STATE OF MINNESOTA
IN COURT OF APPEALS
A15-1964

State of Minnesota,
Respondent,

vs.

Robert Nicholas Heinze,
Appellant.

Filed April 24, 2017
Affirmed in part, reversed in part, and remanded
Bratvold, Judge

Washington County District Court
File No. 82-KX-97-001435

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

Peter Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kirk, Judge; and Bratvold, Judge.

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

BRATVOLD, Judge

In postconviction proceedings, appellant challenged his 68-month sentence, an upward durational departure from the presumptive guidelines sentence, which the district

court executed at a probation-revocation hearing nearly 17 years after sentencing. In his postconviction petition, appellant argued that his upward durational departure should be modified to a presumptive guidelines sentence because the sentencing record did not support the durational departure and, alternatively, that he should be permitted to withdraw his guilty plea because the upward durational departure violated his plea agreement.

On appeal, appellant argues that the postconviction court abused its discretion in determining that his claims were time-barred and declining to address the merits. Because appellant timely appealed his sentence under *State v. Fields*, 416 N.W.2d 734 (Minn. 1987), and the sentencing record does not establish substantial and compelling circumstances justifying an upward durational departure, we reverse and remand to the district court for imposition of a presumptive guidelines sentence. Because appellant's plea-withdrawal claim is time-barred, the postconviction court did not abuse its discretion in denying relief on that alternative ground and we affirm.

FACTS

Between July 1996 and January 1997, appellant Robert Heinze engaged in criminal sexual conduct in Ramsey and Washington Counties with a child who was under the age of 13. For the Washington County crimes, the state charged Heinze with two counts of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(a) (1996), alleging sexual contact and sexual penetration. After Washington County filed its complaint, but before the case was adjudicated, Ramsey County charged Heinze with, and Heinze pleaded guilty to, first-degree criminal sexual conduct, and he began serving an 86-month executed sentence for that conviction in 1997. In 1998, Heinze pleaded guilty to the

Washington County sexual-contact charge in exchange for dismissal of the sexual-penetration charge and the state's promise not to seek an upward departure at sentencing.[1]

The Washington County presentence investigation (PSI) correctly stated two different presumptive sentence durations based on whether the district court exercised its discretion to order Heinze's sentence consecutive with the Ramsey County sentence. For a concurrent sentence, the PSI stated that the presumptive sentence was 68 months. For a consecutive sentence, the PSI stated that the presumptive sentence was 48 months. Minn. Sent. Guidelines IV (1996).[2] Regardless of whether the sentence was concurrent or consecutive, the presumptive disposition was commitment to the commissioner of corrections. The PSI recommended staying execution of a 68-month sentence, with 30 years of probation, which was a downward dispositional departure. The PSI did not specifically recommend a concurrent or consecutive sentence, nor did it mention a durational departure. The PSI's recommendation of 68 months implies that probation

[1] The plea petition does not mention the state's promise not to seek an upward departure. But the postconviction court found that the state's sentencing promise was a term of the plea agreement, based on statements made at the plea hearing. The guilty-plea record supports the postconviction court's determination, and the parties do not dispute this factual determination on appeal.

[2] At the time of Heinze's offense, first-degree criminal sexual conduct involving sexual contact with a victim who was under age 13 was a severity-level seven offense. Minn. Sent. Guidelines IV, V (1996). Because Heinze had a prior felony conviction of first-degree criminal sexual conduct in Ramsey County, his criminal history score was two. *Id.*, II.B.03(1)(a), V. But the guidelines provided that, if a consecutive sentence was imposed, Heinze's criminal history score would revert to zero for the Washington County sentence, resulting in a lower presumptive sentence duration. *Id.*, II.F.02.

recommended a concurrent sentence. The sentencing worksheet, however, incorrectly stated that the "Presump[tive] *Consecutive*" sentence was 68 months. (Emphasis added.)

At sentencing in November 1998, Heinze, through counsel, argued for a downward dispositional departure based on his limited criminal history, amenability to sex-offender treatment, and lack of mental capacity. The state did not oppose Heinze's motion or request an upward departure but asked to impose the sentence consecutive to the Ramsey County sentence.

The sentencing court granted Heinze's request for a downward dispositional departure, pronounced a 68-month sentence, consecutive to the Ramsey County sentence, and stayed execution for 30 years, subject to conditions. But the sentencing court did not state that it was departing durationally or provide reasons for the upward durational departure. The sentencing court filed a departure report, on which it checked the box for dispositional departure, but not the box for durational departure. The departure report stated that the sentence imposed was "68 months, execution stayed, consecutive to current sentence, for the reasons indicated on the back."[3] On the back of the report, the sentencing court checked two boxes for aggravating factors and five boxes for mitigating factors. Heinze did not pursue a direct appeal.

[3] The sentencing court also noted that "[t]he County Attorney believes the consecutive stay on a presumptive commit is not a downward departure, but I am submitting this report because reasonable minds could differ on that point." We conclude that the consecutive sentences were permissive and required no departure findings. Minn. Sent. Guidelines II.F (1996).

In July 2002, Ramsey County released Heinze on supervised release and he began serving his stayed Washington County sentence. While on release, Heinze moved to Green Bay and his supervision was transferred to Wisconsin. In November 2010, Heinze was convicted in Wisconsin of second-degree sexual assault of a child and was sentenced to five years in prison. After Wisconsin released Heinze from prison, he appeared in Washington County for probation-revocation proceedings in April 2015.

The same judge who sentenced Heinze in 1998 presided over his probation-revocation hearing on May 7, 2015. Initially, the court discussed Heinze's sentence, stating "I failed to utter the words [at sentencing] that at the same time that I was departing downward dispositionally, I was also departing upwards durationally. Though, when I filled out the guidelines departure report I did succeed in checking the necessary boxes for the findings to support the aggravated durational departure." Heinze argued the sentencing court did not "establish a sufficient factual basis for an upward durational departure." Heinze pointed out that, at sentencing, the court found "the mitigating factors override the aggravating factors." Without filing a written motion, Heinze orally moved to modify his sentence to a presumptive durational sentence. The court declined to modify the sentence, stating it intended in 1998 to impose an upward durational departure, and the two aggravating factors listed on the departure report supported the 20-month upward durational departure.

Regarding the revocation issue, the state requested execution of the 68-month sentence. Heinze, through counsel, admitted to violating the terms of his probation, but explained he had not had a chance to prove that he could be successful in the community

because he had not completed sex-offender treatment. Heinze also claimed that he could find suitable employment and housing in Wisconsin if the court reinstated his stayed sentence. The court denied the state's request to execute the sentence and reinstated Heinze's stayed sentence subject to additional conditions, including jail time.

After the state learned that Heinze made misrepresentations about treatment, housing, and employment options at the May 7 hearing, the district court reconsidered its revocation decision and executed the previously stayed 68-month sentence in September 2015. On December 7, 2015, Heinze timely filed this appeal. Before briefs were submitted, Heinze moved to stay this appeal to pursue postconviction relief and "to present additional evidence to the district court regarding a challenge to the durational departure." This court granted the stay, and Heinze filed a postconviction petition, arguing that his sentence should be modified to a presumptive guidelines sentence because the upward durational departure lacked a factual basis in the 1998 sentencing record, and, alternatively, seeking to withdraw his plea because the upward durational departure violated his plea agreement.[4]

The postconviction court determined that Heinze's plea agreement included the state's promise not to pursue an aggravated sentence, which "in effect, [was] an agreement" to a presumptive guidelines or lesser sentence. The court concluded the upward durational departure "resulted in rejection of the plea agreement." Nonetheless, the court denied

[4] Heinze also claimed that his conditional-release term on his sentence should be amended from ten to five years, and that his stayed sentence should be reinstated. The postconviction court granted Heinze's request to amend the conditional-release term to five years but denied his request for reinstatement of probation. Minn. Stat. § 609.346, subd. 5(a) (1996) (stating Minn. Stat. § 609.342 carries a five-year mandatory conditional-release term).

Heinze's plea-withdrawal and sentence-modification requests as untimely under Minn. Stat. § 590.01, subd. 4(a) (2014). This court then dissolved the stay and reinstated this appeal.

D E C I S I O N

On appeal, Heinze argues that his 1998 sentence was an unlawful upward durational departure because the sentencing court did not identify substantial and compelling circumstances justifying the departure, and, alternatively, he is entitled to withdraw his plea because the upward durational departure violates the plea agreement. We analyze each claim separately.

I. The postconviction court abused its discretion in denying Heinze's motion to correct the illegal upward durational departure.

When a defendant files a direct appeal and then moves to stay the appeal to pursue postconviction relief, "we review the postconviction court's decisions using the same standard that we apply on direct appeal." *State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015) (citations omitted).

Preliminarily, we note that, when the probation-revocation court executed Heinze's sentence, it denied Heinze's oral motion to modify the upward durational departure to a presumptive guidelines sentence because the two aggravating factors listed on the departure report supported the departure. In the postconviction proceedings, however, the court denied Heinze's sentencing challenge after concluding it was time-barred under

Minn. Stat. § 590.01, subd. 4(a). We will first address the postconviction court's time-bar decision before discussing the merits.

On appeal, the state concedes, and we agree, that Heinze's sentencing challenge is timely under *State v. Fields*, which held that a probationer may challenge his sentence for the first time at a probation-revocation hearing through a "simple motion," and, if necessary, directly appeal the probation-revocation decision. 416 N.W.2d at 736; Minn. R. Crim. P. 27.04, subd. 3(4). This so-called "*Fields* sentencing appeal" is an exception to the time limitations for direct appeals and postconviction petitions. *Fields*, 416 N.W.2d at 736; *see also State v. Hockensmith*, 417 N.W.2d 630, 633 (Minn. 1988) (noting rule 27.03, subdivision 9, gives the district court discretion to modify a sentence "before or simultaneous with revoking the stay of execution"). Heinze's sentencing challenge is a timely *Fields* sentencing appeal.[5] Thus, the postconviction court abused its discretion in concluding that Heinze's sentencing claim was time-barred, and we will consider the merits.

The Minnesota Sentencing Guidelines establish sentencing ranges that are "presumed to be appropriate." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). The sentencing court must impose a sentence within the presumptive range unless "identifiable, substantial, and compelling circumstances" distinguish the case to overcome

[5] Heinze filed this appeal within the applicable time limit for appealing probation-revocation decisions. Minn. R. Crim. P. 27.04, subd. 3(4)(b) (providing that probation revocation appeals are subject to same procedures as sentencing appeals); Minn. R. Crim. P. 28.05, subd. 1(1) (providing that a defendant must file a notice of appeal within 90 days of judgment and sentencing).

the presumption in favor of the guidelines sentence. *Id.* Therefore, a sentencing court may impose an upward departure only if: (a) aggravating circumstances exist, and (b) those circumstances establish a substantial and compelling reason not to impose a guidelines sentence. *Id.* This court reviews a sentencing court's decision to depart from a presumptive sentence for an abuse of discretion. *Id.* at 307–08.

When a sentencing court departs from a presumptive sentence, it must make findings supporting the departure. Minn. R. Crim. P. 27.03, subd. 4(C). Appellate courts are bound by the sentencing record to determine whether substantial and compelling reasons support a sentencing departure. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). On appeal, the following rules apply:

> 1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.
> 2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.
> 3. If the reasons given justify the departure, the departure will be allowed.
> 4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.
> 5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

Id. at 515 (emphasis and quotation omitted).

Here, the sentencing record establishes that the court identified aggravating factors, including the victim's vulnerability and multiple incidents of criminal sexual conduct involving the same victim. The court commented that it would consider these aggravating factors "*if* the Court chose to depart upwards from the guideline sentence." (Emphasis

added.)[6] The court then identified mitigating factors, including lack of substantial capacity for judgment, amenability to treatment, expression of remorse and acceptance of responsibility, and the length and intensity of probation, and concluded that they supported a downward dispositional departure.

Heinze argues that his upward durational departure is invalid because the sentencing court did not expressly state it was imposing a durational departure, and the record does not establish substantial and compelling reasons to support the departure. Heinze relies on *State v. Thieman*, which reversed an upward durational departure and remanded for imposition of a presumptive guidelines sentence because the sentencing record established that the court mistakenly imposed an upward durational departure instead of a guidelines sentence, and the record did not provide "any other rationale which would support a departure." 439 N.W.2d 1, 7 (Minn. 1989); *see also State v. Foreman*, 680 N.W.2d 536, 540–41 (Minn. 2004) (stating that "the proper remedy" for a court's mistaken imposition of an upward durational departure is modification of the sentence to a presumptive guidelines sentence).[7]

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[6] No *Blakely* analysis is necessary. *See Blakely v. Washington*, 512 U.S. 296, 313–14, 124 S. Ct. 2531, 2543 (2004) (holding a criminal defendant is entitled to have a jury determine whether aggravating factors exist for a sentencing departure). Heinze was sentenced before *Blakely* was decided. In *State v. Losh*, the supreme court held that *Blakely* does not apply retroactively in a *Fields* sentencing appeal brought after the expiration of the 90-day limitations period for direct appeals. 721 N.W.2d 886, 895 (Minn. 2006).

[7] *Foreman* is similar to Heinze's case in a number of important respects. The sentencing court in *Foreman* imposed an upward durational departure without stating an intent to do so or reasons for the departure on the record. 680 N.W.2d at 540. Also, in *Foreman*, the state did not move for an upward durational departure, the presentence investigation report did not recommend a durational departure, and the sentencing court did not provide

The state acknowledges that the sentencing court "did not explicitly state at that time that its sentence constituted an upward durational departure." Relying on *State v. Coleman*, the state nevertheless contends that, because the aggravating factors identified at sentencing could have supported an upward durational departure, the sentencing judge was permitted to clarify her intent at the probation-revocation hearing and execute the upward departure. 731 N.W.2d 531, 533, 536–37 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007) (remanding to the district court for resentencing with instructions to impose either a guidelines sentence or the upward durational departure originally imposed at sentencing "if the departure is supported by departure reasons stated on the existing record"). We are not persuaded.

We agree with Heinze's reading of the sentencing record, which establishes that the court identified aggravating and mitigating factors only with regard to the downward dispositional departure. The state did not move for an upward durational departure, the presentence investigation report did not recommend an upward durational departure, the sentencing worksheet incorrectly stated that the "Presump[tive] Consecutive" sentence was 68 months, the sentencing court did not provide presentence notice of a possible durational departure, and the sentencing court filed a departure report, but only checked the box for a dispositional departure. The sentencing record only mentions an upward departure in passing, when the court states that it "could" consider aggravating factors if it "chose" to depart upward. But the record shows that the court imposed only a *dispositional* departure

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presentence notice of an intent to depart durationally. *Id.* The only material difference appears to be that no departure report was filed in *Foreman*.

and mistakenly used the 68-month presumptive durational sentence for a concurrent sentence, rather than a 48-month middle-of-the-box presumptive durational sentence with a zero criminal history score for a consecutive sentence. We conclude that the court failed to cite reasons on the record at sentencing to support the upward durational departure. Therefore, no departure is allowed.

We do not question the sentencing judge's intent to depart upward as stated at the probation-revocation hearing. But we are bound to review the sentencing record to determine whether substantial and compelling circumstances support an upward durational departure. Accordingly, for the reasons discussed, we reverse the upward durational departure and remand to the district court with instructions to impose a guidelines sentence. We note that it is within the district court's discretion to impose any sentence within the presumptive guidelines range and we provide no opinion as to what guidelines sentence is appropriate. *See State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) ("[A]ny sentence within the presumptive range for the convicted offense constitutes a presumptive sentence.").

II. The postconviction court did not abuse its discretion in determining Heinze's plea-withdrawal claim is time-barred.

A motion to withdraw a guilty plea after sentencing under Minn. R. Crim. P. 15.05 must be brought in a postconviction petition and, therefore, is subject to the postconviction statute's time restrictions. *Lussier v. State*, 821 N.W.2d 581, 586 n.2 (Minn. 2012); *see* Minn. R. Crim. P. 15.05, subd. 1 (providing that a defendant may withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice"). Unless an exception applies, a

postconviction petition must be filed within two years of "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." Minn. Stat. § 590.01, subd. 4(a) (2014). The two-year deadline applies to all convictions that became final after August 1, 2005. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097–98. Under the statute's safe-harbor provision, any person whose conviction became final before that date was permitted to file a postconviction petition until August 1, 2007. *Id.*

Heinze's conviction became final in February 1999, 90 days after sentencing. Minn. R. Crim. P. 28.02, subds. 2(3), 4(3)(a). Because Heinze's conviction became final before August 1, 2005, he had until August 1, 2007, to file a postconviction petition. Heinze filed this postconviction petition in 2016, well beyond the 2007 deadline. Thus, unless an exception applies, Heinze's plea-withdrawal claim is time-barred.

A. The interests-of-justice exception does not apply.

Heinze asserts the interests-of-justice exception applies to save his plea-withdrawal claim. We disagree for at least two reasons. First, Heinze's petition did not invoke any exception to the two-year time-bar. *See Brocks v. State*, 883 N.W.2d 602, 604 (Minn. 2016) (stating that a petitioner must "invoke an exception in the petition"). In determining whether a petition invokes an exception, courts "liberally construe" the petition. *Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010). Heinze's petition does not mention the postconviction time-bar or allege any reason for waiting nearly 17 years to challenge the plea. In fact, Heinze first invoked the interests-of-justice exception in his reply brief in this appeal.

Second, although Heinze did not raise the interests-of-justice exception in his petition, the postconviction court analyzed it and found that it did not apply because Heinze's plea-withdrawal claim arose at the 1998 sentencing hearing. We agree. A petitioner must file a petition invoking an exception "within 2 years of the date that the claimed exception arose." *Brocks*, 883 N.W.2d at 604. A claim under the interests-of-justice exception "arises on the date of an event that establishes a right to relief in the interests of justice." *Bee Yang v. State*, 805 N.W.2d 921, 925 (Minn. App. 2011), *review denied* (Minn. Aug. 7, 2012). The date on which the claim "arises" is determined objectively based on when the petitioner "knew or should have known" that the claim existed, not when the petitioner subjectively knew about the claim. *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012). "A postconviction court's determination of when a petitioner knew or should have known about his or her claim is reviewed under a clearly erroneous standard." *Bolstad v. State*, 878 N.W.2d 493, 497 (Minn. 2016). The postconviction court did not clearly err in determining that Heinze knew or should have known that the durational departure violated the plea agreement in 1998 when the sentencing court imposed but stayed the 68-month sentence.

Heinze argues that his plea-withdrawal claim did not arise until the probation-revocation hearing, because only then did the court make "it clear that [it] intended to impose an upward departure." Heinze's argument is without merit. Although the sentencing court did not expressly state that it was imposing an upward durational departure, it pronounced a 68-month stayed sentence, which was a 20-month upward durational departure. Therefore, Heinze either actually knew or objectively should have

known that the sentence violated the plea agreement at the time he was sentenced in 1998. Notably, because Heinze was permitted to file a postconviction petition until 2007 under the statute's safe-harbor provision, he had nearly nine years to realize that his sentence violated the plea agreement and to file a petition. Accordingly, the postconviction court did not clearly err in determining that Heinze's claimed exception arose in 1998, and therefore his petition is untimely under the interests-of-justice exception.

B. Heinze's plea-withdrawal claim does not fall within the scope of review of his timely *Fields* sentencing appeal.

Heinze also argues that his plea-withdrawal claim is timely as part of his *Fields* sentencing appeal. The state incorrectly likens this *Fields* sentencing appeal to a rule 28.05 direct appeal of "the sentence imposed or stayed." Minn. R. Crim. P. 28.05, subd. 2.[8] In *Losh*, the supreme court held that a *Fields* sentencing appeal is not a direct appeal of the sentence imposed. 721 N.W.2d at 894–95. Here, Heinze's sentencing challenge proceeded under rule 27.03, subdivision 9. A challenge that goes "beyond the sentence" cannot be brought under rule 27.03, subdivision 9, and must be raised either in a direct appeal or postconviction petition. *State v. Coles*, 862 N.W.2d 477, 480 (Minn. 2015). Unlike Heinze's request for a modified sentence, his plea-withdrawal claim requests reversal of his conviction, which has been final for nearly 17 years.

[8] Rule 28.05, subdivision 2, defines the scope of review of an appeal of "the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the sentencing court's findings of fact."

The supreme court recently distinguished a defendant's right to challenge a sentence under rule 27.03, subdivision 9, and the right to challenge a conviction, which is subject to the postconviction statute's time limitations. *Reynolds v. State*, 888 N.W.2d 125, 132–33 (Minn. 2016). This court has also acknowledged that "the postconviction two-year limitations provision serves the public interest in finality, [but] that interest is not as strong when it is the finality of the sentence that is at issue rather than the finality of the conviction." *Vazquez v. State*, 822 N.W.2d 313, 319 (Minn. App. 2012). "[T]he reversal of a conviction may seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). Based on our precedent establishing the scope of review from a rule 27.03, subdivision 9, motion, we conclude that Heinze's plea-withdrawal claim falls outside the scope of his *Fields* sentencing appeal because it implicates the conviction and goes "beyond the sentence." Accordingly the postconviction court did not abuse its discretion in denying Heinze's plea-withdrawal claim as untimely.

Affirmed in part, reversed in part, and remanded.