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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0053**

Andrew Wayne Clarke, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

**Filed August 19, 2019
Affirmed
Klaphake, Judge***

St. Louis County District Court
File No. 69DU-CR-12-3177

Andrew W. Clarke, Bayport, Minnesota (pro se appellant)

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

Mark S. Rubin, St. Louis County Attorney, Kristen E. Swanson, Assistant County
Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Klaphake,
Judge.

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Pro se appellant Andrew Wayne Clarke filed this appeal from the postconviction court's denial of his motion for a correction or reduction of his sentence. He argues that the postconviction court erred by treating his motion, brought under Minn. R. Crim. P. 27.03, subd. 9, as a postconviction petition under Minn. Stat. § 590.01 (2018). Because the district court properly treated Clarke's motion as a postconviction petition, and did not abuse its discretion in its determination that the claims raised therein were procedurally barred, we affirm.

DECISION

I.

In addition to a direct appeal, a sentence may be challenged in two ways: (1) by filing a petition for postconviction relief under chapter 590 of the Minnesota Statutes; or (2) by filing a motion to correct sentence pursuant to rule 27.03, subdivision 9. *See Washington v. State*, 845 N.W.2d 205, 210 (Minn. App. 2014). Different requirements apply to each challenge.

The postconviction statute authorizes a person convicted of a crime to seek postconviction relief by filing a petition claiming that the conviction "violated the person's rights under the Constitution or laws of the United States or of the state." Minn. Stat. § 590.01, subd. 1(1). There are time and procedural constraints to postconviction petitions. Generally, "[n]o petition for postconviction relief may be filed more than two years after" the judgment of conviction is final. *Id.* at subd. 4(a); *see also Hooper v. State*, 838 N.W.2d

775, 780-82 (Minn. 2013). Additionally, “where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief.” *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976); *see also Quick v. State*, 757 N.W.2d 278, 280 (Minn. 2008).

The same procedural requirements do not apply to rule 27 motions. *See Reynolds v. State*, 888 N.W.2d 125, 133-34 (Minn. 2016) (holding that the two-year time limit does not apply); *State v. Amundson*, 828 N.W.2d 747, 751-52 (Minn. App. 2013) (holding that a motion to correct a sentence is not barred by the statutory prohibition on second or successive postconviction petitions). Instead, a district court may correct a sentence at any time. Minn. R. Crim. P. 27.03, subd. 9. However, the issues that may be raised under rule 27.03 motions are limited to errors in sentencing. *Washington*, 845 N.W.2d at 213.

Though it may be advantageous to bring a rule 27 motion in lieu of a postconviction petition, courts have held that rule 27 is not a mechanism to circumvent the requirements of Minn. Stat. § 590.01. *Id.* at 212. In certain circumstances, a district court may treat a petitioner’s rule 27 motion as a postconviction petition under chapter 590. *Id.* Here, Clarke filed a rule 27 motion to correct his sentence on the ground that the jury erred when it determined that he has five prior felonies and there was insufficient evidence to determine that Clarke’s prior offenses demonstrated a pattern of criminal conduct. In response, the district court issued an order which analyzed Clarke’s motion as a petition for postconviction relief, and found that the claims were procedurally barred. Clarke now appeals, restating his claims and arguing that his motion under rule 27 was proper.

The state contends that the district court properly considered Clarke’s motion as a petition for postconviction relief because Clarke challenges the evidence at trial rather than the legality of the sentence. For a sentence to be unauthorized by law, it must be contrary to law or applicable statutes. *Evans v. State*, 880 N.W.2d 357, 359 (Minn. 2016). The determinative question here is whether the issues raised by Clarke are limited to a challenge to his sentence on the ground that it is unauthorized by law, or if his challenges impact his conviction. Compare *Washington*, 845 N.W.2d. at 215 (determining that a claim challenging the district court’s findings of fact relevant to a sentence is not within the scope of rule 27.03), with *Vazquez v. State*, 822 N.W.2d 313, 314-19 (Minn. App. 2012) (determining that a sentence based upon an incorrect criminal-history score is an unauthorized sentence), and *Reynolds*, 888 N.W.2d at 130 (determining that a sentence that violates *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), is unauthorized by law). Here, the jury made findings that Clarke had the requisite five felony-level convictions¹ and the present offense was committed as a part of a pattern of criminal

¹ Even if we determined that Clarke’s challenge regarding his five felony-level convictions was properly raised as a rule 27 motion, he does not prevail. According to Clarke, he has nine prior felony convictions, but three of those convictions were disposed of together and two other convictions were disposed of together, so they cannot be counted separately as multiple sequential felony convictions under the career offender statute. In Clarke’s direct appeal, this court noted that the state introduced evidence of 13 prior felony convictions and the testimony of the probation officer. See *Clarke*, 2014 WL 1875779, at *2 (“Clarke’s 13 prior felony convictions are: (1) passing counterfeit currency; (2) aggravated forgery; (3) burglary; (4) second-degree burglary; (5) offering a forged check; (6) first-degree possession of crack cocaine; (7) fifth-degree possession of a controlled substance; (8) fourth-degree assault on a corrections employee; (9) fifth-degree possession of a controlled substance; (10) felony identity theft; (11) fifth-degree possession of a controlled substance; (12) felony theft; and (13) felony theft.”). As the district court in this case noted, even if Clarke’s contention were true, he would still have the requisite five felony-level

conduct, and we therefore determine that Clarke’s claims are properly construed as an attack on the jury’s findings of fact. Because Clarke’s challenges do not indicate that his sentence is unauthorized by law, but involve a challenge to the jury’s findings, the district court did not err when it treated Clarke’s motion as a petition for postconviction relief.

II.

Appellate courts review a postconviction court’s denial of a petition for postconviction relief for an abuse of discretion. *Andersen v. State*, 913 N.W.2d 417, 422 (Minn. 2018). “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, or exercises its discretion in an arbitrary or capricious manner.” *Crow v. State*, 923 N.W.2d 2, 9 (Minn. 2019) (quotation omitted). The district court determined that Clarke’s claims were untimely. A postconviction petition is untimely if it is filed more than two years after “an appellate court’s disposition of petitioner’s direct appeal.” Minn. Stat. § 590.01, subd. 4(a)(2). There are certain exceptions to the time limitation, but these exceptions must be raised by the petitioner. *Roby v. State*, 787 N.W.2d 186, 191 (Minn. 2010). Here, final judgement on Clarke’s direct appeal was entered on August 8, 2014, but his motion was filed with the postconviction court in November 2018—more than four years later. Because a postconviction petitioner is not entitled to relief if the petition is untimely, the district court did not abuse its discretion when it denied Clarke’s motion.

convictions. Accordingly, the district court did not abuse its discretion when it denied Clarke’s motion.

III.

Clarke raises two additional arguments in this appeal: (1) that the officer's testimony in the second phase of his trial was highly prejudicial; and (2) that his employment status should not have been used as a sentencing factor. Clarke's arguments fail for two reasons. First, Clarke could have raised these issues in his initial appeal, but failed to do so. We therefore determine that his claims are procedurally barred. *See id.* Second, Clarke failed to support his pro se arguments with citation to legal authority, and we therefore deem them waived. *See State v. Taylor*, 869 N.W.2d 1, 22 (Minn. 2015) ("We deem arguments waived on appeal if a . . . brief contains no argument or citation to legal authority in support of the allegations." (quotation omitted)).

Affirmed.