STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0182

Carl Adam Mulvihill, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 28, 2019
Affirmed
Johnson, Judge

Dakota County District Court
File No. 19HA-CR-10-1236

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

James C. Backstrom, Dakota County Attorney, Anna Light, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Connolly, Judge; and Peterson, Judge.*

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

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

JOHNSON, Judge

In 2010, Carl Adam Mulvihill pleaded guilty to three counts of first-degree criminal sexual conduct. In 2018, he petitioned for post-conviction relief, arguing that the district court lacked subject-matter jurisdiction over one of the three charges on the ground that the factual record of the plea hearing did not establish that he committed the offense in Minnesota. The post-conviction court denied the petition on the ground that it is untimely. We conclude that the two-year statute of limitations for post-conviction petitions applies to a claim based on a lack of subject-matter jurisdiction and, accordingly, that Mulvihill's petition is untimely. Therefore, we affirm.

FACTS

In June 2010, the state charged Mulvihill in an amended complaint with three counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subds. 1(a), 1(h)(iii) (2008). With respect to the first count, the state alleged that, in August 2009, Mulvihill traveled from Minnesota to Oregon and back with a young boy and, on more than one occasion, at unknown locations, inserted his penis into the boy's anus or mouth. With respect to the second count, the state alleged that, in August 2009, Mulvihill traveled from Minnesota to California and back with a different young boy and, on more than one occasion, in Minnesota and elsewhere, inserted his penis into the boy's anus or mouth. With respect to the third count, the state alleged that, in August or September of 2009, Mulvihill engaged in criminal sexual conduct toward a third young boy in Minnesota.

The state and Mulvihill entered into a plea agreement. Mulvihill agreed to plead guilty to all three counts; the state agreed to not charge Mulvihill with possession of child pornography and to obtain the agreement of federal prosecutors to not charge Mulvihill with any crimes in federal court. The parties also agreed on Mulvihill's sentences. The plea agreement was reflected in a plea petition, which Mulvihill signed.

At the plea hearing, Mulvihill's attorney and the prosecutor sought to establish a factual basis for Mulvihill's plea. The prosecutor noted that the first young boy does not know the state in which Mulvihill engaged in criminal sexual conduct. Mulvihill stated that he was unclear where it occurred and that he believed that it did not occur in Minnesota. The prosecutor asked Mulvihill to acknowledge that he could be prosecuted in federal court if he committed the offense charged in count 1 outside Minnesota but that he preferred to be prosecuted in the Minnesota state courts. Mulvihill agreed. Mulvihill also acknowledged that there is sufficient evidence to allow a jury to find that he committed the offense charged in count 1 in Minnesota. The district court accepted Mulvihill's guilty plea on each count.

At a sentencing hearing in September 2010, the district court imposed the agreed-upon sentences of 180 months of imprisonment on count 3, a consecutive sentence of 180 months of imprisonment on count 2, and a concurrent sentence of 360 months of imprisonment on count 1. Mulvihill did not pursue a direct appeal.

Nearly eight years later, in July 2018, Mulvihill filed a *pro se* motion in which he argued that the district court did not have jurisdiction at the time of his guilty plea and sentencing. In August 2018, the state filed a response in which it argued that Mulvihill's

motion should be treated as a post-conviction petition, that the petition is untimely because it was filed more than two years after final judgment, and that no exception to the two-year limitations period applies. In October 2018, an assistant state public defender filed a letter brief on Mulvihill's behalf, arguing alternatively that the district court lacked jurisdiction over count 1, that a jurisdictional defect cannot be remedied by an *Alford* plea, and that Mulvihill's plea did not satisfy the requirements of an *Alford* plea.

In November 2018, the post-conviction court filed an order in which it construed Mulvihill's motion to be a petition for post-conviction relief and denied the petition on the ground that it is untimely. Mulvihill later filed a *pro se* request for a hearing on the petition. The post-conviction court filed an amended order that denied the request for a hearing. Mulvihill appeals.

D E C I S I O N

Mulvihill argues that the post-conviction court erred by denying his petition for post-conviction relief. He contends that the district court lacked subject-matter jurisdiction with respect to the offense charged in count 1 on the ground that it was not committed in Minnesota. *See* Minn. Stat. § 609.025(1) (2008); *State v. Smith*, 421 N.W.2d 315, 318-21 (Minn. 1988). He further contends that the two-year statute of limitations does not apply to post-conviction claims that challenge subject-matter jurisdiction.

A person seeking post-conviction relief must file a post-conviction petition within a two-year limitations period. Minn. Stat. § 590.01, subd. 4(a) (2016). The two-year limitations period begins upon 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." *Id.* If the two-year limitations period has expired, the post-conviction court nonetheless may consider the petition if any one of five exceptions applies. *Id.*, subd. 4(b) (2016). But a petition relying on an exception to the two-year statute of limitations is subject to another limitations period, which provides that the petition "must be filed within two years of the date the claim [for the exception] arises." *Id.*, subd. 4(c) (2016); *see also Sanchez v. State*, 816 N.W.2d 550, 556-58 (Minn. 2012). Accordingly, "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.'" *Roberts v. State*, 856 N.W.2d 287, 290 (Minn. App. 2014) (quoting *Riley v. State*, 819 N.W.2d 162, 168 (Minn. 2012)), *review denied* (Minn. Jan. 28, 2015). "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." *Id.*; *see also Andersen v. State*, 913 N.W.2d 417, 424 (Minn. 2018). This court applies an abuse-of-discretion standard of review to the denial of a post-conviction petition for untimeliness. *Riley*, 819 N.W.2d at 167.

Mulvihill contends that the two-year limitations period does not apply to arguments based on a lack of jurisdiction because such an argument cannot be waived or forfeited. In response, the state cites an opinion of the supreme court that, it contends, is contrary to Mulvihill's argument. In *Stewart v. State*, 764 N.W.2d 32 (Minn. 2009), the offender petitioned for post-conviction relief more than seven years after his convictions were affirmed on direct appeal. *Id.* at 33. He argued in his petition that the district court lacked subject-matter jurisdiction at the time of his convictions on the ground that "the offenses

of which he was convicted do not have all constitutionally-required components, as published in the Minnesota Statutes, and are therefore invalid laws." *Id.* The post-conviction court summarily denied the petition on the ground that it was untimely and, in addition, lacked merit. *Id.* The supreme court affirmed with respect to the issue of untimeliness, reasoning that the offender "did not assert or establish any of the [post-conviction] statute's exceptions." *Id.* at 34. The supreme court did not consider the merits of the petition. *Id.* at 33-34.

The state contends that the *Stewart* opinion illustrates that the two-year statute of limitations applies to an untimely post-conviction petition even if the petition challenges the subject-matter jurisdiction of the district court. *See id.* at 33-34. Mulvihill did not file a reply brief. We agree with the state that, in light of *Stewart*, Mulvihill's post-conviction petition is subject to the two-year statute of limitations that applies generally to post-conviction petitions, notwithstanding the fact that his petition challenges the district court's subject-matter jurisdiction. That principle is dispositive of the appeal inasmuch as Mulvihill filed his post-conviction petition almost eight years after final judgment and has not sought to invoke any of the exceptions to the two-year statute of limitations.

Thus, the post-conviction court did not err by denying Mulvihill's post-conviction petition on the ground that it is untimely.

Affirmed.