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

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-476**

Hugo Rene Roque, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed July 18, 2011  
Affirmed  
Connolly, Judge**

Ramsey County District Court  
File No. 62-K6-99-2053

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Willis,  
Judge.\*

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

## UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant argues that the postconviction court abused its discretion when it denied his petition for relief on the basis that it is time-barred or, alternatively, that it does not satisfy the interests-of-justice exception outlined in Minn. Stat. § 590.01, subd. 4(b)(5). Because the postconviction court did not abuse its discretion when it denied appellant's petition on either basis, we affirm.

### FACTS

In July 1999, the state charged appellant Hugo Roque with second-degree criminal sexual conduct based on allegations that he had sexual contact with his daughter's nine-year-old friend. On March 15, 2002, Roque agreed to a trial on stipulated facts. With the help of an interpreter and his Spanish-speaking attorney, he reviewed and signed a jury-trial-waiver form. Roque acknowledged on the record that he was specifically waiving his right to a trial by jury and his right to testify and that the judge was going to decide the case based solely on the state's evidence. Based on the complaint, police reports, and other records in the state's file, the district court found Roque guilty as charged.

In April 2002, the district court sentenced Roque to 21 months in prison, but stayed execution of the sentence and placed him on probation for 25 years. It also imposed five years of conditional release. Less than a month later, the federal government deported Roque to Guatemala. Roque did not file a direct appeal.

At some point between Roque's deportation and September 20, 2009, Roque re-entered the United States. In May 2009, Roque's probation officer recommended

vacating Roque's stay of execution because Roque had failed to stay in contact with him. Police arrested Roque in Los Angeles, California on September 20, 2009, and transferred him to Minnesota to appear on the probation violation. The district court revoked his probation, vacated the stay of execution, ordered Roque to serve the balance of his 21-month prison sentence, and imposed a ten-year conditional release term.

Roque contacted the Minnesota appellate public defender's office in November 2009 to challenge his probation revocation. An attorney advised him that he could file a petition for postconviction relief because his jury-trial waiver was insufficient. Roque decided not to file a postconviction petition at that time because he "believed [he] was going to be deported when released in April [2010]" and "the court of appeals would not rule on [his] probation revocation appeal before [he] was released." In April 2010, Roque had completed his prison sentence, but, rather than deporting him, the federal government charged him with illegally entering the country after deportation.

Upon learning that he was not going to be deported, Roque again contacted the public defender's office and asked them to challenge his conviction and the imposition of a ten-year conditional release term. Roque filed a petition for postconviction relief on November 19, 2010, requesting that his conditional release term be reduced from ten years to five years because the applicable statute when he committed his offense in 1999 authorized only a five-year term. The state acknowledged that the conditional release term must be reduced to five years. Roque also requested reversal of his conviction based on his claim that his jury-trial waiver was invalid under Minnesota Rule of Criminal Procedure 26.01, subd. 3, because he did not, on the record, acknowledge that

he was waiving the right to confront prosecution witnesses in open court and to require any favorable witnesses to testify in his defense. *See State v. Halseth*, 653 N.W.2d 782, 785-86 (Minn. App. 2002) (requiring strict compliance with rule 26.01). The postconviction court reduced Roque's conditional release term to five years, but denied his invalid-jury-trial-waiver claim on the basis that it was time-barred or, alternatively, because the interests-of-justice exception under Minn. Stat. § 590.01, subd. 4(b)(5) did not apply. Roque appeals.

## D E C I S I O N

When reviewing the decision of the postconviction court, we review questions of law de novo. *Arredondo v. State*, 754 N.W.2d 566, 570 (Minn. 2008). Our review of factual findings is limited to determining whether there is sufficient evidence in the record to support the findings of the postconviction court. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The decisions of a postconviction court will not be disturbed unless the court abused its discretion. *Perry v. State*, 595 N.W.2d 197, 200 (Minn. 1999).

### **I. The district court did not abuse its discretion when it denied Roque's petition on the basis that it was time-barred.**

A petition for postconviction relief is subject to a two-year statute of limitations. Minn. Stat. § 590.01, subd. 4(a) (2010). Specifically, “[n]o petition for postconviction relief may be filed more than two years after the later of: (1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court’s disposition of petitioner’s direct appeal.” *Id.* As a result, a petition for postconviction relief filed after the two-year statute of limitations runs is generally time-barred. *Stewart v. State*,

764 N.W.2d 32, 34 (Minn. 2009). If the two-year time-bar has expired, a postconviction court “may hear a petition for postconviction relief” only if one of the five exceptions listed under Minn. Stat. § 590.01, subd. 4(b) is satisfied.

Roque concedes that his petition for postconviction relief was not filed within the two-year statute of limitations under Minn. Stat. § 590.01, subd. 4(a), but argues that the interests-of-justice exception in Minn. Stat. § 590.01, subd. 4(b)(5) allows the court to hear his petition. Exceptions listed under subdivision 4(b), however, are also subject to a statute of limitations under subdivision 4(c), providing that “[a]ny petition invoking an exception provided in paragraph (b) must be filed within two years of the date the claim arises.” *See Roby v. State*, 787 N.W.2d 186, 189 (Minn. 2010) (noting statute of limitations for exceptions invoked under subdivision 4(b)).

The postconviction court decided that Roque’s petition was time-barred under subdivision 4(c) because his claim concerning the validity of his jury-trial waiver “arose on March 15, 2002, the date when he agreed to submit the case on stipulated facts.” A claim arises when it can survive a motion to dismiss for failure to state a claim upon which relief can be granted. *Herrmann v. McMenemy & Severson*, 590 N.W.2d 641, 643 (Minn. 1999). Roque’s claim concerning the validity of his jury-trial waiver would have survived a motion to dismiss for failure to state a claim upon which relief can be granted on March 15, 2002, when he agreed to submit the case on stipulated facts, because any injury or prejudice to Roque as a result of his jury-trial waiver would have occurred on that date. Roque raised this claim in November 2010, more than eight years after the

claim arose.<sup>1</sup> Thus, the postconviction court did not abuse its discretion when it decided that Roque's claim based on an invalid jury-trial waiver is time-barred.

In a thoughtful and well-written brief, counsel for Roque argues that, even if the petition is time-barred, the postconviction court should have heard it because the Minnesota Constitution gives criminal defendants the right, without limitation, to one substantive review of a criminal conviction. However, it is not the province of this court to "make . . . a dramatic change in the interpretation of the Minnesota Constitution" when the supreme court has not done so. *Minn. State Patrol Troopers Ass'n ex rel. Pince v. State, Dep't of Pub. Safety*, 437 N.W.2d 670, 676 (Minn. App. 1989) (quoting *State v. Herbst*, 395 N.W.2d 399, 404 (Minn. App. 1986)), *review denied* (Minn. May 24, 1989).

In *Rickert v. State*, decided on March 23, 2011, the Minnesota Supreme Court expressly declined to address the same issue Roque raises here because it resolved the controversy on other grounds:

Rickert asserts that the Minnesota Constitution guarantees defendants the right to one review of their convictions, through either a direct appeal or first review by postconviction proceeding. Based on his assertion, Rickert argues that the statute of limitations in Minn. Stat. § 590.01, subd. 4(a), is unconstitutional when applied to a defendant whose conviction has not been reviewed on direct appeal or first review by postconviction proceeding. Because we conclude that Rickert's petition is not barred by the statute of

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<sup>1</sup> The postconviction relief statute was significantly changed in 2005. When the legislature changed the statute, it allowed individuals who had previous convictions to file their petitions under the new statute. An individual whose conviction became final before August 1, 2005 was required to file their postconviction petition before August 1, 2007. *Moua v. State*, 778 N.W.2d 286, 288 (Minn. 2010) (citing Act of June 2, 2005, ch. 136, art. 14, § 13, 2005 Minn. Laws 901, 1097-98). At the most, therefore, Roque had until August 1, 2007 to raise his claim in a petition for postconviction relief.

limitations in section 590.01, subdivision 4(a), we need not address his constitutional claim. *See State v. Bourke*, 718 N.W.2d 922, 926 (Minn. 2006) (explaining that we will not address a constitutional issue if there is another basis on which the case can be decided).

795 N.W.2d 236, 243-44 (Minn. 2011). Similarly, in *Deegan v. State*, 711 N.W.2d 89, 95 (Minn. 2006), the Minnesota Supreme Court expressly declined to determine whether the Minnesota Constitution gives defendants the right to one review of a criminal conviction.

Because interpreting the Minnesota Constitution as providing defendants the right, without limitation, to one review of a criminal conviction would be a dramatic change in the interpretation of the Minnesota Constitution on an issue the supreme court has declined to address, we will not do so.

**II. The district court did not abuse its discretion when it denied Roque’s petition on the basis that it did not satisfy the interests-of-justice exception.**

Even if Roque’s petition was not time-barred, the district court’s decision that it does not meet the interests-of-justice exception was not an abuse of discretion.

Roque contends that the court is permitted to hear his petition because it satisfies an exception to the two-year statute of limitations: the petition is “not frivolous and is in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5). A court will hear a petition in the interests of justice only in exceptional situations. *Gassler v. State*, 787 N.W.2d 575, 586 (Minn. 2010); *see In re Welfare of S.M.E.*, 725 N.W.2d 740, 744 (Minn. 2007) (discussing the application of the interests-of-justice exception in exceptional cases to allow out-of-time appeals to proceed). The court should consider a nonexclusive list of

factors for determining whether the petition is “in the interests of justice,” including (1) “the degree to which the party alleging error is at fault for that error”; (2) “the degree of fault assigned to the party defending the alleged error”; (3) “whether some fundamental unfairness to the defendant needs to be addressed”; and (4) the need for protecting the “integrity of judicial proceedings.” *Gassler*, 787 N.W.2d at 586-87.

Even though it was not Roque’s fault that his jury-trial waiver was procedurally deficient, the last two factors do not require that we set aside Minn. Stat. § 590.01, subd. 4(a)’s time-bar in the interests of justice. Here, there is no fundamental unfairness to Roque because he does not contest any of the evidence admitted at his trial in support of his conviction. *See Scott v. State*, 788 N.W.2d 497, 503-04 (Minn. 2010) (concluding that interests of justice did not require defendant’s postconviction petition to be heard because there was substantial evidence of guilt admitted at trial notwithstanding fact that error was not defendant’s fault and defendant did not have chance to challenge error); *Gassler*, 787 N.W.2d at 587 (same). Roque acknowledged on the record that the district court judge was going to decide the facts of his case based solely on the police reports. Roque does not challenge the evidence in the police reports or allege that the outcome of a new trial would be different if this court were to reverse his conviction in the interests of justice. Thus, there is no fundamental unfairness that needs to be addressed.

As for protecting the integrity of judicial proceedings, the supreme court has recognized that “the reversal of a conviction may seriously affect the fairness, integrity, or public reputation of judicial proceedings.” *Gassler*, 787 N.W.2d at 587 (emphasis omitted). In this case, a reversal of Roque’s conviction based on his petition for



postconviction relief filed more than eight years after sentencing and after Roque failed to file a direct appeal or a timely postconviction petition would seriously affect the fairness and integrity of judicial proceedings. *See Opsahl v. State*, 677 N.W.2d 414, 425 (Minn. 2004) (quoting *McMaster v. State*, 551 N.W.2d 218, 218-19 (Minn. 1996) for proposition that inexcusable delay in filing petition may be “an abuse of the judicial process”). Roque’s claim that he could not file a direct appeal or a timely petition for postconviction relief because he “was on probation and deported to Guatemala” is not a persuasive reason for waiting over eight years to challenge his jury-trial waiver. Furthermore, granting Roque a new trial despite his failure to challenge the evidence of guilt admitted at trial or to allege that the outcome would be different after a new trial would put an unreasonable burden on the victim in this case and “would be an exercise in futility and a waste of judicial resources” which would thwart “the integrity of judicial proceedings.” *State v. Griller*, 583 N.W.2d 736, 742 (Minn. 1998).

Roque’s claim does not fall into the category of exceptional cases requiring that we set aside Minn. Stat. § 590.01, subd. 4(a)’s time-bar in the interests of justice.

**Affirmed.**