STATE OF MINNESOTA
IN COURT OF APPEALS
A10-865

Aeropajito Castro Vazquez, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 18, 2011
Reversed and remanded
Larkin, Judge

Ramsey County District Court
File No. 62-K1-00-002355

Aeropajito Castro Vazquez, Bayport, Minnesota (pro se appellant)

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Wright, Judge; and Stauber, 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 summary denial of his motion for correction or reduction of sentence. Because appellant's claim that his criminal history

score was improperly calculated is not barred under *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976), and because the record does not conclusively show that appellant is not entitled to relief, we reverse and remand.

D E C I S I O N

In 2001, appellant Aeropajito Castro Vazquez was convicted of second-degree murder and sentenced to 406 months in prison. Vazquez appealed his conviction, and this court affirmed. *State v. Vazquez*, 644 N.W.2d 97 (Minn. App. 2002). Vazquez did not seek further review.

In 2003, Vazquez filed a petition for postconviction relief. The district court denied Vazquez's petition. Vazquez did not appeal. Vazquez again sought postconviction relief in 2007. The district court denied Vazquez's petition. Vazquez appealed, and this court affirmed. *Vazquez v. State*, A07-1994 (Minn. App. Oct. 7, 2008), *review denied* (Minn. Dec. 16, 2008).

On January 29, 2010, Vazquez filed a motion for correction or reduction of his sentence, arguing that the district court erred in calculating his criminal history score. The district court summarily denied Vazquez's motion as procedurally barred, treating it as a petition for postconviction relief.[1]

[1] Any challenge to a conviction or sentence after a direct appeal or after the time for a direct appeal has expired must be pursuant to the postconviction relief statute. Minn. Stat. § 590.01, subd. 2 (2008). But Minn. R. Crim. P. 27.03, subd. 9, provides that a court "may at any time correct a sentence not authorized by law." A motion for correction of sentence pursuant to rule 27.03 may be treated as a petition for postconviction relief. *Powers v. State*, 731 N.W.2d 499, 501 n.2 (Minn. 2007).

It is well settled 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." *Knaffla*, 309 Minn. at 252, 243 N.W.2d at 741. "Similarly, a postconviction court will generally not consider claims that were raised or were known and could have been raised in an earlier petition for postconviction relief." *Spears v. State*, 725 N.W.2d 696, 700 (Minn. 2006). "There are two exceptions to these general rules: (1) if a novel legal issue is presented, or (2) if the interests of justice require review." *Id.* Review of a denial of postconviction relief based on *Knaffla* is for an abuse of discretion. *Quick v. State*, 692 N.W.2d 438, 439 (Minn. 2005).

The district court denied Vazquez's motion for correction or reduction of his sentence based solely on the *Knaffla* procedural bar. The district court recognized, and the state agrees, that Vazquez's criminal-history-score challenge was raised for the first time in his motion for sentence correction or reduction. But the district court concluded that "despite the fact that Mr. Vazquez has never had this sentencing issue addressed on appeal or on post-conviction remedies, *Knaffla* bars this [c]ourt from addressing the claim because it was known to him but not raised in prior proceedings."

The district court relied on *Powers v. State*, 731 N.W.2d 499 (Minn. 2007), to support its determination that Vazquez's postconviction petition is *Knaffla*-barred. In *Powers*, the defendant moved for correction of his sentence under Minn. R. Crim. P. 27.03. 731 N.W.2d at 500. The sentencing issue concerned alleged constitutional violations under *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *Id.* at 501. Powers had

previously filed two postconviction petitions, one of which challenged his sentence. *Id.* at 500. The supreme court stated that Powers's claim in his motion for correction of sentence was "essentially the same claim" that he made in his first petition for postconviction relief and held that the claim was therefore *Knaffla*-barred. *Id.* at 501. The *Powers* court also stated that to the extent that the sentencing claim was different, it was nonetheless *Knaffla*-barred because it was known and could have been raised in Powers's second petition for postconviction relief. *Id.* at 501-02.

But Vazquez cites *State v. Maurstad*, 733 N.W.2d 141 (Minn. 2007), arguing that "a criminal defendant cannot waive or forfeit a review challenging the calculation of his criminal history score which resulted in an illegal sentence." In *Maurstad*, the district court imposed a 129-month sentence based on a four-point criminal history score. 733 N.W.2d at 144. Maurstad appealed his sentence, and later moved to stay the appeal so he could pursue postconviction relief, arguing that his criminal history score had been improperly calculated. *Id.* The district court denied his petition, finding that Maurstad had waived or forfeited review by failing to object at the sentencing hearing. *Id*. at 142. This court reversed. *Id*. at 143.

On further review, the supreme court affirmed the court of appeals, concluding that "because a sentence based on an incorrect criminal history score is an illegal sentence-and therefore, under Minn. R. Crim. P. 27.03, subd. 9, correctable 'at any time'-a defendant may not waive review of his criminal history score calculation." *Id.* at 147. The supreme court based its holding on the legislative policy favoring sentencing uniformity. *Id.* The court stated that "[i]n order to effectuate the foregoing policy,

sentences must be based on correct criminal history scores, as these scores are the mechanism district courts use to ensure that defendants with similar criminal histories receive approximately equal sanctions for the same offense." *Id.*

This case is analogous to *Maurstad* in that the sentencing issue involves proper calculation of the underlying criminal history score and the issue has not been raised in a previous appeal or postconviction proceeding. And the *Maurstad* holding is broad enough to encompass a subsequent postconviction proceeding in which a disputed criminal-history-score calculation has never been raised. *See id.* at 146 (stating that the appropriate focus is "the legislature's stated public policy of achieving uniformity in sentencing"). Moreover, this court has held that because the prohibition against double punishment under Minn. Stat. § 609.035 (2010) cannot be waived, "the *Knaffla* rule does not bar a subsequent attack on multiple sentencing." *State v. Johnson*, 653 N.W.2d 646, 651 n.2 (Minn. App. 2002). We similarly conclude that because "[a] criminal defendant cannot waive or forfeit review of the criminal history score calculation on which his sentence is based," *Knaffla* does not bar review of the criminal-history-score challenge in this case. *Maurstad*, 733 N.W.2d at 142; *see also Johnson*, 653 N.W.2d at 651 n.2.

This conclusion does not end our analysis. A postconviction court is not required to order an evidentiary hearing if "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 postconviction petition must include "more than argumentative assertions without factual support." *Powers*, 731 N.W.2d at 501 (quotations omitted). We therefore consider whether the record before the postconviction court conclusively

showed that Vazquez was not entitled to relief, in which case, reversal would not be necessary.

"[U]nder the sentencing guidelines the sentencing court, in its discretion, is to determine the weight to be accorded an out-of-state conviction after considering the nature and definition of the offense and the sentence imposed for the offense." *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). "In doing so, the court must comply with the sentencing guidelines' mandate that the court determine how the offender would have been sentenced had the offense occurred in Minnesota at the time of the current offense, not when the offense actually occurred out of state." *Id.* The district court has a responsibility to ensure that the proper weight is assigned to an out-of-state conviction when calculating a defendant's criminal history score. *See Maurstad*, 733 N.W.2d at 147 ("In order to effectuate the [uniformity-in-sentencing] policy, sentences must be based on correct criminal history scores, as these scores are the mechanism district courts use to ensure that defendants with similar criminal histories receive approximately equal sanctions for the same offense.").

Here, the district court adopted the criminal history score contained in a sentencing worksheet. Vazquez was assigned five criminal history points as follows: 1.5 points for a residential burglary; .5 points for "Man./Del. Of Cannabis"; 1.5 points for "Man./Del. Cocaine"; and 1.5 points for "Man./Del. Cocaine."

In his motion for sentence correction or reduction, Vazquez asserted that his Illinois conviction for burglary was the equivalent of second-, and not first-, degree residential burglary in Minnesota and that he therefore should have received one criminal

history point, rather than one and one-half, for this offense. *See* Minn. Stat. § 609.582, subd. 2(a) (defining second-degree residential burglary as entering into a dwelling without consent and intending to commit, or actually committing, a crime); Minn. Stat. § 609.582, subd. 1(a) (defining first-degree residential burglary as entering into a dwelling without consent where another person, not an accomplice, is present and intending to, or actually committing, a crime); Minn. Sent. Guidelines V (1999) (establishing second-degree residential burglary as a level V offense and first-degree residential burglary as a level VI offense); Minn. Sent. Guidelines cmt. II.B.04.1(a) (1999) (stating that a level V offense results in one criminal history point and a level VI offense results in one and one-half criminal history points). The state agrees that residential burglary can be either a first- or second- degree burglary in Minnesota and either a level VI or a level V offense under the Minnesota Sentencing Guidelines.

Vazquez attached a copy of the order of sentence and commitment regarding the Illinois burglary, which indicates that he was convicted under "Ill. Rev. Stat. Ch. 38, Sec. 19, Par. 3." The Illinois statute defined the offense of residential burglary as follows: "A person commits residential burglary who knowingly and without authority enters the dwelling place of another with the intent to commit therein a felony or theft." 38 Ill. Comp. Stat. § 19-3 (1982). But in Minnesota, a residential burglary is not a first-degree offense unless another person, who is not an accomplice, is present in the dwelling at the time of the burglary. Minn. Stat. § 609.582, subd. 1(a) (1998). The Illinois residential-burglary statute does not include this "presence" requirement. Moreover, there is nothing

in the record to indicate that another person was present in the dwelling at the time of the Illinois burglary.

Vazquez also asserts that he should not have been given any felony criminal history points for his conviction of marijuana possession because the amount was 30 grams, which is not a felony-level offense in Minnesota. *See* Minn. Stat. § 152.027, subd. 4(a) (1998) ("A person who unlawfully sells a small amount of marijuana for no remuneration, or who unlawfully possesses a small amount of marijuana is guilty of a petty misdemeanor punishable by a fine of up to $200"); Minn. Stat. § 152.01, subd. 16 (1998) ("'Small amount' as applied to marijuana means 42.5 grams or less."). The state counters that Vazquez was convicted of sale of cannabis and not mere possession. But the record is unclear on this point. The record contains a copy of a complaint for preliminary examination. It alleges that Vazquez committed the offense of "POSSESSION OF CANNABIS . . . in violation of Chapter 56½[,] Section 704." The record also contains a copy of an order and sentence of probation for a charge of "PCS w/INT, of marijuana." But this sentencing order does not identify the statute that underlies Vazquez's conviction. In fact, it is not clear that the order concerns the same offense referenced in the complaint for preliminary examination.

If either of the above-assertions is correct, Vazquez's criminal history score should have been calculated as 4.5, which would reduce to four, and he would be entitled to relief. *See* Minn. Sent. Guidelines cmt. II.B.101 (1999) (stating that an offender who receives a half point after all points have been calculated will not receive that point). But because the record is not fully developed, and proper analysis requires fact-finding, we

cannot determine whether Vazquez's criminal history score was properly calculated. *See In re Welfare of M.D.O.*, 462 N.W.2d 370, 374-75 (Minn. 1990) (holding that the role of the court of appeals is to correct errors, not to find facts); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). Because the record does not conclusively show that Vazquez is not entitled to relief, we reverse and remand for consideration of Vazquez's motion for correction or reduction of sentence on the merits. [2]

The state argues that Vazquez's motion for sentence correction or reduction is untimely under the recently amended postconviction statute. *See* Minn. Stat. § 590.01, subd. 4 (2008) (requiring any person whose conviction was final before August 1, 2005, to file a postconviction petition by July 31, 2007). The district court's order denying the motion for correction or reduction of sentence does not address the application of Minn. Stat. § 590.01, subd. 4, to this case, and we will not consider this argument for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that generally an appellate court will not consider matters not argued to and considered by the district court).

Reversed and remanded.

Dated:

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Judge Michelle A. Larkin

[2] In his motion for sentence correction or reduction, Vazquez raised other challenges to the weight assigned to his out-of-state convictions. Because we determine that the record does not conclusively show that he is not entitled to relief, we do not review these challenges. But the district court should address all of the challenges in Vazquez's original motion on remand.