STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1832

Fong Lee, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 14, 2020
Reversed and remanded
Johnson, Judge

Ramsey County District Court
File No. 62-K8-04-003298

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

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

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Considered and decided by Reyes, Presiding Judge; Johnson, Judge; and Cochran, Judge.

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

JOHNSON, Judge

In 2004, Fong Lee shot two men, killing one of them and injuring the other. In 2005, a Ramsey County jury found Lee guilty of second-degree murder and attempted

second-degree murder. The district court, relying on the 2004 version of the sentencing guidelines, imposed consecutive prison sentences of 306 and 153 months. In 2019, Lee filed a motion to correct his sentences. He seeks to take advantage of a 2005 modification to the sentencing guidelines that, if applied, would presumptively require the district court to impose concurrent sentences rather than consecutive sentences. The district court denied Lee's motion on the grounds that the motion is procedurally barred and that Lee cannot satisfy the requirements of the amelioration doctrine. We conclude that the district court erred by reasoning that Lee's motion is procedurally barred and by reasoning that the amelioration doctrine does not apply. Therefore, we reverse and remand for further proceedings.

FACTS

This case is before this court for the third time. In our first opinion, in 2006, we described the underlying facts, which occurred on August 21 and 22, 2004, as follows: Lee, Lee's brother, and Tou Yang went to a bar in St. Paul. Lee gave Yang a gun, which Yang hid in the waistband of his pants. Hours later, the three men got into an argument with a group of approximately nine other men. The two groups had an altercation outside the bar. A man from the other group punched Yang, who fell to the ground. Lee removed the gun from Yang's waistband and fired several shots. One bystander was shot in the chest and died; a second bystander was shot in a knee and survived. *State v. Lee*, No. A05-2138, 2006 WL 3490432, at *1 (Minn. App. Dec. 5, 2006), *review denied* (Minn. Feb. 20, 2007).

The state charged Lee with second-degree murder, in violation of Minn. Stat. § 609.19, subd. 1(1) (2004), based on the allegation that he shot the bystander who died. Before trial, the state amended the complaint to add a charge of attempted second-degree murder based on the allegation that he shot the bystander who survived. A Ramsey County jury found Lee guilty of both charges. In July 2005, the district court imposed consecutive sentences of 306 months of imprisonment for second-degree murder and 153 months of imprisonment for attempted second-degree murder, for a total of 459 months of imprisonment.

On direct appeal, Lee argued that the evidence was insufficient to support the convictions. This court affirmed the conviction. *Lee*, 2006 WL 3490432, at *4. In 2007, Lee petitioned for post-conviction relief, arguing that his trial attorney provided him with ineffective assistance of counsel. The post-conviction court denied Lee's petition, and this court affirmed. *Lee v. State*, No. A08-1713, 2009 WL 2595889 (Minn. App. Aug. 13, 2009).

A decade later, in April 2019, Lee filed a motion to correct sentence pursuant to rule 27.03, subdivision 9, of the rules of criminal procedure. Lee requested resentencing pursuant to a 2005 modification to the sentencing guidelines that would be more favorable to him than the sentencing guidelines that applied at the time of his sentencing. In July 2005, the sentencing guidelines provided for permissive consecutive sentences for the two offenses of which Lee was convicted. Minn. Sent. Guidelines II.F (2004). But, one month later, after the 2005 modification took effect, consecutive sentences for the two offenses no longer was permissive but, rather, was an upward departure. Minn. Sent. Guidelines

II.F (Supp. 2005). Based on the 2005 modification, Lee invoked the amelioration doctrine and requested that his two sentences "be corrected to run concurrent." In response, the state argued that "[t]he Guidelines contain a clear statement of abrogation of the amelioration doctrine" such that Lee was correctly sentenced according to the 2004 sentencing guidelines.

In August 2019, the district court denied Lee's motion in a four-page order. The district court reasoned that Lee's motion is barred by the *Knaffla* doctrine and that he cannot satisfy the first and second requirements of the amelioration doctrine. Lee appeals.

D E C I S I O N

Lee argues that the district court erred by denying his motion to correct sentence. A district court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. An offender may seek correction of a sentence by filing a motion to correct sentence. *See, e.g.*, *Townsend v. State*, 834 N.W.2d 736, 739 (Minn. 2013); *Johnson v. State*, 801 N.W.2d 173, 175 (Minn. 2011). A sentence is not authorized by law if it is "contrary to law or applicable statutes." *State v. Schnagl*, 859 N.W.2d 297, 301 (Minn. 2015). In general, this court applies an abuse-of-discretion standard of review to a district court's denial of a motion to correct sentence. *Evans v. State*, 880 N.W.2d 357, 359 (Minn. 2016).

I. *Knaffla* Doctrine

Lee first argues that the district court erred by concluding that his motion to correct sentence is procedurally barred by *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976).

In *Knaffla*, the supreme court held that an offender may not file a post-conviction petition to assert a claim that previously was raised on direct appeal or that could have been raised but was not raised on direct appeal. *Id.* at 741; *see also Quick v. State*, 757 N.W.2d 278, 280 (Minn. 2008). Similarly, "matters raised or known but not raised in an earlier petition for postconviction relief will generally not be considered in subsequent petitions for postconviction relief." *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007).

The remedy that may be obtained by a motion to correct sentence "coexist[s] with the postconviction remedy." *Vazquez v. State*, 822 N.W.2d 313, 317 (Minn. App. 2012). Accordingly, an offender may elect to challenge his or her sentence by filing either a petition for post-conviction relief, Minn. Stat. § 590.01, subd. 1(1) (2018), or a motion to correct sentence, Minn. R. Crim. P. 27.03, subd. 9. But an offender may not invoke rule 27.03, subdivision 9, to seek relief for anything other than an unauthorized sentence because the rule "is limited to sentences, and the court's authority under the rule is restricted to modifying a sentence." *State v. Coles*, 862 N.W.2d 477, 480 (Minn. 2015). Consequently, if an offender files a motion that "implicates more than simply his sentence," a district court may construe the motion as a petition for postconviction relief. *Johnson v. State*, 877 N.W.2d 776, 779 (Minn. 2016) (quotation omitted).

The supreme court has not yet decided "whether . . . the procedural bar under *Knaffla* appl[ies] to a motion to correct a sentence under rule 27.03, subdivision 9." *Townsend*, 834 N.W.2d at 739. This court, however, has held that the *Knaffla* doctrine does not apply to a motion to correct sentence filed pursuant to rule 27.03, subdivision 9. *State v. Amundson*, 828 N.W.2d 747, 751-52 (Minn. App. 2013).

In this case, the district court did not construe Lee's motion to correct sentence as a petition for post-conviction relief. There is no basis for recharacterizing the motion in that manner because the relief Lee seeks is limited to a correction of his sentence. *See Coles*, 862 N.W.2d at 480. The district court simply applied the *Knaffla* doctrine and concluded, "*Knaffla* procedurally bars Petitioner's motion." The district court's application of the *Knaffla* doctrine is contrary to this court's caselaw, in which we have held that the *Knaffla* doctrine does not apply to a motion to correct sentence filed pursuant to rule 27.03, subdivision 9. *See Amundson*, 828 N.W.2d at 751-52; *see also Washington v. State*, 845 N.W.2d 205, 214, 216 (Minn. App. 2014).

Thus, the district court erred by concluding that Lee's motion to correct sentence is procedurally barred by the *Knaffla* doctrine.

II. Amelioration Doctrine

Lee's primary argument is that the district court erred by concluding that the amelioration doctrine does not apply and that he was properly sentenced under the 2004 sentencing guidelines instead of the 2005 sentencing guidelines.

In August 2004, when Lee committed his crimes, the sentencing guidelines provided, "Multiple current felony convictions *for crimes against persons* may be sentenced consecutively to each other." Minn. Sent. Guidelines II.F (2004) (emphasis added). In July 2005, the district court imposed consecutive sentences on Lee for the offenses of second-degree murder and attempted second-degree murder. On August 1, 2005, a modification to section II.F of the guidelines became effective. *See* Minn. Sentencing Guidelines Comm'n, *Report to the Legislature* 13-18 (Jan. 2005); 2005 Minn.

Laws ch. 136, art. 16, § 14, at 1119; Minn. Sent. Guidelines II.F (Supp. 2005). After that modification, the guideline quoted above provided, "Multiple current felony convictions *for crimes on the list of offenses eligible for permissive consecutive sentences found in Section VI* may be sentenced consecutively to each other." Minn. Sent. Guidelines II.F (Supp. 2005) (emphasis added). At that time, the list of offenses in section VI included first-degree murder, attempted first-degree murder, and second-degree murder. Minn. Sent. Guidelines VI (Supp. 2005).

This court later held that the absence of any mention of attempted second-degree murder in section VI of the 2005 guidelines implies that multiple convictions of that offense may not be sentenced consecutively to each other under section II.F. *State v. Johnson*, 756 N.W.2d 883, 886, 894-96 (Minn. App. 2008), *review denied* (Minn. Dec. 23, 2008). The sentencing guidelines permit consecutive sentences on two convictions only if both offenses are listed in section VI. *Bilbro v. State*, 927 N.W.2d 8, 14 (Minn. 2019) (citing Minn. Sent. Guidelines II.F & VI (2007)). Lee and the state agree that, if the 2005 modification to section II.F were to apply, it would not authorize permissive consecutive sentencing.[1]

[1]We note that the 2005 modification to section II.F effectively has been superseded by a subsequent modification to another section of the guidelines. In 2009, section VI of the sentencing guidelines was modified by the addition of the following sentence: "Convictions for attempted offenses or conspiracies to commit offenses listed below are eligible for permissive consecutive sentences as well as convictions for completed offenses." Minn. Sent. Guidelines VI (Supp. 2009). The 2009 modification has been retained in the current version of the guidelines. *See* Minn. Sent. Guidelines 6.A (Supp. 2019). Neither party called the 2009 modification to this court's attention. We identified a potential issue on our own initiative and requested supplemental briefing on two questions regarding the 2009 modification. The first question asked, "Does the sentencing

Under the common-law amelioration doctrine, a law that mitigates punishment applies to acts committed before the effective date of the law if final judgment has not yet been entered. *State v. Kirby*, 899 N.W.2d 485, 489 (Minn. 2017); *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979). The amelioration doctrine is grounded in the principle that if the legislature has amended a statute to mitigate criminal punishment in a particular situation, "the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient." *Coolidge*, 282 N.W.2d at 514. In that situation, "Nothing would be accomplished by imposing a harsher punishment, in light of the legislative pronouncement, other than vengeance." *Id.* at 514-15. Consequently, a defendant or offender whose criminal case has not yet reached final judgment may receive the benefit of the new, more lenient law, so long as there is no "contrary statement of intent by the legislature." *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982). Thus, the amelioration doctrine applies if three conditions are satisfied: "(1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been

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guidelines commission's 2009 modification applying permissive consecutive sentences to attempt crimes, Minn. Sent. Guidelines VI (Supp. 2009), alter application of the amelioration doctrine to appellant's case, and, if so, how?" The second question asked, "Based on the procedural history of this case," is the issue "properly before this court?" In their respective supplemental briefs, both parties answered the second question in the negative. The parties' shared position is consistent with the general rule that this court does not consider issues that were not presented to and resolved by the district court. *See, e.g.*, *State v. Bailey*, 732 N.W.2d 612, 623 (Minn. 2007). Accordingly, we decline to consider *sua sponte* how the 2009 modification might affect the application of the amelioration doctrine in light of the fact that Lee was sentenced before the 2005 modification to section II.F but did not move to correct his sentence until after the 2009 modification to section 6.A. To be clear, we take no position on that issue.

entered as of the date the amendment takes effect." *Kirby*, 899 N.W.2d at 490. This court applies a *de novo* standard of review to a district court's decision concerning the application of the amelioration doctrine. *See State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012).

The district court reasoned that the first requirement and the second requirement of the amelioration doctrine are not satisfied. On appeal, Lee challenges the district court's reasoning with respect to both of those requirements. In response, the state argues that the district court correctly determined that both the first requirement and the second requirement are not satisfied. The district court and the parties agree that the third requirement is satisfied, so it is not at issue on appeal.

A. First Requirement: No Statement of Abrogation

As stated above, the first requirement of the amelioration doctrine is that "there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine." *Kirby*, 899 N.W.2d at 490.

The district court determined that there is a statement clearly expressing an intent to abrogate the amelioration doctrine in the 2005 sentencing guidelines, which stated, "Modifications to the Minnesota Sentencing Guidelines and associated commentary will be applied to offenders whose date of offense is on or after the specified modification effective date." Minn. Sent. Guidelines III.F (Supp. 2005). Lee contends that section III.F of the guidelines "merely reiterate[s] the general rule that newly-enacted laws are not retroactive" and is not a statement by the legislature reflecting an intent to abrogate the amelioration doctrine. The state contends that the provision on which the district court

relied, section III.F, makes clear that the 2005 modification to section II.F does not apply to Lee's crime, which was committed in 2004.

After the parties filed their respective briefs in this appeal, this court issued its opinion in *State v. Robinette*, 944 N.W.2d 242 (Minn. App. 2020), *review granted* (Minn. June 30, 2020).[2] In that case, we considered whether Robinette was entitled to resentencing under the amelioration doctrine based on a 2019 modification to section 2.B.2 of the sentencing guidelines. *Id.* at 249-50. The sentencing guidelines commission had submitted proposed modifications of section 2.B.2 to the legislature, as required by statute. *Id.* at 250 (citing Minn. Stat. § 244.09, subd. 11 (2018)). But "the legislature did not act," so the modification took effect on August 1, 2019, pursuant to statute. *Id*. We considered the question "whether a policy statement adopted by the guidelines commission without express legislative approval operates as a statement of intent by the legislature." *Id.* at 249. We answered that question in the negative, reasoning that the legislature's inaction was not an express statement of intention to abrogate the amelioration doctrine. *Id.* Accordingly, we determined that Robinette satisfied the first requirement of the amelioration doctrine. *Id.*

In light of our *Robinette* opinion, we requested supplemental briefing on the following question: "Does this court's opinion in *State v. Robinette* alter the application of

[2]The supreme court denied Robinette's petition for review of parts I and II of this court's opinion. The supreme court granted the state's cross-petition for review of part III of this court's opinion, which concerns the amelioration doctrine. *State v. Robinette*, No. A19-0679 (Minn. June 30, 2020) (order). The state's cross-petition framed the issue as, "May the amelioration doctrine be abrogated by express statements by the Sentencing Guidelines Commission that are ratified by the Legislature?"

the amelioration doctrine to appellant's case, and, if so, how?" In Lee's supplemental brief, he argues that *Robinette* provides additional support for his argument that section III.F of the 2005 guidelines "was not a statement of legislative intent to abrogate." In contrast, the state argues in its supplemental brief that the *Robinette* opinion has no bearing on this case because it did "not deal with an express statement like the one in this case."

The present case is somewhat similar to *Robinette* in that, in each case, the amelioration issue arose from a modification to the sentencing guidelines that was proposed by the sentencing guidelines commission. *See id.* But this case is different from *Robinette* in the manner in which the proposed modification became effective. In *Robinette*, the legislature took no action on the commission's proposed modification, so the modification became effective by operation of law. *See* 944 N.W.2d at 249-50. In this case, the legislature actually acted on the commission's multiple proposed modifications, approving some and disapproving others. 2005 Minn. Laws ch. 136, art. 16, § 14, at 1119. Thus, we must determine whether the legislature abrogated the amelioration doctrine with respect to the 2005 proposed modification to section II.F of the guidelines when the legislature expressly adopted that proposed modification. We do so by asking whether there is a "statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine." *See Kirby*, 899 N.W.2d at 490.

In January 2005, the sentencing guidelines commission submitted a report to the legislature in which it proposed multiple modifications to the guidelines, including the modification to section II.F on which Lee relies. *Report to the Legislature*, *supra*, at 13-18. The legislature responded by expressly adopting the proposed modifications in parts I.A.,

I.B., and II. of the commission's report but expressly rejecting the proposed modifications in parts I.C. and III. of the commission's report. 2005 Minn. Laws ch. 136, art. 16, § 14, at 1119. The commission's proposed modification to section II.F of the guidelines was included in part I.B. of the report and, thus, was expressly adopted by the legislature. *Report to the Legislature*, *supra*, at 13. The session law states that the proposed modifications that were adopted shall "take effect on August 1, 2005." 2005 Minn. Laws ch. 136, art. 16, § 14, at 1119.

After carefully reviewing the 2005 session law, we do not find any statement that clearly establishes the legislature intent to abrogate the amelioration doctrine. The legislature included no such statement in the provisions that adopted and rejected the various proposals of the commission; the legislature did so without explaining its reasons. *Id.* Likewise, the legislature included no such statement in the effective-date provision; the language used there is similar to the language of the effective-date provision at issue in *Kirby*, which simply specified the date on which the new law became effective. *See* 899 N.W.2d at 490 (citing 2016 Minn. Laws ch. 160, § 18, at 591). But the supreme court concluded in *Kirby* that such language was not an express statement by the legislature of any intention to abrogate the amelioration doctrine. *Id.* at 490-93.

The state argues that the district court correctly reasoned that the commission (not the legislature) made an express statement of an intention to abrogate the amelioration doctrine with respect to the 2005 modification to section II.F of the guidelines. As stated above, the district court relied on a provision in the 2005 guidelines that stated, "Modifications to the Minnesota Sentencing Guidelines and associated commentary will

be applied to offenders whose date of offense is on or after the specified modification effective date." Minn. Sent. Guidelines III.F (Supp. 2005). In *Kirby*, the supreme court considered a similar argument based on a subsequent version of the same provision, which had since been modified slightly. 899 N.W.2d at 492-93 (citing Minn. Sent. Guidelines 3.G (2016)). The supreme court noted that section 3.G of the guidelines was adopted by the sentencing guidelines commission without legislative action because the commission was not required to obtain the legislature's approval for that type of guideline. *Id.* at 492 (citing Minn. Stat. § 244.09, subd. 5 (2016)). The supreme court then rejected the state's argument by stating, "We have never ruled—and decline to rule today—that the amelioration doctrine may be abrogated by Commission statements *not* ratified by the Legislature." *Id.* at 493 (emphasis added). We interpret that statement to mean that the amelioration doctrine cannot be abrogated by a statement of the sentencing guidelines commission that was not ratified by the legislature. In other words, section III.F of the 2005 guidelines does not abrogate the amelioration doctrine with respect to the 2005 modification to section II.F of the guidelines. Consequently, the district court's reasoning is contrary to the supreme court's *Kirby* opinion.

Thus, the first requirement for the application of the amelioration doctrine is satisfied.

B. Second Requirement: Mitigation of Punishment

The second requirement of the amelioration doctrine is that "the amendment mitigates punishment." *Kirby*, 899 N.W.2d at 490. The *Kirby* opinion does not define the word "mitigate" as used in this context, and we are unaware of any other opinion that

defines the word for purposes of the amelioration doctrine. The common definition of the word is "[t]o make less severe or intense." *The American Heritage Dictionary of the English Language* 1129 (5th ed. 2011).

The district court determined that this requirement is not satisfied on the ground that the 2005 modification changed "the procedures required for consecutive sentences," which the district court reasoned is "not the same as mitigation." Lee contends that the 2005 modification to section II.F mitigated punishment because it "lowered the highest potential sentence [he] could receive without [the] additional factfinding" required for an upward departure. The state contends that the 2005 modification to section II.F does not mitigate punishment because it does not preclude a district court from imposing consecutive sentences, so long as the district court follows the procedures for an upward departure.

In 2004, section II.F of the sentencing guidelines permitted the district court, in its discretion, to impose consecutive sentences for Lee's convictions of second-degree murder and attempted second-degree murder. *See* Minn. Sent. Guidelines II.F (2004); *State v. McLaughlin*, 725 N.W.2d 703, 714-15 (Minn. 2007) (citing Minn. Sent. Guidelines II.F.2 (2004)). After the effective date of the 2005 modification, section II.F of the sentencing guidelines does not permit a district court to impose consecutive sentences for those offenses, unless the district court ordered an upward departure from the presumptive guidelines sentence, which would require the existence of aggravating factors and a written statement of reasons that provide "identifiable, substantial, and compelling circumstances to support" the departure. Minn. Sent. Guidelines II.D (Supp. 2005).

The 2005 modification has the effect of reducing the total duration of the imprisonment that may result from the imposition of presumptive sentences on Lee for his convictions of second-degree murder and attempted second-degree murder. The effect of the 2005 modification is consistent with the common meaning of the word "mitigate" because the modification had the effect of making the total duration of his presumptive sentence "less severe." *See American Heritage*, *supra*, at 1129.

Thus, the second requirement of the application of the amelioration doctrine is satisfied.

We note that the state did not seek an upward departure, and the district court did not purport to order an upward departure, when Lee was sentenced in July 2005, when the 2004 guidelines governed. Lee contends that he "should be resentenced under the new [*i.e.*, 2005] guidelines." Nothing in this opinion should be understood to preclude the state from seeking, or the district court from ordering, an upward departure in the form of consecutive sentences, consistent with the 2005 guidelines.

In sum, the district court erred by denying Lee's motion to correct sentence. Therefore, we reverse and remand for further proceedings.

Reversed and remanded.