STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1479

Lorenzo Damien Brewer, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 15, 2020
Affirmed
Reyes, Judge

Stearns County District Court
File No. 73-CR-08-5631

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

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Bryan, Judge.

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

REYES, Judge

In this appeal from the postconviction court's denial of his motion to correct an unlawful sentence under Minn. R. Crim. P. 27.03, subd. 9, appellant argues that the

postconviction court abused its discretion by (1) determining that his ineffective-assistance-of-counsel claim is a time-barred postconviction claim and (2) denying his remaining claims without an evidentiary hearing. We affirm.

FACTS

In June 2009, appellant Lorenzo Damien Brewer pleaded guilty to second-degree controlled-substance sale, in violation of Minn. Stat. § 152.022, subds. 1(1), 3(a) (2008) (count I), and third-degree controlled-substance sale, in violation of Minn. Stat. § 152.023, subds. 1(1), 3(a) (2008) (count II). Appellant admitted to selling approximately 2.2 grams of methamphetamine on November 26, 2007 (count II), and approximately 4.4 grams the next day (count I). His presentence-investigation report (PSI) listed a presumptive prison sentence of 84 to 117 months for count I, based on a severity level of eight and five criminal-history points, including 1.5 points from count II. For count II, the PSI listed a presumptive executed sentence of 34 to 46 months.

As part of his guilty plea, appellant agreed to accept a 67-month sentence for the offenses. He asked the district court to release him until sentencing. The district court agreed to release him on the condition that, if he failed to attend sentencing, his guilty plea would stand, and the district court could impose a top-of-the-box sentence of 117 months. Appellant stated twice that he understood.

Appellant failed to appear at the sentencing hearing. In October 2013, approximately four years later and after his extradition from Illinois, the district court held appellant's sentencing hearing. It first sentenced him to imprisonment of 39 months on count II and then to 117 months on count I, to run concurrently.

More than five years later, in November 2018, appellant filed a pro se motion to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9. He argued that his trial counsel provided ineffective assistance and that his sentence is unauthorized by law for several reasons. At his motion hearing, he argued only that the two-year limitation period for postconviction claims does not bar his ineffective-assistance-of-counsel claim. The postconviction court disagreed, denying appellant's motion without an evidentiary hearing on the basis that it is a time-barred postconviction petition. This appeal follows.

D E C I S I O N

Appellant argues that the postconviction court abused its discretion by (1) determining that his ineffective-assistance-of-counsel claim is a time-barred postconviction claim and (2) denying his remaining claims without an evidentiary hearing. We address each argument in turn.

We review postconviction decisions for an abuse of discretion. *See Davis v. State*, 784 N.W.2d 387, 390 (Minn. 2010). We review the postconviction court's interpretation of procedural rules and issues of law de novo. *See Vazquez v. State*, 822 N.W.2d 313, 315 (Minn. App. 2012). We review its factual findings for clear error. *Id.* at 316.

An offender may challenge "a sentence not authorized by law" at any time. *See* Minn. R. Crim. P. 27.03, subd. 9. A sentence is authorized by law if it is not prohibited by statute or caselaw. *See State v. Borrego*, 661 N.W.2d 663, 667 (Minn. App. 2003). Rule 27.03, subdivision 9, does not apply to sentence challenges based on claimed factual inaccuracies before the district court at sentencing or when the district court "select[ed]

one among two or more sentences that are authorized by law." *Washington v. State*, 845 N.W.2d 205, 213 (Minn. App. 2014).

A challenge to a sentence for reasons other than it being unauthorized by law must be brought instead as a petition for postconviction relief within two years of the entry of judgment of conviction or sentence. *See* Minn. Stat. § 590.01, subd. 4(a)(1) (2018); *Washington*, 845 N.W.2d at 213-14 (discussing distinction between rule 27.03, subdivision 9, and postconviction claims). An offender may not avoid this two-year limitation period "by simply labeling a [postconviction] challenge as a motion to correct sentence under rule 27.03, subdivision 9." *Id.* at 212.

I. The postconviction court did not abuse its discretion by determining that appellant's ineffective-assistance-of-counsel claim is time-barred.

Appellant appears to argue that the postconviction court abused its discretion by denying his ineffective-assistance-of-counsel claim without meaningful review. We disagree.

Appellant claims that he received ineffective assistance of counsel because his trial counsel failed to inform the district court that he missed his sentencing hearing because of a gunshot wound, and the district court may have imposed a lower sentence had it known. This claim involves the accuracy of the facts before the district court at sentencing. Appellant does not argue that his 117-month sentence would be unauthorized by law because of the reasons that he failed to appear at sentencing. Further, he effectively acknowledged at his motion hearing that the district court sentenced him *within* its discretion by stating that it "may have given" him a lower sentence had it heard his reasons

for missing sentencing. Because his ineffective-assistance-of-counsel claim is a "fact-based challenge" to his sentence and not a claim that the sentence is "unauthorized by law," it is a postconviction claim. *See Washington*, 845 N.W.2d at 214-15 (quotation omitted). Because appellant filed his motion more than three years after the two-year period for postconviction claims had expired, the postconviction court properly denied his claim as untimely. *See* Minn. Stat. § 590.01, subd. 4(a) (2018).

In a related claim, appellant argues that the district court should have held an evidentiary hearing on why he missed sentencing. This claim is also based on the accuracy of the facts before the district court and not an assertion that his sentence is unauthorized by law. Appellant is not entitled to relief on this basis, and the postconviction court properly denied this as a time-barred postconviction claim.

II. The postconviction court did not abuse its discretion by denying appellant's remaining claims without an evidentiary hearing.

Appellant argues that we must remand because the postconviction court summarily denied his remaining claims that (1) his 117-month sentence is an impermissible upward departure; (2) Minn. Stat. § 609.035 (2018) prohibits the multiple sentences imposed by the district court; and (3) his sentence is based on an incorrect criminal-history score, all of which he argues are within the scope of rule 27.03, subdivision 9. While we agree that these claims are within the scope of rule 27.03, subdivision 9, they nevertheless lack merit and do not require an evidentiary hearing.

Rule 27.03, subdivision 9, does not require the postconviction court to hold an evidentiary hearing or make findings of fact. *State v. Masood*, 739 N.W.2d 736, 739 (Minn.

App. 2007). Further, we will not reverse the postconviction court's denial of a rule 27.03, subdivision 9, motion unless it "abused its discretion or the original sentence was unauthorized by law." *State v. Amundson*, 828 N.W.2d 747, 752 (Minn. App. 2013). Whether a sentence is unauthorized by law is a legal question that we review de novo. *Borrego*, 661 N.W.2d at 667. We address each of appellant's claims in turn.

First, appellant argues that his sentence is an impermissible upward departure because the district court failed to provide reasons for imposing it, a jury did not hear the facts that enhanced the sentence, and the plea-agreement condition providing for the upward departure is unconstitutional. All of these claims rely on appellant's assertion that his 117-month sentence is an upward departure from the sentencing guidelines. A sentence is a departure only if it is outside of the presumptive range in the applicable cell of the sentencing grid. *See* Minn. Sent. Guidelines II.C (2007). Here, the presumptive range for appellant's second-degree controlled-substance offense, based on his criminal-history score of five, is 84 to 117 months' imprisonment. *See* Minn. Sent. Guidelines IV (2007). Appellant's 117-month sentence is within the presumptive range and therefore is not an upward departure. His claims based on the illegality of the "departure" fail.

Second, he argues that he should not have received multiple sentences, based on Minn. Stat. § 609.035. Section 609.035 prohibits multiple sentences for offenses that arise from a "single behavioral incident." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). But appellant's charges are based on separate controlled-substance sales on two different days, and he does not argue that they form a single behavioral incident. The district court properly imposed a separate sentence for each offense.

Third, he argues that his criminal-history score for count I should not have included points from his conviction for count II because points from a guilty plea should not be used in the same case. A district court should assign criminal-history points "for every felony conviction for which a felony sentence was . . . imposed before the current sentencing" and sentence multiple offenses "in the order in which they occurred." Minn. Sent. Guidelines cmt. II.B.03(1) (2007). The district court imposed appellant's felony sentence on count II first, as the count-II offense occurred the day before the count-I offense. It then imposed the sentence on count I.[1] It therefore properly included the points from count II in count I.

Appellant nonetheless relies on *Vazquez* to argue that we must remand for an evidentiary hearing. 822 N.W.2d 313. *Vazquez* clarified that a motion to correct a sentence based on an inaccurate criminal-history score is properly brought under rule 27.03, subdivision 9. *Id.* at 320. But it did not require an evidentiary hearing on all such motions.

Because rule 27.03, subdivision 9, does not require the postconviction court to hold an evidentiary hearing, see *Masood*, 739 N.W.2d at 739, and because appellant is not entitled to relief on his remaining claims, the postconviction court did not abuse its discretion by denying appellant's motion without an evidentiary hearing.

Affirmed.

[1] The district court initially referred to the second-degree offense incorrectly as count II during sentencing, but it later clarified that the second-degree offense is count I.