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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1476

Gary Lee Johnson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 15, 2019
Affirmed
Larkin, Judge

Clay County District Court
File No. 14-CR-11-3353

Gary L. Johnson, Bayport, Minnesota (pro se appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Brian J. Melton, Clay County Attorney, Pamela L. Foss, Interim County Attorney, Moorhead, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's summary denial of his third petition for postconviction relief. We affirm.

FACTS

In October 2011, respondent State of Minnesota charged appellant Gary Lee Johnson with seven counts of criminal sexual conduct, based on allegations that he had engaged in sexual penetration with his 15-year-old stepdaughter. In May 2012, Johnson pleaded guilty to three counts of first-degree criminal sexual conduct and was sentenced to a 360-month prison term with a lifetime conditional release period. Johnson did not file a direct appeal. But in 2014, he successfully moved the district court to correct the conditional release portion of his sentence. In 2016 and 2017, Johnson unsuccessfully petitioned for postconviction relief.

In June 2018, Johnson filed his third petition for postconviction relief, arguing that he should be allowed to withdraw his guilty plea and requesting a hearing on his petition. Johnson argued that he had newly discovered evidence in the form of "[t]he case of the San Antonio Four" and that his petition was not time-barred because the newly-discovered-evidence and interests-of-justice exceptions applied. In August 2018, the district court summarily denied the petition, stating,

> [Johnson's] claim was not filed within two years of his conviction or sentence, or a disposition of a direct appeal. [Johnson] was convicted and sentenced over six years ago. Therefore, for the Court to consider this Petition, one of the listed exceptions [to the statutory time bar to postconviction

> relief] must apply. Here, [Johnson] seems to claim that there is newly discovered evidence. The Court disagrees. [Johnson] appears to argue that a case which he entitles "the San Antonio Four" is new evidence and as such, this Court should allow him to withdraw his guilty plea. A court case from another jurisdiction is not new *evidence*. [Johnson] has submitted no evidence or authority to raise any legitimate question worthy of consideration. Therefore, the Petition for Postconviction Relief is time-barred under Minnesota Statute § 590.01. The Petition, files, and records of these proceedings conclusively show that [Johnson] is entitled to no relief. Further, this Court finds that the Petition for Postconviction Relief is frivolous. Nor does [Johnson] establish to this Court's satisfaction that his prayers for relief should be granted in the interests of justice. Accordingly, [Johnson's] Petition for Postconviction Relief is DENIED.

Johnson appeals.

D E C I S I O N

I.

A person convicted of a crime who claims that the conviction violates his rights under the constitution or laws of the United States or Minnesota may petition for postconviction relief unless direct appellate relief is available. Minn. Stat. § 590.01, subd. 1 (2016). The petition must include "a statement of the facts and the grounds upon which the petition is based and the relief desired." Minn. Stat. § 590.02, subd. 1(1) (2016). A petitioner is entitled to a hearing "[u]nless 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 (2016).

A petition for postconviction relief 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) (2016). However, a petition filed after the two-year limit may be considered if it satisfies one of several statutory exceptions. *See id.*, subd. 4(b) (2016) (listing five exceptions). If an exception is claimed, the petition must be filed within two years of the date the claim arose. *Id.*, subd. 4(c) (2016). A claim arises when the petitioner "knew or should have known that the claim existed." *Sanchez v. State*, 816 N.W.2d 550, 552 (Minn. 2012).

A postconviction petitioner is not entitled to relief or an evidentiary hearing on an untimely petition unless he can demonstrate that "he satisfies one of the [statutory] exceptions . . . and that application of the exception is not time-barred." *Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012). If the petitioner does not demonstrate that an exception applies and that application of the exception is timely, the postconviction court may summarily deny the petition as untimely. *See id.* at 171 (affirming postconviction court's summary denial of petition because petitioner failed to demonstrate an exception applied). We review a summary denial of a postconviction petition for an abuse of discretion. *Id.* at 167. "A postconviction 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).

Johnson acknowledges that his petition was untimely under Minn. Stat. § 590.01, subd. 4(a). He appears to contend that the postconviction court should have considered his petition under the newly-discovered-evidence and interests-of-justice exceptions to the time bar.

Under the newly-discovered-evidence exception, a court may hear an untimely petition for postconviction relief if (1) "the petitioner alleges the existence of newly discovered evidence"; (2) the evidence "could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition"; (3) "the evidence is not cumulative to evidence presented at trial"; (4) the evidence "is not for impeachment purposes"; and (5) the evidence "establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which the petitioner was convicted." Minn. Stat. § 590.01, subd. 4(b)(2). "All five criteria must be satisfied to obtain relief." *Riley*, 819 N.W.2d at 168.

Johnson proffers a decision from the Texas Court of Criminal Appeals, *Ex parte Mayhugh*, 512 S.W.3d 285 (Tex. Crim. App. 2016), as newly discovered evidence. In *Mayhugh*, four women were convicted of aggravated sexual assault of two children based, in part, on testimony from an expert that a scar on one of the victim's hymen indicated that sexual penetration had occurred. 512 S.W.3d at 289-91. The Texas Court of Criminal Appeals reversed the convictions, largely because the expert later "retracted her testimony about the physical indicators of past trauma" and "acknowledged that her testimony at trial was wrong." *Id.* at 288, 307.

Johnson's reliance on *Mayhugh* is unavailing because an appellate court decision is not evidence. Moreover, this case is unlike *Mayhugh* because there is no evidence that any expert has retracted any statement implicating Johnson. Because Johnson did not proffer any new evidence in support of his postconviction claim, the postconviction court did not

abuse its discretion by concluding that the newly-discovered-evidence exception is inapplicable.

Under the interests-of-justice exception, a court may hear an untimely petition for postconviction relief if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5). Appellate courts "have only applied the interests of justice in exceptional situations." *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010).

Johnson appears to argue that he should be allowed to withdraw his guilty plea because the state's evidence would have been insufficient to convict him if he had gone to trial. He again relies on *Mayhugh* to show that the evidence would have been inadequate.

The supreme court's decision in *Shorter v. State*, 511 N.W.2d 743 (Minn. 1994), guides our analysis. In *Shorter*, the supreme court exercised its supervisory powers and reversed the denial of a postconviction request for plea withdrawal. 511 N.W.2d at 747. In granting relief, the supreme court found persuasive "the unusual fact that the Minneapolis police department reopened its investigation and was prepared to testify before the [district] court that the original police investigation into Shorter's case was incomplete." *Id*. at 746. The supreme court noted that "the *highly unusual* facts" of the case rendered Shorter's plea "suspect." *Id*. (emphasis added).

Unlike the circumstances in *Shorter*, there are no highly unusual facts rendering Johnson's plea suspect. There is no indication that the investigation of his case was reopened or that the investigating authorities believe that the investigation was incomplete. And again, the *Mayhugh* case does not in any way regard the particular circumstances of

Johnson's case. In sum, because Johnson did not establish that his postconviction petition is not frivolous, the postconviction court did not abuse its discretion by concluding that the interests-of-justice exception is inapplicable.

In conclusion, the district court correctly determined that Johnson's petition was time-barred and did not err by summarily denying relief.

II.

Johnson argues that the postconviction court was required to rule on his petition for postconviction relief "within 30 days of filing." Johnson argues that because the postconviction did not do so, its order is "invalid."[1] Johnson does not cite authority in support of his argument, and we are unaware of a 30-day deadline for postconviction rulings. Moreover, Johnson does not allege that he was prejudiced by the timing of the district court's ruling. Mere assertions of error without supporting legal authority or argument are waived unless prejudicial error is obvious on mere inspection. *State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015). Because we do not discern any obvious prejudicial error stemming from the timing of the postconviction court's ruling, Johnson's assertion of error is waived.

III.

Johnson's brief to this court raises several issues that were not identified as a basis for relief in his postconviction petition, including the following issues: (1) the state, prosecutor, and judge were biased against him; (2) he received a longer sentence than

[1] Johnson filed his postconviction petition on June 26, 2018, and the district court's ruling was issued on August 23, 2018.

another man who committed a similar offense; (3) the judge in the underlying criminal case had a conflict and should have recused herself; (4) his bail was excessive; (5) he is required to pay a "5% DOC imposed fine to Aid to Victims of crimes and is being forced to pay for victims of crimes that have nothing to do with him"; (6) he received ineffective assistance of counsel; (7) the state violated the rights of his wife and the victim; (8) the state failed to convene a grand jury; and (9) based on a Biblical quote, "even if there had been a sexual involvement between [Johnson] and the Alleged victim, the State cannot say it is illegal."

"It is well settled that a party may not raise issues for the first time on appeal from denial of postconviction relief." *Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (quotation omitted). We therefore do not consider any issues that were not raised in the postconviction proceeding.

Affirmed.