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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-941**

Anthony L. Nelson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 29, 2008
Reversed and remanded
Connolly, Judge**

Scott County District Court
File No. 70-05-04841

Anthony Lee Nelson, OID 217461, MCF – Rush City, 7600 – 525th Street, Rush City,
MN 55069 (pro se appellant)

Patrick J. Ciliberto, Scott County Attorney, Todd P. Zettler, Special Assistant County
Attorney, Justice Center JC340, 200 Fourth Avenue West, Shakopee, MN 55379 (for
respondent)

Considered and decided by Connolly, Presiding Judge; Kalitowski, Judge; and
Minge, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant appeals the district court's order denying him postconviction relief,
arguing that his right to assistance of counsel was violated. Because the district court

administrator failed to forward appellant's postconviction petition to the public defender's office as required by Minn. Stat. § 590.02, subd. 1(4) (2006), and appellant was never appointed a public defender, we agree, and reverse and remand so that appellant may be appointed counsel to assist him in bringing a petition for postconviction relief.

FACTS

On June 10, 2005, appellant Anthony L. Nelson pleaded guilty to the underlying charge of aiding and abetting criminal sexual conduct in the second degree. The same day, appellant was sentenced to a term of 90 months' imprisonment and five years of conditional release. Approximately one year later, on June 28, 2006, appellant filed his first pro se petition for postconviction relief and simultaneously moved "to correct a manifest of injustice in accordance to Minnesota Rule of Criminal Procedure 15.05 and correct an error during sentencing under Rule 27.03, Subdivision 8; Subdivision 9." The district court denied appellant's request for a hearing on the motion to correct a manifest injustice and his petition for postconviction relief. Appellant next filed a pro se appeal with this court while his petition for postconviction relief was still pending in the district court. On August 27, 2006, the district court denied appellant's motion to correct a manifest injustice and his petition for postconviction relief. On October 19, 2006, this court dismissed appellant's appeal due to procedural deficiencies.

Thereafter, on April 3, 2007, appellant filed his second pro se petition for postconviction relief with the district court. Appellant argued that he was incorrectly sentenced under the Minnesota Sentencing Guidelines and that he had the right to have a

jury determine his mandatory minimum sentence and his conditional-release term. Appellant further asserts in this appeal that his right to counsel was violated because a lawyer was not appointed to represent him on his most recent petition for postconviction relief. On April 10, 2007, the district court denied appellant's second petition. This appeal follows.

D E C I S I O N

Appellant contends that his right to counsel was violated when a public defender was not appointed to represent him on his second petition for postconviction relief. Respondent asserts that appellant was not denied his right to counsel because he never requested an attorney. We disagree.

The denial of postconviction relief will be reviewed by this court for an abuse of discretion. *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005). "Application of a statute to the undisputed facts of a case involves a question of law" reviewed de novo by this court. *Gilder v. Auto-Owners Ins. Co.*, 659 N.W.2d 804, 807 (Minn. App. 2003).

Minnesota law provides indigents with the right to counsel for postconviction remedies if the defendant has not already had a direct appeal of his conviction.¹ Minn. Stat. § 590.05 (Supp. 2007). "In the event the petitioner is without counsel, the court administrator shall forthwith transmit a copy of the petition to the state public defender and shall advise the petitioner of such referral." Minn. Stat. § 590.02, subd. 1(4) (2006).

¹ Appellant did file an appeal with this court while the first petition for postconviction relief was pending in the district court. That appeal was dismissed without actual appellate review. Therefore, appellant has not exhausted his right to postconviction representation. *Paone v. State*, 658 N.W.2d 896, 898 (Minn. App. 2003).

Appellant and respondent agree that appellant was unrepresented and that the Scott County court administrator failed to forward a copy of his postconviction petition to the state public defender's office. "In *Paone v. State*, the petitioner for postconviction relief did not request a public defender, but the court administrator neglected to forward a copy of the petition to the state public defender's office." *Lewis v. State*, 697 N.W.2d 624, 627 (Minn. App. 2005). This failure constituted a violation of the right to counsel. *Paone v. State*, 658 N.W.2d 896 (Minn. App. 2003). Therefore, in this case, the failure of the district court administrator to forward appellant's petition to the public defender's office so that a public defender could be appointed to represent him was a violation of his right to counsel regardless of whether appellant himself requested an attorney.

This court does not evaluate the denial of counsel in postconviction proceedings under a harmless-error standard because the right to counsel is fundamental. *See id.* at 899 ("We are not prepared to say that it was harmless error for appellant not to have the services of an appointed criminal defense attorney. The right to counsel is one of the most fundamental.").

Appellant was denied his right to counsel when the district court administrator failed to forward his petition to the public defender's office pursuant to Minn. Stat. § 590.02, subd. 1(4). This error necessitates reversal so that counsel may be appointed to represent appellant on his postconviction petition.² The petition will not be limited to the

² Because we hold that appellant was denied his right to counsel in the first instance, we need not address appellant's other arguments.

issues raised by appellant when he was acting pro se and did not have the benefit of counsel.

Reversed and remanded.