STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1662

Rico Ronondo Rodriguez, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 14, 2009
Affirmed
Halbrooks, Judge

Hennepin County District Court
File Nos. 27-CR-00-083526, 27-CR-00-111482

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Michael K. Walz, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Toussaint, Chief Judge; and Willis, Judge.*

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

HALBROOKS, Judge

In this postconviction appeal, appellant argues that (1) his petition should not be barred for untimeliness; (2) he is entitled to one right of review; and (3) the district court erred by sentencing him to an upward durational departure when he did not waive his right to have aggravating factors determined by a jury. We affirm.

FACTS

Appellant Rico Ronondo Rodriguez faced numerous criminal charges—including three counts of first-degree burglary, two counts of third-degree criminal sexual conduct, two counts of fifth-degree criminal sexual conduct, one count of attempted first-degree criminal sexual conduct, and one count of indecent exposure—arising out of several incidents that occurred in 2000.

As part of a negotiated plea agreement, appellant pleaded guilty to one third-degree and one fifth-degree count of criminal sexual conduct. The state agreed to dismiss the other charges. The parties also agreed that appellant would receive a stayed sentence of 42 months. The state explained to the district court that this sentence was an upward durational departure based on *State v. Givens*, 544 N.W.2d 774 (Minn. 1996), *superseded by statute*, Minn. Stat. § 244.09, subd. 5(2) (1998), as recognized in *State v. Shattuck*, 704

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

N.W.2d 131, 139 n.5 (Minn. 2005). Appellant's trial counsel acknowledged this bargain: "[I]n return for dismissing [the other charges], which would [have been] a presumptive prison commit, we're agreeing to an upward amount of time hanging over [appellant's] head." Appellant stated that he wished to take advantage of this agreement; he then pleaded guilty to the two counts.

In April 2001, the district court sentenced appellant to the agreed-upon 42 months with a five-year conditional-release period and stayed execution of the sentence for five years. In October 2003, after a series of probation violations by appellant, the district court revoked his probation and executed the 42-month sentence. In May 2005, appellant was placed on supervised release, which was revoked in September 2005.

On March 5, 2008, appellant filed a pro se petition for postconviction relief. Appellant requested that his five-year period of conditional release be vacated and that the district court grant him an evidentiary hearing. On April 8, 2008, appellant's appointed counsel moved the district court to correct appellant's sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9.

The district court denied appellant's claims. The district court found, among other things, that (1) appellant could not withdraw his accurate, voluntary, and intelligent plea; (2) appellant's claims were untimely and barred by Minn. Stat. § 590.01, subd. 4 (2006); (3) appellant's sentence is controlled by *Givens* and was therefore proper; and (4) no hearing was required.

This appeal follows.

D E C I S I O N

I.

We review a summary denial of a postconviction petition for abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). But matters of law are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A postconviction court is not required to conduct an evidentiary hearing "if the petition, files, and record conclusively show that the petitioner is entitled to no relief." *Greer v. State*, 673 N.W.2d 151, 155 (Minn. 2004) (quotation omitted).

The district court found that appellant's petition for postconviction relief was untimely under Minn. Stat. § 590.01, subd. 4(a), and that appellant had failed to demonstrate that his petition meets any of the statutory exceptions listed under Minn. Stat. § 590.01, subd. 4(b). Minnesota law imposes a two-year time limit on filing postconviction petitions. Minn. Stat. § 590.01, subd. 4(a). For convictions that became final before August 1, 2005, a postconviction petition must be filed "before August 1, 2007." *Gustafson v. State*, 754 N.W.2d 343, 347 n.2 (Minn. 2008); *see also* 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097–98. *Stewart v. State* states that a petitioner may file for postconviction relief "until July 31, 2007." 764 N.W.2d 32, 34 (Minn. 2009). *Nestell v. State* states that a postconviction petition must be filed "by July 31, 2007." 758 N.W.2d 610, 612 (Minn. App. 2008). It is undisputed that appellant's convictions became final on July 17, 2001, and that he did not file for postconviction relief until March 2008.

In *Nestell*, the appellant (Nestell) was required to file his postconviction petition by July 31, 2007. 758 N.W.2d at 612. Nestell's petition was mailed to the district court on August 1, 2007, and filed on August 7, 2007. *Id.* The district court interpreted section 590.01, subdivision 4, to "mandate dismissal of [the] late petition," and dismissed Nestell's petition without an evidentiary hearing. *Id.* On appeal, this court held that the exceptions listed in subdivision 4(b) applied "to petitions filed by prisoners whose convictions became final before August 1, 2005." *Id.* at 614. But this court also held that a petitioner "seeking the benefit of a subdivision 4(b) exception must 'invoke' the exception" by "expressly identify[ing]" the applicable exception. *Id.* This court then upheld the dismissal of Nestell's late petition. *Id.*; *see also Stewart*, 764 N.W.2d at 34 (holding that postconviction petition was untimely when petitioner, whose conviction became final on April 19, 2001, did not file until April 30, 2008, and "did not assert or establish" any of the statutory exceptions).

Appellant, whose convictions became final well before August 1, 2005, argues that *Nestell* does not control for two reasons. First, appellant contends that *Nestell* does not apply because it was decided after the district court ruled on his petition. But appellant cites no authority for this proposition.

Second, appellant contends that he invoked the "interests of justice" exception set forth in Minn. Stat. § 590.01, subd. 4(b). That exception provides that the time limit for a postconviction petition does not apply if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). Appellant claims that the following language in his pro se

petition expressly identified the subdivision 4(b)(5) exception: "When the interests of justice require consideration and doing so would not work an unfair surprise on a party." We conclude that this language does not "expressly identify" the applicable exception.

In light of appellant's failure to file a postconviction petition within the statutory time limit and his failure to invoke one of the statutory time-limit exceptions, we conclude it was not an abuse of discretion for the district court to find that his petition was barred by Minn. Stat. § 590.01, subd. 4.

II.

Appellant also contends that the imposition of the two-year time limit violates his right to one review of his convictions and sentence.[1] But here, the district court reached the merits of appellant's petition. When a district court considers the substantive merits of a postconviction claim, an appellant's right to one review is not prejudiced. *See Sykes v. State*, 578 N.W.2d 807, 810, 814 (Minn. App. 1998), *review denied* (Minn. July 16, 1998). We therefore conclude that appellant's right to a review of his conviction has been satisfied, and we turn to a review of the district court's determination that appellant's petition is without merit.

Appellant argues that the district court incorrectly applied *Givens* instead of *State v. Misquadace*, 644 N.W.2d 65 (Minn. 2002). In the alternative, appellant argues that he

[1] Appellant asserts that this right is constitutional in nature. But the supreme court recently recognized that it has never reached the issue of whether the Minnesota Constitution compels the recognition of the right to one review. *Morris v. State*, 765 N.W.2d 78, 82-83 & nn.2-3 (Minn. 2009). Instead, the supreme court noted that recognition of the right was independently supported by "the broad language of the postconviction remedy act and existing case law." *Id.* at 82 n.2 (citing *Deegan v. State*, 711 N.W.2d 89, 95 (Minn. 2006)).

did not waive his right to be sentenced under the guidelines. We address each of these arguments in turn.

A. *Givens* applies.

The district court is correct that *Givens*, not *Misquadace*, applies. In *Givens*, the supreme court held that there was "no reason not to allow a defendant to agree to a departure [from the sentencing guidelines] as part of a plea bargain with the prosecutor." 544 N.W.2d at 777. After appellant's conviction became final, the supreme court decided *Misquadace*. In that case, the supreme court held that "all departures from the Minnesota Sentencing Guidelines must be supported by substantial and compelling circumstances, and that a plea agreement—standing alone—is not a sufficient basis to depart from the sentencing guidelines." *Misquadace*, 644 N.W.2d at 72.

But the supreme court specifically stated that the new rule of law announced in *Misquadace* was not retroactive:

> [R]etroactive application is not required. Given the purposes to be served, the extent of reliance by the parties and courts on previous standards, and the effect of retroactivity on the administration of justice, prospective application is appropriate. We limit application of the ruling to this case and to pending and future cases.

Id. (citation omitted).

Because appellant's convictions became final in July 2001, before *Misquadace* was decided, the rule of that case does not apply to him. *See State v. Kilgore*, 661 N.W.2d 654, 659 (Minn. App. 2003), *review denied* (Minn. Aug. 19, 2003).

B. Appellant waived his right to be sentenced under the guidelines.

Givens provides that "a criminal defendant may knowingly, intelligently, and voluntarily waive his right to be sentenced under the guidelines." 544 N.W.2d at 775. For a waiver to be valid,

> [t]he defendant must have been advised of his or her right to be sentenced under the guidelines, which . . . includes the possibility of just such a departure as discussed above, and have had the opportunity to consult counsel. In addition, the waiver must be approved by the [district] court. An examination by the sentencing court, consistent with the approach of Minn. R. Crim. P. 15, will meet this requirement.

Id. at 777 (citation omitted).

Appellant asserts that the transcripts of his guilty-plea and sentencing hearings merely "indicate[] that he wished to take advantage of the plea bargain" and "[a]t no time . . . was [he] asked about his right to be sentenced under the guidelines or whether he waived that right." We disagree. The plea-hearing transcript indicates that appellant understood that he was agreeing to an upward departure:

> Appellant's Counsel: [I]n return for dismissing this case and the other case, which would be a presumptive prison commit, we're agreeing to an upward amount of time hanging over his head.
>
> . . . .
>
> Appellant's Counsel: Mr. Rodriguez, you heard the prosecutor tell the Judge about the deal, right?
>
> Appellant: Yes.
>
> Appellant's Counsel: And I know it's complicated and you and I spent a couple of days talking about this, right?
>
> Appellant: Right.

Appellant's Counsel:	In essence what he said was that you'd have 12 months consecutive to 12 months in the workhouse and the 42 months hanging over your head as long as you comply with probation, right?
Appellant:	Yes.
. . . .	
Appellant's Counsel:	That's a deal you want to take advantage of today?
Appellant:	Yes.

At sentencing, appellant's counsel again acknowledged that the agreement called for an upward departure. Appellant clearly understood that the sentence was an upward departure from the guidelines and agreed to it as part of his negotiated plea, waiving his right to be sentenced under the guidelines. *See Lewis v. State*, 697 N.W.2d 624, 628-29 (Minn. App. 2005) (stating that, under *Givens*, a waiver of the right to be sentenced under the guidelines was knowing, intelligent, and voluntary when "[i]t appear[ed] from the record that the petitioner and his attorney understood the sentence petitioner had agreed to").

We therefore conclude that the district court did not abuse its discretion when it determined that appellant's postconviction petition failed on the merits.

Affirmed.