

DA 18-0286

IN THE SUPREME COURT OF THE STATE OF MONTANA

2019 MT 32N

FRANCO LEO TORRES,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

APPEAL FROM: District Court of the First Judicial District,
In and For the County of Lewis and Clark, Cause No. CDV-2017-655
Honorable Kathy Seeley, Presiding Judge

COUNSEL OF RECORD:

For Appellant:

Franco Leo Torres, Self-Represented, Helena, Montana

For Appellee:

Timothy C. Fox, Montana Attorney General, Madison L. Mattioli,
Assistant Attorney General, Helena, Montana

Leo J. Gallagher, Lewis and Clark County Attorney, Helena, Montana

Submitted on Briefs: January 9, 2019

Decided: February 5, 2019

Filed:


Clerk

Chief Justice Mike McGrath delivered the Opinion of the Court.

¶1 Pursuant to Section I, Paragraph 3(c), Montana Supreme Court Internal Operating Rules, this case is decided by memorandum opinion and shall not be cited and does not serve as precedent. Its case title, cause number, and disposition shall be included in this Court's quarterly list of noncitable cases published in the Pacific Reporter and Montana Reports.

¶2 Franco Leo Torres (Torres) appeals from a March 29, 2018 First Judicial District Court order denying his petition for post-conviction relief. We affirm.

¶3 In May 2008, Torres was charged with Partner or Family Member Assault (PFMA) for purposely or knowingly causing bodily injury to his partner, M.R. On May 29, 2008, Torres pleaded guilty pursuant to a plea agreement and received a deferred sentence. Torres did not appeal the judgment.

¶4 In 2009, Torres' deferred sentence was revoked and he was sentenced to the Department of Corrections (DOC) for five years, with two years suspended. After serving three years, Torres was released in 2012 to serve the suspended portion of his sentence. In August 2013, Torres was arrested for felony PFMA in Yellowstone County. Torres denied the allegations in the petition and filed a motion to set aside his 2008 PFMA conviction, arguing the pre-2013 PFMA statute was unconstitutional. The District Court denied his motion. Torres' suspended sentence was subsequently revoked and he received a two-year sentence to the DOC, to run concurrently with the sentence imposed by the Yellowstone County District Court for Torres' 2013 PFMA conviction.

¶5 In 2017, Torres appealed the denial of his motion to set aside the prior conviction and revocation of his suspended sentence. This Court affirmed the District Court’s decision. *State v. Torres*, 2017 MT 177, 388 Mont. 161, 398 P.3d 279. In August 2017, Torres filed a petition for postconviction relief related to the 2008 conviction. The District Court denied Torres’ petition, holding that his claims were time-barred and he waived his right to challenge the PFMA statute when he pleaded guilty in 2008. Torres appeals.

¶6 We review a district court’s denial of a petition for postconviction relief to determine whether that court’s findings are clearly erroneous and whether its conclusions of law are correct. *Walker v. State*, 2003 MT 134, ¶ 36, 316 Mont. 103, 68 P.3d 872.

¶7 A petition for postconviction relief must be filed within one year of the date the conviction becomes final. Section 46-21-102(1), MCA. A conviction becomes final when the time for appeal to this Court expires, which, in this case, was sixty days after the entry of judgment. Section 46-21-102(1)(a), MCA; M. R. App. P. 4(5)(b). Because Torres did not file a direct appeal from the June 10, 2008 judgment, his conviction became final for purposes of § 46-21-102(1)(b), MCA, on August 10, 2008. Accordingly, Torres had one year, until August 10, 2009, to file a petition for postconviction relief. *Davis v. State*, 2004 MT 112, ¶ 14, 321 Mont. 118, 88 P.3d 1285. Torres did not file his petition for postconviction relief until August 14, 2017—eight years after the expiration of the one-year limitations period.

¶8 Torres acknowledges that his claims are time-barred but nonetheless argues that his petition for postconviction relief should be decided on the merits because the District

Court “abridged his due process rights” when it used his prior domestic violence convictions in Nevada for stacking purposes to raise his 2008 PFMA conviction to a felony.¹ In an attempt to circumvent the one-year limitations period, Torres argues that newly-discovered evidence establishing his innocence of felony PFMA has surfaced and the District Court lacked subject matter jurisdiction over his case. Neither argument is compelling.

¶9 Section 46-21-102(2), MCA, provides an exception to the one-year deadline:

A claim that alleges the existence of newly discovered evidence that, if proved and viewed in light of the evidence as a whole would establish that the petitioner did not engage in the criminal conduct for which the petitioner was convicted, may be raised in a petition filed within 1 year of the date on which the conviction becomes final or the date on which the petitioner discovers, or reasonably should have discovered the existence of the evidence, whichever is later.

Torres has not presented newly discovered evidence showing he did not assault M.R. Rather, his argument on appeal is that his prior Nevada convictions were improperly stacked. Even if Torres’ Nevada convictions were unlawfully stacked for Montana sentencing purposes, it would not prove his innocence of the assault of M.R., a condition for the exception to apply. Further, assuming Torres presented evidence demonstrating his actual innocence of felony PFMA, he has nevertheless been aware of the stacking issue for more than one year. Torres acknowledged the stacking issue when he pleaded

¹ Section 45-5-206(3)(a)(iv), MCA, provides that a third or subsequent conviction for PFMA is a felony. For the purpose of determining the number of convictions under this statute, a conviction includes “conviction for a violation of a statute similar to this section in another state[.]” Section 45-5-206(3)(b)(iii), MCA.

guilty in 2008 and presented this exact argument when he appealed to this Court in 2016.² Torres' claim for postconviction relief does not fall under the § 46-21-102(2), MCA, exception.

¶10 Torres' claim that the District Court lacked subject matter jurisdiction is similarly unpersuasive. Torres asserts that the District Court did not "have jurisdiction over a felony PFMA because he is innocent of felony PFMA due to the state lacking [evidence of] the supporting predicate offenses."

¶11 District courts have "original jurisdiction in all criminal cases amounting to felony[.]" Mont. Const. art. VII, § 4. Even assuming Torres was improperly charged with a felony, district courts have concurrent jurisdiction with justice courts over all misdemeanors punishable by a fine exceeding \$500 or imprisonment exceeding six months or both. Section 3-10-303(1)(c), MCA. The maximum fine for a first conviction of PFMA is \$1,000 and the maximum term of imprisonment is one year. Section 45-5-206(3)(a)(i), MCA. "Hence, under § 3-10-303(1)(c), MCA, district courts have concurrent jurisdiction with justice courts over misdemeanor charges of [PFMA]." *State v. Brockway*, 2005 MT 179, ¶ 11, 328 Mont. 5, 116 P.3d 788. Torres' jurisdictional claims are without merit.

¶12 Moreover, the "knowing and voluntary entry of a guilty plea waives all non-jurisdictional defects and defenses" *Torres*, ¶ 11. Because Torres' stacking claims are non-jurisdictional, the District Court correctly determined that Torres' guilty

² *Torres v. State*, No. DA 16-0693, 2018 MT 79N, 2018 Mont. LEXIS 87.

plea in 2008 effectively waived his right to challenge the 2008 conviction on these grounds.

¶13 Finally, Torres argues that his attorney’s failure to pursue a reduction of the felony PFMA to a misdemeanor resulted in ineffective assistance of counsel. Due to this alleged ineffectiveness, Torres moved the District Court to withdraw his guilty plea; the District Court denied his motion. A challenge to the voluntariness of a guilty plea is subject to a one-year deadline, absent a few narrow exceptions. Sections 46-21-102(2),³ 46-16-105(2), MCA.⁴ The District Court correctly noted that Torres’ claim of innocence is not supported by a fundamental miscarriage of justice, nor does he allege or present any newly discovered exculpatory evidence. Because neither exception applies, the one-year deadline is controlling. Torres failed to pursue this claim within one year. Thus, the claim is time-barred and this Court cannot address the argument on the merits.

¶14 Torres’ petition for postconviction relief and his motion to withdraw his guilty plea are time-barred and the District Court correctly declined to address them.

¶15 We have determined to decide this case pursuant to Section I, Paragraph 3(c) of our Internal Operating Rules, which provides for memorandum opinions. This appeal presents no constitutional issues, no issues of first impression, and does not establish new precedent or modify existing precedent.

³ One-year limitation period to file petition for postconviction relief with exception for “newly discovered evidence.”

⁴ One-year limitation period for withdrawal of guilty plea with exception for when a claim of innocence is supported by evidence of a fundamental miscarriage of justice.

¶16 Affirmed.

/S/ MIKE McGRATH

We Concur:

/S/ JAMES JEREMIAH SHEA

/S/ JIM RICE

/S/ BETH BAKER

/S/ INGRID GUSTAFSON