STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1566

Melvin Bilbro, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 9, 2018
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Hennepin County District Court
File No. 27-CR-08-6698

Cathryn Middlebrook, Chief Appellate Public Defender, F. Richard Gallo, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Reilly, Judge.

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

REILLY, Judge

Appellant challenges the district court's denial of his motion to correct unauthorized sentences for his convictions of attempted second-degree murder and second-degree

criminal sexual conduct. We determine that the district court erred by construing appellant's motion to correct an unauthorized sentence as a petition for postconviction relief, that appellant's consecutive sentences were authorized by law, and that the imposition of a conditional-release term for attempted second-degree murder was in error. We affirm in part, reverse in part, and remand for sentencing consistent with this opinion.

FACTS

In 2008, appellant Melvin Bilbro stabbed his girlfriend A.F. in the eye. The stabbing chipped a bone in her eye socket, which severed her optic nerve. A.F. is now blind in that eye. Sometime during the assault, appellant demanded A.F.'s 11-year-old daughter remove her clothing, and he touched her vagina.

On May 27, 2008, appellant pleaded guilty to attempted second-degree murder and second-degree criminal sexual conduct. The substance of the plea agreement was that, in exchange for appellant's "straight" plea of guilty to the court, the state would waive its right to seek an aggravated sentence and would dismiss the other two counts in the complaint.

At the sentencing hearing, appellant argued that the two sentences should be served concurrently. The state requested that the sentences be served consecutively, and requested a consecutive sentence totaling 199 months. The district court sentenced appellant to the presumptive guidelines sentence of 163 months in prison (half the presumptive range of 326 months) for attempted second-degree murder and to 36 months in prison for second-degree criminal sexual conduct. The district court also imposed a ten-year period of conditional release. The district court ordered the sentences to be served consecutively.

The district court did not issue a written sentencing order. The register of actions shows that both offenses were subject to a ten-year period of conditional release. Appellant did not file a direct appeal.

On July 5, 2017, almost nine years after appellant pleaded guilty, appellant filed a pro se motion for correction of an unauthorized sentence. The district court construed appellant's motion as a petition for postconviction relief. The district court found that appellant's petition was not timely and that he had not satisfied any exception to the statutory time bar. Nevertheless, the district court addressed the merits of appellant's petition. The district court determined that a ten-year period of conditional release is required by law for second-degree criminal sexual conduct, and that consecutive sentences were warranted for attempted second-degree murder and second-degree criminal sexual conduct because there were two separate victims.

This appeal followed.

D E C I S I O N

I. The district court erred by construing appellant's motion as a petition for postconviction relief.

Whether the district court properly characterized the motion as a petition for postconviction relief is a threshold issue that requires this court to interpret a rule and a statute, which is subject to de novo review. *State v. Coles*, 862 N.W.2d 477, 479 (Minn. 2015). After the time for direct appeal has passed, a person convicted of a crime may challenge his sentence in two ways. He may file a petition for postconviction relief under Minn. Stat. § 590.01, subd. 1 (2016), or he may file a motion to correct his sentence under

Minn. R. Crim. P. 27.03, subd. 9. *Washington v. State*, 845 N.W.2d 205, 210 (Minn. App. 2014). Different conditions apply to the two remedies. A petition for postconviction relief has a temporal condition: it must generally be filed within two years after the entry of judgment of the petitioner's conviction or sentence, or an appellate court's disposition of the petitioner's direct appeal. Minn. Stat. § 590.01, subd. 4(a). By contrast, a motion to correct an unauthorized sentence under rule 27.03, subd. 9, is not subject to such a time bar. *Washington*, 845 N.W.2d at 211. In other words, a person convicted of a crime may file a motion to correct a sentence unauthorized by law at any time. *Id.* at 212.

Here, appellant filed his request as a motion to correct his sentence, not as a postconviction petition. A sentence is unauthorized by law if it is "contrary to law or applicable statutes or contrary to statutory requirements." *Id.* at 213. Such a sentence is illegal and therefore subject to review. *Id.* at 214. A sentence imposed without following the proper procedures required by law is also considered to be unauthorized by law. *Reynolds v. State*, 888 N.W.2d 125, 129-30 (Minn. 2016). However, a sentence challenged on the ground that "the facts before the district court at sentencing were inaccurate or that a district court otherwise erred by selecting one among two or more sentences that are authorized by law" is a sentence authorized by law. *Washington*, 845 N.W.2d at 213.

In this case, appellant agreed to a "straight plea to the court," which the parties understood to mean that the parties did not agree to any specific sentence as part of the agreement, and the state would waive its *Blakely*[1] issues and dismiss two other charges.

[1] Other than a prior adjudication, any fact that increases the penalty for a crime beyond the sentence authorized by "the facts reflected in the jury verdict or admitted by the defendant,"

Appellant claims that his sentence to a ten-year period of conditional release for his conviction of attempted second-degree murder is illegal because imprisonment is the only allowed sentence for that crime under the statute. *See* Minn. Stat. §§ 609.17, 609.19, subd. 2 (2008). He then argues that his two convictions cannot be sentenced consecutively because they do not both appear on the list of crimes subject to permissive consecutive sentences. Both arguments attack the sentences directly and allege that they are unauthorized by law.

Respondent argues that the district court properly construed appellant's motion as a petition for postconviction relief because appellant essentially attacked his conviction and the negotiated plea agreement by masking a petition for postconviction relief as a motion to correct a sentence. Respondent is correct that district courts should treat a purported motion to correct a sentence as a petition for postconviction relief when a defendant challenges a sentence imposed as part of a plea agreement. *Coles*, 862 N.W.2d at 481 ("[W]here the sentence at issue is imposed as part of a plea agreement, a motion to change that sentence impacts more than simply the sentence, and [the sentence modification statute] does not apply.").

However, *Coles* is inapposite. There, the defendant agreed to a specific sentence as part of his plea agreement, and the subsequent challenge to his sentence was essentially a challenge to the plea agreement, which was properly brought pursuant to a petition for postconviction relief. *Id.* at 481. Here, the parties did not agree to a specific sentence in

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must be submitted to a jury and proved beyond a reasonable doubt. *See Blakely v. Washington*, 542 U.S. 296, 301-03, 124 S. Ct. 2531, 2536-37 (2004).

the plea agreement. Instead, appellant agreed to submit a "straight plea to the court," which contained no agreement as to any of the terms of the sentence, including whether any term of conditional release should be imposed. The only agreement between the parties was that respondent would waive its *Blakely* issues and dismiss two charges in exchange for appellant's guilty plea. Because appellant's motion to correct a sentence does not attack the substance of the plea agreement, *id.*, appellant's filing is properly construed as a motion to correct a sentence.

Respondent next argues that its waiver of its right to seek an upward departure pursuant to *Blakely* impacts appellant's sentence, and that any modification of appellant's sentence defeats the purpose of the plea agreement and prejudices respondent's ability to pursue an aggravated sentence. But appellant's arguments do not relate to the enhancement of his sentences. Rather, appellant argues the sentences are unauthorized by law. Addressing appellant's sentence would not prejudice respondent's waiver of its right to seek an aggravated sentence, because the sentencing issues raised by appellant are unrelated to the enhancement of a sentence requiring proven facts. Correcting the sentence does not affect the integrity of the plea agreement, because the plea agreement was not concerned with conditional release periods, the consecutiveness of the sentences, or upward departures from the sentencing guidelines.

In summary, the district court erred by construing appellant's motion as a petition for postconviction relief, and we consider appellant's arguments on the merits to correct an unauthorized sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9.

II. Appellant's ten-year term of conditional release for his conviction of attempted second-degree murder is unauthorized by law.

Appellant argues that the district court's imposition of a ten-year term of conditional release for his attempted second-degree murder conviction was erroneous because that crime is not subject to conditional release.[2] On appeal from the district court's denial of a motion to correct a sentence brought under Minn. R. Crim. P. 27.03, subd. 9, this court will not reevaluate a sentence unless the district court abused its discretion or the original sentence was unauthorized by law. *Anderson v. State*, 794 N.W.2d 137, 139 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011).

Appellant is correct; conditional release is not authorized for attempted second-degree murder. *See* Minn. Stat. § 609.17 (2008); Minn. Stat. § 609.19, subd. 2 (2008). The second-degree murder statute imposes a sentence of "imprisonment for not more than 40 years." Minn. Stat. § 609.19, subd. 2. By comparison, convictions for crimes subject to conditional release explicitly authorize conditional release as part of the sentence imposed. *See, e.g.*, Minn. Stat. § 169A.276, subd. 1(d) (2016) (penalties for driving while impaired). The second-degree murder statute does not include conditional release as a sentencing component. Appellant's ten-year conditional-release term for his conviction of attempted second-degree murder is unauthorized by law, and should be vacated on remand.

[2] The state concedes that appellant's sentence is erroneous with respect to the ten-year period of conditional release for his conviction of attempted second-degree murder. But this court has an independent duty to consider issues despite this concession. *See State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990).

III. Appellant's consecutive convictions for attempted second-degree murder and second-degree criminal sexual conduct are authorized by law.

Appellant argues his consecutive sentences for attempted second-degree murder and second-degree criminal sexual conduct were unauthorized by law because the applicable sentencing guidelines did not allow for attempted crimes to be sentenced consecutively without an explanation of departure. Appellant is correct that crimes may be sentenced consecutively if they both appear on the list of offenses eligible for permissive consecutive sentences, Minn. Sent. Guidelines II.F.2 (2008) (effective August 1, 2008), and that attempted second-degree murder was not listed as an offense eligible for permissive consecutive sentences in 2008. *Id.* at VI (2008).

However, as the district court reasoned, "[c]onsecutive sentencing of multiple felonies with multiple victims is permissive and within the broad discretion of the [district] court." *State v. Richardson*, 670 N.W.2d 267, 284 (Minn. 2003). Here, appellant committed two felonies: attempted second-degree murder and second-degree criminal sexual conduct. Appellant's two felony convictions involved two different victims: A.F. and her daughter. Because appellant committed two felonies against two different victims, appellant's consecutive sentences are authorized by law. *Id.*

The district court therefore did not abuse its discretion in imposing consecutive sentences. Appellant's sentence was neither disproportionate to his offenses nor unfairly exaggerated the criminality of his conduct. *State v. Vang*, 847 N.W.2d 248, 264 (Minn. 2014).

Affirmed in part, reversed in part, and remanded.