petition, Schmidt submitted an affidavit executed by a private investigator, who conducted interviews in early 2017 of T.S.; her mother, S.B.; and Schmidt's adult daughter, A.S. The investigator's affidavit and accompanying exhibits state as follows: T.S. believes that she, not Schmidt, injured her son in 1994, but she is not sure. T.S. said that she was examined after the incident by a hypnotist, who told her that she had caused the injuries. T.S. believes that Schmidt took responsibility for the incident because she was in nursing school at the time and would have been expelled if she had injured her son. S.B. stated that T.S. told her within a year of the 1994 incident that Schmidt took the blame for the incident even though he was not responsible. S.B. also stated that other members of the extended family believe that T.S. was responsible for the boy's injuries. S.B. stated that she tape-recorded T.S. admitting to injuring her son and gave the recording to the Hastings Police Department, although S.B. did not state when she did this. A.S. told the investigator that she overhead T.S. telling a friend in 2010 that Schmidt did not hurt her son but that he took the blame because she was in nursing school. A.S. also heard T.S. say that she was intoxicated and injured her son while putting him in his crib.

Schmidt also submitted a second affidavit executed by the same investigator, who conducted interviews in 2017 of nine of the 14 jurors in Schmidt's 2010 trial. The investigator asked each juror whether the "admission of the prior offense affected their decision to convict" Schmidt. Three jurors (one of whom was an alternate juror who did not deliberate) responded that the *Spreigl* evidence affected their decisions to find Schmidt guilty. Four jurors stated that the *Spreigl* evidence did not affect their decisions. Two jurors stated that they could not remember.

In March 2018, the post-conviction court denied Schmidt's petition without an evidentiary hearing. The post-conviction court reasoned that Schmidt had not presented newly discovered evidence that would entitle him to relief because the evidence he presented merely created doubts and would not have produced an acquittal or a more favorable result at trial. The post-conviction court also reasoned that Schmidt's petition was untimely because it was filed after the two-year statute of limitations had lapsed. Schmidt appeals.

D E C I S I O N

Schmidt argues that the district court erred by denying his petition for post-conviction relief. He challenges both bases of the post-conviction court's decision. In response, the state makes three arguments: Schmidt's petition is untimely, the petition is procedurally barred by his previous post-conviction petition, and Schmidt cannot establish the requirements of the newly-discovered-evidence test.

We begin by considering whether Schmidt's petition is untimely and, if so, whether an exception to the statute of limitations applies. A person seeking post-conviction relief must file a post-conviction petition within a two-year limitations period. Minn. Stat. § 590.01, subd. 4(a) (2016). The two-year limitations period begins upon the later of "(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." *Id.*, subd. 4(a)(1)-(2). If the two-year limitations period has expired, the post-conviction court nonetheless may consider the petition if any one of five exceptions applies. *Id.*, subd. 4(b). But a petition relying on an exception to the two-year statute of limitations is subject to another limitations period, which provides that the petition "must be filed within two years of the date the claim [for the exception] arises." *Id.*, subd. 4(c); *see also Sanchez v. State*, 816 N.W.2d 550, 556-58 (Minn. 2012). Accordingly, "A postconviction petitioner is not entitled to relief or an evidentiary hearing on an untimely petition unless he can demonstrate that 'he satisfies one of the [statutory] exceptions . . . and that application of the exception is not time-barred.'" *Roberts v. State*, 856 N.W.2d 287, 290 (Minn. App. 2014) (quoting *Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012)), *review denied* (Minn. Jan. 28, 2015). "If the petitioner does not demonstrate that an exception applies and that application of the exception is timely, the postconviction court may summarily deny the petition as untimely." *Id.*; *see also Andersen v. State*, 913 N.W.2d 417, 423 (Minn. 2018). This court applies an abuse-of-discretion standard of review to a post-conviction court's denial of a post-conviction petition. *Roberts*, 856 N.W.2d at 290.

In this case, the post-conviction court noted that Schmidt's second petition was filed more than two years after his conviction became final. That is not disputed on appeal. Schmidt's conviction became final in September 2012, 90 days after the supreme court denied his petition for further review of this court's decision to affirm his conviction and sentence. *See Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010); *see also* 28 U.S.C. § 2101(c); Sup. Ct. R. 13(1). He did not file his second petition until February 2018, more than five years after his conviction became final. Thus, the second petition is untimely. Accordingly, Schmidt may obtain review of his post-conviction claim only if he can establish one of the exceptions to the two-year statute of limitations.[1] *See Andersen*, 913 N.W.2d at 424.

Schmidt contends that only one exception to the two-year statute of limitations applies—the newly-discovered-evidence exception. *See* Minn. Stat. § 590.01, subd. 4(b)(2). Under that exception, an untimely post-conviction petition may be considered if five requirements are satisfied:

> (1) "the petitioner alleges the existence of newly discovered evidence"; (2) the evidence "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition"; (3) "the evidence is not cumulative to evidence presented at trial"; (4) the evidence "is not for impeachment purposes"; and (5) the evidence "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted."

Roberts, 856 N.W.2d at 290 (quoting Minn. Stat. § 590.01, subd. 4(b)(2)); *see also Riley*, 819 N.W.2d at 168.[2] The state contends that Schmidt's evidence concerning the 1994

[1]We need not consider whether Schmidt timely asserted his claim for an exception to the statute of limitations because the state does not argue that he did not do so.

[2]The post-conviction court did not expressly consider the statutory newly-discovered-evidence exception to the statute of limitations. The post-conviction court did analyze Schmidt's common-law newly-discovered-evidence claim. The common-law

incident is not newly discovered because it was known by him before the 2010 incident and because the evidence does not establish by a clear and convincing standard that Schmidt is innocent of the 2010 offense.

The second requirement of the newly-discovered-evidence exception to the statute of limitations asks whether the evidence that a petitioner has put forward as newly discovered evidence "could . . . have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition." Minn. Stat. § 590.01, subd. 4(b)(2). The record indicates that the evidence that Schmidt's investigator elicited from T.S., S.B., and A.S. was known by those persons at the time of Schmidt's trial and sentencing in 2010. More importantly, Schmidt and his trial attorney knew or should have known about the evidence before Schmidt was sentenced. S.B. wrote a letter to the district court in November 2010, after the jury's verdict and before the sentencing hearing, stating that she and other family members were aware that T.S., not Schmidt, had committed the acts that were the subject of the state's *Spreigl* evidence. In addition, Schmidt himself told the author of the pre-sentence investigation report in December 2010 that S.B. had obtained an audio-recording of T.S. admitting that

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definition of newly discovered evidence for purposes of a claim for post-conviction relief is similar to, but less stringent than, the statutory definition of newly discovered evidence for purposes of the exception to the statute of limitations. *Andersen*, 913 N.W.2d at 425. To establish a claim of newly discovered evidence under the common-law standard, a petitioner must prove "(1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result." *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997). The *Rainer* criteria apply only to timely-filed post-conviction claims. *Andersen*, 913 N.W.2d at 425.

she caused her infant son's injuries in 1994. These parts of the record show that the evidence implicating T.S. and exonerating Schmidt in the 1994 incident "could . . . have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition." *See id.* The record makes clear that what Schmidt describes as "newly discovered evidence" simply is not newly discovered. Accordingly, Schmidt cannot satisfy the second requirement of the newly-discovered-evidence exception to the statute of limitations.

The fifth requirement of the newly-discovered-evidence exception to the statute of limitations asks whether the evidence that a petitioner has put forward as newly discovered evidence "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." *Id.* The nature of the evidence Schmidt presented to the post-conviction court precludes him from satisfying this requirement. His evidence is not determinative or conclusive with respect to whether he engaged in the acts alleged in the complaint, *i.e.*, whether he engaged in sexual penetration or sexual contact toward his nine-month-old niece in 2010. *See* Minn. Stat. § 609.342, subd. 1(a). His purportedly new evidence is concerned only with whether he caused injuries to an infant boy's genitals in 1994. That factual issue was relevant at trial because the state sought to prove that Schmidt penetrated or had sexual contact with his nine-month-old niece's genitals in 2010 for reasons other than a mistake or an accident. *See* Minn. R. Evid. 404(b). Even if Schmidt could establish that he was not the person who injured the infant boy in 1994, that fact would not exonerate him, by clear and convincing evidence, of the crime that he was alleged to have committed in 2010. Such a determination would be possible only with new evidence that related directly to Schmidt's conduct toward his nine-month-old niece in 2010. This is true regardless of the weight of the evidence arising from the investigator's brief questioning of some of the jurors in Schmidt's trial.[3] Accordingly, Schmidt cannot satisfy the fifth requirement of the newly-discovered-evidence exception to the statute of limitations.

Throughout his appellate brief, Schmidt contends that the post-conviction court erred by denying his petition without conducting an evidentiary hearing. A post-conviction court must hold an evidentiary hearing "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2016). "In determining whether an evidentiary hearing is required, a postconviction court considers the facts alleged in the petition as true and construes them in the light most favorable to the petitioner." *Andersen*, 913 N.W.2d at 422-23. In this case, Schmidt would not be able to establish the five requirements of the newly-discovered-evidence exception to the statute of limitations even if the post-conviction court had held an evidentiary hearing. Schmidt has not identified any evidence that is capable of satisfying the second and fifth requirements of the newly-discovered-evidence exception to the statute of limitations. *See Riley*, 819 N.W.2d at 170.

[3]The state does not argue that Schmidt is precluded from proving that he was prejudiced by the admission of the state's *Spreigl* evidence on the ground that this court previously determined that any error in the admission of the state's *Spreigl* evidence "was harmless in light of the strong evidence of guilt." *Schmidt I*, 2012 WL 1149327, at *1. Thus, we need not consider the issue.

Thus, the post-conviction court did not err by concluding that Schmidt's post-conviction petition is barred by the statute of limitations. That part of the post-conviction court's decision is a sufficient basis for denying Schmidt's petition. Because Schmidt's petition is untimely, we need not consider whether Schmidt's petition is procedurally barred by the *Knaffla* doctrine or whether the post-conviction court erred by rejecting Schmidt's newly-discovered-evidence claim.

In sum, the post-conviction court did not err by denying Schmidt's petition for post-conviction relief.

Affirmed.