STATE OF MINNESOTA
IN COURT OF APPEALS
A11-288

James Lee Michael Lundquist, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 18, 2011
Affirmed
Larkin, Judge

Ramsey County District Court
File No. 62-K8-97-2745

James Lee Michael Lundquist, Bayport, Minnesota (pro se appellant)

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Kalitowski, Judge; and Wright, Judge.

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

LARKIN, Judge

Appellant challenges the district court's summary denial of his petition for postconviction relief. Because appellant's claims are time and procedurally barred, we affirm.

FACTS

In 1997, appellant James Lee Michael Lundquist was charged with second-degree murder under Minn. Stat. § 609.19, subd. 1(2) (1996), and second-degree assault under Minn. Stat. § 609.222, subd. 1 (1996). He pleaded guilty to the charges and was sentenced to concurrent, executed prison terms of 306 months for the murder and 36 months for the assault.

On May 18, 1999, Lundquist petitioned for postconviction relief, arguing that his plea lacked an adequate factual basis. The district court denied relief, and this court affirmed. *Lundquist v. State*, CX-99-1430, 2000 WL 310356, at *1 (Minn. App. Mar. 28, 2000), *review denied* (Minn. May 23, 2000). Over the next nine years, Lundquist, proceeding pro se, filed four more petitions for postconviction relief, all of which were denied. On November 9, 2010, Lundquist filed his sixth petition for postconviction relief. The district court summarily denied the petition as untimely under Minn. Stat. § 590.01, subd. 4(a) (2010), and as procedurally barred under caselaw. Lundquist challenges the district court's summary denial of his petition for postconviction relief.

D E C I S I O N

"A petition for postconviction relief is a collateral attack on a conviction that carries a presumption of regularity." *Hummel v. State*, 617 N.W.2d 561, 563 (Minn. 2000). A summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). The postconviction court's factual determinations are upheld if they are supported by sufficient evidence, and issues of law are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

With certain exceptions, "[n]o petition for postconviction relief may be filed more than two years after . . . an appellate court's disposition of petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a). The legislature added this two-year time limit in a 2005 legislative amendment to the postconviction relief statutes. *See* 2005 Minn. Laws ch. 136, art. 14, § 13, at 1097-98. This amendment provided that the filing deadline would go into effect on August 1, 2005, and that "[a]ny person whose conviction became final before August 1, 2005, shall have two years after the effective date of this act to file a petition for postconviction relief." *Id.* at 1098.

Lundquist was sentenced on January 13, 1998 and did not file a direct appeal, making his conviction final in 1998. *See Johnson v. Gray*, 533 N.W.2d 57, 60 (Minn. App. 1995) (explaining that, generally, a conviction is final when the appellate process is terminated or the time for appeal has expired); *see also* Minn. R. Crim. P. 28.02, subd. 4(3)(a) (stating that in felony and gross-misdemeanor cases, the defendant must appeal within 90 days after final judgment). Because his conviction was final before August 1, 2005, Lundquist had until July 31, 2007—two years after the effective date of the

amending act—to file his petition for postconviction relief. *See* 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. Lundquist filed his current petition for postconviction relief on November 5, 2010, more than three years after the statutory deadline. Unless an exception[1] applies, the district court correctly dismissed Lundquist's petition as untimely. *See Stewart v. State*, 764 N.W.2d 32, 34 (Minn. 2009) (affirming the dismissal of a postconviction petition as untimely when the conviction was final before August 1, 2005, and the petition was not filed by July 31, 2007).

Moreover, [w]hen "direct appeal has once been taken," all issues raised in the appeal, and all issues "known but not raised, will not be considered [in] a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). When no direct appeal has been taken, a postconviction proceeding can take the place of a direct appeal. *See id.* at 251-52, 243 N.W.2d at 740-41 (stating that a defendant is entitled to at least one review of conviction by an appellate or postconviction court). Issues "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).

There are two exceptions to the *Knaffla* rule. First, a claim will not be barred if its novelty is so great that its legal basis was not reasonably available when direct appeal was taken. *Roby v. State*, 531 N.W.2d 482, 484 (Minn. 1995). Second, even if the

[1] There are several exceptions to the statutory deadline, including where a petitioner's disability prevents a timely petition, newly discovered evidence clearly and convincingly establishes innocence, a change in the law applies to the petitioner's case, or "the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b) (2010).

claim's legal basis was sufficiently available, substantive review may be allowed "when fairness so requires and when the petitioner did not deliberately and inexcusably fail to raise the issue on direct appeal." *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997) (quotation omitted).

Lundquist's postconviction petition raised five claims: (1) his plea must be withdrawn because it was inaccurate; (2) his plea must be withdrawn because it was involuntary; (3) he received ineffective assistance of trial counsel because his trial counsel did not know the meaning of "reckless," an element of the charged offense; (4) he received ineffective assistance of appellate counsel because appellate counsel failed to raise the ineffective-assistance-of-trial-counsel issue on appeal; (5) his murder sentence constitutes cruel and unusual punishment.

Lundquist's first four claims are based on his argument that there was an inadequate factual basis for his second-degree murder plea because no testimony or finding established that he consciously disregarded a substantial risk when he pointed a gun, which he knew to be loaded, at the victim's car. This argument concerns the definition of "reckless," which is an element of Lundquist's second-degree murder conviction.[2] But Lundquist challenged the adequacy of his plea in his first postconviction

[2] A person who "causes the death of a human being while committing or attempting to commit a drive-by shooting" is guilty of second-degree murder. Minn. Stat. § 609.19, subd. 1(2). A drive-by shooting is committed when a person, who, "while in . . . a motor vehicle, recklessly discharges a firearm at or toward a person [or] another motor vehicle." Minn. Stat. § 609.66, subd. 1e(a) (1996).

proceeding, which was reviewed by this court. Thus, these claims are procedurally barred unless one of the *Knaffla* exceptions applies.

Lundquist relies on *State v. Engle*, 743 N.W.2d 592 (Minn. 2008), to establish the existence of an exception to the time and *Knaffla* bars. Lundquist argues, "*State v. Engle* was not available at the time of [the] direct appeal . . . [t]herefore [it could not be raised and] *Knaffla* would be inadequate during this proceeding." We construe this as an assertion that *Engle* sets forth a change in the law such that the legal basis for Lundquist's postconviction claims was not reasonably available at the time of his appeal and subsequent postconviction proceedings.

But Lundquist's reliance on *Engle* to establish the existence of an exception to the time and *Knaffla* bars fails for two reasons. First, *Engle* was decided on January 3, 2008—before Lundquist filed his fifth petition for postconviction relief on September 15, 2008. Lundquist quoted *Engle* in that petition and argued that a "significant change in substantive or procedural law has occurred which, in the interest of justice should be applied." Thus, in this sixth postconviction proceeding, the *Engle* holding is not new to Lundquist.

Second, *Engle* does not state a new rule of law. The sole issue in *Engle* was whether a conviction under Minn. Stat. § 609.66, subd. 1a(a)(3) (2006), which proscribes recklessly discharging a firearm in a municipality, requires an intentional discharge of a firearm. *See Engle*, 743 N.W.2d at 593. ("[W]e granted [review] only as to the issue of whether subdivision 1a(a)(3) requires an intentional discharge of a firearm."). Before determining that issue, the court clarified the appropriate definition of reckless to be

applied in a reckless-discharge-of-a-firearm-in-a-municipality case and held that "one acts recklessly by creating a substantial and unjustifiable risk that one is aware of and disregards." *Id.* at 594-95. The court explained that this definition had been applied in reckless-homicide and reckless-weapons-handling cases and concluded that there was no reason not to apply this general definition of reckless to felony weapons offenses. *Id*. at 594; *see State v. Zupetz*, 322 N.W.2d 730, 733-34 (Minn. 1982) (defining "recklessly," in the context of reckless homicide, as consciously disregarding a substantial and unjustifiable risk); *see also State v. Cole*, 542 N.W.2d 43, 51-52 (Minn. 1996) (applying the same definition in a reckless-use-of-a-dangerous-weapon case). Thus, *Engle* merely clarified that the existing definition of reckless, as stated in *Cole*, applies in felony weapons cases; *Engle* did not state a new definition of reckless. Because *Engle* does not set forth a change in the law, the change-in-law exception to the statutory time bar does not apply. And because the legal basis for Lundquist's arguments regarding the adequacy of his factual basis for his plea under the *Cole* definition of reckless was reasonably available to him at the time of his first postconviction proceeding and appeal, [3] his claims are barred under *Knaffla* as well.

Lundquist contends that this court nonetheless must address his *Engle* argument because he is entitled to one right of review, asserting that because he has not received a review of his *Engle* argument, his "current petition should be treated as his first." We disagree. Lundquist had one appellate review during his first postconviction proceeding.

[3] In fact, this court applied the *Cole* definition of reckless when we reviewed the adequacy of Lundquist's plea in his appeal from his first postconviction proceeding. *Lundquist*, 2000 WL 310356, at *2.

And he is not entitled to review of any claims that were known but not raised in his first appeal or in his subsequent postconviction proceedings. *See Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

We now turn to Lundquist's claim that his sentence constitutes cruel and unusual punishment. Lundquist offers no argument or authority to explain why this claim is not barred under statute and caselaw. And because we discern no obvious, prejudicial error in the district court's summary denial of this claim, Lundquist's assignment of error is waived. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (explaining that an assignment of error based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

In sum, the district court did not err by summarily denying Lundquist's sixth petition for postconviction relief.

Affirmed.

Dated:

Judge Michelle A. Larkin