STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2146

Perry Shawn Hardesty, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 6, 2009
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19-KX-06-000081

Perry S. Hardesty, MCF/Fairbault #174561, 1101 Linden Lane, Faribault, MN 55021 (pro se appellant)

Lori Swanson, Attorney General, 445 Minnesota Street, Suite 1800, St. Paul, MN 55101; and

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Larkin, 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 denial of his petition for postconviction relief. Because the district court did not abuse its discretion by determining that appellant's challenge to the legality of his sentence is procedurally barred and by summarily denying his petition on this ground, we affirm.

FACTS

A jury convicted appellant Perry Shawn Hardesty of first- and second-degree attempted aggravated robbery in July 2006, and the district court adjudicated him guilty of first-degree attempted aggravated robbery. Following a sentencing trial, the jury determined that aggravating sentencing factors existed and specifically found that Hardesty had five or more prior felony convictions and that the present offense was committed as part of a pattern of criminal conduct. The district court sentenced Hardesty as a career offender and imposed a 120-month term of imprisonment, which constitutes more than a double upward departure from the presumptive sentence.

Hardesty appealed his conviction and sentence. *State v. Hardesty*, No. A07-0290, 2008 WL 2245815, *4 (Minn. App. June 3, 2008), *review denied* (Minn. Aug. 19, 2008). Among the issues raised on appeal, Hardesty argued that the state's evidence was insufficient to show that he had the five prior felony convictions necessary for sentencing under the career-offender statute. *Id.* We affirmed, holding in pertinent part that there was sufficient evidence for the jury to find that Hardesty was a career offender. *Id.* at *12. But because the existing record and briefing did not permit us to adequately review

Hardesty's ineffective-assistance-of-counsel claims, we preserved Hardesty's right to make a full record on those claims in a postconviction proceeding. *Id.*

Hardesty petitioned for postconviction relief and requested, in relevant part, that his sentence be judicially reviewed in an evidentiary hearing pursuant to Minn. R. Crim. P. 27.03, subd. 9, "for correction of an unlawful sentence," and that the presumptive sentence be imposed. Hardesty also referenced ineffective-assistance-of-counsel claims related to his sentence. Hardesty requested an evidentiary hearing so the exhibits presented at his sentencing trial could be reviewed.

The district court interpreted Hardesty's petition as "directed entirely to the question of whether he was sentenced properly under the career offender statute, not whether he was assisted properly by competent counsel." The district court therefore limited its decision to Hardesty's claim that he was not properly sentenced as a career offender. But the district court stated that it would not limit Hardesty's right to raise a broader claim of ineffective assistance of counsel in a separate and subsequent petition.

The district court concluded that because Hardesty's collateral attack on his sentence was raised and decided by this court on direct appeal, the claim is procedurally barred. The district court further concluded that no exception to the procedural bar applies and that Hardesty was not entitled to an evidentiary hearing. The district court dismissed Hardesty's petition without a hearing. This appeal follows.

D E C I S I O N

A person convicted of a crime may petition for postconviction relief. Minn. Stat. § 590.01, subd. 1 (2008). A postconviction court must grant a hearing on a petition for

postconviction relief "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief . . . ." Minn. Stat. § 590.04, subd. 1 (2008). The right to an evidentiary hearing on a postconviction petition depends upon the petitioner "first making an adequate offer of proof." *Erickson v. State*, 725 N.W.2d 532, 537 (Minn. 2007).

Once a direct appeal has been taken, all claims raised in that appeal, all claims known at the time of that appeal, and all claims that should have been known at the time of that appeal "will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976); *see* Minn. Stat. § 590.01, subd. 1 (barring postconviction relief for claims that petitioner "could have . . . raised on direct appeal"). "There are two exceptions to the *Knaffla* rule: (1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Powers v. State*, 731 N.W.2d 499, 502 (Minn. 2007); *see also Fox v. State*, 474 N.W.2d 821, 824-25 (Minn. 1991). A district court may apply the second exception if fairness requires it and if the petitioner did not "deliberately and inexcusably" fail to raise the claim on direct appeal. *Fox*, 474 N.W.2d at 825. "Claims decided in the interests of fairness and justice also require that the claims have substantive merit." *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005).

Appellate courts "review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Summary denial of a postconviction petition is reviewed for an abuse of discretion. *Powers*, 695 N.W.2d at 374. A denial of postconviction relief based on the

Knaffla procedural bar is also reviewed for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

I.

Hardesty was sentenced under the career-offender statute, which permits a judge to impose an upward departure, up to the statutory maximum, "if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4 (2006). Section 609.1095 defines prior conviction as "a conviction that occurred before the offender committed the next felony resulting in a conviction and before the offense for which the offender is being sentenced under this section." *Id.*, subd. 1(c) (2006). In *State v. Huston*, 616 N.W.2d 282, 283 (Minn. App. 2000), we concluded that the definition of a prior conviction applied to a prior felony conviction, meaning that "five sequential felony offenses and convictions are required (i.e., offense/conviction, offense/conviction, offense/conviction, etc.)." We reasoned that such a requirement "better serves the general purpose of the statute by permitting five full postconviction opportunities for reform." *Id.* at 284 (quotation omitted).

Hardesty's primary postconviction claim is that sentencing pursuant to the career-offender statute was unlawful because he does not have the five sequential felony convictions necessary under the statute. Hardesty argues that his postconviction claim is not procedurally barred because "the statutory sequential requirement has been ignored" and because this court did not rule on the sequencing requirement on direct appeal. Hardesty contends that both *Knaffla* exceptions are applicable, asserting that "respondent

has failed to produce any evidence indicating that the failure to raise the sequencing requirement was deliberate or inexcusable."

As correctly noted by the district court, we addressed the issue of whether Hardesty has five prior felony convictions in Hardesty's direct appeal. *See Hardesty*, No. A07-0290, 2008 WL 2245815 at *9-11 (concluding that the record supports the jury's determination that Hardesty has five prior felony convictions and its finding of a pattern). While our decision addressed the sufficiency of the evidence to sustain the jury's determination that Hardesty had five prior convictions, it does not address whether the convictions satisfy the sequencing requirement. *Id.* However, Hardesty's claim that his convictions are not sequential is clearly a claim that was known or should have been known at the time of his direct appeal. It is therefore barred unless one of the *Knaffla* exceptions applies.

Hardesty's claim does not raise an issue "so novel that it can be said that its legal basis was not reasonably available at the time the direct appeal was taken and decided." *Fox*, 474 N.W.2d at 824. Hardesty relies on *State v. Huston* in support of his postconviction claim; *Huston* was decided in 2000—approximately six years before Hardesty's conviction and direct appeal. *Huston*, 616 N.W.2d at 282. Thus the legal basis for Hardesty's claim was available to him at the time of his direct appeal. And while application of the interest-of-justice exception may appear appropriate on the surface, a close examination of Hardesty's claim leads us to conclude that it is without merit and that the exception therefore does not apply. *See Powers*, 695 N.W.2d at 374 (stating that claims decided in the interests of justice must have merit).

The crux of Hardesty's challenge to his sentence concerns the sequencing of his two 1993 convictions of fifth-degree controlled-substance crime and third-degree assault. Hardesty contends that he received a stay of adjudication under Minn. Stat. § 152.18 on the fifth-degree controlled-substance crime in February 2003 and that the stay of adjudication was not vacated until November 2003, which was after he committed the third-degree assault. *See* Minn. Stat. § 152.18, subd. 1 (2008) (deferring prosecution for certain first-time drug offenders and providing for discharge and dismissal without an adjudication of guilt). Hardesty argues that his stay of adjudication did not result in a conviction until it was revoked. *See id.* ("Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided."); *Bourbon Bar & Cafe Corp. v. City of St. Paul*, 466 N.W.2d 438, 441 (Minn. App. 1991) (holding that a disposition under section 152.18 may not be treated as a conviction unless the offender violates conditions of probation and the court enters an adjudication of guilt). Therefore, he argues, the third-degree assault was committed prior to his conviction of fifth-degree controlled-substance crime. Hardesty contends that the sequence is as follows: (1) Hardesty committed the fifth-degree controlled-substance crime in December 1992; (2) Hardesty committed the third-degree assault in October 1993; (3) Hardesty was convicted of the fifth-degree controlled-substance crime in November 1993 (upon revocation of his stay of adjudication); and (4) Hardesty was convicted of the third-degree assault in December 1993.

The state disputes that Hardesty received a stay of adjudication, but argues that even if he did, the stay of adjudication was revoked at a probation-violation hearing in

May 1993, resulting in his conviction at that time. Alternatively, the state argues that the date of conviction for a stay of adjudication "relates back" to the date of the plea. But the state concedes that the record is ambiguous regarding whether Hardesty received a stay of adjudication and if so, when it was revoked. The state included the MNCIS printout regarding the fifth-degree controlled-substance crime as Appendix A and requests that we take judicial notice of the document. *See* Minn. R. Evid. 201 (allowing court to take judicial notice of any fact generally known or capable of accurate determination); *Cummings v. Koehnen*, 568 N.W.2d 418, 424 n.7 (Minn. 1997) (taking judicial notice, in appeal from determination under Minnesota Human Rights Act of the Department of Human Right's findings in two similar cases); *Smisek v. Comm'r of Pub. Safety*, 400 N.W.2d 766, 768 (Minn. App. 1987) (taking judicial notice of district court order in related proceeding). The MNCIS printout indicates that Hardesty received a disposition under Minn. Stat. § 152.18 on the fifth-degree controlled-substance offense at a sentencing hearing in February 2003. A MNCIS notation regarding the May probation-revocation hearing states that Hardesty was continued on probation without losing his "STAY OF IMP." And a MNCIS notation regarding the November probation-revocation hearing states that Hardesty admitted a violation and that the district court vacated the "STAY OF ADJ."

The ambiguity reflected in the MNCIS printout also exists in the sentencing record. The state submitted seven exhibits for the jury's consideration at the sentencing trial. Exhibit 1A concerns the fifth-degree controlled-substance conviction. The exhibit contains certified copies of four documents: the criminal complaint; minutes of

conviction and sentence; Hardesty's guilty-plea petition; and the transcript of the May probation-revocation hearing.[1] The plea petition indicates that Hardesty pleaded guilty in exchange for the state's agreement to recommend a section 152.18 disposition "assuming no prior adult felon[ies] or serious assault type misdemeanors." Hardesty's sentence is consistently referred to as a "stay of adjudication" in the transcript of the May probation-revocation hearing; for example, the district court stated that it was "leaving the stay of adjudication intact at this time." However, the minutes of conviction and sentence consistently describe Hardesty's sentence as a stay of imposition, instead of a stay of adjudication. The document indicates that Hardesty received a stay of imposition at sentencing in February 1993, the stay of imposition was continued at the May probation-revocation hearing, and the stay of imposition was vacated at the November probation-revocation hearing.

Given the ambiguity, Hardesty argues that the proper remedy is a remand to the district court for a "factual determination on the stay of adjudication." Hardesty notes that the district court is permitted to determine the fact of a prior conviction for sentencing enhancement purposes, *see Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000) (holding that the fact of a prior conviction may be determined by a judge), and argues that on remand, the district court should determine whether he received a stay of adjudication. The state suggests that "[t]he appropriate remedy is therefore to remand the case to the district court in order to retry the *Blakely*

[1] The jury did not receive a transcript of the relevant plea or sentencing hearings.

hearing and make appropriate findings of fact to eliminate the ambiguity."[2] However, neither party cites legal authority in support of a remand for additional factfinding by the district court to resolve an ambiguity underlying a *jury's* factual determination. And we are not persuaded that the existence of an ambiguity regarding whether Hardesty received a stay of adjudication mandates a new sentencing trial.

Even though the district court is permitted to determine the fact of a prior conviction, in this case this issue was submitted to the jury, and it determined that Hardesty has five prior felony convictions. Thus, Hardesty's claim presents a challenge to the jury's finding that he has five prior felony convictions. There is no need for the district court, or a newly empanelled jury, to engage in factfinding concerning the existence of Hardesty's fifth-degree controlled-substance-crime conviction unless the jury's special verdict regarding Hardesty's five prior felony convictions is set aside. And the jury's special verdict will not be set aside as long as it is supported by sufficient evidence. *See Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) ("We will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [a] defendant was proven guilty of the offense charged.") (quotation omitted).

Courts review a challenge to the sufficiency of evidence through "a painstaking analysis of the record to determine whether the evidence, when viewed in the light most

[2] The state's suggestion is made in the context of Hardesty's alternative request that we vacate his sentence and remand to the district court for imposition of the presumptive guidelines sentence.

favorable to the conviction," was sufficient to permit the factfinder to reach the verdict that it did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). While the record evidence regarding the disposition of Hardesty's fifth-degree controlled-substance offense is conflicting, when it is viewed in the light most favorable to the jury's special verdict, it was sufficient to permit the jury to conclude that Hardesty had five prior felony convictions. The minutes of conviction and sentence directly establish the terms of Hardesty's sentence. Regardless of the conflicting information in the guilty-plea petition and probation-revocation hearing transcript, the minutes of conviction and sentence clearly and unambiguously state that Hardesty received a stay of imposition on his fifth-degree controlled-substance offense at a sentencing hearing in February 2003. Hardesty's argument that he received a stay of adjudication and was not convicted until the stay was revoked in November 2003 is unavailing in the context of an evidentiary record that sufficiently supports a finding that he never received a stay of adjudication. We therefore conclude that Hardesty's challenge to the legality of his sentence, which is based solely on the timing of the revocation of the purported stay of adjudication on his fifth-degree controlled-substance crime, is without merit. The *Knaffla* interest-of-justice exception is therefore inapplicable. *See Powers*, 695 N.W.2d at 374 ("Claims decided in the interests of fairness and justice also require that the claims have substantive merit.").

Because Hardesty's claim that he does not have the five sequential prior felony convictions necessary for career-offender sentencing was known or should have been known at the time of his direct appeal and neither *Knaffla* exception applies, the district court did not abuse its discretion by summarily denying this postconviction claim.

II.

Hardesty also raised ineffective-assistance-of-counsel claims in his postconviction petition, arguing that he was denied effective representation due to counsel's "failure to raise issues in regards to the sentencing departure at the omnibus hearing pursuant to Minn. R. Crim. P. 11.04 or to investigate into the sequencing of the petitioner's prior convictions."

Ineffective-assistance-of-counsel claims involve mixed questions of fact and law. *Opsahl v. State*, 677 N.W.2d 414, 420 (Minn. 2004). To prevail on a claim that counsel is ineffective, a petitioner must demonstrate both that counsel's performance fell below an objective standard of reasonableness and that a reasonable probability exists that but for counsel's unprofessional error, the outcome would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 2064 (1984); *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003); *Gates v. State*, 398 N.W.2d 558, 562 (Minn. 1987). "The court must be 'highly deferential' when scrutinizing defense counsel's performance." *Tsipouras v. State*, 567 N.W.2d 271, 275 (Minn. App. 1997), *review denied* (Minn. Sep. 18, 1997) (quoting *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065). "[T]here is a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Robinson v. State*, 567 N.W.2d 491, 494 (Minn. 1997). And the right to an evidentiary hearing on a postconviction petition depends upon the petitioner "first making an adequate offer of proof." *Erickson*, 725 N.W.2d at 537.

Hardesty's postconviction submissions in the district court did not present an argument or affidavit in support of his ineffective-assistance-of-counsel claims. Hardesty

did not make an offer of proof indicating that counsel's performance fell below an objective standard of reasonableness and that but for counsel's unprofessional error, the outcome would have been different. Thus, Hardesty failed to present a claim of ineffective assistance of counsel for the district court to review. However, the district court did not "limit [Hardesty's] right to raise his broader claim for ineffective assistance of counsel in a separate and subsequent petition." We therefore preserve Hardesty's right to make a full record on his claims of ineffective assistance of counsel.

Affirmed.

Dated: _____ _____

Judge Michelle A. Larkin