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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-341

Lisa Marie Shane, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 27, 2009
Affirmed
Schellhas, Judge

Nobles County District Court
File No. 53-K2-05-000481

Marie L. Wolf, Interim Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Gordon L. Moore, III, Nobles County Attorney, P.O. Box 337, Suite 400, Worthington, MN 56187; and

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101 (for respondent)

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

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

SCHELLHAS, Judge

On appeal from the denial of her petition for postconviction relief, appellant contends that the sentencing court improperly based an upward departure on the absolute vulnerability of the three-month-old victim, when age is an element of the conviction offense of felony murder predicated on child neglect. Because we conclude that the absolute vulnerability of a three-month-old is not an element of the predicate felony of child neglect and was not factored into the presumptive sentence for felony murder predicated on child neglect, we affirm.

FACTS

A complete statement of the facts underlying this case can be found in this court's opinion on appellant Lisa Marie Shane's direct appeal, *State v. Shane*, A06-1581, 2008 WL 660543, at *1–3 (Minn. App. Mar. 11, 2008), *review denied* (Minn. May 28, 2008). The postconviction court relied on the following facts, which appellant does not challenge.

In October of 2004, appellant was the single mother of four children, ages four, two, one, and three months. The three-month-old, A.C., was born prematurely with a hole in her heart and respiratory problems. A.C. remained hospitalized from her birth until on or about October 1, 2004, when she was released to appellant's care with an apnea monitor to measure her breathing and heart rates. The monitor sounded a loud alarm if either dropped below a certain level. Appellant received two days of training for the use of the monitor.

At approximately 10:00 a.m. on October 28, 2004, a home-health nurse visited appellant's residence to administer shots to A.C. to prevent pneumonia. The nurse examined A.C. and noticed a small bruise above her right eyebrow and a superficial scratch across the top of her right eyebrow. Otherwise, the nurse believed that A.C. was doing very well.

Appellant indicated to the nurse that the only alarms that sounded from the apnea monitor were due to loose connections. A record from the monitor showed that during the week before October 28, 2004, no apnea or bradycardia episodes had occurred, but beginning at about 11:24 a.m. on October 28, A.C. had a number of long-apnea and dropping-heart-rate episodes reflecting cardio-respiratory instability. The monitor indicated 84 "events" between 11:24 a.m. and 11:18 p.m., and testimony established that there would have been many more than 84 alarm blasts because the "beeping" would have continued until A.C. breathed or her heart rate corrected itself. The longest spell lasted 78 seconds and would have triggered 78 blasts.

Appellant testified that A.C. did not eat well at 4:00 p.m., started becoming unresponsive, and the monitor alarm started sounding more frequently around 5:00 p.m. Contrary to her prior statements, appellant admitted that the monitor alarm "went off a lot that day."

The monitor records and medical testimony established that between 5:11 p.m. and 11:30 p.m. on the date in question, A.C. was a very sick baby who "would have been gasping for air like a fish out of water" and whose skin color would have been an

unhealthy grayish color such that any parent would know that the child needed urgent medical attention.

Appellant testified that the apnea-monitor alarm continued to go off and she called her mother, a licensed practical nurse, at work at approximately 9:00 p.m. Appellant's mother suggested appellant call 911, call the number on the monitor, or take A.C. to the hospital. When appellant's mother returned home, she looked at A.C. and said they needed to take her to the hospital immediately.

Appellant and her mother took A.C. to the emergency room at approximately 11:10 p.m. Upon arrival, A.C.'s skin was gray, she was flaccid and nonresponsive, and she was in severe respiratory distress. Shortly after arriving, A.C. stopped breathing and was put on a ventilator while the hospital arranged for a helicopter transfer to a hospital in Sioux Falls, South Dakota that was better equipped to meet the emergency.

A medical examination of A.C. revealed that she had sustained a skull fracture that took up the entire surface of her skull and that she had healing bilateral rib fractures. Appellant told medical personnel at both hospitals that she had been the caretaker for A.C. during the day and that she had not noticed any problems with A.C. until about 4:00 p.m. Appellant denied dropping or otherwise injuring A.C. and said she did not know what had happened to A.C.

A.C. was placed on life support. After five days, appellant was informed that A.C. was unlikely to survive and would be neurologically devastated and in a vegetative state, if she did survive. Appellant made the decision to withdraw life support.

Appellant was convicted of second-degree unintentional murder while committing child neglect. *Shane*, 2008 WL 660543, at *3. Appellant waived her right to have a jury determine aggravating factors, and the district court sentenced appellant to 180 months in prison, an upward durational departure from the sentencing guidelines' presumptive range of 144–156 months. *Id.* The district court based the departure on the fact that the victim was particularly vulnerable due to her age and prematurity. *Id.*

Appellant challenges her conviction and sentence, arguing, among other things, that the district court abused its discretion in basing an upward departure on a finding that A.C. was particularly vulnerable due to her age and prematurity. *Id.* at *9. This court agreed that the prematurity departure ground was not supported by the evidence, but affirmed the departure based on vulnerability-due-to-age, reasoning that "the absolute vulnerability of a three-month-old baby has not been factored into the presumptive sentence for the crime of child neglect." *Id.* at *10. The supreme court denied review on May 28, 2008.

Appellant filed a petition for postconviction relief on July 7, 2008. The postconviction court denied the petition after making findings of fact and conclusions of law. This appeal follows.

D E C I S I O N

On appeal, this court examines the postconviction court's findings to determine if they are supported by sufficient evidence, but reviews issues of law de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). This court will not reverse a denial of postconviction relief except for abuse of discretion. *Id.*

The postconviction court denied appellant's petition because her claims were barred by the rule set forth in *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Subject to two exceptions, the *Knaffla* rule is that "[o]nce a direct appeal has been taken, all claims raised in that appeal, all claims known at the time of that appeal, and all claims that should have been known at the time of that appeal will not be considered in a subsequent petition for postconviction relief." *Leake*, 737 N.W.2d at 535. The first exception to the *Knaffla* rule provides that claims will not be barred "if the claim's novelty was so great that its legal basis was not reasonably available when direct appeal was taken." *Id.* The second exception allows for substantive review "when fairness so requires and when the petitioner did not 'deliberately and inexcusably' fail to raise the issue on direct appeal." *Id.* (quoting *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997)).

In her direct appeal, appellant argued that the district court abused its discretion in basing an upward departure on the absolute vulnerability of the three-month-old victim, because age is an element of child neglect. Though she makes the same general argument here, appellant urges us to consider her postconviction appeal under the exceptions to *Knaffla*. First, she argues that *State v. Jones*, 745 N.W.2d 845 (Minn. 2008), decided by the supreme court after this court's decision on appellant's direct appeal but before her conviction became final, provides a legal basis that was unavailable at the time of her direct appeal. Second, she argues that her petition should be considered in the interests of justice.

We are not persuaded that either *Knaffla* exception applies in this case and conclude that the postconviction court correctly denied appellant's petition as *Knaffla*-barred. But, even if appellant's petition were not *Knaffla*-barred, her claim that her sentence was improper in light of *Jones* lacks substantive merit.

In *Jones*, the supreme court relied on Minn. Stat. § 609.035, subd. 1 (2006),[1] to invalidate a durational departure. Section 609.035, subdivision 1, provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses." The defendant in *Jones* was convicted of third-degree criminal sexual conduct, third-degree controlled-substance crime, child neglect, and child endangerment. 745 N.W.2d at 846. The district court sentenced the defendant for criminal sexual conduct but enhanced the sentence based on elements of the unsentenced convictions for child neglect and child endangerment. *Id.* at 847. After this court affirmed, the supreme court reversed, reasoning that basing the departure on elements of convicted, but unsentenced, offenses amounts to cumulative punishment barred by section 609.035. *Id.* at 850–51.

By relying on section 609.035, *Jones* clarified the previously murky issue of whether elements of offenses for which a defendant is convicted but not sentenced may be used as aggravating sentencing factors. As *Jones* noted, the supreme court has stated in the past that "conduct underlying one conviction cannot be relied on 'to support departure on a sentence for a separate conviction.'" *Id.* (quoting *State v. Williams*, 608

[1] *Jones* refers to the 2006 statutes, but the 2004 version applies in this case because the conduct occurred in October 2004. Section 609.035 has not been modified since 2001, so the language is identical.

N.W.2d 837, 840 (Minn. 2000)). *Williams* relied on *State v. Spaeth*, 552 N.W.2d 187, 196 (Minn. 1996), as the origin of this rule. In *Spaeth*, however, there was no unsentenced offense. The defendant was convicted, and sentenced consecutively, for both first-degree murder and first-degree burglary, and the sentencing court used an element of first-degree murder—that someone was killed—to enhance the sentence for first-degree burglary. *Spaeth*, 552 N.W.2d at 196. While the fact that the defendant was sentenced for both offenses is not reflected in the *Williams* version of the *Spaeth* rule, *see Williams*, 608 N.W.2d at 840 (stating broadly that "the trial court may not rely on conduct underlying one conviction to support departure on a sentence for a separate conviction"), it is reflected in *State v. Osborne*, 715 N.W.2d 436, 446 (Minn. 2006). The *Osborne* court more precisely stated the *Spaeth* rule as "conduct underlying one conviction *for which a defendant was sentenced* cannot be used to support an upward sentencing departure for a separate conviction." 715 N.W.2d at 446 (emphasis added). This court acknowledged in *State v. Masood* that whether elements of an unsentenced conviction may be used as aggravating sentencing factors remained an open question. 739 N.W.2d 736, 740 (Minn. App. 2007).

While *Jones* resolved the open question by making clear that a departure based on elements of offenses for which there was a conviction but not a sentence amounts to illegal cumulative punishment, this clarification has no bearing on appellant's case. The sentencing court's departure in this case was not based on an element of the unsentenced offense of child neglect but, rather, on the absolute vulnerability of the infant victim. In concluding that its decision to depart on this basis was appropriate, the sentencing court

relied on *State v. Partlow*, 321 N.W.2d 886 (Minn. 1982). In *Partlow*, the defendant was convicted of first-degree criminal sexual conduct for sexual penetration of a person under 13 years of age by a person more than 36 months older. 321 N.W.2d at 886. The district court made an upward departure from the then-presumptive sentence of 41–45 months in part on the basis of the particular vulnerability of the 2-year, 10-month-old victim. *Id.* at 886–87. The supreme court affirmed, reasoning that:

> While the offense charged contains a victim age element, *i.e.*, under 13 years, and thus under ordinary circumstances the victim's age could not be again relied upon for a departure factor because the same factor would then be twice considered in sentencing, the *absolute vulnerability* of the 2-year, 10-month-old victim here justifies an aggravation of sentence.

Id. at 887 n.1 (emphasis added).

On direct appeal in this case, appellant relied on the more recent decision of *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003), for the proposition that when the age of the victim is an element of the offense, the victim's particular vulnerability due to age is an "inappropriate basis for departure." In *Taylor*, the supreme court distinguished *Partlow*, noting that *Partlow* "was decided 20 years ago, during the early stages of the determinate guidelines system in which 'real time' sentences revealed relatively short terms typically served and the presumptive term for first-degree criminal sexual conduct was 43 months," as opposed to 144 months at the time of *Taylor*. 670 N.W.2d at 589. The *Taylor* court then reduced the defendant's sentence to the presumptive sentence for first-degree criminal sexual conduct, even though the victim was only three years old. *Id.* at 590. In reaching its conclusion, the court said that the victim's vulnerability due to age

was an inappropriate basis for departure because that fact was “already taken into account by the legislature in determining the degree of seriousness of the offense.” *Id.* at 589. The court pointed out that “[t]he legislature has set absolute vulnerability for [first-degree criminal sexual conduct] at 13 years, and we are not inclined to tamper with that.” *Id.*

This court acknowledged and distinguished *Taylor* on appellant’s direct appeal in this case, when it explicitly held that the legislature did *not* take the absolute vulnerability of a three-month-old victim into account when determining the seriousness of child neglect. *Shane*, 2008 WL 660543, at *9–10. Consistent with *Partlow*, we reasoned that while the legislature’s increased sentences for criminal sexual conduct already included a consideration of the greater vulnerability of a young victim,

> the absolute vulnerability of a three-month-old baby has not been factored into the presumptive sentence for the crime of child neglect. For purpose of the crime of child neglect, a “child” is defined as anyone under the age of 18. Unlike an older child who could communicate injury, pain, and other distress, A.C. was entirely helpless and dependent on [appellant] to provide her with necessary care.

Id. (citation omitted).

We see nothing in *Jones* that compels a different result than that reached by this court on appellant’s direct appeal. The rules about age-based departure grounds for crimes with an age element have not changed since *Taylor*, which this court considered and distinguished on direct appeal. Nothing in *Jones* provides a basis for this court to overturn its prior decision. Therefore, appellant’s claim that *Jones* requires reduction of her sentence is without merit.

Affirmed.