2010 WL 772622
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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

Michael William GARBERG, Appellant.

No. A09-914.

March 9, 2010.

West KeySummary

1 **Criminal Law** ⇐ Particular Documents or Tangible Objects

A defendant convicted of third-degree driving while impaired was not entitled to discovery of the source code of the Intoxilyzer 5000EN software. The defendant submitted no evidence in support of his discovery motion, and thus failed to make the threshold evidentiary showing that the source code information may have related to his guilt or innocence, negated his guilt, or reduced his culpability. 49 M.S.A., Rules Crim.Proc., Rule 9.01.

Hennepin County District Court, File No. 27-CR-08-53168.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Patrick G. Leach, Edina City Attorney, Thomas F. DeVincke, Assistant City Attorney, Minneapolis, MN, for respondent.

Stephen R. O'Brien, Minneapolis, MN, for appellant.

Considered and decided by LANSING, Presiding Judge; HALBROOKS, Judge; and SCHELLHAS, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge.

*1 Following his conviction of third-degree driving while impaired (DWI), appellant challenges the district court's denial of his motion for discovery of the Intoxilyzer source code. We affirm.

FACTS

A police officer stopped appellant Michael William Garberg for speeding on October 22, 2008, at approximately 11:00 p.m. The officer suspected that appellant was driving while impaired and requested that appellant submit to a preliminary breath test (PBT). Appellant acquiesced and the PBT revealed an alcohol concentration of .199. Appellant was arrested for DWI and, at 11:33 p.m., provided a breath sample for an Intoxilyzer test that revealed an alcohol concentration of .24. Respondent State of Minnesota charged appellant with: (1) third-degree DWI for driving under the influence in violation of Minn.Stat. § 169A.20, subd. 1(1) (2008); and (2) third-degree DWI for having an alcohol concentration of .08 or more within two hours of driving, in violation of Minn.Stat. § 169A.20, subd. 1(5) (2008). Third-degree DWI is a gross misdemeanor. Minn.Stat. § 169A.26, subd. 2 (2008).

The parties appeared for trial and advised the district court that they intended to proceed under *State v. Lothenbach*, 296 N.W.2d 854, 857-58 (Minn.1980).[1] Before the parties submitted the stipulated facts, appellant moved the court for discovery of the source code for the Intoxilyzer machine used to test him. Appellant supported his motion with a memorandum in which he explained that "source code" refers to "the computer program that runs the breath-testing equipment" and argued that the only way to know whether certain mathematical equations were properly programmed is to have an expert look at the source code. Appellant argued more generally that the breath-test result obtained by the Intoxilyzer is undermined if it can be established that the machine's software generates an incorrect result or is not functioning properly. In opposition to appellant's motion, the state filed a memorandum, along with a copy of an affidavit from a toxicology supervisor at the Bureau of Criminal Apprehension (BCA) Forensic Science Laboratory.

1 Minn. R.Crim. P. 26.01, subd. 4, which became effective in 2007, "implements and supersedes the procedure authorized by [*Lothenbach*]." *State v. Antrim,* 764 N.W.2d 67, 69 (Minn.App.2009). Now, when a defendant stipulates to the prosecution's case in order to obtain review of a pretrial ruling, the proceeding occurs under rule 26.01, subdivision 4, not *Lothenbach. Id.*

The district court denied appellant's discovery motion without making findings or providing an explanation for its ruling, found appellant guilty of third-degree DWI, and stayed his sentence pending appeal. This appeal follows.

DECISION

Appellant argues that the district court erred by denying his request for discovery of the Intoxilyzer source code. "A district court judge has wide discretion to issue discovery orders, and normally an order will not be overturned without clear abuse of that discretion." *State v. Underdahl,* 767 N.W.2d 677, 684 (Minn.2009) (*Underdahl II*) (quotation omitted). "To find an abuse of discretion, an appellate court must conclude that the district court erred by making findings unsupported by the evidence or by improperly applying the law." *Id.*

In *Underdahl II,* the supreme court addressed two similar discovery requests made in separate cases by defendants Underdahl and Brunner. 767 N.W.2d 677. Both Underdahl and Brunner requested the source code for the Intoxilyzer 5000EN, "the most recently approved breath-test instrument for the State of Minnesota," and the district courts granted the requests. *Id.* at 680-81. The supreme court addressed two issues in its analysis of the defendants' discovery request for the Intoxilyzer source code: whether the source code was relevant for purposes of Minn. R.Crim. P. 9.01, subd. 2(3); and whether the state had possession or control of the source code such that it must assist the defendant in seeking access to the materials under Minn. R.Crim. P. 9.01, subd. 2(1). *Id.* at 684, 686.

***2** Rule 9.01 governs prosecution disclosure in felony and gross-misdemeanor cases. Subdivision 2 of rule 9.01 details the circumstances under which the district court may use its discretion to order the prosecuting attorney to provide additional discovery. *Underdahl II,* 767 N.W.2d at 684. Subdivision 2(1) provides that "[u]pon motion of the defendant, the court for good cause shown shall require the prosecuting attorney ... to assist the defendant in seeking access to specified matters relating to the case that are within the possession or control of an official or employee of any governmental agency." Minn. R.Crim. P. 9.01, subd. 2(1). Subdivision 2(3) provides that, upon motion of the defendant, the court "may, in its discretion, require the prosecuting attorney to disclose ... any relevant material and information" provided that "a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged." Minn. R.Crim. P. 9.01, subd. 2(3). The *Underdahl II* court discussed what "may relate to a defendant's guilt or innocence in a DWI case" for purposes of establishing relevance under subdivision 2(3) of rule 9.01. 767 N.W.2d at 684-85. The court reviewed prior cases that addressed requests for confidential information and noted that, in that context, the court had required "some plausible showing that the information sought would be both material and favorable to his defense." *Id.* at 684 (quoting *State v. Hummel,* 483 N.W.2d 68, 72 (Minn.1992)). In one such case, the court had overturned a discovery order when the defense had not demonstrated that the materials "could be related to the defense" or were likely to contain "information related to the case." *Id.* at 685 (quotation omitted).

In evaluating the evidentiary showings made by Underdahl and Brunner, the court noted that Underdahl had requested a copy of the source code with a motion that "contained no other information or supporting exhibits related to the source code." *Id.* "Underdahl made no threshold evidentiary showing whatsoever" and failed to show how the source code would help him dispute the charges against him. *Id.* By contrast, Brunner had submitted a memorandum and nine exhibits supporting his request for the source code. *Id.* Brunner's "memorandum gave various definitions of 'source code' " and his exhibits included written testimony from a computer-science professional, who explained the importance of source code in finding defects and problems in voting machines and explained issues surrounding source-code disclosure. *Id.* Brunner also included a report that analyzed the New Jersey breath-test machine's source code and uncovered "a variety of defects that could impact the test result." *Id.* The *Underdahl II* court concluded that Brunner's submissions showed "that an analysis of the source code may reveal deficiencies that could challenge the reliability of the Intoxilyzer and, in turn, would relate to Brunner's guilt or innocence." *Id.* at 686. The court concluded that Brunner's discovery requests sought relevant evidence. *Id.* But the court concluded that Underdahl had not shown that the source code may relate to his guilt or innocence

and his discovery requests therefore did not seek relevant evidence. *Id.* at 685-86.

***3** In *Underdahl II,* the supreme court also reviewed the district courts' findings that the state was the owner of the source code and addressed whether the state had possession or control of the source code for purposes of rule 9.01, subdivision 2(1). *Id.* at 686-87. The court noted that, at the time of oral arguments, the state and the Intoxilyzer 5000EN's manufacturer, CMI Inc., "were working toward a settlement to give DWI defendants access to the source code," and were doing so as a result of the state suing CMI. *Id.* at n. 7. The court concluded that the source code was in the possession, custody, or control of the state, *id.* at 686-87 (citing *Underdahl v. Comm'r of Pub. Safety (In re Comm'r of Pub. Safety),* 735 N.W.2d 706, 712 (Minn.2007) (*Underdahl I*)), and that the district courts had not abused their discretion by "finding the State had possession or control of the source code under Minn. R.Crim. P. 9.01, subd. 2(1)." *Id.*

After addressing relevance and possession or control, the *Underdahl II* court concluded that the district court did not abuse its discretion in ordering the discovery sought by Brunner, but that the district court abused its discretion in ordering the discovery sought by Underdahl. *Id.* at 687.

Here, appellant argues that the source code was relevant, that the state had possession or control of the source code and, for the first time on appeal, that due process requires disclosure of the source code. The state opposes all of appellant's arguments and also argues that appellant presents a "general challenge to the validity" of the Intoxilyzer 5000EN software, which was approved in a rule-making process. *See Underdahl I,* 735 N.W.2d at 710 (summarizing the rule that approved the Intoxilyzer 5000EN for statewide use).

We begin by rejecting the state's argument that the district court had no jurisdiction to hear a challenge to the validity of the Intoxilyzer 5000EN software. Appellant challenges the Intoxilyzer test results in his case; he has not presented a challenge to the use of the Intoxilyzer in general. A defendant charged with DWI may challenge his Intoxilyzer test results in his criminal case. *See Underdahl II,* 767 N.W.2d at 685 n. 4 ("The Intoxilyzer 5000EN is statutorily presumed reliable, but Minnesota law permits this presumption to be challenged by drivers charged with DWI-related offenses."); *see also* 10A *Minnesota Practice,* CRIMJIG 29.10 (2006) (addressing the crime of driving with an alcohol concentration of .08 or more and stating that the jury "must evaluate the reliability of the testing method and the test results").[2]

2 We view the JIG as instructive in this case, but we recognize that the JIG is not controlling because JIGs "merely provide guidelines and are not mandatory rules," *State v. Kelley,* 734 N.W.2d 689, 695 (Minn.App.2007), *review denied* (Minn. Sept. 18, 2007).

Appellant argues that his discovery motion sought relevant evidence because the source code is relevant. The district court's lack of findings or rationale makes review difficult. But, in this case, rather than remand for findings, we affirm the district court because appellant submitted no evidence in support of his discovery motion. Appellant failed to make a threshold evidentiary showing that the source code information may relate to his guilt or innocence, negate his guilt, or reduce his culpability. Minn. R.Crim. P. 9.01, subd. 2(3); *Underdahl II,* 767 N.W.2d at 684-85. We therefore do not reach appellant's arguments regarding possession or control of the source code. We also do not reach appellant's due-process argument, which appellant waived because he did not raise it in district court. *See Roby v. State,* 547 N.W.2d 354, 357 (Minn.1996) (stating that appellate courts "generally will not decide issues which were not raised before the district court").

***4 Affirmed.**

All Citations

Not Reported in N.W.2d, 2010 WL 772622

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State of Minnesota
9/9/2020 4:32 PM

2010 WL 3632505
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Court of Appeals of Minnesota.

Tou Lu YANG, petitioner, Appellant,

v.

STATE of Minnesota, Respondent.

No. A10-84.

Sept. 21, 2010.

Review Denied Dec. 14, 2010.

West KeySummary

1 **Criminal Law** ⇐ Pretrial proceedings

The state's failure to disclose a St. Paul police officer's statement that defendant was not the shooter, if proved by a fair preponderance of the evidence, would entitle defendant to relief from his three convictions stemming from the shooting of two men. Therefore, defendant was entitled to an evidentiary hearing in a postconviction proceeding. A notarized affidavit from the defense investigator stated the officer had told the investigator that he knew the names of the shooters, who were the defendant's cousins. The state was obligated to disclose this information to the defendant, and the failure to do so may have resulted in a Brady violation.

Hennepin County District Court, File No. 27-CR-99-69223.

Attorneys and Law Firms

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Lori Swanson, Attorney General, St. Paul, MN, Michael O. Freeman, Hennepin County Attorney, Paul R. Scoggin, Assistant County Attorney, Minneapolis, MN, for respondent.

Considered and decided by LANSING, Presiding Judge; WRIGHT, Judge; and CONNOLLY, Judge.

UNPUBLISHED OPINION

LANSING, Judge.

*1 In this appeal from the partial denial of a petition for an evidentiary hearing in a postconviction proceeding, Tou Lu Yang asserts that the postconviction court erred in ordering an evidentiary hearing on only two of the multiple issues raised in his petition. We agree with Yang's claim that the state's failure to disclose a St. Paul police officer's statement that Yang was not the shooter satisfies the evidentiary-hearing threshold for a violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Consequently, we reverse and remand that issue for inclusion in the evidentiary hearing, but we affirm the district court's order on all other issues.

FACTS

Following a December 1999 jury trial, Tou Lu Yang was convicted of three charges that stemmed from the shooting of Curtis Campbell and the shooting death of Miguel McElroy, Campbell's son. In a direct appeal, Yang challenged his convictions of aiding and abetting second-degree murder, aiding and abetting second-degree attempted murder, and aiding and abetting second-degree assault. We affirmed his convictions in an opinion that addressed the sufficiency of the evidence, the district court's evidentiary rulings, the district court's refusal to reopen the testimonial phase of the trial when a claim of recanted eye-witness testimony arose after the jury began deliberations, the denial of a new trial based on claims of prosecutorial misconduct, and the denial of a new trial to allow evidence of the recanted testimony. *State v. Yang*, 627 N.W.2d 666, 671-72 (Minn.App.2001), *review denied* (Minn. July 24, 2001).

Yang filed a pro se postconviction appeal in 2007, and, following the appointment of counsel, an amended postconviction petition in 2009. Yang raised multiple claims in his postconviction petition. The postconviction court

ordered an evidentiary hearing on only two of the claims: the credibility of a posttrial recanting witness's exonerating statements and whether Yang's trial counsel was ineffective when he told the jury in his opening statement that Yang would testify without consulting Yang. Yang now appeals the denial of an evidentiary hearing on five of his claims. The facts underlying Yang's conviction and the evidence presented at trial are set forth in this court's opinion in Yang's direct appeal. *See Yang,* 627 N.W.2d 666. We briefly summarize the facts that are relevant to Yang's current claims.

In July 1999 four Asian men in a green Tahoe, a Chevrolet sports utility vehicle (SUV), approached McElroy's brother, DM, outside a convenience store and asked him to purchase marijuana for them. DM agreed and got into the SUV and rode with the men to several locations to try to buy the drugs. Eventually, DM got out of the car and took with him $60 that the men had given him to purchase drugs. DM did not return to the SUV. Later that day, two of the men who had been in the SUV went to the convenience store and confronted McElroy about the money that his brother had taken. Campbell, DM's and McElroy's father, saw the confrontation as he was driving past the store and pulled over to see what was happening. After speaking with the two Asian men, Campbell and McElroy walked toward the entrance of the convenience store and the other men shot them. McElroy died on the street in front of the store.

***2** Campbell and two other eye-witnesses identified Yang as one of the shooters from a photographic display. They also identified Yang at trial as one of the shooters. A fourth witness testified that he saw Yang near the convenience store shortly before the shooting. From a photographic display, DM identified Yang as the driver of the SUV that he rode in before the shooting and testified that Yang had asked him to buy marijuana in the past. DM also testified about the detailed description of the SUV's interior he provided the police after the shooting and his later identification of the SUV. Police witnesses testified that the SUV that DM identified was registered to Yang's father and seized at Yang's residence.

The five claims on which the postconviction court denied an evidentiary hearing that Yang raises in this appeal are: (1) that the state failed to disclose exculpatory evidence that members of the St. Paul police department knew the identity of the shooters, who did not include Yang; (2) that the state failed to disclose the fact that one of the eye-witnesses identified another person as one of the shooters from a second photographic display; (3) that the evidence that St. Paul police officers knew Yang was not one of the shooters constituted newly discovered, exculpatory evidence; (4) that DM's statement to a defense investigator that he was told his DNA and fingerprints were discovered in the SUV and that he was shown pictures of the SUV before identifying it constituted newly discovered, exculpatory evidence; and (5) that another potential suspect with gang ties was a block away from the shooting at the time and may have been involved constituted newly discovered, exculpatory evidence. Yang raises several other arguments for relief in his reply brief and supplemental pro se brief.

DECISION

A petitioner for postconviction relief "has the burden of establishing, by a fair preponderance of the evidence, facts [that] warrant a reopening of the case." *State v. Rainer,* 502 N.W.2d 784, 787 (Minn.1993). Denial of a petition without a hearing is appropriate if "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 (2008). To receive an evidentiary hearing, a "petitioner must allege facts that would, if proved by a fair preponderance of the evidence, entitle him to relief." *Ferguson v. State,* 645 N.W.2d 437, 446 (Minn.2002). The allegations must consist of more than "conclusory, argumentative assertions, without factual support." *State v. Turnage,* 729 N.W.2d 593, 599 (Minn.2007). If material facts are in dispute, the postconviction court must grant an evidentiary hearing. *Hodgson v. State,* 540 N.W.2d 515, 517 (Minn.1995).

I

The first two claims that Yang contends were erroneously excluded from the district court's order for an evidentiary hearing allege failure to disclose exculpatory evidence. "[S]uppression by the prosecution of evidence favorable to an accused ... violates due process [when] the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady,* 373 U.S. at 87, 83 S.Ct. at 1196-97. This obligation extends to anyone who has participated in the investigation or evaluation of the case. Minn. R.Crim. P. 9.01, subd. 1(7); *State v. Williams,* 593 N.W.2d 227, 235 (Minn.1999) (stating "individual prosecutor has a duty to learn of any favorable evidence known to others

acting on the government's behalf in the case, including the police" (quotation omitted)).

*3 To constitute a *Brady* violation, the evidence must be favorable to the accused, either because it is exculpatory or impeaching; it must have been suppressed by the state, willfully or inadvertently; and the nondisclosure must have resulted in prejudice. *Pederson v. State,* 692 N.W.2d 452, 459 (Minn.2005). The determination of prejudice, or materiality, requires "consideration of whether the evidence would have been admissible at trial and whether there is a 'reasonable probability' that it would have made a difference in the result at trial." *Gorman v. State,* 619 N.W.2d 802, 806 (Minn.App.2000), *review denied* (Minn. Feb. 21, 2001). Reasonable probability means that the state's nondisclosure of evidence "undermines confidence in the outcome of the trial." *Id.* at 807 (quoting *Kyles v. Whitley,* 514 U.S. 419, 434, 115 S.Ct. 1555, 1566, 131 L.Ed.2d 490 (1995)). We review the question of materiality de novo. *Pederson,* 692 N.W.2d at 460.

Yang submitted a notarized affidavit from the defense investigator that he hired. In his affidavit the investigator stated that a St. Paul police officer, who had provided the initial information linking the shooting to Yang's green Tahoe, told the investigator that he knew the names of the shooters, who were Yang's cousins; that this information had been offered to the prosecution or investigating officers but was not accepted because it would "mess up the appeals;" that the investigator arranged an interview to find out more information; and that the officer called the investigator to cancel the interview stating that his boss did not approve the meeting and that he would only provide additional information if he were subpoenaed.

Yang argues that the evidence of a St. Paul police officer's knowledge of the shooters' identities and knowledge that Yang was not one of the shooters should have been disclosed, and the failure to disclose constitutes a *Brady* violation, requiring a new trial.

The police officer told the defense investigator that Yang's cousins, and not Yang, were the shooters. This is exculpatory evidence favorable to Yang. The officer who made these statements had also contributed to the initial investigation of the shooting. Consequently, the state was obligated to disclose to Yang this information about the possible identity of shooters other than Yang. Because the state had an obligation to provide this information to Yang, the failure to provide it results in a *Brady* violation if the evidence was material to the determination of Yang's guilt. The postconviction court concluded that the officer's statement to the investigator was merely an opinion about the identity of the shooters and not evidence that should have been disclosed. The officer, however, indicated to the investigator that he could provide additional details but later refused to provide the details without a subpoena. Under these circumstances, the absence of more detailed facts is not sufficient to deny Yang an evidentiary hearing if the evidence is material.

*4 Whether evidence is material requires consideration of both its admissibility and the likelihood that it would have changed the outcome at trial. *Gorman,* 619 N.W.2d at 806. The evidence submitted in support of a petition for postconviction relief need not be admissible if it could lead to admissible evidence at an evidentiary hearing. *See Ferguson,* 645 N.W.2d at 443, 446 (reversing and remanding for evidentiary hearing despite inadmissibility of supporting affidavit because evidentiary hearing could lead to admissible evidence through subpoenaed testimony or hearsay exceptions).

The officer stated to the investigator that he would cooperate with a subpoena. And the record suggests that the officer may be able to testify to sufficient facts based on personal knowledge to show that a different outcome at trial was reasonably probable if Yang had evidence of the identity of alternative shooters. In assessing materiality, we may also consider "any adverse effect that the prosecutor's failure to disclose [evidence] might have had on the preparation or presentation of the defendant's case." *State v. Williams,* 593 N.W.2d at 235 (quoting *United State v. Bagley,* 473 U.S. 667, 683, 105 S.Ct. 3375, 3384, 87 L.Ed.2d 481 (1985)). Even if an evidentiary hearing does not lead to admissible evidence from the officer, the officer's testimony may show that Yang's preparation or presentation of his defense was prejudiced by not knowing what police knew about the identities of the shooters.

We recognize that the weight of the other evidence at trial can be sufficient to show that the undisclosed evidence is not material and that an evidentiary hearing is not warranted. *See Williams,* 593 N.W.2d at 235-36. Although three eye-witnesses identified Yang as the shooter, one of these witnesses recanted during jury deliberations. Even though the recantation was later determined not to be genuine, the district court questioned the credibility of the witness generally. Two other witnesses who spoke with the shooters at the scene

shortly before the shooting took place did not identify Yang as a shooter and the postconviction court granted an evidentiary hearing to evaluate the credibility of the statement by one of these witnesses that she is ninety to ninety-five percent certain Yang was not one of the shooters. We also note that the test for prejudice, or materiality, in a *Brady* violation is not as stringent as the test for prejudice that is applied to newly discovered evidence, and it is the less-stringent standard that we apply to determine whether an evidentiary hearing is required. *Walen v. State*, 777 N.W.2d 213, 217 (Minn.2010); *Gorman*, 619 N.W.2d at 806. We conclude that Yang has met the evidentiary-hearing threshold on the state's failure to disclose the St. Paul police officer's statement that Yang was not the shooter.

Yang's second *Brady* claim relies on the fact that witness RH identified another suspect from a second photographic display. Yang submitted an affidavit from RH and the transcript of the defense investigator's interview with RH in support of his postconviction petition. It demonstrates that RH identified Yang as one of the shooters from one photographic display and identified the person he believed to be the other shooter from the second photographic display. The fact that RH identified the person he believed was the second shooter is not exculpatory and not material because it is unlikely to have any impact on a jury's verdict of Yang's guilt. Thus, the postconviction court did not err in denying an evidentiary hearing on this ground.

II

*5 Yang advances the remaining three claims for an evidentiary hearing under the claim of newly discovered evidence. One of these claims, the statements of the St. Paul police officer, has already been addressed in our analysis of Yang's *Brady* argument and we remand it for inclusion in the evidentiary hearing. Thus it is unnecessary to address it as newly discovered evidence.

To receive a new trial based on newly discovered evidence, a petitioner must show: "(1) that the evidence was not known [by] the defendant or his counsel at the time of [ ] 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 more favorable result." *Rainer*, 566 N.W.2d at 695.

Yang argues that he should be granted an evidentiary hearing based on evidence that DM believed his DNA and fingerprints were found in the SUV, that DM was shown pictures of the green Tahoe before identifying it, and he possibly saw those pictures before describing it to police. In support of this claim, Yang only submitted copies of notes from the defense investigator's interview with DM. In his brief to this court, Yang asserts that DM refused to provide an affidavit to the investigator, but the investigator's notes do not address this refusal and the investigator did not submit an affidavit on this issue. In his notes, the investigator states that DM told him that he was shown pictures of a green Tahoe before he identified Yang's car at the impound lot and that DM cannot remember if he was shown the photographs before giving a detailed description of the SUV's interior to the police. The investigator's notes do not indicate whether DM was shown pictures of the SUV's interior, or only the exterior of a green Tahoe. The notes also state that DM told the investigator that police informed him that fingerprint and DNA evidence proved he had been in the car. The notes do not specify whether DM was told this before or after he identified the SUV.

Although Yang argues that this new evidence undermines the reliability of DM's identification of the SUV, and therefore his connection to the crimes, the record does not support his argument. From a photographic display DM identified Yang as the driver of the car and as someone who had previously approached him to buy drugs, independent from his description and identification of the SUV. Three eye-witnesses identified Yang as the shooter or as present outside the convenience store shortly before the shooting. And the district court record indicates the following timeline: DM gave a description of the SUV on July 11, investigators did not obtain pictures of the exterior of the SUV until July 12, and investigators did not obtain access to the interior until July 13-the same day DM identified it.

The notes from the investigator fail to establish grounds for postconviction relief based on newly discovered evidence. It is the petitioner's burden to allege facts that, if proven by a fair preponderance of the evidence, entitle him to relief. *Ferguson*, 645 N.W.2d at 446. And "allegation[s] must be more than just [ ] argumentative assertion[s] to warrant an evidentiary hearing." *Doppler v. State*, 771 N.W.2d 867, 873 n. 2. Yang did not provide a factual basis for his allegations, and the facts alleged by Yang are not sufficient to undermine the reliability of DM's identification. Also, the evidence that DM was shown photographs of an SUV and told that his

fingerprints and DNA were found in the Tahoe, if proved, would not likely lead to an acquittal in light of the other evidence at trial. The district court did not abuse its discretion in denying an evidentiary hearing to assess the evidence that DM was shown photographs of the SUV before identifying it, but likely after describing it, and was told at some point that forensic evidence connected him to the car.

*6 Yang also argues that the district court erred in denying an evidentiary hearing based on his claim that another potential suspect, KMY, was near the convenience store at the time of the shooting and was connected to the shooting. The district court granted an evidentiary hearing to assess the credibility of one witness's exonerating statements and her explanation that she did not tell police about the shooters' connection to KMY because KMY threatened her. Thus, much of the evidence that Yang discusses in his new-evidence claim will be evaluated in the evidentiary hearing. Evidence limited to KMY's presence at the scene and police records of his gang connections is speculative and collateral and unlikely to lead to a more favorable result at trial, on its own. *See Williams*, 593 N.W.2d at 235 (holding collateral and speculative evidence that third-party may have committed crime with which defendant is charged is not material under *Brady*). The district court did not abuse its discretion in denying a hearing to explore evidence that consists only of KMY's presence and criminal history.

III

Yang raises several additional arguments in his reply brief and supplemental pro se brief that were not raised directly in his 2009 amended petition. In his reply brief, Yang challenges the reliability of identifications from photographic displays and cross-racial identifications. These claims are *Knaffla*-barred. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (holding all claims that have been raised or could have been raised on direct appeal are procedurally barred from consideration in postconviction review).

In his pro se supplemental brief, Yang argues that the claims raised in his 2009 amended postconviction petition and his main appellate brief require us to reverse his convictions and release him from incarceration. Because the evidence submitted in support of his petition has not been shown to be admissible in a new trial, much less sufficient to prove Yang's innocence on its own, reversal and discharge are inappropriate. In the direct appeal we held that the evidence submitted at trial was sufficient to support Yang's convictions, and until Yang establishes new evidence that would call the trial evidence into question, he has not carried his burden to show he is entitled to relief. *See Rainer*, 502 N.W.2d at 787 (stating petitioner's burden).

Affirmed in part, reversed in part, and remanded.

All Citations

Not Reported in N.W.2d, 2010 WL 3632505

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