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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1503

Marcus Allen Brown,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 16, 2012
Affirmed
Randall, Judge*

Hennepin County District Court
File No. 27-CR-05-009930

Frederick J. Goetz, Goetz & Eckland, P.A., Minneapolis, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Connolly, Judge; and Randall, Judge.

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

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

RANDALL, Judge

In this postconviction appeal challenging his conviction of second-degree intentional murder, appellant argues that the district court abused its discretion in denying his request to withdraw his guilty plea. We affirm.

FACTS

On August 19, 2004, appellant Marcus Allen Brown approached several people who were involved in an argument outside of a home in Minneapolis. Someone handed appellant a gun and he fired it several times, killing Darrius Dixon and wounding Chris Shaw. In an interview on August 20, Minneapolis Police Lieutenant Richard Zimmerman asked Shaw if he had ever seen the person who shot him, and Shaw stated: "I ain't going to lie. I was sort of tipsy, so I don't even remember his face. I just remember light skinned with braids. If I had a picture of him I probably can—you know what I am saying." In an interview with Zimmerman on August 31, Shaw identified appellant as the man who shot him. Shaw later testified before the Hennepin County grand jury that appellant was the person who shot him. In February 2005, appellant was indicted by the grand jury for one count of first-degree murder and two counts of first-degree attempted murder.

In September 2005, appellant pleaded guilty, pursuant to a plea agreement, to an amended count of second-degree intentional murder. In exchange, the state agreed to dismiss the two counts of first-degree attempted murder at the time of sentencing. The parties further agreed that appellant would be sentenced to 432 months, which was an

upward departure from the 306-month presumptive sentence. Following the plea hearing, appellant sent a letter to the district court stating that he intended to file a motion to withdraw his guilty plea. But appellant later agreed to proceed with sentencing, and the district court sentenced him to 432 months in prison.

In 2008, appellant filed a petition for postconviction relief, arguing that the upward departure in his sentence violated his rights under *Blakely v. Washington*.[1] The district court denied appellant any relief, finding that he had waived his *Blakely* rights. On appeal, this court concluded that appellant's *Blakely* waiver was valid and affirmed the district court. *Brown v. State*, No. A08-709 (Minn. App. Mar. 31, 2009).

In 2010, appellant filed a second petition for postconviction relief. He requested that the district court allow him to withdraw his plea because he alleged that the prosecution had suppressed the following evidence at the time he pleaded guilty: the police promised Shaw that he would not be charged with a serious felony if he identified appellant as the person who shot him; the police "engaged in suggestive conduct" when they displayed a photo lineup to Shaw; and the police did not disclose that Shaw told them he could not identify appellant as the shooter. Appellant submitted an affidavit from Shaw, dated August 13, 2010, in which he stated:

> The shooting happened real quick. It was also dark outside. I was also still under the influence of the pills and alcohol when the shooting happened. I did not get a good look at the person who shot me. I can not now and never have been able to identify who it was who shot me.

[1] 542 U.S. 296, 301-04, 124 S. Ct. 2531, 2536-38 (2004) (holding that a defendant has the right to have a jury determine whether there are any aggravated factors that would affect sentencing).

In the affidavit, Shaw stated that he told Lieutenant Zimmerman the day after the shooting that he did not know who shot him. He further stated that, about a week later, Zimmerman showed him photographs and he was again unable to identify the person who shot him. He stated that Zimmerman "pointed to one of the photos and said something like 'are you sure it's not him.'" Shaw later found out that the person in the photograph was appellant. Shaw stated: "I identified [appellant] as the shooter because I felt that Zimmerman wanted me to. He also made it clear to me that he would take care of the assault/gun possession case that I was then locked up for." According to Shaw's affidavit, he was "released from jail within hours of identif[ying] [appellant]."

Appellant included a copy of Shaw's "Inmate Booking History Summary" from the Hennepin County Sheriff's Office with his postconviction petition. According to the document, Shaw was booked into the Hennepin County jail on August 28, 2004, for "PC Assault" and was "Released Pending Complaint" on August 31.

In February 2011, Minneapolis Police Sergeant Darcy Klund met with Shaw, who was in prison at the time. During their conversation, which was secretly, but legally, tape-recorded, Shaw told the police officer that he did not lie when he identified appellant as the person who shot him. Shaw stated that he signed the August 13 affidavit because he wanted appellant to be released so that he could get revenge for the murder of his friend, Dixon, by killing appellant. He stated that Zimmerman was a "cool dude" and that he did not lie to him. During the meeting, Shaw wrote the following statement on a copy of the August 13 affidavit: "Your Honor, my statement to this affidavit was false

and I had ulterior motives when giving this statement. What I told Zimmerman was totally true in 04 and I recant this statement."

The district court held an evidentiary hearing, and Shaw testified that he did not know who shot him. He testified that he assumed that he would be released from jail if he identified appellant as the shooter and, in fact, he was released within an hour of identifying appellant as the shooter. Shaw further testified that he told Sergeant Klund that he lied in the August 13 affidavit because he had just talked to Dixon's family and they did not want appellant to be released from prison.

Appellant testified that he would not have pleaded guilty if he had known that the police engaged in misconduct. He testified that he lied when he pleaded guilty to second-degree murder and admitted shooting Dixon because he wanted to take advantage of the plea agreement. Appellant acknowledged that three other witnesses were planning to testify that he was the shooter.

Lieutenant Zimmerman testified that after Shaw was arrested on August 28 he requested to speak to Zimmerman so that he could "tell him everything." Lieutenant Zimmerman testified that he did not promise Shaw anything in exchange for identifying appellant as the shooter. He testified that Shaw was released on August 31 because the 36-hour hold was expiring.

The district court denied appellant's petition for postconviction relief. The district court found that "nothing Chris Shaw has ever said about who shot Darrius Dixon and himself is credible. Mr. Shaw's story changes whenever it suits him to change it. The Court is clearly aware of the intense dislike between [appellant] and Chris Shaw but the

Court does not believe Chris Shaw is ever capable of telling the truth." The district court further found that the police "did not withhold any exculpatory evidence about the murder," and stated that it did not "believe anything [Shaw] has said to anyone about the shooting on this case, whether or not he has been under oath when he said it. The truth is not in him. He says whatever he thinks might be of benefit to him at any given moment." The district court concluded that appellant was not entitled to relief because he "failed to credibly establish by a fair preponderance of the evidence any of the facts alleged in his post-conviction petition." Appellant concedes that during discovery he received a copy of the August 20 statement Shaw made to Lieutenant Zimmerman. But he argues that he did not receive jail records that demonstrate that Shaw was released from prison shortly after the statement was made and evidence that Shaw was never charged with a crime for that offense. This appeal follows.

D E C I S I O N

A defendant does not have an absolute right to withdraw a guilty plea after it has been accepted. *Perkins v. State*, 559 N.W.2d 678, 685 (Minn. 1997). But a district court may allow a defendant to withdraw a guilty plea at any time, even after sentencing, upon timely motion and proof that "withdrawal is necessary to correct a manifest injustice." Minn. R. Crim. P. 15.05, subd. 1. A defendant who files a petition for postconviction relief has the burden of proving the facts alleged in the petition by a "fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2010). To meet that burden, the petition "must be supported by more than mere argumentative assertions that lack factual support." *Henderson v. State*, 675 N.W.2d 318, 322 (Minn. 2004). A district court's

decision on a postconviction petition will not be reversed absent an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). On appeal from a postconviction order, appellate courts review issues of law de novo and issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A reviewing court gives "great deference to a district court's findings of fact" and will only reverse if the findings are clearly erroneous. *Dukes*, 621 N.W.2d at 251.

Appellant contends that he should be permitted to withdraw his plea because the prosecution failed to disclose that Shaw was unable to identify appellant as the person who shot him, and that Shaw's previous identification was the result of "police overreaching and suggestive conduct." "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963); *see also* Minn. R. Crim. P. 9.01, subd. 1(6) (stating that the state has a duty to disclose to a defendant all "[m]aterial or information in the prosecutor's possession and control that tends to negate or reduce the defendant's guilt"). A constitutional violation occurs if the evidence is favorable to the defendant, because it is exculpatory or impeaching; the evidence was suppressed by the state, either willfully or inadvertently; and the defendant was prejudiced as a result. *Pederson v. State*, 692 N.W.2d 452, 459 (Minn. 2005) (citing *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999)).

Appellant contends that the district court abused its discretion when it found that Shaw's statements were not credible, for two reasons. First, he argues that independent

evidence confirmed Shaw's claim that he received a benefit from the police in exchange for identifying appellant as the person who shot him. Specifically, he asserts that the record shows that Shaw was released from jail shortly after he identified appellant as the shooter and he was never charged with a crime. In response, the state argues that Shaw's underlying claim that he was released in exchange for his identification of appellant is not credible. Second, appellant contends that, while Shaw's story changed several times, "at some point, he had to be telling the truth." He asserts that Shaw's testimony was truthful because it was the only statement he made under oath, and that Shaw had nothing to gain by testifying at the postconviction hearing. The state responds that this argument is "ridiculous on its face."

Here, the record supports appellant's argument that Shaw was released from jail shortly after he identified appellant. But there is no evidence in the record that supports Shaw's claim that he was released from jail *in exchange for* the identification. Lieutenant Zimmerman testified that he did not promise Shaw anything in exchange for identifying appellant as the shooter and that Shaw was released because the 36-hour hold was expiring. In addition, the district court found that every statement that Shaw made about who shot him was not credible, and appellate courts defer to a district court's credibility determinations. *See Opsahl v. State*, 710 N.W.2d 776, 782 (Minn. 2006) (stating that the district court "is in a unique position to assess witness credibility, and [appellate courts] must therefore give the [district] court considerable deference in this regard"). There appears to be sufficient evidence in the record to support this finding because Shaw changed his story several times throughout this case. On August 20, he stated that he did

not recognize who shot him, but then on August 31 he identified appellant as the shooter. He also testified in front of the grand jury that appellant was the person who shot him. Several years later, he signed an affidavit stating that he never saw who shot him and then a few months later retracted that statement. Finally, he testified at the postconviction hearing that he could not identify appellant as the shooter.

Further, Shaw's claim that he was telling the truth at the postconviction hearing because he was under oath is undercut by the fact that he told Sergeant Klund, when he did not know that he was being recorded, that appellant was the shooter. In addition, contrary to appellant's argument, Shaw had something to gain by testifying at the postconviction hearing. As Shaw admitted to Sergeant Klund, if appellant was released from prison, Shaw could seek revenge for his friend's murder by killing appellant.

Appellant acknowledges that Shaw has made inconsistent statements, but contends that if he had known that Shaw was released from jail after the identification and never charged with a crime, he would not have pleaded guilty. And appellant argues that he should have been allowed to confront Shaw with his inconsistent statements on cross examination. But appellant concedes that he had access to Shaw's August 20 statement to police, in which Shaw denies that he saw who shot him, before he pleaded guilty. Thus, appellant knew when he pleaded guilty that he could have confronted Shaw with that statement on cross examination.

Appellant also argues that *Shorter v. State*, 511 N.W.2d 743 (Minn. 1994), is instructive. In *Shorter*, the defendant filed a motion to withdraw his guilty plea to criminal sexual conduct. *Id.* at 744. At the time that the defendant pleaded guilty, the

evidence against him included statements from the victim and two of her friends. *Id.* The defendant maintained that he had consensual sexual intercourse with the victim. *Id.* When the defendant entered his plea, his attorney did not ask him questions that required him to admit the elements of the crime, but instead the defendant gave yes or no answers and simply acknowledged the evidence that the state would present at trial. *Id.* at 745. The Minneapolis Police Department reopened its investigation as a result of the defendant's motion and discovered two witnesses who corroborated defendant's story. *Id.* at 744. The supreme court concluded that the defendant had demonstrated that withdrawal of his plea was necessary to correct a manifest injustice and ordered that the defendant be permitted to withdraw his plea. *Id.* at 746. The supreme court stated several times that it came to this conclusion based on the "highly unusual facts" of the case, including the fact that the police department reopened its investigation and admitted that the investigation was incomplete. *Id.* at 746-747.

This case is distinguishable from *Shorter*. Unlike *Shorter*, this case does not involve new witnesses who corroborate appellant's version of the events, but rather it involves a witness who has changed his story on numerous occasions. In addition, unlike the defendant in *Shorter*, when appellant pleaded guilty he testified in his own words about the elements of the crime. The supreme court made it clear in *Shorter* that the facts of the case were "highly unusual" partially because of the police department's admission that the investigation was insufficient, and no similar "unusual facts" are present in this case.

Finally, we note that appellant filed this petition for postconviction relief five years after he pleaded guilty. A recantation from a witness has more impact if it is contemporaneous with the guilty plea or conviction. *See, e.g.*, *Vance v. State*, 752 N.W.2d 509, 514 (Minn. 2008) (stating that a witness's recantation lacked sufficient indicia of trustworthiness, partially because it "comes several years after the murder"). Also, at the time that appellant entered his guilty plea, there were several witnesses in addition to Shaw who were prepared to testify that appellant was the shooter, which undermines appellant's argument that Shaw was the "key" witness against him.

There is sufficient evidence in the record to support the district court's finding that Shaw's testimony, affidavit, and statements to police were not credible; we conclude the district court did not abuse its discretion when it determined that appellant failed to prove the facts of his petition by a preponderance of the evidence.

Affirmed.