STATE OF MINNESOTA
IN COURT OF APPEALS
A10-877

Anthony Lee Nelson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 4, 2011
Reversed and remanded
Harten, Judge*

Hennepin County District Court
File No. 27-CR-03-046187

Anthony Lee Nelson, Stillwater, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Shumaker, Judge; and Harten, 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

HARTEN, Judge

Pro se appellant challenges the district court's denial of his petition for a writ of coram nobis, which the court construed to be appellant's third petition for postconviction relief in Hennepin County District Court File No. 27-CR-03-046187. The district court denied the petition as procedurally barred by *Knaffla* and as untimely under Minn. Stat. § 590.01, subd. 4 (2008). But the claims raised in appellant's petition involve the criminal history score assigned to him at sentencing in another district court file, Hennepin County District Court File No. 27-CR-01-087765. We reverse and remand.

FACTS

In October 2001, appellant was charged with committing first-degree robbery in Hennepin County District Court File No. 27-CR-01-087765 (hereafter file #87765). After he pleaded guilty in February 2003, he was sentenced to 88 months in prison, execution stayed, and placed on probation for five years.

Less than five months later, in July 2003, appellant robbed five people at gunpoint in Hennepin County and was charged with five counts of first-degree aggravated robbery and one count of felon in possession in Hennepin County District Court File No. 27-CR-03-046187 (hereafter file #46187). In January 2004, at sentencing in file #46187, the district court imposed an aggregate term of 171 months[1] in prison, to be served consecutively to the now executed 88-month sentence in file #87765.

[1] This 171-month sentence was later reduced to 96 months on resentencing. *See Nelson v. State*, No. A08-462, 2009 WL 817915, at *1 (Minn. App. 31 Mar. 2009).

All of appellant's previous appeals have involved challenges to his conviction and sentence in file #46187. *See State v. Nelson*, No. A04-749, 2005 WL 2126022 (Minn. App. 6 Sept. 2005), *review denied* (Minn. 22 Nov. 2005); *Nelson v. State*, No. A08-462, 2009 WL 817915 (Minn. App. 13 Mar. 2009); *Nelson v. State*, No. A10-500 (Minn. App. 22 Dec. 2010) (order op.). But none to date have involved claims related to his conviction and to the 88-month sentence he received in file #87765.

D E C I S I O N

In his petition and appellate brief in the instant case, appellant asserts that the 88-month sentence he received in file #87765 was improperly based on a criminal history score of four points, when he should have been assigned only three and one-half points, and that the proper assignment of points would have resulted in a 78-month sentence. Appellant explains that he was assigned an additional one-half point based on an "unproven" 2001 California conviction noted in the presentence investigation report (PSI), and that his criminal history score was not "thoroughly investigated as to its accuracy before it was relied upon." He acknowledges that he has fully served the 88-month sentence and that it expired sometime in October 2008, but asserts that "it would only be fair and in the interest of justice that [he] be given a sentence modification thus crediting 10 months to the sentence currently being served since it was ordered to be served consecutively[,] thus reducing [his] sentence by 10 months." He advances no statutory or caselaw support for this contemplated sentence modification procedure.

The district court summarily denied appellant relief on his petition, concluding that appellant's claim was previously known but not raised in any of his prior appeals,

citing *Knaffla*. But because this is appellant's first postconviction or appellate challenge to his conviction in file #87765, it is not *Knaffla* barred. *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (postconviction court will not consider matters raised in earlier direct appeal or known at time of direct appeal). Thus, the district court erred in determining that appellant's claim is barred by *Knaffla*.[2]

The district court also concluded that appellant's claim lacks merit. Out-of-state convictions are considered in calculating a defendant's criminal history score. Minn. Sent. Guidelines cmt. II.B.502. The state has the burden to establish the facts necessary to justify consideration of an out-of-state conviction. *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. 15 July 2008). And the sentencing court must consider the nature, definition, and sentence imposed for an out-of-state conviction to 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." *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001).

The merits of appellant's claim are difficult to assess because only file #46187 was transmitted to this court. But the PSI for file #87765 was included in the state's appendix. The PSI describes the offense as "Evade Peace Officer with Disregard for Safety," and as occurring on 6 January 2001 in Solano, California. The PSI indicates that

[2] The district court also concluded that appellant's petition was untimely. While the two-year deadline for filing a petition for postconviction relief set out in Minn. Stat. § 590.01, subd. 4 (2008), easily applies to this 2003 conviction, the constitutionality of that statute, particularly as it applies to a first-time challenge to a conviction, is currently before the supreme court. *See Rickert v. State*, No. A08-2269 (Minn. App. 22 Dec. 2009), *review granted* (Minn. 16 Mar. 2010). We are therefore reluctant to affirm the district court on this basis.

on 22 January 2001, appellant was placed on probation for 36 months and was ordered to serve 180 days, but that because he failed to appear for his jail sentence on 21 February 2001, a warrant was issued. The PSI goes on to note: "The defendant denied this conviction (Evade Peace Officer with Disregard [for] Safety) to this agent. However, fingerprints from California matched his fingerprints in the Hennepin County Sheriff's office file."

The state argues that the California crime of evading a police officer with disregard for safety would be a felony in Minnesota under Minn. Stat. § 609.487 (2002) (making it a felony to flee a police officer in a motor vehicle). *See* Cal. Vehicle Code § 2800.2 (2001) (making it a crime to drive a motor vehicle in disregard for others' safety while fleeing or eluding pursuing a police officer). But appellant maintains that it is unclear from the PSI whether a motor vehicle was involved in the California offense; appellant also refers to Minn. Stat. § 609.487, subd. 6, which makes it a misdemeanor to evade a peace officer by means of running, hiding, or by any other means except driving a motor vehicle.[3] The state further argues that the sentence appellant received for the California conviction, 180 days in jail and 36 months of probation, is a felony-level sentence under Minn. Stat. § 609.135, subd. 2 (2002). These issues require more detailed refinement on remand.

[3] That subdivision, however, was added to section 609.487 in 2005. 2005 Minn. Laws ch. 136, art. 17, § 28 at 1137. Prior to that time, fleeing a police officer by foot may have been considered obstructing legal process as defined by Minn. Stat. § 609.50, subd. 1 (2002).

Because this is appellant's first appellate or postconviction challenge in file #87765, the district court erred in concluding that his claims are barred by *Knaffla*. We therefore reverse and remand, with directions that the district court consider appellant's petition as it pertains to file #87765. This disposition is not to be construed as an expression of any opinion on the merits of appellant's claim or on the availability of the relief sought by appellant, who apparently has fully served his 88-month sentence and is currently serving the sentence imposed on file #46187.

Reversed and remanded.