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STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2261

Angelina Cress, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 12, 2013
Affirmed
Rodenberg, Judge

Ramsey County District Court
File No. 62-K3-06-000717

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

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

John L. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Stoneburner, Judge; and Connolly, Judge.

U N P U B L I S H E D O P I N I O N

RODENBERG, Judge

Appellant challenges the district court's denial of her petition for postconviction relief and her motion to modify her sentence. We affirm.

FACTS

Appellant Angelina Cress is a citizen of the Marshall Islands and has lived in the United States since 1979 when she was eight years old. Appellant has three children who are United States citizens.

On February 12, 2006, appellant was arrested at a Ramsey County Wal-Mart store after she attempted to purchase items valued at $113.28 with a forged check.[1] On March 29, appellant pleaded guilty to felony check forgery in violation of Minn. Stat. § 609.631, subds. 3, 4(3)(b) (2004). Prior to entering the guilty plea in open court, and while represented by a public defender, appellant submitted a signed petition to plead guilty to the district court. The petition included the following language:

> I have been told by my attorney and I understand . . . [t]hat if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

Appellant did not appear for sentencing as scheduled on July 17, 2006, and the district court issued a warrant for her arrest. Appellant was arrested and sentenced to one year and one day in prison (366 days). The district court stayed execution of appellant's sentence and placed appellant on probation for up to five years, with probationary conditions not relevant to this appeal. Appellant did not appeal her conviction or

[1] Appellant had a prior conviction in Hennepin County District Court in 2004 of felony theft by swindle (over $2,500) under Minn. Stat. § 609.52 (2012), which is not implicated in this appeal, except it was a prior conviction and therefore provided a criminal history point for purposes of the Minnesota Sentencing Guidelines and may be of consequence to the immigration proceedings discussed below.

sentence. Appellant complied with the terms of her probation and was discharged from probation on August 5, 2009.

In 2012, federal Immigration and Customs Enforcement initiated removal proceedings against appellant based upon the check-forgery conviction. Appellant was scheduled to appear before an immigration law judge in November 2012.

On March 30, 2012, appellant filed a petition for postconviction relief under Minn. Stat. §§ 590.01–.10 (2010). Relying on *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473 (2010), appellant argued that she had been ineffectively represented by counsel when counsel failed to specifically advise appellant of the "clear immigration consequences" of her 2006 guilty plea. Appellant also argued that the district court failed to establish an adequate factual basis for her guilty plea. The district court granted respondent's motion to stay the postconviction proceeding pending the Minnesota Supreme Court's decision in *Campos v. State*, 816 N.W.2d 480 (Minn. 2012), which was expected to address the issue of retroactive application of *Padilla*. On May 7, 2012, appellant filed a notice of appeal from the order staying her petition for postconviction relief. On May 17, appellant moved the district court for reduction of her sentence from one year and one day to 364 days so as to render her conviction a gross misdemeanor under Minn. Stat. § 609.03 (2) (2004). On June 20, the Minnesota Supreme Court issued its decision in *Campos*, holding that *Padilla* does not apply retroactively to claims of ineffective assistance of counsel on collateral review and that the law in place at the time of the plea applies to pre-*Padilla* claims. 816 N.W.2d at 499. On July 3, following the

supreme court's decision in *Campos*, this court dismissed by order appellant's May 7, 2012 appeal as moot.

On October 18, 2012, the district court denied both appellant's petition for postconviction relief and her motion to modify her sentence. The district court found that appellant's guilty plea was intelligent and accurate, that she had received effective assistance of counsel, and that her petition for postconviction relief was untimely and failed to meet any of the exceptions enumerated by Minn. Stat. § 590.01, subd. 4(b). The district court further concluded that it was without authority to amend appellant's sentence. Appellant requested reconsideration.

By order dated November 29, 2012, the district court denied appellant's motion for reconsideration, again concluding that it lacked authority to reduce appellant's sentence because she had already completed her probation. The district court also concluded that, even if it had the authority to amend the sentence, appellant's arguments did not "constitute substantial and compelling circumstances which would be sufficient to justify a departure from the sentence provided by the Minnesota Sentencing Guidelines." This appeal followed.

D E C I S I O N

"When reviewing a postconviction court's decision, we examine only whether the postconviction court's findings are supported by sufficient evidence." *Lussier v. State*, 821 N.W.2d 581, 588 (Minn. 2012) (quotation omitted). We "will reverse a decision of a postconviction court only if that court abused its discretion." *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). We review issues of law de novo. *Id.*

Generally, a person must file a petition for postconviction relief within two years of "(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court's disposition of petitioner's direct appeal." Minn. Stat. § 590.01, subd. 4(a). But an otherwise untimely petition under subdivision 4(a) may be considered if it meets one of five exceptions. *See* Minn. Stat. § 590.01, subd. 4(b) (listing the five exceptions). Appellant was sentenced on May 14, 2007 and did not appeal her conviction. She did not file her petition for postconviction relief until March 30, 2012. It is undisputed that she failed to meet the statutory two-year time period. Appellant argues that her petition satisfies an exception to the statutory time bar because it is "not frivolous and is in the interests of justice" under Minn. Stat. § 590.01, subd. 4(b)(5).

A defendant may withdraw a guilty plea upon a timely motion and proof that withdrawal is necessary to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs when a guilty plea is not accurate, voluntary, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A petitioner must invoke the interests-of-justice exception within two years of when the claim arises. Minn. Stat. § 590.01, subd. 4(c); *Rickert v. State*, 795 N.W.2d 236, 242 (Minn. 2011). An interests-of-justice claim arises "when the petitioner knew or should have known that [she] had a claim." *Sanchez v. State*, 816 N.W.2d 550, 560 (Minn. 2012). This is an objective standard, and a petitioner's subjective, actual knowledge is irrelevant. *Id.* at 558. And a claim invoking the interests-of-justice exception must relate to why the petitioner missed the primary deadline of subdivision 4(a). *Id.* at 557.

Appellant argues that (1) her plea was involuntary because she was not informed of any potential immigration consequences at the time of her plea, (2) it was unintelligent because she was unaware of the direct consequences of pleading guilty, and (3) it was inaccurate because the district court failed to establish a proper factual basis on the record. We disagree.

In *Sanchez*, the supreme court explained that

> the interests-of-justice exception is triggered by an injustice that *caused* the petitioner to miss the primary deadline in subdivision 4(a), not the *substance* of the petition. When the only injustice claimed is identical to the substance of the petition, and the substance of the petition is based on something that happened before or at the time a conviction became final, the injustice simply cannot have caused the petitioner to miss the 2–year time limit in subdivision 4(a), and therefore is not the type of injustice contemplated by the interests-of-justice exception in subdivision 4(b)(5).

Id.

Here, appellant alleges that an injustice occurred when she entered her guilty plea on March 29, 2006, because her plea was not valid. But that claimed injustice is identical to the substance of her petition, which relates to her plea hearing. Thus, because appellant knew or should have known about her claim on March 29, 2006, her petition for postconviction relief does not satisfy the interests-of-justice exception to the two-year limitation set forth in Minn. Stat. § 590.01, subd. 4(a). Appellant's petition also fails under Minn. R. Crim. P. 15.05, subd. 1. *See Lussier*, 821 N.W.2d at 586 n.2 (reaffirming that "a motion to withdraw a guilty plea made after sentencing must be raised in a petition for postconviction relief and the timeliness of such a motion is treated the same

as the manner in which delays in filing petitions for postconviction relief are treated" (quotation omitted)).

Appellant also challenges the district court's denial of her motion to modify her sentence from a felony level crime to a gross misdemeanor. It is undisputed that appellant had completed her probationary sentence before she requested modification of her sentence. Appellant cites no persuasive authority for the proposition that the district court retained discretion to reduce her sentence. Although appellant cites Minn. R. Crim. P. 27.03, subd. 9, in support of her argument, that rule by its terms applies to modification of a sentence "during a stay of execution or imposition of sentence." Here, appellant's probation ended prior to her motion. Therefore, the rule is inapposite. Appellant also cites *State v. Hockensmith*, 417 N.W.2d 630, 632–33 (Minn. 1988). But *Hockensmith* related to the correction of an unauthorized sentence, a situation that is not present here. The district court here correctly determined that it was not authorized to modify a probationary sentence, which was authorized by law, and as to which the probation pursuant to a stay of execution had been successfully completed.

Even if the district court somehow retained authority to modify appellant's sentence, the district court engaged in the appropriate analysis and found that "[appellant]'s arguments as to why she feels she should be granted a durational departure . . . do not constitute substantial and compelling circumstances which would be sufficient to justify a departure from the sentence provided by the Minnesota Sentencing Guidelines." The record supports the district court's conclusion, and appellant has not demonstrated any abuse of discretion by the district court.

We recognize appellant's regrettable legal and immigration situation. But she has failed to show that the postconviction court erred by denying her petition for postconviction relief and her motion to modify her sentence. Her petition for postconviction relief was untimely, and her request for resentencing is without support in existing law.

Affirmed.