STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1221

Arthur Gacheru Ngacah, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 14, 2014
Affirmed
Schellhas, Judge

Hennepin County District Court
File No. 27-CR-07-025065

William Ward, Hennepin County Public Defender, Melissa Fraser, Assistant Public Defender, Minneapolis, Minnesota (for appellant)

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

Corrine Heine, Minnetonka City Attorney, Anna Krause Crabb, Assistant City Attorney, Minnetonka, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Schellhas, Judge; and Klaphake, Judge.[*]

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

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

SCHELLHAS, Judge

Appellant argues that the district court abused its discretion by denying his postconviction-relief petition without a hearing. We affirm.

FACTS

Respondent State of Minnesota charged appellant Arthur Ngacah with one count of gross-misdemeanor domestic assault, intent to cause fear, under Minn. Stat. § 609.2242, subd. 1(1) (2006), and one count of gross-misdemeanor domestic assault, intent to cause bodily harm, under Minn. Stat. § 609.2242, subd. 1(2) (2006). A jury found Ngacah guilty of gross-misdemeanor domestic assault–harm. On April 9, 2008, the district court sentenced Ngacah to 365 days in the workhouse, staying 275 days of the sentence for four years and noting that, depending on Ngacah's conduct, "probation can terminate early after at least two years." Ngacah appealed, and this court affirmed Ngacah's conviction, rejecting Ngacah's argument that the district court plainly erred in its evidentiary ruling. *State v. Ngacah*, No. A08-1141, 2009 WL 2431994, at *1 (Minn. App. Aug. 11, 2009), *review denied* (Minn. Oct. 20, 2009). Nothing in this court's opinion suggests that Ngacah challenged his sentence. *Id.* at *1–4.

Ngacah asserts, and the district court found, that the district court discharged Ngacah from probation on August 27, 2010.[1] On March 20, 2013, Ngacah petitioned the district court for postconviction relief, asking the court to reduce his sentence from 365

[1] The register of actions states that Ngacah's probation discharge occurred on August 26, 2010.

days to 364 days on the basis that the United States Immigration and Customs Enforcement (ICE) would otherwise deport him. Ngacah argued that his postconviction petition was not time-barred because of "the interests of justice." The district court denied Ngacah's petition as untimely, reasoning in part that Ngacah alleged no injustice that *caused* his petition to be untimely, nor one that arose within the two years preceding his filing of his postconviction petition in March 2013. In July 2013, Ngacah noticed this appeal. Ngacah also asked the district court to reconsider its denial of his postconviction petition, arguing that he filed his petition within two years of when his claim arose—January 31, 2013. Ngacah argued that his claim arose on January 31, 2013, "because ICE did not initiate deportation proceedings until on or about" that day. On July 26, the district court declined to reconsider its denial of the postconviction petition.

In this appeal, we granted the state's motion to strike two affidavits in the appendix to Ngacah's appellate brief because they were created after Ngacah filed this appeal.

D E C I S I O N

An appellate court "review[s] the denial of postconviction relief for an abuse of discretion," reviewing legal conclusions de novo and factual findings for clear error. *Greer v. State*, 836 N.W.2d 520, 522 (Minn. 2013). An appellate court "review[s] the denial of a postconviction evidentiary hearing for an abuse of discretion." *Hooper v. State*, 838 N.W.2d 775, 786 (Minn. 2013). A postconviction court need not hold an evidentiary hearing if "the petition and the files and records of the proceeding

conclusively show that the petitioner is entitled to no relief." Minn. Stat. § 590.04, subd. 1 (2012).

Subdivision 4(a) Two-Year Time Limit

Minnesota Statutes section 590.01, subdivision 4(a) (2012), provides that "[n]o petition for postconviction relief may be filed more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." Ngacah filed his postconviction petition more than two years after August 11, 2009, the date on which this court disposed of his direct appeal. Ngacah's petition therefore was untimely under section 590.01, subdivision 4(a).

Subdivision 4(b)(5) Interests-of-Justice Exception

When "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice," the postconviction petition is excepted from the two-year time limit in subdivision 4(a). Minn. Stat. § 590.01, subd. 4(b)(5) (2012). The supreme court explained in *Sanchez v. State* that

> the interests-of-justice exception is triggered by an injustice that *caused* the petitioner to miss the primary deadline in subdivision 4(a), not the *substance* of the petition. When the only injustice claimed is identical to the substance of the petition, and the substance of the petition is based on something that happened before or at the time a conviction became final, the injustice simply cannot have caused the petitioner to miss the 2-year time limit in subdivision 4(a), and therefore is not the type of injustice contemplated by the interests-of-justice exception in subdivision 4(b)(5).

816 N.W.2d 550, 557 (Minn. 2012).

Ngacah has not alleged an injustice that *caused* him to miss the subdivision 4(a) deadline. Rather, Ngacah has alleged an injustice that is identical to the *substance* of the allegations in his postconviction petition, that is, that his sentence was "fundamentally unfair[] and . . . violative of due process" because the district court, "by sentencing him to 365 days, instead of 364, . . . essentially convicted him of a felony under federal law."

The interests-of-justice exception under subdivision 4(b)(5) is therefore unavailable to Ngacah, and the two-year time limit in subdivision 4(a) bars his postconviction petition.

Subdivision 4(c) Two-Year Time Limit

Even if the substance of Ngacah's petition could satisfy the interests-of-justice exception under subdivision 4(b)(5), Minnesota Statutes section 590.01, subdivision 4(c) (2012), would bar it. Section 590.01, subdivision 4(c), provides that "[a]ny petition invoking an exception provided in paragraph (b) must be filed within two years of the date the claim arises." The supreme court held in *Sanchez* that "[a] claim based on an exception in Minn. Stat. § 590.01, subd. 4(b), arises, for purposes of calculating the 2-year time limit in Minn. Stat. § 590.01, subd. 4(c), when the claimant knew or should have known that the claim existed." 816 N.W.2d at 552. The knew-or-should-have-known standard is an objective standard, under which a petitioner's subjective, actual knowledge is irrelevant. *Id.* at 558. Here, the district court concluded that "Ngacah's claim arose on April 9, 2008," reasoning that Ngacah "knew or should have known of the potential for deportation based upon his 365-day sentence on the day he was sentenced on April 9, 2008." We agree.

Ngacah's claim would have arisen when he was sentenced on April 9, 2008, because the same statutes on which Ngacah bases his argument that a one-day sentencing decrease is necessary to prevent his deportation remain unchanged today from when the district court sentenced him in April 2008. *Compare* 8 U.S.C. § 1229b(a)(3) (2006) (providing that "[t]he Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of any aggravated felony"), *with* 8 U.S.C. § 1229b(a)(3) (2012) (same); 8 U.S.C. § 1101(a)(43)(F) (2006) (defining aggravated felony as including "a crime of violence"), *with* 8 U.S.C. § 1101(a)(43)(F) (2012) (same); *and* 18 U.S.C. § 16(b) (2006) (defining crime of violence as including "any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"), *with* 18 U.S.C. § 16(b) (2012) (same). Moreover, at the April 2008 sentencing hearing, the district court noted the possibility of Ngacah's probation affecting "immigration matters":

> I'll put in here that probation can terminate early after at least two years, I'm going to leave it in their discretion given his track record. If they are not inclined to terminate it at that time and it's something that's going to impact your immigration matters, contact [your defense attorney], she can bring it up with the Court, and I can look at it at the time.

Ngacah relies on *State v. Byron*, 683 N.W.2d 317 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). In *Byron*, we concluded that the postconviction court did not abuse its discretion by considering Byron's motion to withdraw his guilty plea when he "diligently moved forward with his motion shortly after serious immigration

consequences arose as a result of his guilty plea." 683 N.W.2d at 322. But *Byron* is unpersuasive authority because it predates (1) the legislature's addition of the time limits in subdivision 4(a) and (c) in 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097–98, and (2) the supreme court's opinion in *Sanchez*, 816 N.W.2d at 550. *See id.* at 317.

Ngacah invites us to deviate from the supreme court's construction of subdivision 4(c) in *Sanchez*, arguing that, "[i]n the immigration context . . . this holding is irreconcilable with the ripeness doctrine." *See State v. Murphy*, 545 N.W.2d 909, 917 (Minn. 1996) ("Issues which have no existence other than in the realm of the future are purely hypothetical and are not justiciable. Neither the ripe nor the ripening seeds of controversy are present." (quotation omitted)). We decline. "[W]hen the supreme court has already construed a statute, this court is bound by that interpretation." *State v. Rohan*, 834 N.W.2d 223, 227 (Minn. App. 2013), *review denied* (Minn. Oct. 15, 2013).

Sentence Modification and Correction

Minnesota Rule of Criminal Procedure 27.03, subdivision 9, provides that "[t]he court may modify a sentence during a stay of execution or imposition of sentence if the court does not increase the period of confinement." We have concluded that the two-year time limit in the postconviction statute "does not apply to motions properly filed under" rule 27.03, subdivision 9. *Vazquez v. State*, 822 N.W.2d 313, 318 (Minn. App. 2012). But, because Ngacah stated in his petition that he "successfully completed probation and was discharged . . . on August 27, 2010," he essentially conceded that the district court "cannot modify his sentence under Rule . . . 27.03, subd. 9." "When a court does not have the authority to hear and determine a particular class of actions and the particular

questions that the court assumes to decide, the court lacks subject-matter jurisdiction." *Vang v. State*, 788 N.W.2d 111, 117 (Minn. 2010). "The Rules of Criminal Procedure . . . grant courts authority to 'modify a sentence *during* either a stay of imposition or stay of execution of sentence,' but grant no authority to modify a sentence once that stay has expired." *State v. Pflepsen*, 590 N.W.2d 759, 765 (Minn. 1999) (quoting Minn. R. Crim. P. 27.03, subd. 9 (emphasis added)); *cf. State v. Ford*, 539 N.W.2d 214, 230–31 (Minn. 1995) ("[U]nder Minn. R. Crim. P. 27.03, subd. 9, not even the trial court has authority to modify a sentence once the sentence has been executed.").

Rule 27.03, subdivision 9, also provides that "[t]he court may at any time correct a sentence not authorized by law." But Ngacah does not argue that his sentence is unauthorized by law. Instead, relying on *State v. Calmes*, 632 N.W.2d 641 (Minn. 2001), Ngacah argues that the district court had authority to modify his sentence "as a matter of due process." But the supreme court recognized no such authority in *Calmes*; the supreme court held that "[t]here are due process *limits* on a court's ability to modify a sentence to correct an error." 632 N.W.2d at 643 (emphasis added).

We conclude that the district court did not abuse its discretion by denying Ngacah's untimely postconviction-relief petition without a hearing.

Affirmed.