**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A08-1892**

Chee Yang, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 18, 2009**
**Affirmed**
**Schellhas, Judge**

Ramsey County District Court
File No. K6-02-508

Melissa V. Sheridan, Assistant Public Defender, 1380 Corporate Center Curve, Suite 320, Eagan, MN 55121 (for appellant)

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

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

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

**SCHELLHAS**, Judge

Appellant challenges the partial denial of his petition for postconviction relief, arguing that the district court erred in determining that (1) the petition was time-barred,

(2) the petition was Knaffla-barred, and (3) appellant was not entitled to jail credit for time spent at Mille Lacs Academy. We affirm.

## FACTS

Appellant Chee Yang was 16 years old when he was charged by delinquency petition with several offenses, including first-degree and third-degree criminal sexual conduct, conspiracy to commit criminal sexual conduct, kidnapping, and commission of a crime for the benefit of a gang. The prosecution moved to have appellant certified to stand trial as an adult. In April 1998, pursuant to a plea agreement, appellant pleaded guilty to three counts of first-degree criminal sexual conduct and one count of commission of a crime for the benefit of a gang. In exchange, the prosecutor agreed to dismiss the remaining charges and to withdraw the adult-certification motion. Appellant and the prosecution agreed that appellant should be designated an extended jurisdiction juvenile (EJJ), and appellant agreed to the presumptive sentences for these offenses, which ran consecutively for a combined period of 270 months. The district court stayed the execution of appellant's sentences and placed appellant on EJJ probation.

In January 2002 the district court found that appellant had violated his EJJ probation by failing to remain law-abiding, engaging in unlawful activity with known gang members, conspiring to commit a crime for the benefit of a gang, failing to follow rules at Minnesota Correctional Facility-Red Wing (MCF-RedWing), and failing to cooperate with law enforcement investigations. The district court revoked appellant's EJJ probation, executed his 270-month sentence, and imposed an additional ten-year sex-offender conditional-release term on appellant, on the basis that appellant pleaded guilty

to more than two criminal-sexual-conduct offenses. Neither appellant nor his counsel objected to the court's imposition of the ten-year sex-offender conditional-release term.

Appellant challenged his sentences on appeal to this court on the grounds that the district court abused its discretion in revoking his EJJ probation and imposing cumulative presumptive sentences totaling 270 months. *State v. Yang*, No. C9-02-605, 2002 WL 1614065, *1 (Minn. App. Jul. 23, 2002). Appellant did not challenge the imposition or the length of the conditional-release term. *Id.* This court affirmed, and the Minnesota Supreme Court did not disturb our holding that the district court did not abuse its discretion in imposing the 270-month sentence because appellant's cumulative sentences were the presumptive sentences for the crimes to which he pleaded guilty, but remanded the case to this court for reconsideration in light of the supreme court's decision in *State v. B.Y.*, 659 N.W.2d 763 (Minn. 2003). *State v. Yang*, No. C9-02-605, 2003 WL 22078936, *1 (Minn. App. Sept. 9, 2003). Because we determined that there were factors on which *B.Y.* required a district court finding but none was made, we remanded the case to the district court. *Id.* at *1-2. In March 2004, on remand from this court, the district court determined that the need for appellant's confinement outweighed the policies favoring probation and that any mitigating circumstances did not weigh against the execution of appellant's adult sentences. Appellant did not appeal.

In February 2008 appellant filed a pro se petition for postconviction relief, arguing that (1) the district court improperly imposed the ten-year conditional-release term upon him because it was not part of his plea agreement, and (2) he is entitled to additional jail credit for time spent in a treatment facility. Appellant subsequently obtained a public

defender, who filed an amended petition arguing that appellant should be allowed to withdraw his plea because his plea agreement did not contemplate the imposition of a conditional-release term and, alternatively, that his conditional-release period should be reduced from ten years to five years because appellant did not have a qualifying prior sex-offense conviction. Appellant did not seek an evidentiary hearing.

The district court denied in part and granted in part appellant's postconviction petition. The court denied the petition in part on the bases that: (1) appellant's claim was time-barred; (2) appellant's challenge to the conditional-release term was *Knaffla*-barred because appellant had not raised the challenge in his appeal from his probation revocation; and (3) appellant failed to meet his burden of proof that Mille Lacs Academy is the functional equivalent of jail. The district court granted the postconviction petition in part by reducing appellant's conditional-release term from ten years to five years and by granting appellant jail credit for the time he served at the juvenile detention center and MCF-Red Wing, contingent upon appellant verifying the dates of his incarceration. This appeal follows.

**D E C I S I O N**

A criminal defendant may petition the district court for postconviction relief under Minn. Stat. § 590.01 (2008). This court reviews the denial of a petition for postconviction relief for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). An appellate court reviews issues of law de novo but examines the postconviction court's findings to determine if they are supported by sufficient evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Under *Knaffla*, once a direct appeal has been taken, "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). A probation-revocation appeal, being a challenge to the revocation of probation, may not be construed as an appeal from the conviction and sentence, and, therefore, the failure to raise an issue in a probation-revocation appeal may not preclude a petitioner from raising the issue in a later postconviction petition or direct appeal of his or her conviction and sentence. But, here, prior to filing his petition for postconviction relief in 2008, appellant appealed from both the revocation of his probation *and* the imposition of his sentences without raising the issues of the imposition or length of the conditional-release term. *Yang*, 2002 WL 1614065, at *1. And this court affirmed the cumulative 270-month prison sentences imposed by the district court. *Id.* at *2. Accordingly, we conclude that the district court did not err in ruling that certain issues raised in appellant's petition were *Knaffla*-barred.

The district court also ruled that because appellant's postconviction petition was not filed until February 2008, appellant's claims were time-barred. Minn. Stat. § 590.01, subd. 4(a); *see* 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098 (providing that no petition for postconviction relief may be filed after August 1, 2007, if the defendant's conviction was final before August 1, 2005). Appellant argues, for the first time on appeal, that this law is unconstitutional. Generally, a reviewing court will not consider matters not argued to the district court, *Roby v. State*, 547 N.W.2d 355, 357 (Minn. 1996), and we decline to consider appellant's constitutional argument. Moreover, appellant provides no evidence

that he notified the attorney general of his challenge to the constitutionality of the legislative act, and this court will not rule on the constitutionality of a statute unless the attorney general has been notified pursuant to Minn. R. Civ. App. P. 144. *State v. Kager*, 357 N.W.2d 369, 370 (Minn. App. 1984).

In his pro se brief, appellant disputes the district court's finding that his petition for postconviction relief was untimely, arguing that he mailed his petition from his correctional facility on July 23, 2007,[1] approximately nine days before the deadline of August 1, 2007. Appellant cites *Houston v. Lack*, 487 U.S. 266, 270, 108 S. Ct. 2379, 2382 (1988), for the proposition that a pro se petition from a prison inmate is considered filed when it is delivered to prison officials. But courts in several states have distinguished *Lack* on state law grounds and determined that the *Lack* rule represents only an interpretation of federal rules of appellate procedure. *See, e.g.*, *Key v. State*, 759 S.W.2d 567, 568 (Ark. 1988); *Carr v. State*, 554 A.2d 778, 779 (Del. 1989); *O'Rourke v. State*, 782 S.W.2d 808, 809 (Mo. Ct. App. 1990). Minnesota has not recognized the *Lack* rule, and the Minnesota Supreme Court has held that pro se defendants are subject to the same procedural rules as attorneys. *State v. Seifert*, 423 N.W.2d 368, 372 (Minn. 1988), *superseded by rule on other grounds*, Minn. R. Crim. P. 28.02, subd. 5(17-19), *as recognized in Black v. State*, 560 N.W.2d 83, 86 (Minn. 1997).

Additionally, appellant raises this argument for the first time on appeal. *See Roby*, 547 N.W.2d at 357 (stating that a reviewing court will generally not consider matters not

[1] The record indicates, however, that the address to which appellant mailed his petition at that time was not the proper address.

argued to the district court). Here, because this argument was not raised in the district court, it did not have the opportunity to make factual findings about when and where the petition was mailed. We therefore reject appellant's argument that his petition was timely.

Appellant also argues that the district court erred in denying his request for jail credit for time spent at the Mille Lacs Academy residential treatment program. 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 "time spent in custody following arrest, including time spent in custody on other charges, beginning on the date that the prosecution acquires probable cause to charge defendant with the offense for which he or she was arrested." *State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994). And a defendant is entitled to credit for time spent in institutions when the "confinement and limitations imposed" in the institution are the "functional equivalent of those imposed at a jail, workhouse, or regional correctional facility." *Asfaha v. State*, 665 N.W.2d 523, 528 (Minn. 2003).

A district court's decision whether to award jail credit is a mixed question of fact and law. *State v. Johnson*, 744 N.W.2d 376, 379 (Minn. 2008). The court must determine the factual circumstances of the custody for which the defendant seeks credit, and those factual findings will not be disturbed on review unless they are clearly erroneous or contrary to law. *Id.* The district court must then apply the rules of criminal procedure to those circumstances, and interpretation of these rules is a question of law subject to de novo review. *Id.* Appellant argues on appeal that the Mille Lacs Academy

is the functional equivalent of a jail but did not present any evidence of this to the district court. *See id.* (stating that the defendant bears the burden of establishing entitlement to credit for time spent in custody during criminal proceedings). Thus, appellant fails to show that he satisfied his burden of proof.

**Affirmed.**