STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1435

Terry Lee Clauthier, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 8, 2020
Affirmed
Cochran, Judge

Polk County District Court
File No. 60-CR-15-2213

Cathryn Middlebrook, Chief Appellate Public Defender, Chelsie M. Willett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, First Assistant County Attorney, Crookston, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

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

COCHRAN, Judge

Appellant Terry Lee Clauthier appeals from the district court's denial of his postconviction petition as untimely under Minn. Stat. § 590.01, subd. 4(a)(1) (2014). He argues that the district court was obligated to grant his petition under the law-of-the-case

doctrine and that his petition was timely under an exception to the general two-year time limit to file a postconviction petition. Because the law-of-the-case doctrine does not apply, and because Clauthier does not articulate an argument as to why his petition fits under an exception to the general time limit, we affirm.

FACTS

The state charged appellant Terry Lee Clauthier with first-degree controlled-substance crime under Minn. Stat. § 152.021, subd. 2(a)(1) (2014) for an incident occurring on December 9, 2015. Clauthier negotiated a plea deal with the state that called for him to plead guilty as charged and receive a "presumptive guidelines sentence." A written summary of the plea negotiation, submitted with Clauthier's plea petition, indicated that the severity level of the offense at that time was nine, and that it was assumed that Clauthier's criminal-history score was at least six and that he would therefore likely receive a sentence of 158 months. The negotiation also contemplated that if Clauthier failed to remain law-abiding pending sentencing, the state could argue for a sentence that was longer than the presumptive sentence.

By the sentencing hearing on May 10, 2016, it was determined that Clauthier had a criminal-history score of 12 and that, under the sentencing guidelines that existed at that time, the presumptive sentence for Clauthier's offense was 161 months. But Clauthier failed to remain law-abiding pending sentencing. Consequently, at the sentencing hearing, the parties indicated that they had entered into a "revised agreement" that Clauthier would receive a sentence of 164 months—three months more than the presumptive sentence under the guidelines, but still within the range of presumptive sentences. The district court

sentenced Clauthier in accordance with the revised agreement. Clauthier did not appeal his conviction or sentence.

On May 23, 2016, a provision of the Minnesota Drug Sentencing Reform Act (DSRA) that reduced the presumptive sentencing range for first-degree controlled-substance crimes took effect. *See State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017). On July 26, 2017, the supreme court held that, under the amelioration doctrine, this DSRA sentencing provision was applicable to any case that was not yet final when the provision took effect. *Id.* at 496. In Minnesota, a conviction is deemed "final" for purposes of the amelioration doctrine when the 90-day period to appeal lapses. *Luna-Pliego v. State*, 904 N.W.2d 916, 919-20 (Minn. App. 2017). Clauthier's conviction and sentence was not "final" when the DSRA sentencing provision took effect because the 90-day period to appeal had not yet expired on May 23, 2016. Under the new DSRA guidelines, Clauthier's presumptive sentence would have been 128 months.

On June 1, 2018, Clauthier filed a motion to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9. He requested that the district court reduce his sentence to 131 months in accordance with the DSRA provision and *Kirby*. He argued that the "revised agreement" called for a sentence that was three months above the presumptive guidelines sentence, and that he therefore should have received a 131-month sentence.

The district court denied Clauthier's motion to correct his sentence in an order dated November 25, 2018. In the memorandum attached to its order, the district court concluded that Clauthier's motion implicated more than just his sentence because it affected the revised agreement the parties reached at sentencing, and that it was therefore inappropriate

to "unilaterally" change Clauthier's sentence. In reaching its conclusion, the district court relied on *State v. Montermini*, 819 N.W.2d 447 (Minn. App. 2012), *review denied* (Minn. Nov. 20, 2012). The district court also concluded that *Kirby* did not require it to modify Clauthier's sentence. The district court then indicated that Clauthier may have another avenue for relief based on *Montermini*, namely withdrawing his plea. The district court stated: "the [c]ourt finds that the Defendant is entitled to relief under *Montermini*. If he so chooses, the Defendant may seek to withdraw his guilty plea, which, if granted, would place both parties back in their original pre-plea positions, albeit under DSRA's modified sentencing guidelines." Clauthier did not appeal the denial of his motion to correct sentence.

Instead, on February 22, 2019, Clauthier filed a petition for postconviction relief seeking to withdraw his guilty plea. The state opposed the postconviction petition and asserted that it was untimely because it was filed more than two years after the entry of judgment of conviction or sentence. *See* Minn. Stat. § 590.01, subd. 4(a)(1) (providing that "[n]o petition for postconviction relief may be filed more than two years after the later of the entry of judgment of conviction or sentence if no direct appeal is filed"). In response, Clauthier asserted that an exception to the two-year time limit applied[1] and that his claim was timely under the exception because it was brought within two years of the *Kirby* decision. The district court concluded that the petition was untimely and dismissed the petition.

[1] *See* Minn. Stat. § 590.01, subd. 4(b)(3) (2014), discussed in more detail below.

Clauthier appeals the denial of his postconviction petition.

D E C I S I O N

Clauthier argues that the district court was obligated to rule in his favor on the postconviction petition under the law-of-the-case doctrine, based on the district court's statement that he was "entitled to relief under *Montermini*." He also argues that, although his petition was not brought within two years of the entry of judgment of conviction, the petition fell under an exception to the two-year limit and was timely filed within two years of *Kirby*. We address each argument in turn, but first we address the appropriate standard of review.

I. Standard of Review

Appellate courts review the denial of a postconviction petition for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). "We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court's findings." *Id.* (quotation omitted). "We will not reverse an order unless the postconviction court exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings." *Id.* (quotation omitted).

II. The law-of-the-case doctrine did not bind the district court to rule in Clauthier's favor on the issue of timeliness.

Clauthier first argues that the district court was bound by the law-of-the-case doctrine to allow him to withdraw his plea. The law-of-the-case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same

issues in subsequent stages in the same case." *In re Matter of Welfare of M.D.O.*, 462 N.W.2d 370, 375 (Minn. 1990) (emphasis omitted) (quotation omitted). "The doctrine of 'law of the case' is based on a policy requiring issues once fully litigated to be set at rest." *Sylvester Bros. Dev. Co. v. Great. Cent. Ins. Co.*, 503 N.W.2d 793, 795 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993).

Clauthier's law-of-the-case argument is not persuasive for two reasons. First, the district court did not make a decision regarding the timeliness of a postconviction petition when it denied Clauthier's motion to correct sentence. Timeliness was not at issue because a motion to correct sentence under Minn. R. Crim. P. 27.03, subd. 9, can be brought at any time. And Clauthier had not yet filed a postconviction petition. Second, although the district court indicated that Clauthier was substantively entitled to relief under *Montermini*,[2] the district court was equivocal as to whether it would actually grant a postconviction petition to withdraw a plea. It indicated that Clauthier "may seek" to withdraw his guilty plea via postconviction petition, and that a petition to withdraw a plea "if granted" would place the parties in their pre-plea positions. We are not convinced that the district court's equivocal statements on the merits of a hypothetical postconviction petition bound the district court under the law-of-the-case doctrine. Thus, we conclude that the district court did not abuse its discretion by denying the postconviction petition despite the indication in its prior memorandum.

[2] We express no opinion on the district court's decision to deny Clauthier's motion to correct sentence or its indication that Clauthier was entitled to relief under *Montermini*.

III. Clauthier has not demonstrated that an exception to the timeliness requirement of Minn. Stat. § 590.01, subd. 4(a)(1) applies.

Clauthier next argues that the district court erred in determining that his postconviction petition was untimely. A postconviction petition must be filed within two years of the entry of judgment of conviction or sentence if no direct appeal is filed, subject to certain specified exceptions. Minn. Stat. § 590.01, subd. 4 (2014). The district court sentenced Clauthier on May 10, 2016 and he did not file a direct appeal. Thus, Clauthier's two-year time limit to bring a petition for postconviction relief expired on May 10, 2018. But Clauthier did not file his postconviction petition until February 22, 2019. A postconviction court may summarily deny a claim that is untimely. *Jackson v. State*, 929 N.W.2d 903, 905 (Minn. 2019).

Clauthier recognizes that his postconviction petition was filed more than two years after sentencing, but argues that an exception to the usual rule applies. He points to the exception that allows a petitioner to bring a petition for postconviction relief if he "asserts a new interpretation of federal or state constitutional or statutory law by either the United States Supreme Court or a Minnesota appellate court and the petitioner establishes that this interpretation is retroactively applicable to the petitioner's case." Minn. Stat. § 590.01, subd. 4(b)(3). A petition invoking this exception "must be filed within two years of the date the claim arises." *Id.*, subd. 4(c) (2014). The petitioner bears the burden of proving that an exception to the two-year time limit applies. *Wayne v. State*, 912 N.W.2d 633, 640 (Minn. 2018).

Clauthier asserts that, although his postconviction petition is untimely under the general rule, the district court should have reviewed it under the new-interpretation exception because he filed his petition within two years of the *Kirby* decision. But *Kirby* expressly emphasized that the opinion was *not* about retroactivity. 899 N.W.2d at 488. And Clauthier offers no argument or case law to support that *Kirby* applies retroactively to his case on collateral review. A party waives review of an issue if his or her brief contains no argument or citation to legal authority to support an assertion. *See State v. Ture*, 632 N.W.2d 621, 632 (Minn. 2001) (deeming a claim waived where the appellant failed to provide any authority or argument to support it). Because the exception only applies where the petitioner has established that the new "interpretation is retroactively applicable to the petitioner's case" and Clauthier has failed to articulate a reason why *Kirby* applies retroactively to his case, we conclude that Clauthier has failed to meet his burden to establish that an exception applies. Alternatively, we conclude that Clauthier has waived the issue on appeal.

In sum, we conclude that the district court did not abuse its discretion in denying Clauthier's postconviction petition.

Affirmed.