STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2269

Jeremy Grant Rickert, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 22, 2009
Reversed and remanded
Halbrooks, Judge

Scott County District Court
File No. 70-CR-06-14674

Melissa Sheridan, Assistant State 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

Patrick J. Ciliberto, Scott County Attorney, Tanya O. O'Brien, Assistant County Attorney, 200 Fourth Avenue West, Shakopee, MN 55379 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Appellant challenges the denial of his petition for postconviction relief on the grounds that (1) his constitutional right to one review of his criminal conviction was

violated by dismissal of his petition; (2) the district court erred by imposing a ten-year conditional-release period; and (3) he received ineffective assistance of his postconviction counsel. Because we conclude that the imposition of appellant's ten-year conditional-release sentence was improper on this record, we reverse and remand to the district court for resentencing. But because appellant's postconviction petition was reviewed on the merits by the district court, we do not reach appellant's constitutional argument and hold that his ineffective-assistance-of-counsel claim fails.

FACTS

In 2006, appellant Jeremy Grant Rickert was charged with three counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2004); and one count of second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(a) (2004), for sexually assaulting a minor. Appellant pleaded guilty to one count of first-degree criminal sexual conduct, and the remaining counts were dismissed pursuant to a plea agreement. During the plea colloquy, appellant's counsel asked appellant whether he "would agree that on a number of occasions, between the time periods of 2003 and 2006" he engaged in sexual penetration of the victim. Appellant responded affirmatively. Appellant was sentenced to the presumptive term of 144-months with a ten-year conditional-release period. He did not seek a direct appeal.

In April 2008, a public defender was appointed to review appellant's case for a possible postconviction petition. The postconviction statute includes a two-year statute of limitations. Minn. Stat. § 590.01, subd. 4(a) (2006). As applied to appellant, the statute was to run on August 16, 2008. On August 20, 2008, four days after the

limitations period passed, appellant's counsel moved for a 60-day extension of the filing deadline. Appellant argued that the interests of justice required an extension because the public defender's office did not receive the guilty-plea transcript until August 14, 2008. Alternatively, appellant argued that the statute-of-limitations period was unconstitutional if it precluded review of his conviction. The district court granted appellant's motion for a filing extension. After the district court's order was filed, respondent State of Minnesota submitted a memorandum in opposition to appellant's motion, objecting to the order on the ground that it had no opportunity to respond before the district court ruled. The state also argued that appellant's failure to file the extension motion within the two-year time period precluded the requested relief.

Appellant petitioned for postconviction relief in October 2008, alleging that the imposition of a ten-year conditional-release period to his sentence violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Appellant argued that the general facts that he admitted at his plea hearing did not establish that any criminal conduct occurred after August 1, 2005, the effective date for a mandatory imposition of a ten-year conditional-release period. Before August 1, 2005, a mandatory five-year conditional-release term applied to the crime that appellant was convicted of. *See* Minn. Stat. § 609.109, subd. 7(a) (2004); 2005 Minn. Laws ch. 136, art. 2, § 21, at 931. The state opposed appellant's petition on the ground that the district court lacked jurisdiction to consider it because the two-year statute-of-limitations period had expired before the motion to extend was filed. The state also addressed the merits of appellant's petition, arguing that the facts that appellant admitted during his guilty plea hearing were

sufficient to establish that his criminal activity occurred after August 1, 2005, and therefore the imposition of the new conditional-release period was warranted.

The district court considered the state's opposition to a time extension as well as appellant's arguments in support of postconviction relief. The district court denied appellant's petition on the ground that it was untimely. But in the alternative, the district court also addressed the merits of appellant's petition and determined that appellant's ten-year conditional-release period was properly imposed and that his sentence does not violate *Blakely*. This appeal follows.

D E C I S I O N

"A petition for postconviction relief is a collateral attack on a judgment which carries a presumption of regularity and which, therefore, cannot be lightly set aside." *Pederson v. State*, 649 N.W.2d 161, 163 (Minn. 2002). The petitioner bears the burden of establishing, by a fair preponderance of the evidence, facts that warrant relief. *State v. Warren*, 592 N.W.2d 440, 449 (Minn. 1999). On appeal, this court reviews the record to determine whether there are sufficient facts to sustain the postconviction court's findings. *Id.* at 449-50. We will not disturb those findings absent an abuse of discretion. *Id.* at 450.

I.

Appellant contends that the district court abused its discretion by dismissing his postconviction petition based on his failure to file it within the two-year statute of limitations. Minn. Stat. § 590.01, subd. 4(a)(1), requires that all postconviction petitions be filed within two years of the later of the entry of judgment of conviction or sentence if

no direct appeal is filed.[1] Appellant does not contest the untimely nature of his petition, but instead asserts that the statutory time limitation is unconstitutional if it precludes what he asserts to be a defendant's constitutional right to one review of his conviction.

Appellant argues that the Minnesota Constitution guarantees a criminal defendant the right to one review of a criminal conviction. In support of this argument, appellant cites *Deegan v. State*, 711 N.W.2d 89, 95 (Minn. 2006), which addressed an amendment to the postconviction statute that denied criminal defendants the assistance of the State Public Defender's Office in certain situations, even when the defendant had not filed an appeal.[2] The supreme court struck down the amendment, holding that the Minnesota Constitution guarantees a criminal defendant the assistance of counsel on one review of a criminal conviction, whether by direct appeal or postconviction proceeding. 711 N.W.2d at 98. Appellant quotes a lengthy passage in which the supreme court noted that "the right to one review of a criminal conviction may arguably be grounded in the Minnesota

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[1] Minn. Stat. § 590.01, subd. 4(b) (2006), contains a number of exceptions to the two-year time limitation. Appellant does not argue that his petition falls under any of these exceptions.

[2] The amendment added the following language to the statute:

> If, however, the person pled guilty and received a presumptive sentence or a downward departure in sentence, and the state public defender reviewed the person's case and determined that there was no basis for an appeal of the conviction or of the sentence, then the state public defender may decline to represent the person in a postconviction remedy case.

Deegan, 711 N.W.2d at 91 (quoting 2003 Minn. Laws 1st Spec. Sess. ch. 2, art. 3, § 2 at 1400, 1401).

Constitution." *Id.* at 95. But as further indicated in that passage, the issue of a right to one review was not before the supreme court in *Deegan*, and thus the issue was not resolved by that case. *Id.* And the supreme court recently emphasized that it has not reached the issue of whether the Minnesota Constitution guarantees a defendant the right to one review of a criminal conviction, recognizing that the postconviction statute and the holding in *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976), provide such a right. *Morris v. State*, 765 N.W.2d 78, 82-83 nn.2-3 (Minn. 2009).

Appellant's argument also fails to consider that the district court, while determining that his postconviction petition was time-barred, chose to address the merits of his postconviction petition. On the merits, the district court determined that the ten-year conditional-release period was statutorily mandated and required no additional fact finding beyond those facts that appellant admitted at his guilty-plea hearing. As a result, appellant cannot claim that the two-year statute-of-limitations period unconstitutionally barred consideration of his claims. *See Sykes v. State*, 578 N.W.2d 807, 814 (Minn. App. 1998) (holding that a district court error in dismissing a postconviction petition for untimeliness was harmless because the district court alternatively considered the merits of the petition), *review denied* (Minn. July 16, 1998). Because appellant's postconviction claims were addressed on the merits by the district court, we do not reach appellant's constitutional argument. *See State v. Hoyt*, 304 N.W.2d 884, 888 (Minn. 1981) ("[Courts] do not decide constitutional questions except when necessary to do so in order to dispose of the case at bar.").

II.

Appellant contends that the postconviction court abused its discretion by denying his claim that a ten-year conditional-release period was improperly imposed on his sentence. If an original sentence was authorized by law and the district court exercised its discretion, this court will not normally reevaluate a sentence. *State v. Stutelberg*, 435 N.W.2d 632, 633-34 (Minn. App. 1989) (quoting *Fritz v. State*, 284 N.W.2d 377, 386 (Minn. 1979) (referring to motions brought under Minn. R. Crim. P. 27.03, subd. 9, which allows courts to correct unlawful sentences)). A district court abuses its discretion if it misinterprets or misapplies the law. *State v. Jedlicka*, 747 N.W.2d 580, 582 (Minn. App. 2008).

Before August 1, 2005, the statute required that a district court impose a five-year conditional-release period when sentencing an offender for the crime of first-degree criminal sexual conduct. Minn. Stat. § 609.109, subd. 7(a). In 2005, the legislature enacted a conditional-release statute that increased from five years to ten years the mandatory conditional-release period for defendants convicted of first-degree criminal sexual conduct. 2005 Minn. Laws ch. 136, art. 2, § 21, at 931. The statute became effective on August 1, 2005, and applied to all crimes committed on or after that date. *Id.* at 932; *see also* Minn. Stat. § 609.3455, subd. 6 (2006).

At his guilty-plea hearing, appellant admitted generally to sexual penetration of the victim on a number of occasions between 2003 and 2006 but did not specify that one or more of the sexual assaults occurred after August 1, 2005. Appellant now asserts that imposition of the ten-year conditional-release term on this record violates the holding in

Blakely. *Blakely* held that the statutory maximum for purposes of the Sixth Amendment is "the maximum [a judge] may impose without any additional findings." *Blakely*, 542 U.S. at 303-04, 124 S. Ct. at 2537. As such, "the Sixth and Fourteenth Amendments guarantee . . . a jury's finding of *any disputed fact essential to increase the ceiling of a potential sentence*." *State v. DeRosier*, 719 N.W.2d 900, 903 (Minn. 2006) (quoting *Shepard v. United States*, 544 U.S. 13, 25, 125 S. Ct. 1254, 1262 (2005)). Under *Blakely*, a jury must determine any fact issue, such as the date of the offense, bearing on the determination of the applicable presumptive sentence. *DeRosier*, 719 N.W.2d at 903. A conditional-release term authorized on the basis of a jury verdict does not require jury findings. *State v. Jones*, 659 N.W.2d 748, 753 (Minn. 2003). But a conditional-release period is "constitutionally significant" in terms of the Sixth and Fourteenth Amendments and, therefore, jury findings are required before a district court may impose a conditional-release period beyond the statutorily mandated maximum. *Id.* at 753-54 (construing *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000)). The right to have a jury determine the date of the offense may not be waived through a defendant's failure to request such a determination. *DeRosier*, 719 N.W.2d at 903-04 (citing *State v. Osborne*, 715 N.W.2d 436, 442 (Minn. 2006)).

Here, the determination of the applicable conditional-release period depended on whether appellant committed criminal sexual conduct after August 1, 2005, the effective date of the new statute. Because appellant did not specifically admit to post-August 1, 2005 conduct, the district court's imposition of the ten-year conditional-release period was based on an implied finding that one or more of appellant's acts occurred after that

date. This contravenes the holding in *Blakely*. A district court may not determine a factual issue that bears on the applicable presumptive sentence, including the mandatory conditional-release period. Because appellant was entitled to have a jury determine the dates of his offenses beyond a reasonable doubt before the district court imposed a ten-year conditional-release period, we conclude that imposition of the ten-year conditional-release term was error.

Appellant's conditional-release term need not be reversed and remanded if the *Blakely* error was harmless. *See DeRosier*, 719 N.W.2d at 904; *see also State v. Chauvin*, 723 N.W.2d 20, 30 (Minn. 2006) (stating that "*Blakely* errors are not structural and thus are subject to a harmless error analysis"). "An error is not harmless if there is any reasonable doubt the result would have been different if the error had not occurred." *DeRosier*, 719 N.W.2d at 904. Here, appellant pleaded guilty to first-degree criminal sexual conduct before any testimony or evidence was gathered. Thus, the record contains no evidence that any of appellant's acts occurred after August 1, 2005. If the district court had not implicitly found that appellant engaged in a sexual act of penetration after August 1, appellant's conditional-release period would have been five years shorter. We cannot conclude beyond a reasonable doubt that the outcome would have been the same without this error. Therefore, the error is not harmless.

Appellant asserts that this court should simply correct his sentence by imposing a five-year conditional-release term. We decline to do so. The district court is the proper forum to determine the correct sentence. Should the district court, on remand, choose to empanel a sentencing jury for additional fact finding, we note that empanelling a

resentencing jury does not violate the Double Jeopardy Clause or constitute an ex post facto violation. *See Hankerson v. State*, 723 N.W.2d 232, 240, 243-44 (Minn. 2006). We leave to the district court's discretion on remand the decision of whether to permit additional fact-finding as to the dates on which appellant committed criminal sexual conduct.

III.

Appellant alleges that his postconviction counsel provided him with ineffective assistance due to his counsel's failure to file his petition within the two-year statute of limitations. Under article I, section 6 of the Minnesota Constitution, criminal defendants are guaranteed "the right to counsel for one review of a criminal conviction, 'whether by direct appeal or a first review by postconviction proceeding.'" *Barnes v. State*, 768 N.W.2d 359, 364 (Minn. 2009) (quoting *Deegan*, 711 N.W.2d at 98); *see* Minn. Const. art. I, § 6 ("The accused shall enjoy the right . . . to have the assistance of counsel in his defense."). Because appellant did not seek a direct appeal, he was constitutionally entitled to counsel in the postconviction proceeding. To bring an ineffective-assistance-of-counsel claim:

> The [appellant] must affirmatively prove that his counsel's representation "fell below an objective standard of reasonableness" and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

Gates v. State, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Leake v. State*, 767

N.W.2d 5, 10 (Minn. 2009) (quotation omitted). "The reviewing court considers the totality of the evidence . . . in making this determination . . . [and] need not address both the performance and prejudice prongs if one is determinative." *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (citation omitted).

We take note of the late date that the public defender's office became involved in this case, the delay in receiving a transcript, and the overall budgetary limitations on the system. Even if, arguably, appellant's counsel's performance failed to meet an objective standard of reasonableness because he failed to file the postconviction petition before the statute-of-limitations period ran, appellant cannot prove that he was prejudiced by this failure. The district court addressed the merits of appellant's postconviction claim, notwithstanding the passing of the two-year time limitation. Therefore, we conclude that appellant's claim of ineffective assistance of counsel in this postconviction context fails.

Reversed and remanded.