

ORIGINAL

FILED

06/22/2021

Bowen Greenwood
CLERK OF THE SUPREME COURT
STATE OF MONTANA

Case Number: DA 20-0132

DA 20-0132

IN THE SUPREME COURT OF THE STATE OF MONTANA

2021 MT 153N

BRYCE EVERETT PETERSON,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

FILED

JUN 22 2021

Bowen Greenwood
Clerk of Supreme Court
State of Montana

APPEAL FROM: District Court of the Twenty-First Judicial District,
In and For the County of Ravalli, Cause No. DV 19-0468
Honorable Howard F. Recht, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Bryce E. Peterson, Self-Represented, Deer Lodge, Montana

For Appellee:

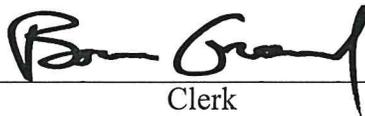
Austin Knudsen, Montana Attorney General, Brad Fjeldheim, Assistant
Attorney General, Helena, Montana

William E. Fulbright, Ravalli County Attorney, Hamilton, Montana

Submitted on Briefs: May 26, 2021

Decided: June 22, 2021

Filed:


Clerk

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 Bryce Everett Peterson appeals an order from the Twenty-First Judicial District Court, Ravalli County, denying his petition for postconviction relief. We affirm.

¶3 In November 2008, Peterson was charged with the following felonies: aggravated kidnapping, aggravated assault, assault with a weapon, intimidation, and aggravated burglary. He was also charged with the following misdemeanor: partner or family member assault. Peterson's six-day trial was set to begin on September 11, 2009. However, on September 10, Peterson filed *Alford* pleas to all the charged offenses. *See North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970). In November 2009, Peterson was sentenced to the Montana State Prison for 70 years with 20 years suspended.

¶4 Peterson filed an appeal on January 22, 2010, and later voluntarily moved to dismiss his appeal, which was granted by this Court on November 5, 2010. On November 22, 2010, Peterson filed a motion to withdraw his *Alford* pleas with the District Court. The District Court denied his motion following an evidentiary hearing. Peterson appealed the denial of his motion to withdraw the pleas, which was affirmed by this Court in 2013. *See generally State v. Peterson*, 2013 MT 329, 372 Mont. 382,

314 P.3d 227 (*Peterson I*). Peterson filed a petition for postconviction relief on December 17, 2014. The District Court denied his petition and Peterson, again, appealed to this Court in 2015. See *Peterson v. State*, 2017 MT 165, ¶¶ 15, 20, 388 Mont. 122, 398 P.3d 259 (*Peterson II*) (affirming the District Court’s denial of Peterson’s petition for postconviction relief because the petition was untimely and the claim of newly discovered evidence was unsupported by the facts).

¶5 On November 7, 2016, Peterson filed a petition for writ of habeas corpus with this Court (OP 16-0668), which was later denied on November 22, 2016. In 2017, Peterson again filed a petition for writ of habeas corpus with the United States District Court of the District of Montana, Missoula Division. *Peterson v. Kirkegard*, 2019 U.S. Dist. LEXIS 188380, 2019 WL 7562401. The petition was denied on October 29, 2019. See *Peterson v. Salmonsén*, 2019 U.S. Dist. LEXIS 187470, 2019 WL 5560240. Peterson filed a second petition for postconviction relief on December 19, 2019, presenting a claim of “actual innocence” under *Herrera v. Collins*, 506 U.S. 390, 113 S. Ct. 853 (1993), to the charges of aggravated assault, assault with a weapon, and aggravated kidnapping. Peterson also alleged he received ineffective assistance of counsel from both his trial and appellate attorneys. The District Court summarily denied his petition concluding it was not timely filed and it did not assert newly discovered evidence which would establish that he did not engage in the criminal conduct for which he was convicted pursuant to § 46-21-102(2), MCA. Peterson appeals.

¶6 On appeal, Peterson asserts a claim of actual innocence and that the District Court erred in failing to consider evidence which was newly discovered and which supported his claim of innocence.

¶7 “This Court reviews a district court’s denial of a petition for postconviction relief to determine whether its factual findings are clearly erroneous and whether its legal conclusions are correct.” *Garding v. State*, 2020 MT 163, ¶ 12, 400 Mont. 296, 466 P.3d 501 (citing *Rose v. State*, 2013 MT 161, ¶ 15, 370 Mont. 398, 304 P.3d 387). “Discretionary rulings, including rulings relating to whether to hold an evidentiary hearing, are reviewed for abuse of discretion.” *State v. Evert*, 2007 MT 30, ¶ 12, 336 Mont. 36, 152 P.3d 713 (citing *State v. Hanson*, 1999 MT 226, ¶ 9, 296 Mont. 82, 988 P.2d 299).

¶8 A petition for postconviction relief must “identify all facts supporting the grounds for relief set forth in the petition and have attached affidavits, records, or other evidence establishing the existence of those facts.” Section 46-21-104(1)(c), MCA. The petition must be accompanied by a supporting memorandum, including appropriate arguments, citations, and discussion of authorities. Section 46-21-104(2), MCA. The petitioner seeking postconviction relief must show, by a preponderance of the evidence, that the facts justify the relief. *State v. Heath*, 2009 MT 7, ¶ 16, 348 Mont. 361, 202 P.3d 118. Petitions for postconviction relief generally must be filed “within 1 year of the date that the conviction becomes final.” *Peterson II*, ¶ 8. An untimely filed petition for postconviction relief may fall within the exception to the time bar provided in § 46-21-102(2), MCA, when a claim is made that alleges the existence of newly

discovered evidence. Newly discovered evidence can present as DNA, perjured testimony, new alibi evidence, a confession by a third party, or recantation evidence. *State v. Marble*, 2015 MT 242, ¶ 32, 380 Mont. 366, 355 P.3d 742.

¶9 Peterson asserts, under both *Herrera* and *Schlup v. Delo*, 513 U.S. 298, 115 S. Ct. 851 (1995), he is able to avoid the one-year time limitation due to his ability to demonstrate actual innocence. Actual innocence requires a petitioner to “show by clear and convincing evidence that . . . no reasonable juror would have found him guilty of the offense in order for him to prevail on his substantive innocence claim.” *Herrera*, 506 U.S. at 399. *Schlup* allows an actual innocence claim as a “gateway” to relief in an untimely postconviction relief petition. *Schlup*, 513 U.S. at 327. Actual innocence claims asserting *Herrera* or *Schlup* are exceptions to the statutory bar to untimely petitions set forth in §§ 46-21-102(1), -102(2), and -105(1)(b), MCA. Section 46-21-102, MCA, provides:

(1) A petition for the relief . . . may be filed at any time within 1 year of the date that the conviction becomes final. A conviction becomes final for purposes of this chapter: (a) when the time for appeal to the Montana supreme court expires; (b) if an appeal is taken to the Montana supreme court, when the time for petitioning the United States supreme court for review expires; or (c) if review is sought in the United States supreme court, on the date that that court issues its final order in the case. (2) A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or *the date on which the petitioner discovers, or reasonably should have discovered, the existence of the evidence*, whichever is later.

(Emphasis added.) Section 46-21-105(1)(b), MCA, provides: “The court shall dismiss a *second or subsequent petition* by a person who has filed an original petition unless the second or subsequent petition raises grounds for relief that could not reasonably have been raised in the original or an amended original petition.” (Emphasis added.)

¶10 The District Court noted that Peterson’s conviction became final on November 5, 2010, under § 46-21-102(1)(a), MCA. Thus, Peterson’s deadline to file a postconviction petition was November 5, 2011. Peterson’s postconviction petition was filed eight years past the one-year deadline of November 5, 2011. Unless Peterson’s petition falls within the exception for newly discovered evidence under § 46-21-102(2), MCA, the petition is time barred. The District Court evaluated whether Peterson’s newly discovered evidence—the two affidavits, a summary report from a forensic pathologist, and newly presented phone records—established actual innocence and fell within the one-year exception. The District Court held none of the evidence Peterson presented was new evidence and concluded the claim was time barred and procedurally barred. We agree.

¶11 This Court first addresses Peterson’s claim of actual innocence. By filing the *Alford* plea in 2009, Peterson pled guilty to his offenses of aggravated assault, aggravated kidnapping, and assault with a weapon without acknowledging guilt. This Court held Peterson was fully aware of the consequences of the plea and that they were knowingly and voluntarily given. *Peterson I*, ¶ 39. As in *Herrera*, Peterson filed the new evidence eight years after his deadline for postconviction relief. *Herrera*, 506 U.S. at 417-18 (“The affidavits filed in this habeas proceeding were given over eight years after

petitioner's trial. No satisfactory explanation has been given as to why the affiants waited until the 11th hour—and, indeed, until after the alleged perpetrator of the murders himself was dead—to make their statements.”). On its face, Peterson's petition for postconviction relief was untimely.

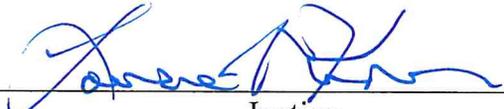
¶12 Again, even if the petition was filed after the one-year deadline under § 46-21-102, MCA, a claim of actual innocence based on newly discovered evidence is an exception and must express more than merely the existence of newly discovered evidence. *Herrera*, 506 U.S. at 400. Peterson offered an affidavit from the victim's acquaintance to demonstrate that the victim in the underlying criminal case self-inflicted her injuries to ensure Peterson would remain in prison. Peterson presented this affidavit in his habeas proceeding with this Court in 2016 and again in federal court in 2017. The District Court concluded the affidavit was time barred because it did not identify Peterson, by name, and the statements within the document were hearsay that did not constitute competent evidence. No showing of actual innocence was established by the affidavit and thus Peterson's petition is time barred. Peterson also produced a report by a forensic pathologist stating that the victim's two most severe injuries occurred after the kidnapping incident and could have been caused by a baseball bat. The report was compiled in January 2019 and offered no explanation as to why Peterson delayed in seeking an expert opinion. The District Court concluded Peterson's doubts as to whether he caused all the victim's injuries was both time barred and procedurally barred because “he repeatedly waived his right to challenge this issue by pleading guilty, by failing to appeal, and by waiting eight years to seek an expert opinion.” We agree and find the

report did not establish that Peterson did not engage in criminal conduct that gave rise to his convictions. Peterson also presented an affidavit from an investigator refuting the victim's claim that Peterson caused her hearing loss. The District Court held the information contained in the affidavit had been open knowledge since before Peterson pled guilty to his charges in 2009. Thus, the affidavit did not present new evidence for a claim of actual innocence. Finally, Peterson presented phone records to refute the timeline corresponding to the assault with a weapon charge and contended he discovered this new evidence on August 12, 2019. The District Court concluded, "Although the Verizon phone records [Peterson] submits in support of his petition may have been *newly produced*, they do not constitute 'newly discovered evidence,' as is required in order to trigger the exception to the one-year period" This Court agrees that the phone records do not establish that Peterson did not engage in criminal conduct for which he was convicted, thus defeating his claim of actual innocence.

¶13 The District Court correctly concluded Peterson failed to meet the exception to the one-year filing requirement under § 46-21-102(2), MCA, because he did not present newly discovered evidence. The District Court also did not abuse its discretion in summarily denying his amended successive petition, under § 46-21-105, MCA, because it merely restated claims already raised and decided.

¶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. In the opinion of the Court, the case presents a question controlled by settled law or by the clear application of applicable standards of review.

¶15 Affirmed.


Justice

We concur:


Chief Justice


Justice


Justice


Justices