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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1669
A10-2234**

Prentice Wheatley, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 20, 2011
Affirmed
Stoneburner, Judge**

Hennepin County District Court
File No. 27CR07033036

Prentice Wheatley, Bayport, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Stoneburner, Judge; and
Muehlberg, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

In this consolidated appeal, pro se appellant challenges a July 27, 2010 order denying his fourth petition for postconviction relief (A10-1669) and a November 9, 2010 order denying his fifth petition for postconviction relief (A10-2234). Both petitions challenged appellant's conviction of first-degree assault for beating his daughter with a belt and an electrical cord. Because the district court did not abuse its discretion in denying the petitions for postconviction relief without an evidentiary hearing, we affirm.

FACTS

In 2007, after a court trial on stipulated facts, appellant Prentice Wheatley, who had been charged with first- and third-degree assault, was found guilty of first-degree assault for beating his daughter with a belt and an electrical cord, leaving permanent scars on her body. At the time of trial, Wheatley stipulated that Dr. Mark Hudson, if called, would testify that the victim's scars were likely permanent, and that he did not expect them to fade more than they had faded by the time of trial, seven months after the incident. And Wheatley stipulated to admission of photographs taken on the day of the trial, revealing scars on the victim's arms, legs, buttocks, and shoulders. Based on the stipulated facts and evidence, the district court found that the scars are permanent. Wheatley was convicted of, and sentenced for, first-degree assault. Wheatley appealed, but the appeal was stayed at Wheatley's request pending completion of postconviction proceedings. This court declined to continue the stay pending completion of a second

postconviction petition and subsequently dismissed the appeal due to Wheatley's failure to file a brief.

This consolidated appeal involves Wheatley's fourth and fifth petitions for postconviction relief. In his fourth petition for postconviction relief, Wheatley argued that he was wrongly convicted of both first- and third-degree assault for the same incident, entitling him to a new trial.¹ Because Wheatley's petition did not assert any disputed facts, the postconviction court did not hold an evidentiary hearing on the petition, and addressed the petition on the merits. The postconviction court explained that there is no merit to Wheatley's assertion that he was convicted of both first- and third-degree assault and denied the petition.

In his fifth petition for postconviction relief, Wheatley requested relief based on newly discovered evidence and requested an evidentiary hearing, arguing that the new evidence would show that, contrary to the findings of the district court at trial, the victim's scars are not permanent, and the evidence is, therefore, insufficient to support his conviction of first-degree assault, which was based on the existence of serious permanent disfigurement constituting great bodily harm. Again, the postconviction court rejected the state's argument that the petition was procedurally barred and addressed the merits of Wheatley's postconviction petition.

To support his claim of newly discovered evidence, Wheatley submitted a notarized transcript of a telephone conversation between Felicia Jonnise Walker and a

¹ Wheatley's appellate briefs assert that he was convicted of three charges arising from a single act, but the record demonstrates that Wheatley was only charged with two offenses: assault in the first degree and assault in the third degree.

person who is identified as Wheatley's personal assistant. In the telephone conversation, Walker, who appears to be the victim's mother, describes herself as "mostly a medical assistant" at Crutchfield Dermatology, whose duties include greeting patients, laboratory work, and assisting with examinations. Walker states that, in her "professional opinion," a "hospital doctor" is less qualified in dermatological matters than a dermatological "specialist" and that a "[s]pecialist in the dermatology field knows [that] . . . recovery is inevitable."

The postconviction court denied the petition, concluding that (1) Wheatley waived the right to present expert testimony on the issue of the permanency of scarring at trial; (2) Wheatley failed to meet his burden in the postconviction proceedings to show that the evidence he now seeks to admit was not known or knowable at the time of the trial; and (3) the proffered testimony is insufficient to create a genuine issue of material fact that would call into question the evidence stipulated to at trial. These appeals followed, challenging denial of his fourth and fifth petitions for postconviction relief followed.

D E C I S I O N

I. Standard of review

"A petitioner seeking postconviction relief has the burden of establishing, by a fair preponderance of the evidence, facts which warrant a reopening of the case." *State v. Rainer*, 502 N.W.2d 784, 787 (Minn. 1993). "On appeal, the decision of the postconviction court is reviewed under an abuse of discretion standard, and the scope of review is limited to determining whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.*

“To obtain a new trial based on newly discovered evidence, [petitioner] must establish that (1) the newly discovered evidence was not within his or his counsel’s knowledge before trial; (2) the evidence could not have been discovered through due diligence before trial; (3) it is not cumulative, impeaching, or doubtful evidence; and (4) the evidence is likely to produce a different or more favorable result at trial.” *Schneider v. State*, 725 N.W.2d 516, 524 (Minn. 2007). An evidentiary hearing is not required for a postconviction petition when the record clearly shows that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2010).

II. Fourth petition

Wheatley’s fourth petition for postconviction relief reasserted his belief that he was wrongly convicted of two offenses that occurred in a single behavioral incident. Because the record conclusively shows that Wheatley was only convicted of assault in the first degree, Wheatley’s erroneous assertion that he was convicted of two offenses for a single incident is without merit.

On appeal from denial of his fourth petition, Wheatley also argues that (1) he received ineffective assistance of trial counsel; (2) he was improperly charged; (3) he should have been convicted of third-degree assault; and (4) the state elicited improper testimony of an expert witness. Although these issues have been raised by Wheatley in earlier petitions, none of these claims is contained in the fourth petition, and they are, therefore, beyond the scope of this review. *See Wheatley v. State*, No. A10-1669 (Minn. App. Oct. 14, 2010) (stating that Wheatley’s appeal in file A10-1669 will be construed as

an appeal from the district court's November 9, 2010 order, which is the order denying his fourth petition).

III. Fifth petition

In his appeal from denial of his fifth petition for postconviction relief, Wheatley argues that he is entitled to an evidentiary hearing to consider whether his newly discovered evidence requires a new trial. But, even if the notarized transcript of a telephone conversation in which a medical assistant opines about what a "specialist in the dermatology field" knows could be considered "evidence," Wheatley failed to explain why evidence of such knowledge was not available at the time of his trial or why his assertion of such knowledge at this time would overcome or create a fact issue about medical testimony he stipulated to at his trial. The district court did not abuse its discretion by concluding that Wheatley's purported newly discovered evidence did not create a genuine issue of fact that warranted an evidentiary hearing and that the record conclusively demonstrates that Wheatley is not entitled to relief based on his claim of newly discovered evidence.

Affirmed.