STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0351

Barry Scott Michaelson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 21, 2013
Affirmed
Cleary, Judge

Anoka County District Court
File No. 02-CR-08-12696

Barry Scott Michaelson, Bayport, Minnesota (pro se appellant)

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

Anthony C. Palumbo, Anoka County Attorney, C. Donald LeBaron, Assistant County Attorney, Anoka, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Larkin, Judge.

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

CLEARY, Judge

Following a direct appeal, where his guilty plea and sentence for first-degree burglary were affirmed, appellant petitioned for postconviction relief, challenging his

sentence and the validity of his waiver of the right to a *Blakely* hearing. The district court denied appellant's petition. Because the petition is procedurally barred, we affirm.

FACTS

Appellant Barry Michaelson was charged with first-degree burglary following the burglary of a home in June 2008. At the time, appellant's criminal history included multiple prior burglary convictions, and several other burglary charges were pending against appellant while this matter was proceeding in district court. The state filed notice of its intent to seek the statutory maximum sentence for burglary, which would be a durational departure from the presumptive sentence under the Minnesota Sentencing Guidelines.

Appellant subsequently signed petitions stating that he agreed to plead guilty to burglary, waive his right to a *Blakely* hearing on factors that would support an aggravated sentence, and admit that he qualified as a career offender. At the plea hearing, appellant pleaded guilty to first-degree burglary and admitted that he qualified as a career offender due to his prior convictions. He waived his right to a *Blakely* hearing and acknowledged that the determination of his sentence would be left to the district court. Appellant received an executed sentence of 150 months.

Appellant challenged his sentence on direct appeal, arguing that the district court had abused its discretion by imposing a sentence that unfairly exaggerated the criminality of his conduct and by refusing to grant a downward dispositional departure from the sentencing guidelines. *See State v. Michaelson*, No. A10-65, 2010 WL 3854665, at *2–3 (Minn. App. Oct. 5, 2010), *review denied* (Minn. Dec. 14, 2010). Appellant also claimed

that he was entitled to withdraw his guilty plea because it was induced by the state's unfulfilled promise that his sentence would include a furlough to attend treatment. *Id.* at *4. This court affirmed the district court, and the supreme court denied review of the direct appeal.

On February 8, 2012, appellant petitioned for postconviction relief, claiming that his sentence under the career-offender statute, Minn. Stat. § 609.1095, subd. 4 (2006), is unlawful because his *Blakely* hearing waiver was invalid and he was denied the right to a hearing on aggravated-sentencing factors. The district court denied the petition due to lack of service on the state, and appellant refiled the petition on June 27, 2012. It was again denied due to lack of service, but the state was served in August 2012, and responded to the petition. The district court denied the petition, holding that appellant knowingly, intelligently, and voluntarily pleaded guilty and waived his right to a *Blakely* hearing. This appeal follows.

D E C I S I O N

The state objects to appellate review of the merits of appellant's petition. The state contends that postconviction relief is barred because the petition was not filed within two years of disposition of the direct appeal and introduced issues that could have been raised on direct appeal. A person convicted of a crime who claims that "the conviction obtained or the sentence or other disposition made violated the person's rights under the Constitution or laws of the United States or of the state" may file a petition to obtain postconviction relief. Minn. Stat. § 590.01, subd. 1 (2012). But such a petition filed after a direct appeal "may not be based on grounds that could have been raised on

direct appeal of the conviction or sentence." *Id.*; *see also State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (holding that "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief"). The *Knaffla* rule bars postconviction relief when the petitioner either knew or should have known about the claims raised in the postconviction petition at the time of the direct appeal. *Jihad v. State*, 714 N.W.2d 445, 447 (Minn. 2006). Additionally, if a direct appeal is taken, "[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) (2012).

The state first contends that appellant's petition was time barred because it was filed more than two years after disposition of his direct appeal. This argument is unavailing. This court issued its opinion in the direct appeal on October 5, 2010, and the supreme court denied review of the direct appeal on December 14, 2010. Appellant filed his petition on February 6, 2012 and June 27, 2012. After the state was served in August 2012, the district court considered the merits of the petition and issued an order without requiring that the petition be filed a third time. Therefore, appellant's petition was filed, and the state was served, within two years of disposition of the direct appeal.

The state also contends that appellant's *Blakely* claim is barred under the *Knaffla* rule because the claim was or should have been known at the time of the direct appeal and could have been raised at that time. This argument has merit. Appellant could have raised his *Blakely* claim on direct appeal when he raised other issues having to do with his plea and sentence. In fact, this court noted in its opinion in the direct appeal that

appellant had "agreed to waive a *Blakely* hearing with respect to the issue of whether the career-offender statute applied" and "does not challenge his sentencing under the career-offender statute." *Michaelson*, 2010 WL 3854665, at *1–2. Appellant provides no explanation for his failure to raise his *Blakely* claim in the direct appeal. Thus postconviction relief based on this claim is barred pursuant to *Knaffla*.

Appellant argues that he is not requesting postconviction relief, but rather is requesting correction of an unlawful sentence and that such a request is not subject to the *Knaffla* rule. He cites to Minn. R. Crim. P. 27.03, subd. 9, which states that "[t]he court may at any time correct a sentence not authorized by law." But relief under rule 27.03, subdivision 9, is a form of postconviction relief that is within the scope of Minn. Stat. § 590.01. *See Powers v. State*, 731 N.W.2d 499, 501 & n.2 (Minn. 2007) (stating that the language of section 590.01 is "broad enough to encompass a motion pursuant to Minn. R. Crim. P. 27.03" and holding that a *Blakely* claim made in a motion brought under rule 27.03, subdivision 9, was barred under *Knaffla*).

Appellant also raises a claim of ineffective assistance of counsel for the first time in this appeal. Because this claim was not raised before the district court, it is deemed waived. *See Azure v. State*, 700 N.W.2d 443, 447 (Minn. 2005) (holding that an appellant waived a claim of ineffective assistance of counsel by failing to raise it to the district court).

Affirmed.