STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2030

Brad Ronald Stevens, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 5, 2011
Affirmed
Peterson, Judge

Goodhue County District Court
File No. 25-K6-02-002009

Brad Ronald Stevens, Rush City, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Stephen N. Betcher, Goodhue County Attorney, Erin L. Kuester, Assistant County Attorney, Red Wing, Minnesota (for respondent)

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

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

PETERSON, Judge

This pro se postconviction appeal is from an order denying appellant's motion to correct his sentence. We affirm.

FACTS

In November 2002, appellant Brad Ronald Stevens was charged by complaint with one count each of fourth-degree criminal sexual conduct, attempted fourth-degree criminal sexual conduct, terroristic threats, and fifth-degree criminal sexual conduct. In March 2003, appellant entered an *Alford* plea to the charge of attempted fourth-degree criminal sexual conduct, in violation of Minn. Stat. §§ 609.345, subd. 1(c), .17, subds. 1, 4(2) (2002).

The district court conducted the plea proceeding and the sentencing hearing together. At the hearing, counsel stated that, pursuant to a plea agreement and based on appellant's criminal history, the recommended sentence would be the mandatory minimum of 36 months. *See* Minn. Stat. § 609.109, subd. 2 (2002) (providing that, "if a person is convicted under sections 609.342 to 609.345, within 15 years of a previous sex offense conviction, the court shall commit the defendant to the commissioner of corrections for not less than three years"). After appellant was extensively questioned about his understanding of his rights, the district court accepted appellant's *Alford* plea, dismissed the remaining charges, and, at appellant's request, immediately proceeded to sentencing after appellant waived a presentence investigation and a psycho-sexual examination. The district court sentenced appellant to an executed 36-month sentence, plus a 10-year conditional release period, and required appellant to provide a DNA sample, comply with predatory-offender registration, and have no contact with the complainant.

In November 2004, the state filed a petition to civilly commit appellant as a sexually dangerous person, and, in August 2005, the district court ordered civil commitment for an indeterminate period.

In July 2005, appellant petitioned for postconviction relief, seeking withdrawal of his guilty plea and an evidentiary hearing. The district court denied appellant's request for postconviction relief, and this court affirmed the district court. *Stevens v. State*, No. A07-1624 (Minn. App. Nov. 25, 2008). This court declined to consider two issues that appellant raised for the first time on appeal, whether the district court erred by allowing appellant to waive a sex-offender assessment and whether civil commitment violated the plea agreement and appellant's constitutional rights.

In January 2009, appellant moved to correct or reduce his sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9, primarily focusing on the issues that this court declined to consider in appellant's previous appeal. In March 2009, the district court denied appellant's motion. The district court also denied appellant's later motion to assert additional claims.

In an appeal to this court, appellant argued that (1) his sentence was enhanced in violation of the due-process guarantees of the Fourteenth Amendment to the United States Constitution and Article I, Section 7, of the Minnesota Constitution; (2) the district court abused its discretion by failing to correct an unauthorized sentence; and (3) imposing a no-contact order as part of his executed sentence was contrary to law. This court reversed only the imposition of the no-contact order as part of the executed sentence, finding that the order was not statutorily authorized, and remanded to the

district court to vacate the no-contact order. *Stevens v. State*, A09-756, 2010 WL 431495, at *3 (Minn. App. Feb. 9, 2010), *review denied* (Minn. Apr. 20, 2010). This court otherwise affirmed the district court's order. *Id.* at *2-3. This court also determined that appellant's arguments addressing withdrawal of his guilty plea were barred because they were raised and addressed in his prior appeal. *Id.* at *4 n.3.

In July 2010, appellant again moved to correct or reduce his sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9. The district court treated the motion as a petition for postconviction relief and summarily denied the motion as procedurally barred under *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). This appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion by summarily denying his motion to correct an unauthorized sentence. "A motion for correction is addressed to the district court's discretion and will be reversed on appeal only when discretion is not properly exercised and the sentence is unauthorized by law." *State v. Cook*, 617 N.W.2d 417, 419 (Minn. App. 2000), *review denied* (Minn. Nov. 21, 2000). A criminal sentence is unauthorized by law when it is contrary to the requirements of the applicable sentencing statute. *Id.*

Appellant contends that his sentence is unauthorized because the sentencing court "inaccurately imposed a provision of a 35-year maximum sentence." During the sentencing hearing, the district court stated that "Count II states a charge of attempted criminal sexual conduct in the 4th degree, use of force. And, that's a felony offense carrying with it a maximum penalty under Minnesota law of zero to 35 years." The

district court's statement that the maximum sentence for Count II was 35 years was incorrect because the statute provides that a person convicted of fourth-degree criminal sexual conduct "may be sentenced to imprisonment for not more than ten years or to a payment of a fine of not more than $20,000, or both." Minn. Stat. § 609.345, subd. 2 (2002). And a person who attempts to commit a crime with a maximum sentence other than life imprisonment may be sentenced "to not more than one-half of the maximum imprisonment or fine or both provided for the crime attempted." Minn. Stat. § 609.17, subd. 4(2). But the district court did not impose a 35-year sentence; the court sentenced appellant to an executed 36-month sentence, plus a 10-year conditional release period. Because the applicable sentencing statute, Minn. Stat. § 609.109, subd. 2, required a minimum sentence of 36 months for an offender with appellant's criminal history and Minn. Stat. § 609.109, subd. 7 (2002), required a 10-year conditional release period, appellant's sentence was authorized by law.

Appellant argues that because there has never been a decision on the merits of his motion to correct an unauthorized sentence, the district court abused its discretion by summarily denying his motion as procedurally barred under *Knaffla*. Appellant concedes that he raised this issue in his prior appeal, but he contends that this court did not reach a decision on the merits of the issue. See Minn. R. Crim. P. 27.03, subd. 9 ("The court at any time may correct a sentence not authorized by law."); *State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008) (explaining that "[b]ecause courts have authority to correct an illegal sentence at any time under Minn. R. Crim. P. 27.03, subd. 9, a defendant cannot

forfeit, or waive by silence, review of an illegal sentence"), *review denied* (Minn. Sept. 23, 2008).

The district court treated appellant's motion to correct his sentence as a petition for postconviction relief. *See Bonga v. State*, 765 N.W.2d 639, 642-43 (Minn. 2009) (noting that treating a rule 27.03 motion to correct sentence as postconviction petition is consistent with caselaw and that statute authorizing postconviction petitions broad enough to encompass rule 27.03 motion). The district court "may summarily deny a second or successive petition for similar relief on behalf of the same petitioner and may summarily deny a petition when the issues raised in it have previously been decided by the Court of Appeals or the Supreme Court in the same case." Minn. Stat. § 590.04, subd. 3 (2008); *see Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006) (stating that, generally, district court will not consider claims raised in, or known but not raised in, earlier petition for postconviction relief). A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

In its opinion reviewing the denial of appellant's earlier motion to correct his sentence, this court noted that "the issue of whether [appellant's] sentence is unauthorized by law . . . and the accompanying arguments are properly before us." *Stevens*, 2010 WL 431495, at *4 n.3. This court also stated that appellant "was sentenced to 36 months' imprisonment and ten years' conditional release, a sentence that is authorized by the statute." *Id.* at *3. But this court did not discuss whether the district court's incorrect statement that Count II had a maximum penalty of 35 years

imprisonment meant that appellant's sentence was unauthorized by law. However, even if this court did not decide this issue on the merits in appellant's prior appeal, the district court did not abuse its discretion by summarily denying appellant's current motion because an evidentiary hearing is not required if the petition and record conclusively show that the petitioner is not entitled to relief. Minn. Stat. § 590.04, subd. 1 (2008). The petition and record conclusively show that appellant's 36-month sentence with ten years of conditional release was authorized.

Appellant also argues that his sentence should be vacated because the district court and the prosecutor incorrectly stated during the plea hearing that the maximum sentence for Count II was 35 years. Appellant contends that he is not seeking to withdraw his plea. But he does not cite any authority that supports his argument that his sentence may be vacated as unauthorized by law because incorrect information about the maximum allowable sentence was provided to him during his plea hearing. Instead, appellant recasts an argument that his plea was not accurate and intelligent, which would be a basis to withdraw his plea, as an argument to vacate the sentence imposed as the result of the plea. *See Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997) (noting that manifest injustice occurs if a guilty plea is not accurate, voluntary, and intelligent; therefore, the plea may be withdrawn). However, because the district court and the prosecutor made their statements before appellant entered his plea, appellant knew of this claim but failed to raise it in 2005 when he brought his first postconviction petition seeking to withdraw

his plea on other grounds.[1] Therefore, we will not consider this claim in this later postconviction proceeding. *See Jones v. State*, 671 N.W.2d 743, 746 (Minn. 2003) (stating that matters that were known to defendant and could have been raised in previous postconviction petition will not be considered upon subsequent petition for postconviction relief); *Wayne v. State*, 601 N.W.2d 440, 441 (Minn. 1999) (declining to consider in review of denial of third petition for postconviction relief claims that appellant could have raised in earlier review).

Affirmed.

[1] In 2005, appellant claimed as a basis for withdrawing his plea that he was informed by counsel before sentencing that the state was not seeking civil commitment and he was not informed that a conditional release period would be included in his sentence.