STATE OF MINNESOTA

IN SUPREME COURT

A20-1602, A22-0057

Becker County

McKeig, J.

Kenneth Eugene Andersen,

Appellant,

vs.

Filed: December 14, 2022
Office of Appellate Courts

State of Minnesota,

Respondent.

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota, for appellant.

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, Saint Paul, Minnesota; and

Brian McDonald, Becker County Attorney, Detroit Lakes, Minnesota, for respondent.

S Y L L A B U S

1. Appellant's claims do not qualify under the newly discovered evidence exception to the statute of limitations in the postconviction statute, Minn. Stat. § 590.01, subdivision 4 (2022).

2. The district court did not err in refusing to consider appellant's time-barred claims in the interests of justice.

3. The district court did not err in denying appellant's request for a new trial.

Affirmed.

Considered and decided by the court without oral argument.

O P I N I O N

McKEIG, Justice.

Following trial, a jury found appellant Kenneth Andersen guilty of the first-degree premeditated murder of Chad Swedberg. Before us now is the question of whether the postconviction court erred in denying Andersen's third and fourth petitions for postconviction relief without holding an evidentiary hearing. Andersen claims that the district court abused its discretion in refusing to hold an evidentiary hearing to consider three pieces of evidence: (1) shell casings recovered from the site of the murder; (2) an affidavit from Ju.F. claiming that she saw someone put a rifle in Andersen's barn; and (3) an affidavit from D.K. that he observed Swedberg's wife L.F. and L.F.'s son Je.F. driving around at a time when they claimed to have heard gunshots. Andersen also argues that we should use our supervisory powers to grant a new trial in the interests of justice. The postconviction court summarily denied Andersen's petition, concluding that none of the three pieces of "newly discovered" evidence satisfied the factors articulated in Minn. Stat. § 590.01, subd. 4(b)(2) (2022), nor did the evidence fall under the "interests of justice" exception in in Minn. Stat. § 590.01, subd. 4(b)(5) (2022). The court also denied Andersen's request for a new trial. We affirm.

FACTS

In 2008, a jury found appellant Kenneth Eugene Andersen guilty of first-degree premeditated murder, *see* Minn. Stat. § 609.185(a)(1) (2022), for the April 2007 shooting

death of Chad Swedberg in Becker County. Our opinion in *State v. Andersen* (*Andersen I*) describes the details of the murder. 784 N.W.2d 320, 323–26 (Minn. 2010). We recite only the pertinent facts here.

On the morning of April 13, 2007, Swedberg was shot while tending to his maple syruping site in rural Becker County. Swedberg's wife, L.F, testified that she heard gunshots shortly before 8:13 a.m. Concerned, she attempted to contact Swedberg multiple times on her cell phone, then finally decided to head out to the syruping site to check on him. When L.F. reached the site, she found Swedberg lying on the ground unconscious. L.F. called 911, but Swedberg was already dead. Law enforcement officials conducted an investigation that involved sweeping the murder scene and interviewing witnesses. The investigators narrowed in on Andersen after he provided a series of inconsistent statements.

Investigators later secured a search warrant for Andersen's property. Andersen told the investigators that he owned several firearms, but he did not volunteer that he had a .30-caliber rifle. At this time the general public was unaware that Swedberg had been shot with a .30-caliber rifle. Andersen consented to the search of the home, but became agitated when officers proceeded to search the outbuildings on the property. The investigators' search of the outbuilding revealed a Tikka T3 Lite .300 Winchester short magnum rifle—a gun capable of shooting .30-caliber bullets—concealed under the insulation in one of the outbuildings. Andersen's palm print was found on the Tikka rifle. Swedberg had purchased that gun for Andersen in 2006.[1] Investigators also found bullets in the home. A

[1] Trial testimony established that the Tikka rifle found concealed on Andersen's property had the same serial number as a gun Swedberg purchased in September 2006.

firearms examiner concluded that the Tikka rifle found in Andersen's outbuilding was capable of firing the bullets removed from Swedberg's body. The examiner also concluded that the bullets found in Andersen's home had characteristics similar to the bullets removed from Swedberg's body.

Andersen was found guilty of first-degree premeditated murder and was sentenced to life in prison without the possibility of release. Andersen filed a direct appeal, and we affirmed his conviction. *Andersen I*, 784 N.W.2d at 323. In Andersen's first postconviction petition, he alleged seven separate grounds for relief, including newly discovered evidence, violations of the Confrontation Clause, and ineffective assistance of counsel. *Andersen v. State* (*Andersen II*), 830 N.W.2d 1, 6 (Minn. 2013). The postconviction court denied Andersen's petition without a hearing and we affirmed. *Id.* at 14.

Andersen subsequently filed a second petition for postconviction relief, claiming newly discovered evidence in the form of multiple violations of the ruling in *Brady v. Maryland*, 373 U.S. 83 (1963), ineffective assistance of counsel, and a request for a new trial in the interests of justice. *Andersen v. State* (*Andersen III*), 913 N.W.2d 417, 419 (Minn. 2018). The petition, in part, was based on information obtained by an investigator, who talked with A.B. as part of his investigation. A.B. informed the investigator that he had found cigarette butts and two spent shell-casings at the syruping site at some point after the murder. The second petition also contained statements by S.W., a witness who claimed she saw L.F., Je.F., and a brother in a white vehicle between 7:30 and 8:00 a.m. the day of the murder.

The district court initially denied Andersen's second petition for postconviction relief, finding the witness affidavits submitted not credible. We remanded the case after determining the district court improperly made credibility judgments without first holding an evidentiary hearing. *Id.* at 424.

At the evidentiary hearing, A.B. denied finding shell casings at the scene. Another witness, S.W., testified that she was "pretty confident" that she had seen L.F. driving through White Earth in a white vehicle with Je.F. and an unknown third man the morning of the murder. Je.F. also testified, stating that he thought he mentioned seeing cigarette butts in the location where the shooter may have hidden and that he thought he mentioned it to law enforcement. Following the hearing, the district court denied Andersen's petition. We affirmed. *Andersen v. State* (*Andersen IV*), 940 N.W.2d 176, 176 (Minn. 2020).

In May 2020, Andersen filed a third postconviction petition, alleging newly discovered evidence regarding shell casings recovered from the scene of the murder, *Brady* violations, and that he should be granted a new trial in the interests of justice. The postconviction court determined that Andersen could have or should have known of the shell casing claim in 2014 following his investigator's interview with A.B. Because the claim was not raised within 2 years of 2014, the court ruled that Andersen's claim was time-barred. The district court also determined that, even if the claim had been raised prior to 2016, the shells failed to constitute newly discovered evidence regardless and were also time-barred for that reason. The postconviction court concluded that it was inexcusable error to not raise his shell casings argument earlier. For the same reason, the postconviction court also determined Andersen's claims were *Knaffla*-barred. *See State v. Knaffla*, 243

N.W.2d 737, 741 (Minn. 1976) (barring claims that could have been raised in an earlier proceeding). Therefore, the postconviction court denied Andersen's third postconviction petition.

Andersen appealed on December 18, 2020, but requested we stay the appeal to give him time to file his fourth postconviction petition. The stay was granted on May 7, 2021.

In May 2021, Andersen filed his fourth postconviction petition. The petition alleged newly discovered evidence in the form of a letter from Ju.F claiming to have witnessed P.H.W. dropping off a firearm at Andersen's residence sometime in April 2007. It also included a motion for an order directing the State to compare fingerprints on the Tikka rifle to any fingerprints of P.H.W. Andersen later amended the petition to include allegations made in a letter that Andersen's fellow inmate, D.K., submitted to the court. D.K. claimed to have seen L.F. and Je.F. driving to Je.F.'s workplace on the morning of Swedberg's murder.

The postconviction court determined that Ju.F.'s evidence was cumulative, merely impeaching, and did not establish Andersen's actual innocence. The court rejected the request for fingerprint testing as well, stating that not only did Andersen fail to show that the now-deceased P.H.W. has fingerprints on file to compare, but even if there was a positive identification of P.H.W.'s fingerprint on the Tikka rifle, any testing would not show Andersen's innocence by clear and convincing evidence. The court rejected D.K.'s letter as newly discovered evidence, finding that it was both cumulative and offered merely for impeachment purposes. Finally, the court concluded that Andersen's petition did not

meet the interests of justice exception. Therefore, the postconviction court denied Andersen's fourth conviction petition without a hearing.

Andersen appealed and we consolidated the third and fourth petitions.

ANALYSIS

We review a summary denial of a postconviction petition for an abuse of discretion. *Griffin v. State*, 961 N.W.2d 773, 776 (Minn. 2021). An abuse of discretion is "based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (citation omitted) (internal quotation marks omitted). We review the district court's factual findings for clear error and its legal conclusions de novo. *Eason v. State*, 950 N.W.2d 258, 264 (Minn. 2020). In reviewing the summary denial, we take the facts alleged in the light most favorable to the petitioner. *Griffin,* 961 N.W.2d at 776.

The issue here is whether the postconviction court abused its discretion in dismissing Andersen's petition without an evidentiary hearing. A petitioner is entitled to a 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 (2022). "[T]he showing required . . . to receive an evidentiary hearing is lower than that required to receive a new trial," and a hearing must be held "if a petitioner alleges facts that, if proven, would entitle him to relief." *Dobbins v. State*, 788 N.W.2d 719, 734 (Minn. 2010). But if allegations in a petition, even when assumed true, are insufficient to entitle a petitioner to relief, denying the petition without a hearing is appropriate. *Rossberg v. State*, 932 N.W.2d 6, 9 (Minn. 2019). Further, no hearing is required if a claim is time-barred. *Bolstad v. State*, 878 N.W.2d 493, 496 (Minn. 2016).

I.

Petitions for postconviction relief must be filed within 2 years of the entry of judgment of conviction if no direct appeal is filed or within 2 years of an appellate court's disposition of the direct appeal. Minn. Stat. § 590.01, subd. 4(a) (2022). We affirmed Andersen's conviction on direct appeal in 2010. *Andersen I*, 784 N.W.2d at 323. As the petitions at issue in this case were filed over 2 years after 2010, they are time-barred unless they fall into an exception under Minn. Stat. § 590.01, subd. 4(b) (2022).

Newly discovered evidence is one such exception. Minn. Stat. § 590.01, subd. 4(b)(2). Newly discovered evidence is evidence "that could not have been ascertained by the exercise of due diligence . . . within the two-year time period for filing a postconviction petition." *Id.* The evidence must also not be cumulative to evidence presented at trial, must not be for impeachment purposes, and it must establish the petitioner's innocence by a clear and convincing standard. *Id.*

To justify holding a hearing to consider the allegedly newly discovered evidence, the evidence must be more than mere "argumentative assertions without factual support," *Schleicher v. State*, 718 N.W.2d 440, 444 (Minn. 2010) (citation omitted) (internal quotation marks omitted). The postconviction court "should not make witness credibility determinations without first holding an evidentiary hearing." *Bobo v. State*, 820 N.W.2d 511, 517 n.4 (Minn. 2012).

Andersen claims to have three different pieces of newly discovered evidence: shell casings discovered at the murder site; a letter from Ju.F. claiming a man known as P.H.W. put a firearm in Andersen's barn; and a statement from D.K. claiming to have seen L.F.,

Je.F., and a third man driving in a white vehicle through White Earth the morning of the murder. For the reasons provided below, none of these pieces of evidence satisfy the newly discovered evidence exception in Minn. Stat. § 590.01, subd. 4(b)(2).

A.

Andersen claims that shell casings discovered in the woods where Swedberg was found are newly discovered evidence. He disagrees with the postconviction court's determination that the shell casing evidence could have been discovered after A.B.'s interview with an investigator in 2014 because the investigator's report did not say that A.B. saw the casings *after* the primary police investigation. He also argues that the postconviction court's conclusion that the shell casing evidence would not have changed the outcome of his case was based on an erroneous characterization of the area as "a known hunting ground" and incorrectly required Andersen to show "concrete proof" that the BCA missed the shell casings.[2]

We need not resolve the issue of when Andersen knew or had reason to know of the shell casing claim in 2014 because the argument is plagued with a fatal flaw regardless—even when the shell casings are viewed in a light most favorable to Andersen, they do not

[2] Andersen also alleges, for the third time since his trial, a claim of a *Brady* violation. Je.F. claims that he would have told officers if he saw shell casings or cigarette butts. Andersen therefore speculates a record of this disclosure must exist, and the failure to investigate and disclose evidence denied him his right to present a defense in violation of cases such as *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); and *Herrera v. Collins*, 506 U.S. 390, 397 (1993). But Je.F. only says that *if* he had seen shell casings or cigarette butts, he believes he would have disclosed the information to the police, not that he did disclose the information. This speculative assertion is simply not enough to establish a *Brady* violation.

provide clear and convincing evidence of innocence. On direct appeal in this case, we noted that a Tikka rifle "was found concealed in the insulation of an outbuilding on Andersen's land," "Andersen's palm print was on the gun," and "[b]ullets found in Andersen's house had characteristics similar to the bullets recovered from [the victim's] body." *Andersen I*, 784 N.W.2d at 331. The shell casings do not call into question the other pieces of evidence in this case, and therefore fail to satisfy Minn. Stat. § 590.01, subd. 4(b)(2)'s requirement of establishing clear and convincing evidence of innocence. *See Caldwell v. State*, 976 N.W.2d 131, 138 (Minn. 2022) ("the petitioner must produce unequivocal, intrinsically probable and credible, frailty-free evidence showing that it is more likely than not that no reasonable jury would decide to convict"). Moreover, Andersen failed to provide factual support as to what the shell casings show. *See Schleicher*, 718 N.W.2d at 444 (stating that claims must be "more than argumentative assertions without factual support" (citation omitted) (internal quotation marks omitted)). The burden is on the petitioner to support his claims, and Andersen has failed to meet that burden. Minn. Stat. § 590.01, subd. 4(b)(2).[3] The shell casing evidence is therefore insufficient to warrant an evidentiary hearing. *See id*.

[3] Andersen claims that the postconviction court erred by requiring "concrete proof" of the relevance of the shell casings. Although the court used the phrase "concrete proof," it does not appear from the context of the phrase that the court was using it to describe the clear and convincing evidence standard under Minn. Stat. § 590.01, subd. 4(b)(2). Instead, the court focused on the purely speculative nature of Andersen's claims, which it concluded were insufficient to establish actual innocence.

B.

Andersen claims that the evidence introduced by Ju.F. supports his claim that he did not know the Tikka rifle was in his barn as he was not present when it was placed there. Andersen claims Ju.F's evidence would put forward another rational hypothesis for why the gun was hidden in Andersen's barn. But even when the statements from Ju.F. are viewed in a light most favorable to Andersen, they do not provide clear and convincing evidence of innocence. Ju.F. does not identify the gun as the Tikka rifle that was found hidden under insulation in Andersen's rafters, nor does any of Ju.F.'s testimony negate the fact that Andersen's palm print was found on the Tikka rifle and bullets similar to those used in the murder in were found in Andersen's house. At most, Ju.F's affidavit establishes a *possibility* that someone other than Andersen could have hidden the gun in his barn. This possibility is simply not enough to satisfy the standard of clear and convincing evidence of Andersen's innocence. Therefore, Ju.F's letter does not meet the standard for newly discovered evidence under Minn. Stat. § 590.01, subd. 4(b)(2).

C.

Andersen's final piece of alleged newly discovered evidence is testimony submitted by D.K., one of Andersen's fellow inmates, claiming that he saw L.F., Je.F., and a third man driving around in a white vehicle at approximately 8:20 on the morning of the murder. The postconviction court concluded that the evidence was cumulative and impeaching, and it therefore did not satisfy the requirements for newly discovered evidence under Minn. Stat. § 590.01, subd. 4(2). We agree with the postconviction court.

Evidence must be more than merely impeaching to satisfy the newly discovered evidence exception. Minn. Stat. § 590.01, subd. 4(b)(2); *Roby v. State*, 808 N.W.2d 20, 26–27 (Minn. 2011). Andersen argues that the D.K. letter establishes an alternate timeline and provides Andersen with an alibi. But even assuming the facts of the D.K. letter are true, Andersen's framing still places the D.K. letter squarely in the category of impeachment evidence. Ultimately, the D.K. letter does not offer evidence of an alternative timeline for the murder or firmly provide Andersen with an alibi as much as it simply would discredit the State's timeline by undermining the testimony of the State's witnesses (in particular, L.F., who emphatically testified that she was on the property and heard shots shortly before 8:13 a.m.). In short, aside from impeaching the credibility of the State's witnesses, the D.K. letter offers no evidence that would "establish by a clear and convincing standard that [Andersen] is innocent," as Minn. Stat. § 590.01, subd. 4(b)(2) requires. Thus, even when viewed in the light most favorable to Andersen, D.K.'s letter does not satisfy the newly discovered evidence exception of Minn. Stat. 590.01, subd. 4(b)(2).

II.

Andersen claims that all of the items he presents as newly discovered evidence also support the conclusion that his petition should be considered under the interests of justice exception to the postconviction petition time limit. *See* Minn. Stat. § 590.01, subd. 4(b)(5). The interests of justice exception to the two-year time bar is intended for injustices related to delays in *filing* a petition, not an injustice related to the *merits* of the petition. *Sanchez v. State*, 816 N.W.2d 550, 557 (Minn. 2012); *see also Andersen III*, 913 N.W.2d at 428

(Minn. 2018). Andersen fails to allege an injustice that prevented him from meeting the primary postconviction deadline. He consequently fails to satisfy Minn. Stat. § 490.01, subd. 4(b)(5)'s interests of justice exception, and his claims are therefore time-barred.[4]

III.

Andersen's final claim is that we should exercise our supervisory powers to grant him a new trial in the interests of justice. We decline to do so in this case.

Our exercise of supervisory powers to order a new trial is limited to "exceptional circumstances." *State v. Jackson*, 977 N.W.2d 169, 177 (Minn. 2022) (recognizing the rarity of our exercise of its supervisory powers to order a new trial). Such circumstances are not present here. As in *Andersen III*, "[w]e have already considered, and rejected, most of the claims that Andersen raises when we reviewed his case on direct appeal and in connection with his [previous] postconviction petition[s]. Nothing in Andersen's petition or briefs, or in our thorough review of the record, compels us to order a new trial at this point."[5] 913 N.W.2d at 428–29 n.13. Because Andersen does not allege claims that

---

[4] Andersen also argues that his claims from earlier petitions and the prosecution's multiple failures to disclose evidence both support considering his current petition under the interests of justice exception to the postconviction petition time limit. These arguments fail for the same reason stated above; they relate solely to the merits of the petition, not the delays in filing. *See Sanchez v. State*, 816 N.W.2d 550, 557 (Minn. 2012).

[5] The three claims added since *Andersen IV*—the shell casing evidence, Ju.F. evidence, and D.K. evidence—are all barred for the reasons already discussed. Therefore, nothing has changed since our previous rejection that we use our supervisory powers to order Andersen's request for a new trial.

warrant the exercise of our supervisory power, we decline to exercise that extraordinary power in this case. *See State v. Jackson*, 977 N.W.2d 169, 177 (Minn. 2022).

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.

Affirmed.