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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0181**

Randy M. Noyola, petitioner,
Appellant

vs.

State of Minnesota,
Respondent.

**Filed January 6, 2009
Affirmed
Stoneburner, Judge**

Ramsey County District Court
File No. K9044170

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, Suite 315, 50 West Kellogg Boulevard, St. Paul, MN 55102 (for respondent)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the denial of his petition for postconviction relief from his conviction of first-degree criminal sexual conduct, arguing that his guilty plea was not knowing and intelligent and that the district court erred in concluding that his petition is barred by the statute of limitations. We affirm.

FACTS

In January 2005, appellant Randy M. Noyola pleaded guilty to one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subds. 1(g), 2(a) (2004), committed against his then 8-year-old daughter. There was no plea agreement, but Noyola's attorney stated on the record that, at sentencing, she intended to argue for a stayed sentence under Minn. Stat. § 609.342, subd. 3 (2004). That statute specifically provides that a district court may stay imposition or execution of some sentences if the district court finds that (a) a stay is in the best interest of the complainant or the family unit and (b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program. *See id.*

At the sentencing hearing, Noyola's attorney stated on the record that the assessment did not support an argument for a stayed sentence. Noyola acknowledged on the record that his attorney had discussed this situation with him, and Noyola agreed to the presumptive sentence of 144 months.

In August 2007, Noyola petitioned for postconviction relief. His initial petition was pro se but was subsequently supplemented by appointed counsel. The state moved to

dismiss the petition as barred by the limitation contained in Minn. Stat. § 590.01, subd. 4 (2006), which provides a two-year limit on petitions for postconviction relief unless the petitioner can show that the petition is not frivolous and is in the interests of justice.

After considering the merits of Noyola's petition, the district court concluded that Noyola failed to show that the petition is not frivolous and dismissed the petition as untimely.

This appeal followed.

D E C I S I O N

It is undisputed that Noyola's petition for postconviction relief was filed after the expiration of the two-year limitation period provided in Minn. Stat. § 590.01, subd. 4(a). But Noyola relies on *Deegan v. State* for the proposition that he is entitled to one review of his conviction. 711 N.W.2d 89, 93, 95, 98 (Minn. 2006) (discussing the right to one review of a criminal conviction recognized in *State v. Knaffla*, 309 Minn. 246, 251, 243 N.W.2d 737, 740 (1976), and holding that the state constitution guarantees the right to assistance of counsel for that review). Because the district court considered the merits of Noyola's claim before concluding that the claim is barred by section 590.01, subdivision 4, we conclude that Noyola's right to a review of his conviction has been satisfied. We therefore turn to a review of the district court's determination that Noyola's petition is without merit.

This court reviews a denial of a petition for postconviction relief for an abuse of discretion. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994). The petitioner has the burden to establish facts alleged in the petition by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2006). If the petition, files, and records conclusively show

that the petitioner is entitled to no relief, the petitioner is not entitled to an evidentiary hearing. Minn. Stat. § 590.04, subd. 1 (2008).

Noyola asserts that he entered the plea based on his understanding that counsel would argue for a stayed sentence and that counsel's failure to make the anticipated argument rendered his plea unknowing and unintelligent. *See Perkins v. State*, 559 N.W.2d 678, 688–89 (Minn. 1997) (stating that manifest injustice warranting withdrawal of a plea occurs if a guilty plea is not accurate, voluntary, and intelligent). But the only understanding at the time of the plea was that counsel intended to argue for a stay under section 609.342, subdivision 3. Noyola does not dispute that the post-plea assessment did not qualify him for a stay under section 609.342, subdivision 3.

Noyola agreed to proceed with sentencing after his attorney told him that there were no grounds to support the planned argument for a stay. But Noyola now argues that his attorney's failure to argue for a stayed sentence under the *Trog* factors made his plea unknowing and unintelligent. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (listing factors including a defendant's prior record, support network, cooperation, remorse, and attitude, that a district court may consider in determining whether a stayed sentence may be appropriate). Noyola argues that his attorney misinformed him at the sentencing hearing when she stated that there were no grounds that would support an argument for a stay and that, had he been aware that counsel could have argued the *Trog* factors, he would not have agreed to go forward with sentencing without having those factors argued.

Postconviction relief is only available if a petitioner alleges and proves, by a preponderance of evidence, that there are facts warranting reopening the case. *See Hummel v. State*, 617 N.W.2d 561, 564 (Minn. 2000) (stating that if the petition, files, and record conclusively show that the petitioner is entitled to no relief, a court need not conduct an evidentiary hearing). Here, Noyola's counsel never stated that she planned to argue for a stay based on the *Trog* factors, so Noyola has failed to show that his plea was induced by an understanding that such an argument would be made. And Noyola has failed to make any showing that his sentence would have been stayed had the *Trog* factors been argued. In fact, the district court concluded that Noyola's showing of a minimal criminal history, remorse, and cooperation "do not begin to rise to the level necessary to justify a dispositional departure for a charge of this magnitude."

To the extent that the district court committed any error by dismissing Noyola's postconviction petition as barred by the statute of limitations, the error was harmless because the district court considered the merits of Noyola's petition and did not abuse its discretion in concluding that Noyola failed to show that he suffered a manifest injustice entitling him to withdraw his plea based on counsel's failure to argue the *Trog* factors at sentencing.

We also find no merit in Noyola's pro-se arguments, which appear to assert a claim for relief based on a previously diagnosed mental illness or deficiency. The record does not indicate that Noyola suffered from any mental illness or deficiency that would have interfered with his participation in the defense of his case. Additionally, there is no

support in the record for Noyola's assertion that he was compelled by his attorney to plead guilty.

Affirmed.