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STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1907

Edisson Daniel Lema, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 12, 2014
Affirmed
Cleary, Chief Judge

Hennepin County District Court
File No. 27-CR-09-29239

Gary R. Wolf, Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Charissa Perzel (certified student attorney), Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Hudson, Judge; and Smith, Judge.

U N P U B L I S H E D O P I N I O N

CLEARY, Chief Judge

Appellant Edisson Daniel Lema appeals a district court order denying his petition for postconviction relief without a hearing. Appellant argues that the district court erred in denying him a hearing after determining that postconviction relief was not warranted on the basis of newly discovered evidence. Respondent State of Minnesota asserts that appellant's petition is time barred. Because appellant's petition is not time barred, but he failed to meet the *Rainer* standard for newly discovered evidence, we affirm.

FACTS

On February 27, 2009, appellant was with E.M. when E.M. shot and injured two rival gang members. Appellant was charged with two counts of attempted second-degree murder for the benefit of a gang and two counts of attempted second-degree murder.

At appellant's trial, three of the rival gang members testified that appellant told E.M. to shoot one of them. Their testimony differed as to what words appellant used and what language he spoke. E.M. invoked his right to remain silent and did not testify at appellant's trial. On September 16, 2009, appellant was convicted of attempted second-degree murder for the benefit of a gang and second-degree assault for the benefit of a gang. This court affirmed appellant's convictions on December 28, 2010. *See State v. Lema*, No. A09-2246 (Minn. App. Dec. 28, 2010), *review denied* (Minn. Mar. 15, 2011).

On December 28, 2012, appellant filed a petition for postconviction relief. The petition was accompanied by a document titled "Sworn Statement," which was signed by

E.M., but was not notarized. In the document, E.M. states that appellant did not know he had a gun and did not tell him to shoot. The petition characterized this document as "new evidence." Additionally, appellant purported to "reserve[] the right to supplement the petition with an affidavit" from E.M. Appellant subsequently filed a document titled "Affidavit of [E.M.]," signed and notarized on January 31, 2013, in district court on February 8, 2013. In the affidavit, E.M. again states that appellant "did not know that [he] was carrying a gun" and that appellant never told him to shoot anyone.

The district court denied appellant's petition for postconviction relief on August 9, 2013. In concluding that appellant was not entitled to an evidentiary hearing or a new trial, the district court determined that appellant had failed to meet the *Rainer* standard for newly discovered evidence. This appeal followed.

D E C I S I O N

On appeal, appellant argues that the district court erred in denying his petition for postconviction relief based on newly discovered evidence without an evidentiary hearing. Respondent asserts that appellant's petition is time barred. "The denial of a new trial by a postconviction court will not be disturbed absent an abuse of discretion and review is limited to whether there is sufficient evidence to sustain the postconviction court's findings." *State v. Hooper*, 620 N.W.2d 31, 40 (Minn. 2000). Similarly, the denial of a petition for postconviction relief without an evidentiary hearing is reviewed for an abuse of discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). This court reviews issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

I.

Respondent asserts that the district court's denial of appellant's petition for postconviction relief is supported because appellant failed to timely file his petition.[1] A petition for postconviction relief may not be filed more than two years after "an appellate court's disposition of [a] petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a)(2) (2012). When the time for petitioning the United States Supreme Court for review expires, a conviction becomes final. *See Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010). The Minnesota Supreme Court denied appellant's petition for review on his direct appeal on March 15, 2011. The time period for appellant to petition the United States Supreme Court for review expired 90 days after this denial. *See* Sup. Ct. R. 13.1 (requiring petitions for writ of certiorari to be filed within 90 days after entry of the state court order denying discretionary review); *see also Berkovitz v. State*, 826 N.W.2d 203, 207 (Minn. 2013) (determining that the petitioner's conviction became final, for purposes of applying the two-year limitations period, 90 days after the Minnesota Supreme Court decided the petitioner's direct appeal). Appellant's convictions became final on June 13, 2011, 90 days after the Minnesota Supreme Court denied review on March 15, 2011. The two-year filing period therefore ended on June 13, 2013. Appellant's petition was filed on December 28, 2012, well within the two-year filing period.

[1] Although respondent challenged the timeliness of appellant's filing in briefing to the district court, the district court did not address whether appellant's petition was time barred in its order.

Respondent maintains that because appellant's petition was filed with an un-notarized statement instead of with the E.M. affidavit, appellant failed to meet the two-year filing requirement. However, the notarized affidavit was also filed well within the two-year filing period. Any deficiency in appellant's initial petition was corrected. Appellant's petition for postconviction relief is not time barred.

II.

A district court must conduct an evidentiary hearing on a petition for postconviction relief "[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 (2012). A new trial based upon newly discovered evidence may be granted if the defendant proves:

> (1) that the evidence was not known to the defendant or his/her counsel at the time of the trial; (2) that the evidence could not have been discovered through due diligence before trial; (3) that the evidence is not cumulative, impeaching, or doubtful; and (4) that the evidence would probably produce an acquittal or a more favorable result.

Rainer v. State, 566 N.W.2d 692, 695 (Minn. 1997). To receive an evidentiary hearing based on a claim of newly discovered evidence, "a defendant is required to allege facts that, if proven by a fair preponderance of the evidence," would satisfy the four *Rainer* elements. *Bobo v. State*, 820 N.W.2d 511, 517 (Minn. 2012). The threshold showing for a postconviction evidentiary hearing is lower than what is required for a new trial. *Nicks*, 831 N.W.2d at 504.

Without making any findings addressing the first three *Rainer* elements, the district court determined that appellant's petition failed on the fourth element. An independent analysis of the *Rainer* elements supports the district court's denial of appellant's petition for postconviction relief without a hearing.

Appellant argues that the first *Rainer* element is satisfied because his counsel was never allowed to interview E.M. and he therefore "could not know what [E.M.] would say on the stand" at trial. Appellant further alleges that the statement E.M. gave to police did not address appellant's knowledge as to E.M. having a gun or what appellant said to E.M. before he shot the gun. Respondent relies on *Whittaker v. State* as dispositive authority that appellant has failed to satisfy the first *Rainer* element. 753 N.W.2d 668 (Minn. 2008).

In *Whittaker*, the petitioner offered the affidavit of an individual who was with him the night of his crime as newly discovered evidence in support of his petition for postconviction relief. *Id*. at 670. The court stated that "the statement of an individual who refused to testify at trial is not 'unknown' for the purposes of *Rainer* if, at the time of trial, the petitioner knew the substance of the testimony that individual might provide." *Id.* at 671. Additionally, "testimony cannot be 'unknown' if the petitioner was admittedly present at the time of the events the witness purports to describe." *Id.*; *see also Pierson v. State*, 637 N.W.2d 571, 577 (Minn. 2002) (holding that because a petitioner and the proffered witness were together at the time of the events at issue, the witness's testimony was not unknown at the time of trial for purposes of the first *Rainer* element).

Here, appellant has alleged that E.M.'s testimony, as to appellant's knowledge of the gun and the words he directed toward E.M., is newly discovered evidence. However, appellant was with E.M. during the shooting. Because appellant was with E.M. during the shooting, appellant was aware that E.M. could testify as to appellant's knowledge of the gun and anything that he said to E.M. Under the reasoning of *Whittaker*, E.M.'s testimony was not unknown to appellant, and appellant has failed to allege facts that, if proven by a fair preponderance of the evidence, would satisfy the first *Rainer* element. Appellant's satisfaction of the three other *Rainer* elements is similarly doubtful. Having failed under the first *Rainer* element, appellant is not entitled to an evidentiary hearing. *See Whittaker*, 753 N.W.2d at 672 (holding that the petitioner was not entitled to an evidentiary hearing when he had not satisfied the first *Rainer* element). The district court did not err in denying appellant's petition for postconviction relief without an evidentiary hearing.

Affirmed.