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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1292**

Julio Cesar Robles, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 19, 2011
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. 62K4054085

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Stephen L. Smith, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Minge, Presiding Judge; Stoneburner, Judge; and
Randall, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges denial of his petition for postconviction relief to correct his sentence or, alternatively, withdraw his plea. We affirm.

FACTS

In 2006, appellant Julio Cesar Robles was sentenced to 333 months in prison for one count of attempted first-degree murder and one count of second-degree assault, both counts committed for the benefit of a gang. More than three years after he was sentenced, Robles petitioned for postconviction relief to correct his sentence or allow him to withdraw his plea, arguing that he believed his plea agreement was for a 240-month sentence. As support for his argument, appellant relies on the plea petition, which states at line 19. b. that appellant had been told by his attorney and understood that the maximum penalty that the court could impose is “imprisonment for 20 years.”

The transcript of the plea hearing, however, shows that the prosecutor and appellant’s attorney stated on the record that their joint recommendation was for a 28-year prison sentence. Appellant, on the record, acknowledged this recommendation and his understanding that he was agreeing to a sentence of 28 years.¹

At the sentencing hearing, the state requested that the district court “execute [Robles’s] sentence of 333 months as we agreed on when he plead[ed] guilty.” Robles did not object to the length of sentence requested. The district court, noting that Robles had admitted five separate bases justifying the one-and-a-half upward-durational

¹ The 333-month sentence imposed is slightly less than 28 years (336 months).

departure from the presumptive guidelines sentence, imposed 288 months for the attempted first-degree murder of one victim, and a consecutive term of 45 months for the second-degree assault of the other victim. Robles did not object to the sentences imposed.

The postconviction court held that Robles's postconviction petition was untimely under Minn. Stat. § 590.01, subd. 4 (2010), which provides, in relevant part, that no petition for postconviction relief may be filed more than two years after the entry of judgment of conviction or sentence. The postconviction court also addressed the merits of Robles's claim and held that the length of sentence to be imposed was plainly and repeatedly stated at the plea hearing and at sentencing, such that Robles's assertion that he did not understand that he was agreeing to a sentence greater than 240 months was without merit.

D E C I S I O N

In reviewing a postconviction court's denial of relief, issues of law are reviewed *de novo* and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). "A petitioner seeking postconviction relief has the burden of establishing by a fair preponderance of the evidence that the facts warrant relief." *Erickson v. State*, 725 N.W.2d 532, 534 (Minn. 2007) (quotations omitted). "[A]llegations in a petition for postconviction relief must be more than argumentative assertions without factual support." *Id.* (quotations omitted).

In this case, the postconviction court did not err in determining that Robles's postconviction petition was untimely under Minn. Stat. § 590.01, subd. 4. As recognized

by the postconviction court, the only possible exception to the time bar is Minn. Stat. § 590.01, subd. 4(b)(5), which provides that, notwithstanding the application of the two-year limitation, the postconviction court may hear a petition if “the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice.” The postconviction court concluded that the petition was frivolous, but nonetheless considered the merits of the petition.

Although we agree with the postconviction court that the petition is without merit, due to the misstatement in the written plea petition about the maximum sentence, we are not convinced that the petition is frivolous. Because this is Robles’s first challenge to his sentence, the district court acted in the interests of justice by considering the merits of his claim, and, in the interests of justice, we review the postconviction court’s decision on the merits.

It is possible that some confusion was caused by the difference between the 20-year sentence mentioned in the plea petition and the 28-year joint recommendation for sentencing made on the record. But the 28-year recommendation was plainly stated several times and acknowledged by Robles on the record at the plea hearing. We conclude that it is not possible that Robles failed to understand that 28 years is longer than 20 years and, therefore, longer than 240 months. The 28-year sentence was stated on the record at least three times during the plea hearing; Robles specifically acknowledged that he was agreeing to a 28-year sentence at least twice at the plea hearing; and Robles acknowledged his understanding that a 28-year sentence would result in his serving a minimum of 18 years in prison.

Additionally, at the sentencing hearing, the sentence was plainly stated as 333 months, and consecutive sentences of 288 months and 45 months were imposed without any objection from Robles or his attorney. Again, Robles could not have failed to understand that this 333-month sentence exceeded 240 months. Under these facts, we affirm the district court's holding that appellant failed to establish that he is entitled to a correction of his sentence or to withdraw his plea of guilty.

Affirmed.