STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0791

State of Minnesota,
Respondent,

vs.

Blanyon Toe Davies,
Appellant.

Filed January 11, 2021
Affirmed
Florey, Judge

Hennepin County District Court
File No. 27-CR-17-24864

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Bryan, Judge; and Klaphake, Judge.[*]

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

NONPRECEDENTIAL OPINION

FLOREY, Judge

In this direct appeal from the district court's order denying postconviction relief, appellant Blanyon Toe Davies argues that he is entitled to a new trial based on newly discovered evidence that undermines the victim's testimony and that the postconviction court erred in denying him an evidentiary hearing where the alleged facts, if true, would entitle him to relief. We affirm.

FACTS

A jury found Davies guilty of first-degree aggravated robbery. We affirmed his conviction in *State v. Davies*, A18-1506, 2019 WL 3000732 (Minn. App. July 1, 2019), *review denied* (Minn. Sept. 17, 2019), rejecting his claim, among others, that he was entitled to a new trial based on newly discovered evidence that undermined the victim's trial testimony.

The evidence presented at trial is summarized in our earlier opinion. Described briefly, Davies accompanied J.O. into an apartment building to discuss the sale of a car. Davies and several other men attacked J.O., threatened to shoot him, and took his money, car keys, and phone. The jury heard testimony from J.O., police officers, and Davies, who denied hitting or robbing J.O. The jury found Davies guilty of first-degree aggravated robbery.

Davies filed a motion for a new trial based on newly discovered evidence. The newly discovered evidence consisted of text messages exchanged between J.O. and M.Z., who was also accused of assaulting and robbing J.O. with Davies. Davies alleged that the

state had only disclosed a portion of the text messages between J.O. and M.Z. before trial and that he did not learn of the additional text messages until after trial. These text messages contradict J.O.'s trial testimony because they (1) suggest that J.O. taunted M.Z. about his relationship with M.Z.'s girlfriend even though he testified this was not the cause of the dispute; (2) suggest that J.O. knew M.Z. fairly well even though he testified that he did not know M.Z. personally; and (3) describe the details of a car deal between M.Z. and J.O.'s friend differently than J.O.'s testimony.

The district court denied the motion, concluding that the motion was untimely and that Davies provided no supporting evidence. *See* Minn. R. Crim. P. 26.04, subd. 1(3) (requiring a motion for a new trial to be served within 15 days after a verdict). Davies then filed a motion to reconsider, which the district court also denied. In his first appeal, Davies asked us to consider the merits of his newly discovered evidence claim. We instead affirmed the district court on the ground that the motion was untimely. The Minnesota Supreme Court denied Davies's petition for further review.

Davies then filed a petition for postconviction relief, again requesting a new trial based on newly discovered evidence that undermined the victim's trial testimony. He also requested an evidentiary hearing. The postconviction court denied the motion without a hearing on the grounds that the claim was procedurally barred and meritless.

This appeal follows.

DECISION

I. Davies's claim is not *Knaffla*-barred.

The state argues that Davies's claim of newly discovered evidence is procedurally barred under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976). Once a direct appeal has been taken, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *Knaffla*, 243 N.W.2d at 741. The *Knaffla* rule bars "all claims that the appellant should have known of at the time of direct appeal." *Koskela v. State*, 690 N.W.2d 133, 134 (Minn. 2004).

"There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Taylor v. State*, 691 N.W.2d 78, 79 (Minn. 2005). "The second exception may be applied if fairness requires it and the petitioner did not 'deliberately and inexcusably' fail to raise the issue on direct appeal." *Id.* (quoting *Fox v. State*, 474 N.W.2d 821, 825 (Minn. 1991)).

Davies argues that he did not "fail to raise the newly discovered evidence claim on appeal," but rather "this court declined to address the merits of the claim." We agree, and because Davies did not "deliberately and inexcusably" fail to raise his claim on direct appeal, we will review the postconviction court's denial of Davies's claim on the merits.

II. The postconviction court applied the correct standard of review.

Davies argues that the postconviction court abused its discretion by imposing on him the "burden to exculpate himself or prove his innocence." Our review of postconviction proceedings is "limited to a determination of whether there is sufficient evidence to sustain the postconviction court's findings." *Rainer v. State*, 566 N.W.2d 692,

695 (Minn. 1997). In a postconviction proceeding, Davies, as the petitioner, bears the burden of proving facts alleged in the petition by a preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2018); *see also Scherf v. State*, 788 N.W.2d 504, 507 (Minn. 2010). "We will not disturb a postconviction court's decision absent an abuse of discretion." *Rainer*, 566 N.W.2d at 695.

Here, in its order denying Davies's petition, the postconviction court correctly stated that Davies must establish "by a fair preponderance of the evidence, facts which would warrant a reopening of the case." *See Scherf*, 788 N.W.2d at 507. We therefore conclude that the postconviction court did not hold Davies to an incorrect burden of proof.

III. The postconviction court did not abuse its discretion by failing to grant Davies a new trial.

Davies argues that the newly discovered text messages entitle him to a new trial because they provide new information about J.O.'s reason for being at the apartment building and his motive to lie. In order to obtain a new trial based on newly discovered evidence,

> a defendant must prove the following: (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).

With respect to the first prong of the newly discovered evidence test, the postconviction court found, and the state does not contest, that at the time of trial Davies

did not know of the text messages. But the parties dispute whether Davies has met his burden to satisfy prongs two, three, and four. We will analyze these prongs in turn.

A. The evidence could have been discovered before trial.

Davies contends that while the state disclosed a portion of the text-message conversation between M.Z. and J.O. before trial, he had no reason to believe additional messages existed and that his failure to obtain the additional text messages before trial was not for his lack of diligence.

The postconviction court reasoned that "due diligence could reasonably include an effort to at least try to ascertain what a co-defendant might be willing to share. And where, as here, the proffered evidence would relate to a mutually beneficial argument each co-defendant could put forward—the victim had a motive to lie—there would be an apparent incentive to share that information." The postconviction court concluded that "the lack of inquiry and apparent surprise at the existence of more communication is not indicative of due diligence to ascertain the evidence presented."

While it may be true that Davies did not know about the other text messages, Davies does not explain why he could not have learned of the text messages earlier. *Cf. Saiki v. State*, 375 N.W.2d 547, 549 (Minn. App. 1985) (concluding that petitioner had not shown that newly discovered witness could not have been discovered earlier through due diligence where record did "not show what efforts were made to locate the witness"), *review denied* (Minn. Dec. 19, 1985). Thus, Davies did not meet his burden to establish that he could not have discovered the text messages before trial with due diligence. *See Pippit v. State*, 737 N.W.2d 221, 226 (Minn. 2007) (stating that a postconviction petitioner "has the burden of

showing that he is entitled to relief"). We therefore conclude that the postconviction court did not abuse its discretion by concluding that Davies did not exercise due diligence to learn about the text messages earlier.

B. The evidence is immaterial and merely impeaching.

The third prong of newly discovered evidence test is that the evidence be material, and not merely impeaching. *Pippitt*, 737 N.W.2d at 228. We will not grant a new trial based on newly discovered evidence that is merely impeaching. *Id.*; *see also Wayne v. State*, 498 N.W.2d 446, 448 (Minn. 1993) (observing that newly discovered evidence that is "doubtful, cumulative or impeaching" may not form the basis for a new trial). Davies acknowledges that the text messages impeach J.O., but argues that they also "provide new and additional information regarding [J.O.'s] presence at the apartment . . . , the extent of his dispute with [M.Z.], and [J.O.'s] motive for fabrication."

Here, the text messages call into question J.O.'s testimony relating to his relationship with M.Z., his knowledge that he and M.Z. dated the same woman, and the details of and his role in the car sale involving M.Z. The postconviction court determined, and the evidence in the record supports, that the newly discovered text messages merely impeach J.O.'s trial testimony. Accordingly, the postconviction court did not abuse its discretion in concluding that the newly discovered text messages did not entitle Davies to a new trial.

C. The evidence is unlikely to produce either an acquittal or a more favorable result.

Davies argues that the newly discovered text messages are likely to produce either an acquittal at retrial or a result more favorable to him because they corroborate his trial testimony and provide a motive for J.O. to fabricate the assault. We analyze the fourth prong of the newly discovered evidence test by examining the admissibility and weight of the evidence introduced. *See Race v. State*, 504 N.W.2d 214, 218 (Minn. 1993) (holding that the postconviction court did not abuse its discretion in finding that evidence would not have caused a more favorable result because other evidence introduced by the state at trial would have accounted for and discredited the defendant's new evidence).

Here, the only effect of the text messages would be to impeach J.O.'s credibility, which Davies already had done at trial. Davies has not shown that additional impeachment of J.O.'s credibility would have produced a more favorable result, nor that the text messages contradict the evidence that Davies assaulted J.O. and took his money. *See, e.g.*, *Campbell v. State*, 916 N.W.2d 502, 511 (Minn. 2018) (noting that if a witness has already been impeached, further impeachment is unlikely to affect the outcome of the case).

After discussing the weight of evidence introduced, the postconviction court concluded that it could not say that "a jury trial probably would have resulted in a more favorable result" because the text messages, "while contradicting several aspects of the victim's testimony, do not demonstrate how [Davies] is innocent of first-degree aggravated robbery." After our own review of the evidence, we also conclude that it is unlikely that the text messages would have produced either an acquittal or a more favorable result. We

therefore conclude that the postconviction court did not abuse its discretion in determining that the newly discovered text messages do not meet the fourth prong of the newly discovered evidence test.

Because Davies has not met his burden of establishing, by a fair preponderance of the evidence, facts that would warrant a new trial, we conclude the postconviction court did not err in denying him relief based on newly discovered evidence.

IV. The postconviction court did not abuse its discretion by denying an evidentiary hearing.

The final question is whether Davies nevertheless alleged sufficient facts to warrant an evidentiary hearing. "The showing required for a petitioner to receive an evidentiary hearing is lower than that required to receive a new trial." *See Opsahl v. State*, 677 N.W.2d 414, 423 (Minn. 2004). To prevail on a request for 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). If the petition and the files and records of the proceeding conclusively show that the petitioner is not entitled to relief, the postconviction court may deny the petition without a hearing. Minn. Stat. § 590.04, subd. 1 (2018). We review the denial of a postconviction evidentiary hearing for an abuse of discretion. *Buckingham v. State*, 799 N.W.2d 229, 233 (Minn. 2011).

As discussed above, Davies fails to allege facts sufficient to satisfy three of the four requirements for a new trial based on newly discovered evidence. Thus, the postconviction court did not abuse its discretion by denying Davies's request for an evidentiary hearing.

Affirmed.