STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2106

Roger Allen Berres, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 13, 2009
Affirmed
Larkin, Judge

Ramsey County District Court
File No. K6-00-1413

Roger Allen Berres, 2957 Arcade Street, Little Canada, Minnesota 55109 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 Kellogg Boulevard West, St. Paul, Minnesota 55102 (for respondent)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

LARKIN, Judge

Pro se appellant challenges the district court's order denying his requests for correction of his sentence and additional jail credit. Appellant claims that his sentence was based on an incorrect criminal history score. Because appellant's sentence was based on an accurate criminal history score and because the district court's jail-credit determination was not clearly erroneous, we affirm.

FACTS

In June 2000, appellant Roger Allen Berres pleaded guilty to second-degree criminal sexual conduct and was sentenced to a 27-month stayed prison term. Appellant was required to serve 120 days in jail as a condition of probation. He served 80 days, having received 40 days of good time. Appellant's sentence was based on a criminal history score that included appellant's 1982 conviction for felony burglary. Appellant received a stay of imposition of sentence on the burglary charge and was discharged from probation on January 18, 1990.

In April 2001, the district court revoked appellant's criminal sexual conduct probation and executed his prison sentence. The district court awarded appellant credit for 122 days spent in custody prior to sentencing. These 122 days consisted of 80 days spent in custody as an initial condition of probation and 42 days spent in custody during the probation-revocation proceedings. Appellant challenged the revocation of his probation on appeal, and we affirmed. *State v. Berres*, No. C3-01-1156, 2001 WL 1606945 (Minn. App. Dec. 18, 2001).

In June 2002, appellant moved for an additional four days of jail credit. The district court granted that request.

In October 2004, appellant filed a postconviction motion with the district court requesting modification of his sentence, which was summarily denied.

In October 2006, appellant filed a motion to correct sentence with the district court, arguing that he had not waived his right to challenge his "illegal sentence," that his sentence was based on an inaccurate criminal history score, and that he was entitled to additional jail credit. By order dated August 8, 2007, the district court concluded that appellant had not waived his right to challenge his sentence and granted appellant's motion "as it relate[d] to his right to challenge an illegal sentence." But the district court denied appellant's request to recalculate his criminal history score and his request for additional jail credit. This appeal follows.

D E C I S I O N

Because appellant's motion to correct sentence challenged the validity of the sentence imposed and was filed after the time for a direct appeal from the sentence had expired, the district court treated appellant's motion as a petition for postconviction relief. Minn. Stat. § 590.01 (2006); *Powers v. State*, 731 N.W.2d 499, 501 n.2 (Minn. 2007). "The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). "We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record" and "will not reverse th[ose] findings unless they are clearly

erroneous." *Id.* Issues of law are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

I

Generally, if a petitioner has directly appealed a conviction, "all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). This rule—known as the *Knaffla* rule—includes claims the petitioner should have known about at the time of his direct appeal. *Mckenzie v. State*, 687 N.W.2d 902, 905 (Minn. 2004). The *Knaffla* rule similarly bars postconviction review of claims that could have been raised in a previous postconviction petition. *Wayne v. State*, 601 N.W.2d 440, 441 (Minn. 1999). There are two exceptions to the *Knaffla* rule, which apply (1) if the claim "is 'so novel that its legal basis was not reasonably available at the time of the direct appeal'" or (2) if "fairness would require a review of the claim in the interest of justice and there was no deliberate or inexcusable reason for the failure to raise the issue on direct appeal." *Mckenzie*, 687 N.W.2d at 905-06 (quoting *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004)).

In *State v. Maurstad*, the Minnesota Supreme Court explained that "sentences must be based on correct criminal history scores," that "a sentence based on an incorrect criminal history score is an illegal sentence," and that a sentence not authorized by law may be corrected at any time, pursuant to Minn. R. Crim. P. 27.03, subd. 9. 733 N.W.2d 141, 146 (Minn. 2007). Accordingly, the supreme court concluded that "a defendant may not waive review of his criminal history score calculation." *Id.* Here, appellant

challenges the calculation of his criminal history score. Therefore, the district court correctly concluded that the claim was not procedurally barred by the *Knaffla* rule. Because appellant has not waived his right to review of his sentence, we address his claim that his sentence was based on an inaccurate criminal history score.

II

Appellant claims that his sentence was based on an inaccurate criminal history score because the 1982 sentencing guidelines governed the use of appellant's 1982 burglary conviction at the time of sentencing in 2000.

The sentencing guidelines in effect in 1982 provided:

> When a prior felony conviction results in a stay of imposition, and when that stay of imposition was successfully served, it shall be counted as a felony conviction for purposes of computing the criminal history score for five years from the date of discharge, and thereafter shall be counted as a misdemeanor . . . .

Minn. Sent. Guidelines II.B.1.d (1982).

Appellant correctly notes that under the sentencing guidelines in effect in 1982, his burglary conviction could not be counted as a felony after 1995 (i.e., five years from the date of appellant's discharge from probation). However, appellant cites no legal authority supporting the contention that the 1982 sentencing guidelines applied to appellant's sentencing in 2000. We conclude that the district court properly applied the guidelines in effect at the time of appellant's sentencing in 2000.

The sentencing guidelines in effect at the time appellant was sentenced provided that stays of imposition and stays of execution were to be treated the same with respect to

criminal history point accrual. Minn. Sent. Guidelines II.B.1 (1982); *see* Minn. Sent. Guidelines cmt. II.B.105 (2000). Further, the 2000 sentencing guidelines provided a 15-year decay period. Minn. Sent. Guidelines II.B.1.e (2000). Because appellant was discharged from probation on his 1982 burglary conviction in 1990 and sentenced for his criminal sexual conduct offense in 2000, the felony burglary had not decayed at the time of sentencing. The district court properly included the burglary in appellant's criminal history score as a felony-level conviction, and appellant's criminal-history-score calculation was not inaccurate. Thus, the district court did not err by refusing to modify appellant's sentence.

III

Appellant next claims that he is entitled to an additional 40 days of jail credit. Appellant does not allege that he spent these 40 days in custody. Rather, he argues that he should receive jail credit for the 40 days of good time that was awarded on his probationary jail term.

"[T]he defendant carries the burden of establishing that he is entitled to jail credit." *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985). A reviewing court applies a clear-error standard to factual findings underlying jail-credit determinations. *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003). Questions of law, however, are subject to de novo review. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

A defendant is entitled to jail credit for "all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed." Minn. R. Crim. P. 27.03, subd. 4(B). This includes "all the time spent in custody following arrest,

including time spent in custody on other charges, beginning on the date the prosecution acquires probable cause to charge defendant with the offense for which he or she" is currently being sentenced. *State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994).

Appellant's claim that he is entitled to additional jail credit in an amount equal to the good time that he earned while serving his probationary jail term is contrary to law. Awards of jail credit and good time credit are separate and distinct. Jail credit "is limited to time spent in jails, workhouses, and regional correctional facilities." Minn. Sent. Guidelines III.C.3. It is awarded at the rate of one day for each day served. Minn. Sent. Guidelines III.C.4; *State v. Arend*, 648 N.W.2d 746, 748 (Minn. App. 2002). Good time, on the other hand, provides a sentence reduction for good behavior at the rate of one day for each two days served. Minn. Stat. § 643.29, subd. 1 (2006).

An offender is entitled to receive both jail credit and good time credit for time spent in jail as a condition of probation. *State v. Barg*, 391 N.W.2d 773, 776 (Minn. 1986) (When a stayed prison sentence is revoked, the offender's good time calculation must include time served in jail as a condition of probation prior to the offender's commitment to the Commissioner of Corrections.). However, jail credit is not awarded for earned good time. Jail credit is limited to time spent in custody. Because appellant received credit for each day that he spent in custody in connection with the criminal sexual conduct offense, the district court's calculation of appellant's jail credit award was not clearly erroneous.

IV

Appellant raises two other issues on appeal, claiming that "the department of corrections imposed a conditional release period that conflicted with the law" and that there was an "unlawful 6 day increase to [his] expiration date for stop time." Appellant's pro se brief merely asserts error, and his claims are not supported with legal argument or citation to the factual record. Therefore, we conclude that he has waived review of these claims. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (deeming waived and refusing to consider portions of pro se briefs that contain only argument and are not supported by legal authority and the facts on the record); *State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (concluding that a pro se appellant's assertions were deemed waived if they contain no argument or legal authority to support the allegations).

Furthermore, neither of these claims were raised in appellant's motion to correct sentence or considered by the district court. "It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006) (quotations omitted).

Thus, even if appellant had not waived review of these claims, we would not consider them here.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals