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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1761**

Brian Lee Wilbur, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed September 16, 2008
Affirmed
Johnson, Judge**

Hennepin County District Court
File No. 27CR97048923

Brian Lee Wilbur, OID No. 116432, MCF-Moose Lake, 1000 Lakeshore Drive, Moose Lake, MN 55767 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mike Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

Brian Lee Wilbur appeals from the district court's denial of his third request for postconviction relief. We conclude that Wilbur's claim is procedurally barred because the claim was raised and decided in two prior postconviction proceedings and, therefore, affirm.

FACTS

On September 18, 1997, a Hennepin County jury found Wilbur guilty of second- and fourth-degree criminal sexual conduct and two counts of first-degree burglary. On October 21, 1997, the district court sentenced Wilbur to 360 months of imprisonment on the second-degree criminal-sexual-conduct charge and to a concurrent sentence of 68 months on one of the burglary counts; the remaining criminal-sexual-conduct and burglary charges merged with the other offenses. This court affirmed the conviction. *State v. Wilbur*, 1998 WL 372773 (Minn. App. July 7, 1998), *review denied* (Minn. Aug. 31, 1998).

On October 3, 2000, appellant filed his first postconviction petition. He sought resentencing on the ground that his sentence was invalid under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). The district court granted Wilbur's petition. On June 19, 2001, the district court resentenced Wilbur to 300 months on the second-degree criminal-sexual-conduct charge but affirmed the other portions of the earlier sentence, including the 68-month concurrent sentence on the burglary offense.

On October 12, 2004, Wilbur filed a second petition for postconviction relief. He again sought resentencing, this time on the basis of the United States Supreme Court's then-recent decision in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). The district court denied the petition, holding that Wilbur was not entitled to the retroactive application of *Blakely*. This court affirmed on the same grounds, citing *State v. Houston*, 702 N.W.2d 268, 273 (Minn. 2005). *Wilbur v. State*, A04-2443 (Minn. App. Aug. 29, 2005) (order op.).

On July 1, 2007, Wilbur filed a motion to correct his sentence, pursuant to Minn. R. Crim. P. 27.03, subd. 9. He again argued that he was entitled to the retroactive application of *Blakely* and that his sentence is unlawful. In an order filed September 4, 2007, the district court denied the motion on the ground that it is barred by *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976). The district court also stated that Wilbur is not entitled to the retroactive application of *Blakely*. Wilbur appeals.

D E C I S I O N

Wilbur argues that the district court erred because the *Knaffla* procedural bar does not apply to a motion to correct sentence filed pursuant to Minn. R. Crim. P. 27.03, subd. 9. A motion to correct sentence filed pursuant to the first sentence of rule 27.03, subdivision 9, is a form of postconviction proceeding that is within the scope of chapter 590 of the Minnesota Statutes. *See Powers v. State*, 731 N.W.2d 499, 501 n.2 (Minn. 2007) (stating that section 590.01 “is broad enough to encompass a motion pursuant to [rule] 27.03”). In a postconviction proceeding, “all matters” raised in a direct appeal and “all claims known but not raised, will not be considered upon a subsequent petition for

postconviction relief.” *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. “Additionally, matters raised or known but not raised in an earlier petition for postconviction relief will generally not be considered in subsequent petitions for postconviction relief.” *Powers*, 731 N.W.2d at 501. There are two exceptions to the *Knaffla* rule. The first was announced in *Case v. State*, 364 N.W.2d 797 (Minn. 1985), in which the supreme court held that if a novel legal issue is presented, a petitioner is excused from the failure to raise it in a prior proceeding. *Id.* at 800. The second exception was fully articulated in *Fox v. State*, 474 N.W.2d 821 (Minn. 1991), in which the supreme court held that a district court may consider an issue otherwise barred by *Knaffla* when “fairness requires.” *Id.* at 825. The second exception often is restated as one that applies when “the interests of justice require review.” *Powers*, 731 N.W.2d at 502.

The district court concluded that Wilbur’s motion is barred by *Knaffla* because Wilbur made the same argument in his second postconviction action in 2004. *See Wilbur*, A04-2443. The district court’s denial of the motion is proper under *Powers*, a case that is very similar to this case. Powers moved to correct his sentence pursuant to rule 27.03, subdivision 9, arguing that *Blakely* retroactively applied to his sentence. 731 N.W.2d at 500-01. The district court denied the motion without a hearing on the ground that it was barred by *Knaffla* because Powers had raised an almost identical argument under *Apprendi* in his first postconviction action. *Id.* The supreme court affirmed, with the following explanation:

Powers raised his sentencing argument based on *Apprendi* in his first postconviction petition. Powers’ current claim is essentially the same claim, but he cites *Blakely* in support of

his argument as well as *Apprendi*. Powers does not explain how *Blakely* has changed his sentencing argument. Moreover, to the extent that the sentencing claim is different based on *Blakely*, it is *Knaffla*-barred because Powers could have raised it in his second petition for postconviction relief.

Id. at 501-02. Thus, the supreme court clearly applied the *Knaffla* procedural bar to a motion to correct sentence filed pursuant to rule 27.03, subdivision 9, and concluded that the *Blakely* claim was barred by the previous *Apprendi* claim. The same may be said here. Wilbur's *Blakely* claim is barred because his *Apprendi* claim was decided on the merits in 2000. Furthermore, Wilbur previously made a *Blakely* argument, which was decided on the merits in 2004 and 2005. Thus, Wilbur's present motion is barred by *Knaffla*.

Wilbur relies on *State v. Stutelberg*, 435 N.W.2d 632 (Minn. App. 1989), in arguing that the *Knaffla* bar does not apply to a motion to correct sentence filed pursuant to rule 27.03, subdivision 9. The *Stutelberg* opinion, however, did not so hold. The decision in *Stutelberg* was based on what is now commonly recognized as the second exception to the *Knaffla* bar. Compare *Stutelberg*, 435 N.W.2d at 636 ("We believe . . . review is required in the interests of justice."), with *Powers*, 731 N.W.2d at 502 (stating that second exception applies "if the interests of justice require review."). In *Stutelberg*, this court invoked the interests-of-justice exception because the merits of *Stutelberg*'s postconviction claim had not been considered in the prior postconviction proceeding. *Id.* at 636. The *Stutelberg* opinion is readily distinguishable on this basis. The claim that Wilbur now is pursuing was considered and decided in both his first and second postconviction proceedings. Wilbur has not identified any other feature of his motion

that makes it deserving of the second exception to the *Knaffla* bar. Even if we were inclined to interpret *Stutelberg* as having held that the *Knaffla* bar does not apply to a motion to correct sentence under rule 27.03, subdivision 9, as Wilbur urges, that holding now would be overruled by the supreme court's opinion in *Powers*, which applied the *Knaffla* bar to such a motion. *See* 731 N.W.2d at 501-02.

In sum, we conclude that this case is governed by *Powers*, that Wilbur's motion is procedurally barred, and, accordingly, that the district court properly denied Wilbur's motion to correct sentence.

Affirmed.