

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0491**

Kenny Lee Reed, FKA: Gordon David Reese, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 18, 2021
Affirmed
Hooten, Judge**

Hennepin County District Court
File No. 27-CR-99-102206

Gordon Reese, Berlin, New Hampshire (pro se appellant)

Michael O. Freeman, Hennepin County Attorney, Jordan W. Rude, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge;
and Hooten, Judge.

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this appeal from the district court's order denying his third petition for postconviction relief, appellant argues that the district court erred by concluding that his claims of ineffective assistance of counsel and newly discovered evidence were procedurally barred. We affirm.

FACTS

In this appeal from the district court's order denying his third petition for postconviction relief, appellant argues that the district court erred by concluding that his claims of ineffective assistance of counsel and newly discovered evidence were procedurally barred. We affirm.

FACTS

The state charged appellant Gordon Reese¹ with second-degree assault after a complainant, R.J.T., identified Reese as the individual who followed him from a party and shot him in the leg and ankle on September 23, 1999. After discovering Reese's previous conviction for a crime of violence, the state also charged him with unlawfully possessing a firearm. Reese agreed to plead guilty to the assault charge relating to the shooting of R.J.T., along with two other second-degree assault charges associated with a shooting in July 1999, with the understanding that the state would drop the felon in possession charge. After he pleaded guilty on December 7, 1999, the district court accepted his plea and convicted him for the second-degree assault offenses, sentencing him to 108 months in prison.

In March 2017, Reese filed a pro se error coram nobis asking to withdraw his guilty plea to the second-degree assault charge related to R.J.T.'s shooting. He challenged the validity of the pleas and argued that the plea was not knowing, intelligent, or voluntary because his trial counsel failed to inform him of his rights. See Minn. R. Crim. P. 15.01.

¹ Although Gordon David Reese is now known as Kenny Lee Reed, we will use the name by which he was known at the time of the offense.

The district court construed the writ as a petition for postconviction relief and denied it on the merits. We subsequently affirmed the denial. *See Reed v. State*, A18-0691, 2018 WL 6837094, at *3 (Minn. App. Dec. 31, 2018), *rev. denied* (Minn. Mar. 19, 2019).

Reese filed a second petition for postconviction relief in March 2019. He alleged that newly discovered evidence, an affidavit from R.J.T., entitled him to a withdrawal of his guilty plea. The affidavit alleged that police pressured R.J.T. to identify Reese as the person who shot him and identified a man speaking Spanish as the real assailant. Reese also alleged that his trial counsel was ineffective because she knew of R.J.T.'s new allegations concerning his assault but failed to disclose them to Reese. The district court denied the petition for postconviction relief, concluding that R.J.T.'s affidavit was not newly discovered evidence because it could have been ascertained by either Reese or his attorney prior to his most recent petition for postconviction relief. We subsequently affirmed the district court's decision. *See Reed v. State*, A19-0882, 2019 WL 7287091, at *3 (Minn. App. 2019), *rev. denied* (Minn. Mar. 17, 2020).

Reese then filed a third petition for postconviction relief asking to withdraw his guilty plea. He raised a number of claims related to R.J.T.'s affidavit and he also presented the district court with an affidavit from a new witness, A.J.F., who alleged that R.J.T. revealed to him that a man speaking Spanish was his assailant in the September 1999 shooting. The district court denied the petition, concluding that the claims Reese raised were procedurally barred pursuant to *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). Reese now appeals.

DECISION

Reese challenges the district court's denial of his petition for postconviction relief without an evidentiary hearing. We review the district court's decision denying a postconviction petition for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). We review legal issues de novo, but our factual review "is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). We will not reverse its decision unless the court "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* (quotation omitted).

a. Knaffla-Barred Claims

Once a defendant directly appeals his conviction, all matters raised in that appeal or known at the time of appeal will not be considered by a court reviewing a subsequent petition for relief. *Knaffla*, 243 N.W.2d at 741; *see also* Minn. Stat. § 590.04, subd. 3 (2020). This rule applies if a defendant knew or should have known about the issue at the time of appeal. *See Black v. State*, 560 N.W.2d 83, 85 (Minn. 1997). A postconviction court may similarly deny a successive petition for postconviction relief if the petition raises claims that are similar in substance to claims raised in previous postconviction petitions. *Perry v. State*, 595 N.W.2d 197, 200 (Minn. 1999).

We have recognized two exceptions to the *Knaffla* rule. 243 N.W.2d at 741. First, a postconviction court may hear and consider a claim that was previously known but not raised if the claim is so novel that its legal basis was not reasonably available at the time of the direct appeal. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995) (citation omitted).

Second, even if the claim contained in a petition for postconviction relief was known at the time of the direct appeal or its legal basis was reasonably available, we allow substantive review of the claim when fairness so requires, and if the petitioner did not “deliberately and inexcusably” fail to raise the issue on direct appeal. *Id.* (citation omitted).

Reese raised a number of claims in his third postconviction petition and all but two of these claims relate to R.J.T.’s affidavit. Those claims include that (1) his trial attorney’s conduct was ineffective for failing to properly investigate R.J.T.’s claims that police pressured him to identify Reese as his assailant; (2) his appellate counsel was ineffective for failing to raise the issue of R.J.T.’s affidavit on appeal; (3) officers committed misconduct by pressuring R.J.T. to identify Reese as his assailant; (4) prosecutors committed misconduct by failing to reveal the officer’s alleged pressuring of R.J.T.; (5) newly discovered evidence in the form of an affidavit from a witness, A.J.F., who spoke with R.J.T. shortly after the shooting, entitles Reese to a withdrawal of his guilty plea; and (6) police officers failed to reveal A.J.F.’s statement to Reese and his attorney. The district court concluded that these claims were all procedurally barred under *Knaffla*. 243 N.W.2d at 741.

We agree with the district court that it did not need to address the bulk of Reese’s claims. Reese raised the issue of R.J.T.’s affidavit in his second postconviction petition and alleged that the affidavit, as newly discovered evidence, entitled him to relief. He also contended that his trial attorney was aware of R.J.T.’s statements concerning the identity of his assailant and misrepresented those statements to Reese. In his third postconviction petition, Reese raises these claims again, along with other arguments related to R.J.T.’s

affidavit. But Reese knew or should have known of these arguments at the time the court addressed his second postconviction petition and he failed to raise them. *See Williams v. State*, 869 N.W.2d 316, 318 (Minn. 2015) (explaining that the *Knaffla* rule bars consideration of claims previously raised or claims that the postconviction defendant could have raised). This failure precludes the postconviction court from addressing the claims unless a *Knaffla* exception applies. *Roby*, 531 N.W.2d at 484. And we conclude that neither exception applies because none of these claims are novel in nature, and Reese has not established that these claims have substantial merit and are being asserted without deliberate or inexcusable delay. *Id.* We therefore conclude that the postconviction court did not err when it concluded that the claims related to R.J.T.’s affidavit were barred by the *Knaffla* rule.

b. Time Barred Claims

Reese’s remaining arguments, however, are not *Knaffla* barred. In his third postconviction petition, Reese raised two additional claims he argued entitled him to relief: (1) he introduced an affidavit from a witness, A.J.F., who alleged that he saw four men, one of whom spoke Spanish, running away from the scene of R.J.T.’s shooting, and that he recalled R.J.T. telling officers on the night of the shooting that he was shot by a Mexican man he did not know; and (2) police failed to inform him of A.J.F.’s statement before trial. The district court declined to reach the merits of either claim because Reese either knew or should have known about the claims at the time he pleaded guilty and filed his previous postconviction petitions. But there is nothing in the record to suggest that Reese knew or should have known about A.J.F.’s affidavit prior to filing his third postconviction petition.

On the contrary, the witness's affidavit alleges that Reese did not discover any information from the witness until August of 2020, eight months after we affirmed the district court's denial of Reese's second postconviction petition. Because district courts must accept the allegations alleged in a postconviction petition as true and construe them in the light most favorable to the petitioner, *Brown v. State*, 895 N.W.2d 612, 618 (Minn. 2017), and there is nothing in the record to contradict Reese's allegation that A.J.T.'s affidavit was newly discovered evidence, Reese's arguments concerning this affidavit were not procedurally barred.

Despite this, the postconviction court did not err when it failed to reach the arguments relating to A.J.F.'s affidavit on the merits because they are time barred. The postconviction statute of limitation provides that "[n]o petition for postconviction relief may be filed more than two years after 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." Minn. Stat. § 590.01, subd. 4(a) (2020). If a defendant's conviction became final before August 1, 2005, the date which the Legislature codified the postconviction statute, the defendant must file his postconviction petition within two years of July 31, 2005. *See Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015). But a postconviction court may nevertheless hear a petition for relief notwithstanding the time limitation if the defendant establishes newly discovered evidence that could not have been discovered prior to the filing of the postconviction petition or is in the interests of justice. Minn. Stat. § 590.01, subd. 4(b)(2), (5) (2020).

The record reflects that Reese filed his most recent postconviction petition in January of 2021, over ten years after the statute of limitations expired in this case on July 31, 2007. His petition is therefore time barred unless either exception is applicable.

i. Newly Discovered Evidence

To satisfy the newly discovered evidence exception, a petitioner must allege: (1) the existence of newly discovered evidence; (2) that could not have been ascertained by the exercise of due diligence within the two-year time period for filing a postconviction petition; (3) is not cumulative to evidence presented at trial; (4) is not for impeachment purposes; and (5) establishes the petitioner's innocence by clear and convincing evidence. *Scott v. State*, 788 N.W.2d 497, 502 (Minn. 2010); see Minn. Stat. § 590.01, subd. 4(b)(2). All five criteria must be satisfied to obtain relief. *Scott*, 788 N.W.2d at 502.

To prove a claim by clear and convincing evidence requires a party's evidence to "on its face" show the petitioner's innocence by clear and convincing evidence. *Miles v. State*, 800 N.W.2d 778, 783 (Minn. 2011). The innocence prong in subdivision 4(b)(2) requires "more than an uncertainty" about the petitioner's guilt. *Riley v. State*, 819 N.W.2d 162, 170 (Minn. 2012). Instead, establishing "actual innocence" requires the petitioner to prove it is "more likely than not that no reasonable jury would convict." *Id.* A postconviction court reviewing the matter must accept the evidence submitted by the petitioner as true before summarily denying the petition. *Henderson v. State*, 906 N.W.2d 501, 507 (Minn. 2018).

Reese argues that A.J.F.'s affidavit establishes that Reese did not shoot R.J.T. and that police committed misconduct when they became aware of A.J.F.'s statement and failed

to inform him. We are satisfied that neither of these claims establish Reese's innocence by clear and convincing evidence. At his plea hearing, Reese repeatedly admitted to shooting R.J.T. He testified that he was at a party on the night of the shooting and got into an argument with R.J.T., and that the argument escalated to a point where he shot R.J.T. in the leg and ankle. He also agreed that his conduct constituted second-degree assault. The allegations A.J.F. made in his affidavit do not negate this testimony. A.J.F.'s affidavit does not indicate that A.J.F. saw who actually shot R.J.T. Rather, the affidavit only indicates that he saw four men, one of them speaking Spanish, running away after R.J.T.'s shooting, and that R.J.T. himself told police that a Mexican man he did not know shot him. It does not on its face establish Reese's innocence by clear and convincing evidence or call into question Reese's testimony at the plea hearing. Reese concedes this in his appellate brief, noting that A.J.F.'s statements "alone probably could not have" proven his innocence. Therefore, the affidavit, as newly discovered evidence, is insufficient to warrant a withdrawal of Reese's guilty plea.

ii. *Interests of Justice*

A postconviction court may also hear a time barred postconviction petition if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). The exception is triggered by an injustice that caused the petitioner to miss the primary postconviction deadline, not the substantive merits of the petition. *Sanchez v. State*, 816 N.W.2d 550, 557 (Minn. 2012). "A petition is frivolous if it is perfectly apparent, without argument, that the petition is

without merit.” *Scott*, 788 N.W.2d at 503. We have reserved the interests-of-justice exception “for exceptional cases.” *Riley*, 819 N.W.2d at 170.

In order to satisfy the interests of justice exception, a court should consider (1) whether the defendant’s claim has substantive merit and whether he did not “deliberately and inexcusably fail[] to raise the issue on direct appeal”; (2) “the degree to which the party alleging error is at fault for that error, the degree of fault assigned to the party defending the alleged error, and whether some fundamental unfairness to the defendant needs to be addressed”; and (3) whether it is necessary to address the error to protect the integrity of judicial proceedings. *Gassler v. State*, 787 N.W.2d 575, 586–87 (Minn. 2010).

We are satisfied that Reese cannot meet this high bar. As explained above, the claims related to A.J.F.’s affidavit that Reese raised in his third postconviction petition do not have any substantive merit because they do not negate Reese’s own testimony at his plea hearing that he shot R.J.T. Further, there is nothing in the record to suggest that police knew of A.J.F.’s statement and refused to disclose it to Reese. And Reese has not shown that some type of injustice occurred to prevent him from previously raising the argument. He therefore failed to show that the interests of justice necessitate the withdrawal of his guilty plea.

Because Reese cannot satisfy either the newly discovered evidence exception or the interests of justice exception to the postconviction statute of limitations, we conclude that the claims relating to A.J.F.’s affidavit are time barred and affirm the district court’s denial of his petition for postconviction relief.

Affirmed.