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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0666**

Gary Lee Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

**Filed November 13, 2017
Affirmed
Worke, Judge**

Clay County District Court
File Nos. 14-CR-08-1481, 14-CR-08-1453

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney, Moorhead, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Cleary, Chief Judge; and Worke, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the denial of his petition for postconviction relief. Because appellant's petition is time-barred, we affirm.

DECISION

Appellant Gary Lee Johnson argues that the district court abused its discretion by denying his petition for postconviction relief as time-barred. This court reviews a district court's denial of a postconviction petition for an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). A district court "abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). This court reviews the district court's findings of fact for clear error, but reviews questions of law de novo. *Id.*

Generally, a petition for postconviction relief must be filed within two years of the entry of judgment of conviction or sentence or the disposition of the direct appeal, whichever is later. Minn. Stat. § 590.01, subd. 4(a) (2016). Johnson pleaded guilty to terroristic threats in September 2008 and the district court sentenced him on October 13, 2008. Johnson did not file a direct appeal. On August 1, 2016, Johnson filed a pro se postconviction petition and the state public defender's office filed a petition on March 20, 2017.¹ Johnson filed his pro se petition nearly eight years after he was sentenced, outside

¹ The district court denied Johnson's pro se postconviction petition and Johnson appealed. Because Johnson had not directly appealed his conviction and instead filed a pro se postconviction petition, this court dismissed the appeal and remanded to the district court with directions to transmit Johnson's petition to the state public defender. *See Deegan v. State*, 711 N.W.2d 89, 98 (Minn. 2006) (extending the right to counsel to "one review of a criminal conviction, whether by direct appeal or a first review by postconviction proceeding"); Minn. Stat. § 590.02, subd. 1(4) (2016) (stating that a court administrator must "transmit a copy of the [postconviction] petition to the state public defender" when the petitioner is pro se and seeking a first-time review of his conviction).

the two-year limitation period. His petition is time-barred unless an exception to the two-year limitation period applies. *See id.*, subd. 4(b) (2016).

A petition invoking an exception “must be filed within two years of the date the claim arises.” *Id.*, subd. 4(c) (2016). For purposes of section 590.01, subdivision 4(c), a claim “arises when the petitioner knew or should have known that he had a claim.” *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012). The knew-or-should-have-known test is an objective standard. *Wayne v. State*, 832 N.W.2d 831, 834 (Minn. 2013). The determination of when a claim arose is a question of fact. *Sanchez*, 816 N.W.2d at 560.

Johnson invoked the exception “that the petition is not frivolous and is in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5). In order for the exception to apply, Johnson had to: (1) satisfy the court that his petition was not frivolous, (2) satisfy the court that his petition was in the interests of justice, and (3) file his petition within two years of the date the claim arose. *See id.*, subds. 4(b)(5), 4(c). The district court determined that Johnson failed to satisfy these requirements. We agree.

Johnson claims that his guilty plea is invalid because it is not supported by an adequate factual basis. But Johnson fails to show that he filed his postconviction petition within two years of the date this claim arose. Johnson argues that this claim arose after he was represented by the state public defender and became aware of potential challenges to his conviction. However, he provides no legal authority or caselaw supporting his assertion that a claim arises when a petitioner discusses a case with an attorney, and this court has rejected this argument in unpublished opinions.

Rather, based on the objective standard, Johnson knew or should have known that he had a claim when, or shortly after, he pleaded guilty. Johnson was represented by counsel at his plea hearing. After the district court established a factual basis, Johnson could have objected and asserted that the elements of the offense were not established in the factual basis. But Johnson admitted to the elements of the offense and agreed that he discussed the matter with his attorney and was aware of the facts and circumstances of the charge. Moreover, Johnson made no claim that he was innocent.

More than a month after he pleaded guilty, Johnson appeared for sentencing, again represented by counsel. Having had a month to contemplate his guilty plea, Johnson should have known by this time whether a claim existed regarding the validity of his guilty plea. Following imposition of sentence, the district court informed Johnson: “You should also be aware that anyone has the right to appeal the court’s judgment and sentence. And if there’s anything about these proceedings you wish to appeal, [your attorney] could help you contact the state public defender.” Johnson was provided adequate information in order to pursue a claim if one existed—notice of his right to appeal and guidance in contacting an attorney who could assist him.

Johnson also argues that it is in the “interest of justice” to consider his petition because the conviction is on his record and affects his criminal-history score. But “the invocation of the interests-of-justice exception” is not “based on the substantive merit of the claim raised in the petition for postconviction relief.” *Sanchez*, 816 N.W.2d at 557. Rather, “the interests-of-justice referred to in subdivision 4(b)(5) relate to the *reason* the petition was filed after the 2-year time limit in subdivision 4(a).” *Id.* “[T]he 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.” *Id.*

Johnson does not explain what caused him to miss the primary deadline other than he did not have the assistance of counsel. But if Johnson was completely unaware of his right/ability to challenge his conviction, he would not have filed a pro se postconviction petition in August 2016, seven months before the state public defender’s office filed a postconviction petition. Because Johnson’s petition was untimely and he fails to show that an exception applies, the district court did not abuse its discretion by denying Johnson’s petition for postconviction relief.

Johnson also argues that the district court erred by denying him an evidentiary hearing. Denial of a postconviction petition without a hearing is appropriate if the petition, files, and records show conclusively that the petitioner is entitled to no relief. Minn. Stat. § 590.04, subd. 1 (2016). This court reviews the district court’s summary denial of a postconviction petition for an abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006).

“A postconviction court may summarily deny a petition for postconviction relief when the petition is time barred.” *Staunton v. State*, 842 N.W.2d 3, 7 (Minn. 2014). Because the district court appropriately concluded that Johnson’s petition is time-barred, it did not abuse its discretion by denying the petition without an evidentiary hearing.

Affirmed.