

*This opinion is nonprecedential except as provided by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
A22-0810**

Jeremy Bruce Cournoyer, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 27, 2023
Affirmed
Reyes, Judge**

Beltrami County District Court
File No. 04-CR-13-1377

Zachary A. Longsdorf, Longsdorf Law Firm, P.L.C., Inver Grove Heights, Minnesota (for appellant)

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

David L. Hanson, Beltrami County Attorney, David P. Frank, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Reyes, Judge; and Kirk, Judge.*

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from an order denying postconviction relief, appellant argues that the postconviction court (1) abused its discretion by denying his petition for postconviction

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

relief under the statutory time-bar exceptions found in Minn. Stat § 590.01, subd. 4; (2) abused its discretion by denying his request for an evidentiary hearing; and (3) erred by denying his ineffective-assistance-of-counsel claims. We affirm.

FACTS

This is appellant Jeremy Bruce Cournoyer's third petition for postconviction relief.¹ In 2013, respondent State of Minnesota charged appellant with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2012), for sexually assaulting A.D.² Appellant waived his right to a jury trial, and a court trial followed.

During trial, A.D., among other pertinent witnesses, testified on behalf of the state. For the defense, appellant, A.D.'s mother, and appellant's mother testified. Appellant denied sexually assaulting A.D. He testified that many people were present in the home that day including his brother Douglas Calhoff. A.D.'s mother and appellant's mother testified that they did not see appellant alone with A.D. that day. They also testified that there were at least six people present in the home, including Calhoff. The district court

¹ Appellant first filed a direct appeal on January 12, 2015, and we affirmed. *See State v. Cournoyer*, No. A15-0067, 2016 WL 102486, at *1 (Minn. App. 2016), *rev. denied* (Minn. Mar. 29, 2016). Appellant filed his first petition for postconviction relief which the postconviction court denied and this court affirmed. *See Cournoyer v. State*, No. A16-1682 (Minn. App. Aug. 7, 2017) (order op.), *rev. denied* (Minn. Oct. 25, 2017). Subsequently, appellant filed his second petition for postconviction relief which the postconviction court denied again. *See Cournoyer v. State*, No. 04-CR-13-1377 (Minn. Dist. Ct. May 15, 2018). Appellant filed his third petition for postconviction relief and on June 10, 2022, he filed the current appeal before our court from the order denying relief.

² These facts are derived from testimony received at the court trial that took place from June 3, 2014, to June 4, 2014.

found appellant guilty of first-degree criminal sexual conduct and sentenced him to serve 300 months in prison.

In appellant's third petition for postconviction relief, he now argues that he discovered new evidence by learning that his brother Calhoff was present in the home after school on the date of the offense. To support appellant's claim, Calhoff submitted an affidavit to the postconviction court. In his affidavit, Calhoff stated that, on the day of the offense, he rode the bus home with A.D. and when they arrived home, appellant was not there. Eventually, appellant arrived home, and Calhoff claimed he never saw A.D. alone with appellant. He also claimed to have personal knowledge that appellant did not sexually assault A.D. because his room was close to the bathroom where the assault took place, and he never heard anything. Finally, Calhoff averred that seven people other than himself were also home when the assault happened. The postconviction court determined that this did not constitute new evidence and denied his postconviction petition. This appeal follows.

DECISION

I. The postconviction court did not abuse its discretion by determining that appellant's claims were statutorily time-barred and did not satisfy any of the exceptions under Minn. Stat § 590.01, subd. 4.

Appellant argues that the postconviction court abused its discretion by denying his postconviction petition as untimely because it did not meet the statutory time-bar exceptions for newly discovered evidence or the interests of justice. We are not persuaded.

We review a postconviction court's denial of a petition for postconviction relief for an abuse of discretion. *Campbell v. State*, 916 N.W.2d 502, 506 (Minn. 2018). This court

reviews the postconviction court's factual findings for clear error and its legal conclusion de novo to determine whether it abused its discretion. *Eason v. State*, 950 N.W.2d 258, 263-64 (Minn. 2020).

A person convicted of a crime may bring a postconviction petition seeking a new trial based on a claim that the conviction violated their constitutional rights or their rights under federal or state law. Minn. Stat. § 590.01, subd. 1 (2022). Generally, no petition for postconviction relief may be filed more than two years after the entry of judgment of conviction or an appellate court's disposition of petitioner's direct appeal. Minn. Stat. § 590.01, subd. 4(a). But a postconviction court may hear a petition for postconviction relief if the petitioner alleges the existence of newly discovered evidence or it is in the interests of justice. Minn. Stat. § 590.01, subd. 4(b)(2) (2022); Minn. Stat. § 590.01, subd. 4(b)(5) (2022).

Here, the district court convicted appellant on June 7, 2014. On direct appeal, this court affirmed the district court on January 11, 2016, and the Minnesota Supreme Court denied further review. Appellant filed this third postconviction petition more than two years after his conviction became final. Appellant's postconviction petition is therefore statutorily time-barred. The only issue is whether appellant can meet an exception to the two-year statutory bar. *Caldwell v. State*, 976 N.W.2d 131, 137 (Minn. 2022).

A. Appellant's evidence is not newly discovered.

Appellant contends that the evidence he presented to the postconviction court satisfied the newly discovered evidence exception Minn. Stat. §590.01, subd. 4(b)(2). To satisfy this exception, appellant must show that the evidence: (1) is newly discovered;

(2) could not have been ascertained by the exercise of due diligence by the petitioner or petitioners' attorney within the two-year time-bar for petitioning; (3) is not cumulative of evidence presented at trial; (4) is not for impeachment purposes; and (5) establishes by clear and convincing evidence that petitioner is innocent of the offenses for which he was convicted. *Caldwell*, 976 N.W.2d at 138. All five requirements must be met for this exception to apply. *Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012).

Calhoff's affidavit is not newly discovered evidence. During trial, A.D. testified that she rode the bus with Calhoff. Appellant, A.D.'s mother, and appellant's mother all testified that there were several people present at the house on the day of the offense, including Calhoff. A.D.'s mother and appellant's mother also testified that they never saw appellant alone with A.D. Calhoff's affidavit also claimed that the sexual assault could not have occurred because Calhoff never heard anything, and his room was close to the bathroom where the assault took place. But "evidence is not newly discovered, . . . when the source of the information was present with the defendant at the scene of the crime. Accordingly, later statements of a witness about events that occurred when the postconviction petitioner was present are not unknown." *Onyelobi v. State*, 966 N.W.2d 235, 238 (Minn. 2021) (citations omitted). It is undisputed that appellant knew that Calhoff was in his room at that time of the assault. Therefore, the assertion that Calhoff could have heard the sexual assault take place is not considered newly discovered evidence.

The Minnesota Supreme Court recently addressed a similar issue in *El-Shabazz v. State*, ___ N.W.2d ___, ___, 2023 WL 379576, at *1 (Minn. Jan. 25, 2023). In that case, appellant filed his eighth postconviction petition arguing that an affidavit from his co-

defendant stating that he acted alone in shooting the police officer and that he did not plan the shooting with anyone else, including appellant, satisfied the newly discovered exception. *Id.* at *5. The supreme court held that “because [appellant] was present during the relevant events described in the affidavit, he had personal knowledge at the time of his trial whether he did, or did not, participate in a plan to shoot a police officer.” *Id.* As a result, the court concluded that the statements in the affidavit were not newly discovered, and the district court did not abuse its discretion. *Id.*

Similarly, here, Calhoff alleges in his affidavit that the sexual assault did not take place because he never heard anything, and his room is close to the bathroom. But because appellant had personal knowledge at the time of the trial of Calhoff’s presence in the home, the statements in the affidavit are not newly discovered evidence. The postconviction court therefore did not abuse its discretion when it determined that “it is not new information that people were present in the house at the time of the sexual assault [because] evidence came out during the trial that several people, . . . said they were in the residence.”³

B. Appellant cannot meet the interests-of-justice exception.

Appellant asserts that the interests-of-justice exception applies here because his claims have merit that negate his conviction. Appellant’s assertion is misguided.

³ Additionally, appellant cannot meet the other requirements of this exception. For example, appellant acknowledges several times in his brief that Calhoff’s affidavit is being used to impeach A.D.’s credibility by stating that the assault did not occur because he did not see or hear anything coming from the bathroom. Moreover, as the postconviction court noted, appellant could have obtained the testimony of his brother, Calhoff, knowing that Calhoff had been present in the house when the sexual assault occurred.

“The interests-of-justice exception requires the petitioner to establish ‘to the satisfaction of the court that the petition is not frivolous and is in the best interests of justice.’” *Caldwell*, 976 N.W.2d at 141 (quoting Minn. Stat. § 590.01, subd. 4(b)(5)). “A postconviction petition is frivolous if it is ‘perfectly apparent, without argument,’ that the petition lacks merit.” *Id.* (quoting *Wallace v. State*, 820 N.W.2d 843, 850 (Minn. 2012)). Importantly, this exception is “triggered by an injustice that caused the petitioner to miss the primary deadline in subdivision 4(a) and not the substantive claims in the petition.” *Id.* (quotation omitted). As a result, the Minnesota Supreme Court has “long held that the interests of justice are implicated only in exceptional and extraordinary situations.” *Carlton v. State*, 816 N.W.2d 590, 607 (Minn. 2012); *Caldwell* 976 N.W.2d at 141. Here, appellant has not alleged an injustice that prevented him from filing a postconviction petition within two years. Therefore, the postconviction court did not abuse its discretion by determining that appellant failed to satisfy this exception.

II. The postconviction court properly exercised its discretion when it denied appellant’s request for an evidentiary hearing.

Appellant argues that he should have been granted an evidentiary hearing to offer testimony to corroborate his claims. We disagree.

We review a petitioner’s request for an evidentiary hearing on a postconviction petition for an abuse of discretion. *Campbell*, 916 N.W.2d at 506. “The legal standard required to obtain an evidentiary hearing is lower than that required for a new trial.” *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (quotations omitted). Nevertheless,

“[a] postconviction hearing is not required when the petitioner alleges facts that, if true, are legally insufficient to entitle him to the requested relief.” *Id.*

The postconviction court determined that Calhoff’s affidavit failed to meet any requirements under any exception to the statutory time bar. Minn. Stat. § 590.01, subd. 4(b)(2). As discussed above, we discern no abuse of discretion by the postconviction court in its findings and determination. It therefore did not abuse its discretion by denying appellant’s request for an evidentiary hearing.

III. Appellant’s claims of ineffective assistance of trial and appellate counsel are procedurally barred and lack merit.

Appellant argues that proper investigations by his trial counsel and appellate counsel would have led to obtaining Calhoff’s affidavit. We are not convinced.

Because a claim of ineffective assistance of counsel involves a mixed question of law and fact, our review is de novo. *Hawes v. State*, 826 N.W.2d 775, 782 (Minn. 2013).

The Minnesota Supreme Court has held that when a “direct appeal has once been taken, all matters raised therein, or all claims known but not raised will not be considered upon a subsequent petition for postconviction relief.” *State v. Knaffla*, 243 N.W.2d 737, 738 (1976). Thus, “when a claim of ineffective assistance of trial counsel can be determined on the basis of the trial record, the claim must be brought on direct appeal or it is *Knaffla*-barred.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). We examine the claim under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668, 687 (1984). *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). To prevail on an ineffective-assistance-of-counsel claim, “appellant must prove (1) that his counsel’s

representation fell below an objective standard of reasonableness; and (2) there is reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015).

"Ineffective assistance of appellate counsel is properly raised in a first postconviction petition, because the petitioner could not have known of such a claim at the time of direct appeal. Applies to both a claim for ineffective assistance of trial counsel, of appellate counsel, a petitioner must prove both prongs of the *Strickland* test." *Zornes v. State*, 880 N.W.2d 363, 370-71 (Minn. 2016). If an ineffective-assistance-of-counsel claim fails to satisfy one of the *Strickland* prongs, we need not consider the other prong. *Andersen*, 830 N.W.2d at 10.

Appellant has raised his ineffective-assistance-of-trial-counsel claim twice before this court, in 2016 and in 2017. In response to appellant's 2016 direct appeal, this court concluded that "the record does not reflect that, but for counsel's errors, the results of the proceedings would have been different." *Cournoyer*, 2016 WL 102486, at *8. Following appellant's first postconviction petition denial, this court stated in an order opinion that, "we rejected the claim concerning trial counsel in [appellant's] direct appeal. Accordingly, this issue is *Knaffla*-barred." *Cournoyer v. State*, No. A16-1682 (Minn. App. Aug. 7, 2017). The same applies here. Because appellant raised his claim of ineffective assistance of trial counsel in his 2016 appeal, he is *Knaffla*-barred from raising that issue in this appeal. *Knaffla*, 243 N.W.2d at 738.

Next, appellant claims he received ineffective assistance of appellate counsel. “When an ineffective assistance of appellate counsel claim is based on appellate counsel’s failure to raise an ineffective assistance of trial counsel claim, the [petitioner] must first show that trial counsel was ineffective to prevail on the appellate counsel claim.” *Zornes*, 880 N.W.2d at 371; *See also Wright v. State*, 765 N.W.2d 85, 91 (Minn. 2009). Because this court rejected appellant’s claim of ineffective assistance of appellate counsel in his 2017 appeal and appellant’s ineffective trial counsel claim is *Knaffla*-barred, we need not to consider the merits of this claim.

Affirmed.