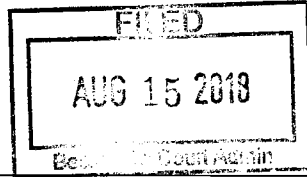


STATE OF MINNESOTA
COUNTY OF BECKER



DISTRICT COURT
SEVENTH JUDICIAL DISTRICT

Kenneth Eugene Anderson,
Petitioner,

Court File No. 03-CR-07-171

vs.

State of Minnesota,
Respondent.

**ORDER FOR EVIDENTIARY HEARING
ON AFFIDAVITS IN SUPPORT OF
POSTCONVICTION RELIEF
AND DENYING MOTION
TO AMEND PETITION**

The above-entitled matter came before the Honorable Jay D. Carlson, Judge of District Court, in the County of Becker, State of Minnesota, upon remand from the Minnesota Supreme Court in an opinion dated June 13, 2018.

The State of Minnesota was represented by Matthew Frank, Assistant Minnesota Attorney General. The Petitioner, Kenneth Anderson, was represented by Zachary Longsdorf, Attorney at Law.


NOW THEREFORE, having duly considered the arguments of counsel, the documents and proceedings herein, together with the applicable law, this Court makes the following:

ORDER

1. The Petitioner's motion to amend his petition for postconviction relief is hereby **DENIED**.
2. An evidentiary hearing on the Petitioner's motion for postconviction relief, after remand, shall be held on October 23, 2018, at 9:00 a.m.
3. The attached **MEMORANDUM** shall be made a part of this order.

Dated: August 15, 2018

BY THE COURT:



Jay D. Carlson
Judge of District Court

MEMORANDUM

I) *Introduction and Facts*

Kenneth Andersen was convicted of first degree murder after a jury trial in 2008. A direct appeal affirmed the conviction in 2010. The Court's summary denial of Mr. Andersen's first postconviction relief petition was affirmed in 2013.¹

A second petition for postconviction relief was filed on September 27, 2016. In the petition, Mr. Andersen argued that sixteen newly discovered pieces of evidence exonerated him. Additionally he argued that ineffective assistance of trial counsel and a *Brady* violation required that a new trial be held. In an Order dated March 1, 2017, the Court denied the requested relief without hearing. Mr. Andersen appealed this decision.

In an Opinion dated June 13, 2018, the Minnesota Supreme Court reviewed this Court's Order, and affirmed in part, reversed in part, and remanded the matter for further proceedings. The Supreme Court affirmed the denial of relief on the issues of ineffective assistance of counsel and the claimed *Brady* violation. It additionally affirmed denial of relief on many of the claims of newly discovered evidence.

However, the Supreme Court also found that this Court erred in ruling on the credibility of two affiants. In his petition, Mr. Andersen included affidavits from his mother: Geraldine Bellanger, and Stacy Weaver. The March 1, 2017 Order indicated that the Bellanger affidavit was "inherently dubious," and found the Weaver affidavit "inherently unreliable." The Supreme Court reversed this decision, and remanded with specific instructions to assume the facts contained in

¹ A summary of testimony and evidence heard at trial may be found in this Court's previous Order on postconviction relief. A more thorough statement of facts may also be found in *State v. Andersen*, 784 N.W.2d 320, 323 (Minn. 2010).

the affidavits are true, construe them in the light most favorable to Mr. Andersen, then determine whether an evidentiary hearing is required.

a. Geraldine Bellanger Affidavit

Ms. Bellanger's statement was made on February 18, 2015. In the affidavit, she stated she spoke to Al Baker on June 17, 2014. During the call, Ms. Bellanger claims Mr. Baker made the following statements:

- He never sent a gun to Alaska, does not know anyone in Alaska, and that he sold all the guns he owned at an auction;
- During trial he told Mr. Andersen "thanks" for not shooting him – and stated he was at Chad Swedberg's house earlier than he told police, admitting he was at Swedberg's house at the time of the murder;
- He received two calls on the day of Swedberg's funeral, one of which was from somebody claiming to be responsible for the murder.

Additionally, Ms. Bellanger stated that Chad's wife, Lisa Swedberg, told Bellanger that Baker "creeps her out." Lisa further told Bellanger that Baker told her (Lisa) that "voices in his head told him to kill Chad." Ms. Bellanger further states that both Kenneth Swedberg (Chad's brother) and Lisa made further allegations of Baker's confessions.²

b. Stacy Weaver Affidavit

A sworn statement by Mr. Weaver was made on December 8, 2014. Mr. Weaver states he purchased a van from Chad, and noted that Chad told him that the sale "would make Leslie Fain mad."

Mr. Weaver also stated that on the day of Chad's murder he was driving with his mother. Sometime between 7:30 and 8:00 a.m., while driving, Mr. Weaver stated he saw a white car driving south on Highway 34. In the car were three occupants: Jesse Fain, Leslie Fain, and Leslie's brother.

² The Bellanger affidavit also includes a discussion of a payment made at Walmart for a gun. The Petitioner cited this as one piece of newly discovered evidence. The Supreme Court affirmed this Court's decision that this piece of evidence is not exculpatory.

Mr. Weaver noted that he was never contacted by law enforcement, nor had disclosed this information to anybody in the time since Chad's murder.

c. Petitioner's Motion to Amend

In the Supreme Court's Opinion, it noted that unsworn investigative reports do not typically provide a sufficient showing for an evidentiary hearing. The reports were all created by the Petitioner's private investigator, in which he recounts interviews made with various potential witnesses. Mr. Andersen has motioned to amend his Petition to include the same investigative reports, which have now been sworn and notarized.

II) *Legal Analysis*

The Court will first analyze whether Mr. Andersen is entitled to amend his Petition to include the newly sworn statements. Secondly, the Court will determine whether an evidentiary hearing is required to determine the availability of postconviction relief.

a. Motion to Amend

A court may allow amendments to a petition for postconviction relief "at any time prior to its decision on the merits." Minn. Stat. § 590.03. Mr. Andersen seeks to include six investigative reports made by John Egelhof. In his affidavit, Mr. Egelhof states he carefully and faithfully took notes of interviews he conducted, and created accurate written memoranda of the notes. The six witnesses were Jeffrey Nelson, Wanda Nelson, Al Baker, Douglas Haverkamp, Frank Lhotka, and Bradley Riggle.

The Minnesota Supreme Court has held "a memorandum written by a defense investigator declaring that a witness provided different information to the investigator than the witness provided at trial was insufficient to warrant an evidentiary hearing." *Laine v. State*, 786 N.W.2d

635, 638 (Minn. 2010). The Petitioner concludes that because the memoranda are now sworn and notarized, this solves any issue with their status as newly discovered evidence.

However, the State correctly points out that the problem with the investigative reports is not their lack of notarization. Instead, the issue is that instead of being affidavits from the *declarants*, they are hearsay recollections made by the investigator. As the Supreme Court's decision points out, sworn statements from these individuals may be included in a future petition, but the investigative reports on their face do not entitle the Petitioner to relief.

More importantly, the Court finds that accepting the affidavits made by Mr. Egelhof would simply re-litigate already decided matters. In this Court's March 1, 2017 Order, the Court rejected all the pieces of evidence allegedly discovered through these interviews. Some of the interviews solely contained possible impeachment evidence, some were time-barred, and others simply did not reflect what the Petitioner argued.

b. Reanalysis of the Weaver and Bellanger Affidavits

A postconviction court is required to hold an evidentiary hearing and make findings of fact and conclusions of law unless the petition, files, and records conclusively show that the petitioner is entitled to no relief. Minn. Stat. § 590.04, subd. 1. No evidentiary hearing is required if the petitioner fails to allege facts sufficient to entitle him to relief. *See Wayne v. State*, 747 N.W.2d 564, 565-66 (Minn. 2008). Allegations must be "more than argumentative assertions without factual support" to require an evidentiary hearing. *Rainer v. State*, 566 N.W.2d 692, 695 (Minn. 1997).

A petition for postconviction relief is barred when it is filed more than two years after a final order is made on the defendant's direct appeal. Minn. Stat. § 590.01, subd. 4. However, if new evidence is discovered "that could not have been ascertained by the exercise of due diligence

by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense,” then a petition may be heard. *Id.*

If a petitioner alleges facts, which if true, entitle him to postconviction relief, an evidentiary hearing is required. A court is prohibited from determining credibility of affidavits when reviewing whether to hold an evidentiary hearing. *See Henderson v. State*, 906 N.W.2d 501, 507 (Minn. 2018).

1. Discovery of Evidence within Time Limit

First, the Court finds both the Bellanger and Weaver affidavits contain newly discovered evidence which could not have been discovered within the two year deadline. In the Bellanger affidavit however, there are a two pieces of information which were, or should have been known to the Petitioner:

- Baker’s alleged thanks to Andersen for not shooting him was made directly to the Petitioner;
- The phone calls from a person claiming to have murdered Chad were unsupported by Baker’s own statement to investigators, and was disclosed to the Petitioner prior to trial.

Additionally, the Supreme Court affirmed that the issue of sending rifles to Alaska is not relevant to the Petitioner’s possible innocence.

That being said, the alleged confession made by Baker to the Swedbergs, which was then relayed to Bellanger, does not appear on its face to be time-barred. While it is unclear when these statements were made, Baker had not made any such confession at trial or in any interview. Therefore, after accepting the affidavit as true, it was impossible for the Petitioner to gain this

information within the time limit, since there was no evidence in the file suggesting Baker's involvement as the perpetrator.³

The Weaver affidavit similarly contains a statement indicating that Weaver never told anybody about seeing the Fains driving on the day of Chad's murder. Law enforcement was not told, nor should the Petitioner have been aware.

2. Cumulative Nature of Evidence

Evidence is not cumulative when it is the only evidence offered on an issue. *State v. Penkaty*, 708 N.W.2d 185, 203 (Minn. 2006). These confessionary statements are not cumulative to evidence presented at trial, as trial testimony established Baker was travelling to and from purchasing groceries at the time of Chad's murder. The Weaver affidavit is also contrary to trial testimony, as the Petitioner stipulated to Jesse Fain being at work, and Leslie Fain testified she was at home between 7:30 and 8:00 a.m.

3. Impeachment Evidence

Third, while the evidence clearly stands to impeach trial testimony, it is not for the sole purpose of impeachment.

4. Clear and Convincing Evidence of Innocence

"[T]he identification of a specific alternative perpetrator is an important, powerful, and distinct part of a defendant's constitutional right to present a complete defense." *Bobo v. State*, 820 N.W.2d 511, 518-19 (Minn. 2012). A statement made by a person other than the accused, claiming responsibility for the crime, is clearly exculpatory. Of course, there must be some corroboration of the statement, but credibility is to be determined at an evidentiary hearing.

³ The Court notes the affidavit concerning the Baker admission appears contrary to evidence submitted at trial or discovered pre-trial.

The Court notes the double-hearsay nature of the alleged Baker confession. However, the fact that the petition contains hearsay is not a reason to deny a hearing. *See Bobo*, 820 N.W.2d at 519-20 (finding an affidavit based on inadmissible hearsay allows for a hearing, due to possibility of conforming the hearsay statement at the hearing).

Because the Bellanger and Weaver affidavits, accepted as true, provide the Petitioner with newly discovered evidence of a possible alternative perpetrator, the Court will hold an evidentiary hearing to determine whether Mr. Andersen is entitled to relief.

JDC