STATE OF MINNESOTA

IN SUPREME COURT

A22-0304

Hennepin County Hudson, J.

Adl El-Shabazz, f/k/a A.C. Ford,

Appellant,

vs. Filed: _____, 2023
Office of Appellate Courts

State of Minnesota,

Respondent.

Jordan S. Kushner, Law Office of Jordan S. Kushner, Minneapolis, Minnesota, for appellant.

Keith Ellison, Minnesota Attorney General, Saint Paul, Minnesota; and

Mary F. Moriarty, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota, for respondent.

S Y L L A B U S

Even when viewed in a light most favorable to appellant, the statements in the affidavit of his codefendant fail to satisfy the time-bar exception for newly discovered evidence because appellant was present during the relevant events described in the

affidavit, and therefore it was not an abuse of discretion for the district court to summarily deny appellant's eighth postconviction petition.

Affirmed.

O P I N I O N

HUDSON, Justice.

This case presents the issue of whether the district court abused its discretion when it summarily denied appellant Adl El-Shabazz's (f/k/a A.C. Ford) eighth postconviction petition as untimely based on its determination that the statements in the affidavit of one of his codefendants fail to satisfy the time-bar exception for newly discovered evidence.

Following a jury trial, El-Shabazz was convicted of first-degree premeditated murder under an aiding and abetting theory of liability based on his involvement in the 1992 shooting death of Minneapolis Police Officer Jerome Haaf. This is El-Shabazz's eighth postconviction petition. The petition invokes the time-bar exception for newly discovered evidence, relying on an affidavit of one of El-Shabazz's codefendants, Nantambu Noah Kambon (f/k/a Shannon Noah Bowles). In his affidavit, Kambon alleges that although El-Shabazz was present during a pre-shooting gathering, there was no plan among the codefendants to shoot a police officer and Kambon acted alone when he shot Officer Haaf. The district court summarily denied El-Shabazz's petition as untimely based on its determination that the statements in Kambon's affidavit were not newly discovered.[1]

[1] The district court also determined that the statements in Kambon's affidavit failed to establish El-Shabazz's innocence by a clear and convincing standard. As explained below, we need not decide whether this determination is an abuse of discretion because we conclude that the district court did not abuse its discretion when it determined that the

El-Shabazz now appeals, arguing that the district court abused its discretion when it summarily denied his postconviction petition. Because we conclude the district court did not abuse its discretion, we affirm.

FACTS

On September 25, 1992, at least two men entered the Pizza Shack restaurant in South Minneapolis and shot and killed Officer Haaf. Gerald Lubarski, who was sitting with Officer Haaf, was wounded.[2] A Hennepin County grand jury indicted El-Shabazz with several offenses, including first-degree premeditated murder. El-Shabazz pleaded not guilty and demanded a jury trial. At trial, Richard, a minor and accomplice, testified about the events leading up to and following the shooting.

Richard, Kambon, Amwati "Pepi" McKenzie, Monterey Willis, Dawn Jones, and El-Shabazz gathered at Samuel "Sharif" Willis's home.[3] Richard testified that while the group was at Sharif's home, El-Shabazz stated, "All right, this is what we are going to do. We are going to walk up on the number five bus line and shoot the bus driver." Monterey

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statements in Kambon's affidavit failed to satisfy the newly discovered evidence requirement of the time-bar exception. *See Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012) (explaining that all five requirements of the time-bar exception for newly discovered evidence must be established to obtain relief).

[2] The facts of the murder are set out in greater detail in our opinion affirming El-Shabazz's conviction on direct appeal, *State v. Ford*, 539 N.W.2d 214, 217–20 (Minn. 1995) (*Ford I*), affirming the denial of El-Shabazz's fourth petition for postconviction relief, *Ford v. State*, 690 N.W.2d 706, 708 (Minn. 2005) (*Ford II*), and affirming the denial of El-Shabazz's fifth petition for postconviction relief, *El-Shabazz v. State*, 754 N.W.2d 370, 372–74 (Minn. 2008).

[3] Testimony was given that each of these individuals was a member of the Vice Lords street gang.

responded, "No man, you must be crazy." El-Shabazz replied, "All right, then let's do Pizza Shack." Richard further testified that El-Shabazz gave McKenzie a bag that appeared to hold a revolver. McKenzie went into the kitchen and, when he returned, Richard saw the handle of a gun above the belt line of McKenzie's pants.

Shortly after, El-Shabazz, Monterey, Kambon, McKenzie, and Richard left Sharif's home. Richard and McKenzie drove together and followed the truck that the three other men rode in. McKenzie told Richard they were "going to the Pizza Shack and kill a cop." Nothing was mentioned about a plan to shoot out windows there. McKenzie got out of the car driven by Richard, Kambon got out of the truck driven by El-Shabazz, and the two headed towards the Pizza Shack. Richard testified that El-Shabazz told him to circle around the block and pick up Kambon and McKenzie if they came his way. When Richard did not see the two, he went to the house of Ed Harris, an acquaintance.[4] McKenzie and Kambon were there when Richard arrived, and McKenzie told Richard, "I think I shot the cop."

A jury found El-Shabazz guilty of first-degree premeditated murder, first-degree murder of a peace officer, and attempted first-degree murder under aiding and abetting theories of liability. *State v. Ford*, 539 N.W.2d 214, 217 (Minn. 1995) (*Ford I*). His convictions were affirmed on appeal. *Id.* In July 1993, a jury found Kambon guilty of the same charges. *State v. Bowles*, No. 27-CR-92-095958 (Henn. Cnty. Dist. Ct.). In

[4] Ed Harris was murdered two weeks after Officer Haaf was murdered. Police theorized that he was killed by Vice Lords members who feared Harris was sharing information relating to the Haaf murder with law enforcement. *Ford I*, 539 N.W.2d at 220.

October 1993, a jury found McKenzie guilty of first-degree murder of a peace officer. *State v. McKenzie*, No. 27-CR-92-095956 (Henn. Cnty. Dist. Ct.). El-Shabazz subsequently filed seven petitions for postconviction relief between 1995 and 2010. *See generally Ford v. State*, 690 N.W.2d 706, 708 (Minn. 2005) (*Ford II*); *El-Shabazz v. State*, 754 N.W.2d 370, 375–77 (Minn. 2008).

In July 2021, Kambon signed a sworn affidavit that alleged he acted alone when he shot Officer Haaf. The affidavit alleges the following relevant facts:

> 2. I was a co-defendant of [A.C.] Ford (n/k/a Adl El-Shabazz) . . .
>
> . . .
>
> 9. While it is the truth that I shot Officer Haaf, it is also the truth that none of my co-defendants had anything to do with the murder. I never had any discussions with any of my co-defendants about shooting a police officer or anyone else. None of my co-defendants said anything to me about shooting anyone. I never said anything to my co-defendants or anyone else about shooting anyone.
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> 10. My co-defendants and I were gathered at the home of Sharif[] Willis prior to going to the Pizza Shack. There was a statement about going to "hit the Pizza Shack." My understanding was that we were going to scare police officers, perhaps by shooting windows. We knew that police officers commonly frequented the Pizza Shack. I had no reason to believe there was any plan or expectation of shooting a police officer or shooting at any people.
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> 11. When we arrived at the Pizza Shack, I took it upon myself to enter the restaurant and shoot a police officer. No one had told me [t]o enter or did anything whatsoever to suggest that I enter the restaurant or shoot a police officer.
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> 12. Although McKenzie followed me into the restaurant, he did not shoot anyone and there was no reason that he would have known what I was going to do.
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> 13. The prosecution claimed at my trial and apparently [m]y co-defendants' trials that the shooting of a police officer was a plan by the

> Vice Lords gang. I was not a member of the Vice Lords, ~~was not trying to get into the Vice Lords~~,[5] and never attended any of the formal meetings of the Vice Lords. I did not take orders from Sharif[] Willis, [El-Shabazz], Monter[e]y Willis or anyone else. My only association with any Vice Lords members was for purposes of my drug dealing business.
>
> l4. Prior to killing of Officer Haaf, I had no relationship with [El-Shabazz]. I believe I saw him at a club or party on a couple of occasions but never had a substantive conversation with him. I did not even know McKenzie's name at the time, and do not believe I had ever seen Richard, the juvenile who admitted to participating in the murder and testified against all of the co-defendants.
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> 15. On July 1, 2021, I called attorney [J.S.K.], whom I knew to have been a defense attorney for [El-Shabazz]. I called [J.S.K] because I have no way of speaking directly with [El-Shabazz] who is in another prison. This was the first time that I had told anyone connected with [El-Shabazz] that I was prepared to come forward and confirm his innocence. I was first able to speak with [J.S.K.] in detail eight days later when prison officials finally arrange[d] for a partially private legal call.

El-Shabazz filed his eighth postconviction petition, asserting that the Kambon affidavit satisfied the 2-year postconviction time-bar exception for newly discovered evidence under Minnesota Statutes section 590.01, subdivision 4(b)(2) (2022). The district court concluded that El-Shabazz's petition failed to satisfy two of the five requirements of the exception for newly discovered evidence. Accordingly, the district court concluded that El-Shabazz's petition was time-barred and summarily denied his petition.

ANALYSIS

We review the summary denial of a petition for postconviction relief for an abuse of discretion. *Martin v. State*, 969 N.W.2d 361, 363 (Minn. 2022). A district court abuses

[5] When Kambon reviewed and signed the affidavit, he crossed out the phrase "was not trying to get into the Vice Lords," presumably because he was in fact trying to get into the Vice Lords gang.

its discretion when it has "exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017) (citation omitted) (internal quotation marks omitted). We review the district court's legal conclusions de novo and its factual findings for clear error. *Thoresen v. State*, 965 N.W.2d 295, 303 (Minn. 2021).

A district court need not hold an evidentiary hearing if the alleged facts when viewed in a light most favorable to the petitioner, together with the arguments of the parties, "conclusively show" that the petitioner is entitled to no relief. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012); *see also Rossberg v. State*, 932 N.W.2d 6, 9 (Minn. 2019) (explaining that a district court "need not hold an evidentiary hearing when the petitioner alleges facts that, if true, are legally insufficient to entitle [the petitioner] to the requested relief"). As a result, a court "may summarily deny a claim that is untimely under the 2-year statute of limitations." *Id.*

Minnesota Statutes section 590.01, subdivision 4(a) (2022), requires that, unless an exception applies, a petition for postconviction relief be filed within 2 years after "the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." If a petitioner's conviction became final before August 1, 2005, as it did for El-Shabazz, the 2-year limitations period began August 1, 2005. *See* Act of June 2, 2005, ch. 136, art. 14, § 13, 2005 Minn. Laws 901, 1097–98. It is undisputed that El-Shabazz filed his eighth postconviction petition more than 2 years after the 2-year limitations period expired. Accordingly, his petition is

untimely unless it falls within one of the exceptions enumerated in subdivision 4. *See* Minn. Stat. § 590.01, subd. 4(b)(1)–(5) (2022).

Only one of the exceptions is relevant here: the exception for newly discovered evidence of innocence. Minn. Stat. § 590.01, subd. 4(b)(2). As an initial matter, "[i]n order for postconviction relief to be granted on the basis of newly-discovered evidence," even when raised in a *timely* petition filed within the 2-year limitations period, "a petitioner must establish that (1) the evidence was unknown to him and his counsel at the time of trial; (2) the failure to discover that evidence before trial was not due to a lack of diligence; (3) the evidence is material (i.e., not impeaching, cumulative, or doubtful); and (4) the evidence would probably produce a more favorable result on retrial." *Whittaker v. State*, 753 N.W.2d 668, 671 (Minn. 2008) (citing the test established in *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997)). The burden on the petitioner is even higher when the newly discovered evidence exception is invoked as the basis for filing a petition beyond the 2-year limitations period. Under the newly discovered evidence exception, the petitioner must show that the evidence: "(1) is newly discovered; (2) could not have been ascertained by the exercise of due diligence by the petitioner or the petitioner's attorney within the 2-year time-bar for filing a petition; (3) is not cumulative to evidence presented at trial; (4) is not for impeachment purposes; and (5) establishes by the clear and convincing standard that petitioner is innocent of the offenses for which he was convicted." *Riley*, 819 N.W.2d at 168; *see also* Minn. Stat. § 590.01, subd. 4(b)(2). All five requirements must be met for the newly discovered evidence exception to apply. *Henderson v. State*, 906 N.W.2d 501, 506 (Minn. 2018).

El-Shabazz argues that the district court abused its discretion when it determined that his petition failed under the first requirement of the newly discovered evidence exception: that the evidence is newly discovered. El-Shabazz contends that the statements in the Kambon affidavit are newly discovered because he could not have known what Kambon would testify and that calling Kambon to testify at his trial would have been futile, as Kambon would have invoked his Fifth Amendment privilege against self-incrimination. We disagree.

Whether a witness did or did not testify at trial is irrelevant to the analysis of newly discovered evidence. In applying the more favorable *Rainer* test to a timely postconviction petition, we held that later statements of a witness are not "unknown" if the petitioner was "admittedly present at the time of the events the witness purports to describe." *Whittaker*, 753 N.W.2d at 671. This holding is true even if the witness invoked his Fifth Amendment right against self-incrimination or did not testify for some other reason. *Id.* at 671–72.

We have held that this principle—that later statements of a witness are not unknown if the petitioner was admittedly present during the events the witness purports to describe—also applies to the newly discovered evidence exception in subdivision 4(b)(2). *See Onyelobi v. State*, 966 N.W.2d 235, 238 (Minn. 2021). The Kambon affidavit, therefore, does not fall within the newly discovered evidence exception to the time-bar simply because Kambon did not testify at El-Shabazz's trial. *See id.* at n.4.

Instead, the proper focus of the analysis is whether El-Shabazz was admittedly present during the *relevant* events alleged in Kambon's affidavit. In his affidavit, Kambon alleges that he acted alone in shooting Officer Haaf and that he did not plan the shooting

with anyone. But he also alleges that he and his codefendants were gathered at Sharif Willis's home before the murder and a statement was made about going "to hit the Pizza Shack." This fact is relevant because El-Shabazz's criminal liability was based on an aiding and abetting theory that relied on his participation in planning the shooting before it occurred. Because El-Shabazz was present at the pre-shooting gathering, he personally knew at the time of his trial whether a plan to shoot a police officer was or was not discussed at the gathering. Put differently, even though Kambon's affidavit did not exist at the time of trial and Kambon did not testify at El-Shabazz's trial, the contention that during the pre-shooting gathering, El-Shabazz did not tell Kambon to shoot a police officer was not unknown to El-Shabazz because he was admittedly present at that pre-shooting gathering.

El-Shabazz argues that the rule announced in *Onyelobi*, 966 N.W.2d at 238, does not apply here because he was not present at the shooting itself. We disagree. The fact that El-Shabazz was not present at the shooting is irrelevant because El-Shabazz's criminal liability is based on an aiding and abetting theory due to his planning actions *before* the shooting occurred.

In sum, even when viewed in a light most favorable to El-Shabazz, the statements in Kambon's affidavit fail to satisfy the time-bar exception for newly discovered evidence. Because El-Shabazz was present during the relevant events described in the affidavit, he had personal knowledge at the time of his trial of whether he did, or did not, participate in a plan to shoot a police officer. Accordingly, the statements in the Kambon affidavit are not newly discovered, and the district court did not abuse its discretion when it summarily

denied El-Shabazz's eighth postconviction petition as untimely under Minnesota Statutes section 590.01, subdivision 4(a).

CONCLUSION

For the foregoing reasons, we affirm the decision of the district court.