STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0044

Darcy Jude Drobec, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 29, 2013
Affirmed
Willis, Judge*

Crow Wing County District Court
File No. 18-K7-93-000612

Darcy Jude Drobec, Shakopee, Minnesota (pro se appellant)

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

Donald F. Ryan, Crow Wing County Attorney, John J. Sausen, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Willis, Judge.

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

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

WILLIS, Judge

Appellant Darcy Jude Drobec challenges the district court's denial of her motion to correct her sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9. Because Drobec's sentence is authorized by law, and three of her arguments are *Knaffla*-barred, we affirm.

FACTS

In November 1993, a jury found Drobec guilty of one count of second-degree intentional murder, one count of second-degree felony murder, and one count of kidnapping.[1] With regard to the kidnapping count, the jury found that the victim was not released in a safe place and suffered great bodily harm during the course of the kidnapping. The district court adjudicated Drobec guilty of all three counts against her and sentenced her to two consecutive terms of imprisonment: 459 months for the conviction of second-degree intentional murder and 91 months for the kidnapping conviction. The 459-month sentence is a 50 percent upward durational departure. The imposition of consecutive sentences also is a departure. Drobec appealed her convictions and sentence, and this court affirmed. *Drobec*, 1995 WL 81417, at *6. The supreme court denied Drobec's petition for further review.

On July 11, 2012, Drobec moved to correct her sentence under Minn. R. Crim. P. 27.03, subd. 9, claiming that it was illegal. The district court, analyzing Drobec's motion as a petition for postconviction relief, denied the motion. This appeal follows.

[1] The facts of the underlying crimes in this case are set forth in detail in *State v. Drobec*, No. C1-94-759, 1995 WL 81417 (Minn. App. Feb. 28, 1995), *review denied* (Minn. Apr. 27, 1995).

D E C I S I O N

Drobec contends that she is entitled to a correction of her sentence because it is not authorized by law. A district court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. Generally, motions made under Minn. R. Crim. P. 27.03, subd. 9, may be treated as postconviction petitions. *See Vazquez v. State*, 822 N.W.2d 313, 316-17 (Minn. App. 2012). When addressing a postconviction petition, "where direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). But certain motions under Minn. R. Crim. P. 27.03, subd. 9—specifically, motions "based solely on an incorrect criminal-history score"—cannot be treated as postconviction petitions and are not subject to *Knaffla*. *Vazquez*, 822 N.W.2d at 315, 320.

We will not reverse the denial of either a petition for postconviction relief or a motion under Minn. R. Crim. P. 27.03, subd. 9, unless the district court abused its discretion or erred as a matter of law. *See Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (addressing petition for postconviction relief); *Anderson v. State*, 794 N.W.2d 137, 139 (Minn. App. 2011) (addressing motion under Minn. R. Crim. P. 27.03, subd. 9), *review denied* (Minn. Apr. 27, 2011).

I. The district court correctly used a criminal-history score of zero in calculating Drobec's consecutive sentence for kidnapping.

Drobec first challenges the criminal-history score used to calculate her kidnapping sentence. Because this challenge alleges the use of an incorrect criminal-history score, it

cannot be treated as a postconviction petition and thus is not barred by *Knaffla*. *Vazquez*, 822 N.W.2d at 315, 320.

Under the Minnesota Sentencing Guidelines:

> [t]he presumptive duration for offenses sentenced consecutively is determined by locating the Sentencing Guidelines Grid cell defined by the most severe offense and the offender's criminal history score and by adding to the duration shown therein the duration indicated for every other offense sentenced consecutively at their respective levels of severity but at the zero criminal history column on the Grid.

Minn. Sent. Guidelines II.F (1992). Thus, Drobec correctly asserts that the presumptive duration for her kidnapping offense is "determined by using a criminal history score of zero." But the record establishes that the district court, in sentencing Drobec to 91 months' imprisonment for the kidnapping conviction, did in fact use a criminal-history score of zero. The relevant sentencing worksheet identifies Drobec's "Total Criminal History Points" as zero. And for kidnapping with great bodily harm, a severity-level eight offense, the Sentencing Guidelines Grid establishes a presumptive guidelines range of 81 to 91 months at the zero criminal-history column and 93 to 103 months at the one criminal-history column. Minn. Sent. Guidelines IV (1992). Because the district court used a criminal-history score of zero to determine the sentence for the kidnapping offense, and the sentence is within the presumptive guidelines range, Drobec is not entitled to relief on this ground.

II. The prosecution did not commit reversible error by filing its sentencing memorandum on the same day as the sentencing hearing.

Drobec next challenges the prosecution's failure, in 1994, to file its sentencing memorandum before the sentencing hearing. Because Drobec filed a direct appeal, and the issue of same-day filing was known but not raised, this argument is barred by *Knaffla*. *See Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. Moreover, Drobec's arguments are unavailing.

Drobec first argues that the prosecution's conduct violates Minn. Stat. § 244.10. The current form of this statute requires the state, when moving for an aggravated sentence, to provide "reasonable notice to the defendant and the district court prior to sentencing of the factors on which the state intends to rely." Minn. Stat. § 244.10, subd. 4 (2012); *see also State v. Robideau*, 817 N.W.2d 180, 188 (Minn. App. 2012), *review denied* (Minn. Sept. 25, 2012). But as the state points out, the applicable version of the statute did not include this language. Minn. Stat. § 244.10 (1992). Rather, the 1992 statute provided only:

> The [sentencing] hearing shall be scheduled so that the parties have adequate time to prepare and present arguments regarding the issue of sentencing. The parties may submit written arguments to the court prior to the date of the hearing and may make oral arguments before the court at the sentencing hearing.

Id., subd. 1. Thus, Drobec's argument is without merit.

In her reply brief, Drobec also contends that the prosecution's same-day filing deprived her of the constitutional right to due process. But issues raised for the first time in an appellant's reply brief in a criminal appeal, having not been raised in respondent's

brief, are "not proper subject matter for appellant's reply brief," and we may deem them "waived and stricken." *State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (applying rule now found in Minn. R. Civ. App. P. 128.02, subd. 4).

III. Drobec's presentence investigation report is statutorily sufficient.

Drobec next contends that, because her presentence investigation report does not include her Supplemental Security Income and Ramsey County Human Services records, the report does not comport with the requirements of Minn. Stat. § 609.115 (1992).[2] Drobec argues that the report's deficiencies "hindered [her] counsel's ability to put up an equal defense during the sentencing hearing" and "resulted in failure for [her] lawyer to prove [her] 'passive role' during the crime."

In essence, Drobec challenges the district court's finding at sentencing that Drobec was an active participant in the kidnapping, not merely one with a minor, passive role. The district court used this finding to support consecutive sentencing. Because Drobec filed a direct appeal challenging the district court's imposition of consecutive sentences, and the contents of the presentence investigation report were known but not raised, this argument is barred by *Knaffla*. *See Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. Moreover, the record establishes that the presentence investigation report provided the district court with information regarding Drobec's criminal record, family of origin,

[2] In the case of a felony conviction, "the court shall, before sentence is imposed, cause a presentence investigation and written report to be made to the court concerning the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history, the circumstances of the offense and the harm caused by it to others and to the community," and certain "information relating to crime victims." Minn. Stat. § 609.115, subd. 1.

marital status, home, education, work history, economic situation, physical and psychological health, and chemical use. This report satisfies the requirements of Minn. Stat. § 609.115, subd. 1, and Drobec is not entitled to relief on this ground.

IV. Drobec has not established an equal-protection or a double-jeopardy claim.

Finally, Drobec argues that as a "direct result" of the "unethical [and] unfair surprise" of the state's same-day sentencing memorandum, her sentence is of "unusual [l]ength" and violates both the constitutional right to equal protection of the laws and the constitutional protection against double jeopardy.[3] Drobec frames these arguments as constitutional issues, but she essentially challenges the district court's imposition of an upward durational departure for the crime of second-degree intentional murder and its use of consecutive sentencing. Drobec raised both of these issues in her direct appeal. *Drobec*, 1995 WL 81417, at *4-6. Thus, they are barred by *Knaffla* and will not be considered. *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741.

Moreover, Drobec's arguments are without merit. The constitutional guarantee of equal protection of the laws mandates that the state treat all similarly situated persons alike. *State v. Behl*, 564 N.W.2d 560, 568 (Minn. 1997). An essential element of any equal-protection claim is that the person claiming disparate treatment must be similarly situated to those to whom the person is compared. *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996), *review denied* (Minn. Jan. 7, 1997).

[3] The Equal Protection Clause of the Fourteenth Amendment provides, in relevant part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Double Jeopardy Clause of the Fifth Amendment provides, in relevant part, "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend. V.

Drobec asserts that she is serving the longest sentence of any recent Minnesota inmate convicted of second-degree intentional murder and kidnapping. Even if this is true, it fails to establish that Drobec is "similarly situated" to other offenders because, on direct appeal, this court concluded that "Drobec's conduct was significantly more serious than that typically involved in the commission of kidnapping and murder." *Drobec*, 1995 WL 81417, at *4. And as this court noted in Drobec's direct appeal, Minnesota's criminal code expressly addresses double jeopardy in the context of a kidnapping offense and provides that a "conviction of the crime of kidnapping is not a bar to conviction of any other crime committed during the time of the kidnapping." Minn. Stat. § 609.251 (1992).

Affirmed.