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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0486**

Emmett Maurice Nelson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed November 12, 2013
Affirmed
Kirk, Judge**

Hennepin County District Court
File No. 27-CR-06-012464

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Anders J. Erickson,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Judge.

UNPUBLISHED OPINION

KIRK, Judge

In this postconviction appeal seeking to withdraw his guilty plea to first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by (1) determining that appellant's petition for postconviction relief was time barred, and (2) finding that appellant did not demonstrate a manifest injustice warranting withdrawal of his guilty plea. In a pro se supplemental brief, appellant argues that a DNA test established that he is not guilty of the crime for which he was convicted. Because we conclude that the district court did not abuse its discretion by determining that appellant's postconviction petition was time barred, we affirm.

DECISION

On review of a postconviction decision, this court "examine[s] only whether the [district] court's findings are supported by sufficient evidence." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). This court will reverse a postconviction court's decision if the court abused its discretion. *Id.* We review issues of law de novo. *Id.*

I. The district court did not abuse its discretion by determining that appellant's petition for postconviction relief was time barred.

Generally, an individual must file a petition for postconviction relief within two years 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." Minn. Stat. § 590.01, subd. 4(a) (2012). But a district court may consider an otherwise untimely

postconviction petition if a statutorily provided exception applies. *Id.*, subd. 4(b) (2012) (providing five exceptions to the two-year time bar).

Appellant concedes that his petition for postconviction relief was not filed within two years of the entry of judgment of conviction, but he contends that the interests-of-justice exception to the time bar applies. To satisfy that exception, appellant must demonstrate that his postconviction petition “is not frivolous and is in the interests of justice.” *Id.*, subd. 4(b)(5). In addition, a postconviction petition that invokes an exception under Minn. Stat. § 590.01, subd. 4(b), “must be filed within two years of the date the claim arises.” Minn. Stat. § 590.01, subd. 4(c) (2012). “[A] petitioner’s claim under Minn. Stat. § 590.01, subd. 4(b)(5), arises when the petitioner knew or should have known that he had a claim.” *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012). This is an objective standard. *Id.* at 558.

Appellant argues that he did not know or have reason to know that he had a claim until he received paralegal training in prison. Appellant contends that because there is nothing in the record that indicates his claim arose on a specific date, the date that he filed his pro se postconviction petition should be considered the date that his claim arose. In contrast, the state argues that appellant’s claim arose in August 2006 when he entered his guilty plea.

We are not persuaded by appellant’s argument. The fact that appellant learned more about the law after he entered his plea is irrelevant to determining when his claim arose. Applying an objective standard, appellant knew or should have known at the time he pleaded guilty whether he had a claim. The record establishes that appellant was

represented by counsel and he discussed the plea agreement with his counsel. Appellant also signed a petition to enter a guilty plea, which required him to acknowledge that he understood he could challenge the state's evidence at a pretrial hearing but that he was waiving that right, and his counsel reviewed the plea petition with him on the record. There is no merit to appellant's argument that the date he filed the postconviction petition should be considered the date his claim arose.

Because appellant's claim arose at the time he pleaded guilty in August 2006 and he did not file his postconviction petition until May 2012, the interests-of-justice exception to the time bar does not apply. Thus, it is not necessary to consider whether appellant's petition "is not frivolous and is in the interests of justice." *See* Minn. Stat. § 590.01, subd. 4(b)(5). We conclude that the district court did not abuse its discretion by determining that appellant's postconviction petition was time barred. Because we reach this conclusion, we need not address appellant's argument that the district court abused its discretion by finding that he did not demonstrate a manifest injustice warranting withdrawal of his guilty plea.

II. Appellant's pro se argument does not have merit.

In his pro se supplemental brief, appellant argues that a DNA test established that he is not guilty. Appellant essentially raised this argument before the district court when he included a list of alleged newly discovered evidence in his motion to withdraw his plea, including an allegation that "D.N.A. Testing was done and there was none that connects me to the crime for which im accused, and there was a third persons D.N.A. that was never processed which argues 'Why?'" The district court did not specifically

address appellant's DNA argument, but it determined that appellant had not established that the newly discovered evidence exception to the time bar applied. *See* Minn. Stat. § 590.01, subd. 4(b)(2).

A district court may consider an untimely petition for postconviction relief if

the petitioner alleges the existence of newly discovered evidence, including scientific evidence, that could not have been ascertained by the exercise of due diligence by the petitioner or petitioner's attorney within the two-year time period for filing a postconviction petition, and the evidence is not cumulative to evidence presented at trial, is not for impeachment purposes, and establishes by a clear and convincing standard that the petitioner is innocent of the offense or offenses for which petitioner was convicted.

Id. Appellant has not established that the DNA evidence could not have been discovered by due diligence within the two-year time period for filing a postconviction petition or that it establishes by clear and convincing evidence that he is innocent. In fact, appellant has not provided evidence of the results of the DNA test or established when the DNA evidence was recovered. Therefore, the district court did not abuse its discretion by determining that the newly discovered evidence exception to the time bar did not apply.

Affirmed.