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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1774**

Larry Vidol McMath, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed June 8, 2010
Affirmed
Lansing, Judge**

Ramsey County District Court
File No. 62-K1-01-34

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Peterson, Judge; and Willis,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LANSING, Judge

The district court denied, without a hearing, Larry McMath's third postconviction petition challenging the conditional-release period included in his sentence for first-degree, criminal sexual conduct and the constitutionality of the statute under which he was convicted. Because McMath's claims are procedurally barred by *State v. Knaffla*, 309 Minn. 246, 243 N.W.2d 737 (1976), and time-barred by statute, and no exception to either bar applies, we affirm.

FACTS

Larry McMath pleaded guilty to first-degree, criminal sexual conduct in March 2001. At the plea hearing, McMath admitted to repeatedly molesting his girlfriend's daughter. The child was between the ages of five and seven when the abuse occurred, and she had lived in the same house as McMath nearly her entire life. McMath was charged after he reported the abuse to a crisis worker at Regions Hospital. Taking into account McMath's remorse and his self-reporting the crime, the district court sentenced him to ninety-three months in prison, the minimum sentence in the presumptive range, followed by five years of conditional release to run concurrently with any supervised-release period. The district court explained that the conditional-release period was a statutory requirement that would begin at the end of his incarceration and that a violation could result in additional time incarcerated. The guilty-plea petition explicitly mentioned a conditional-release period. His attorney explained that the term would be five years and McMath initialed this provision before the plea was accepted by the court.

On May 31, 2006, McMath submitted a postconviction motion arguing that the conditional-release period marked a departure from the presumptive sentence and that this departure could not be imposed unless a jury found factors to support it beyond a reasonable doubt. The district court addressed the merits of the legal issues raised in the petition and denied relief.

On April 11, 2008, McMath filed a second petition, arguing, among other claims, that the conditional-release period violated the terms of his guilty plea, represented a departure from the presumptive sentencing range, and violated the double-jeopardy clause of the Minnesota and U.S. Constitutions. The district court denied McMath's petition, concluding that it was time-barred under Minn. Stat. § 590.01, subd. 4 (2006), and *Knaffla*-barred because some of the issues had been raised in McMath's 2006 petition and others were based on information known to him at that time. McMath did not appeal the denials of his first or second petition.

McMath filed a third postconviction petition on August 20, 2009, arguing that the conditional-release period was not part of his previous plea petition. He also challenged the constitutionality of the criminal-sexual-conduct statute under which he was convicted because it allowed for prosecution of multiple acts over an extended period of time. The district court denied this petition, again concluding that it was time-barred and *Knaffla*-barred.

On appeal, McMath argues that his petition comes within the interests-of-justice exceptions to *Knaffla* and to the statutory deadline for filing a postconviction petition. In

a supplemental pro se brief, McMath expands his constitutional challenges to the criminal-sexual-conduct statute.

DECISION

We review the district court's summary denial of a postconviction petition for abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). “[I]f the petition, files and records conclusively show that the petitioner is entitled to no relief,” a postconviction court may dismiss the petition without an evidentiary hearing. *Scales v. State*, 620 N.W.2d 706, 707-08 (Minn. 2001) (quoting Minn. Stat. § 590.04, subd. 1 (2008)) (quotation marks omitted).

I

Claims asserted in a second or subsequent postconviction petition that could have been raised in a previous postconviction petition are procedurally barred from consideration. Minn. Stat. § 590.04, subd. 3 (2008); *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (stating rule for postconviction petitions after direct appeal); *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007) (applying *Knaffla* bar to successive postconviction petitions). Two exceptions to this rule permit review: when a claim is so novel that its legal basis was not available at the time of the earlier petition, or when the failure to raise the issue was not deliberate or inexcusable and the interests of justice require review. *See White v. State*, 711 N.W.2d 106, 109 (Minn. 2006) (defining exceptions in context of petition that follows direct appeal).

McMath's third postconviction petition challenges, for the second time, the conditional-release term as a violation of his plea agreement and challenges the

constitutionality of Minn. Stat. § 609.342, subd. 1(h)(iii) (1996), which applies to sexual abuse that involves multiple acts over an extended period of time. McMath knew or should have known about both claims at the time he filed his first postconviction petition that challenged the validity of the conditional-release term on the merits. Thus, the district court correctly concluded that McMath's third petition was barred by *Knaffla* and that summary dismissal was proper because McMath was challenging his conditional-release period a second time on the same grounds. *See* Minn. Stat. § 590.04, subd. 3 (2008) (allowing summary denial of successive petitions for same relief from same petitioner); *Taylor v. State*, 691 N.W.2d 78, 79 (Minn. 2005) (affirming summary dismissal of postconviction petition raising same issue as raised in direct appeal).

McMath argues, on appeal, that his petition should be considered in the interests of justice. McMath, however, does not explain why he did not raise either claim in his first petition, nor do his claims have substantive merit. *See Perry*, 731 N.W.2d at 147 (concluding interests-of-justice exception did not apply when petitioner did not explain failure to raise claims in earlier proceeding); *Powers v. State*, 695 N.W.2d 371, 374 (Minn. 2005) (requiring claims decided in interests of justice to have substantive merit). At McMath's plea hearing, the conditional-release term was discussed at length before McMath entered his guilty plea. The on-the-record discussion included the district court's explanation of the relationship between supervised and conditional release and how the conditional-release period could result in his incarceration beyond the term of incarceration included in his initial sentence. The five-year, conditional-release term was explicitly added to McMath's plea petition and initialed by McMath after he agreed that

he understood this term and before it was accepted by the district court. The conditional-release period did not represent an additional term to which McMath did not knowingly or voluntarily agree.

In his pro se brief, McMath appears to challenge Minn. Stat. § 609.342, subd. 1(h)(iii), because he believes it violates section 609.035, subdivision 1, which limits punishment for a single course of conduct that constitutes multiple offenses. Minn. Stat. § 609.035, subd. 1 (1996). McMath was not subjected to punishment for multiple offenses for the same conduct. He was convicted of one count of first-degree criminal sexual conduct for distinct events that did not constitute a “single behavioral incident . . . occur[ring] at substantially the same time and place and aris[ing] out of a continuous and uninterrupted course of conduct.” *State v. Johnson*, 273 Minn. 394, 405, 141 N.W.2d 517, 525 (1966) (stating test for when Minn. Stat. § 609.035, subd. 1, applies). McMath also argues that section 609.342 violates due process because it does not properly notify an accused of “the nature and cause” of the charges under article 1, section 6, of the Minnesota Constitution. At his plea hearing, McMath admitted that he had sexual contact with his girlfriend’s daughter at least ten times in the course of a two-year period. He clearly understood that his repeated behavior was the reason for the charge.

The district court properly determined that McMath’s claims could have been raised in his first postconviction petition and that no exception to the *Knaffla* bar is present. It was, therefore, not an abuse of discretion to conclude that McMath’s claims

were *Knaffla*-barred and to dismiss McMath's third petition without an evidentiary hearing.

II

Minnesota law on filing requirements for postconviction petitions changed in 2005, and anyone whose conviction became final before August 1, 2005, was required to file a petition for postconviction relief by July 31, 2007. 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098. McMath filed his first postconviction petition within this deadline, and consequently it was considered on the merits. McMath filed his third petition on August 20, 2009—well after this deadline. The statute establishing the time limits for filing postconviction petitions includes several exceptions and allows a postconviction court to hear a petition that is otherwise time-barred if “the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice.” Minn. Stat. § 590.01, subd. 4(b)(5) (2008). On appeal, McMath argues that this exception applies.

McMath did not specifically refer to this exception in his petition to the district court or otherwise allude to the interests of justice. Minnesota caselaw has interpreted Minn. Stat. § 590.01, subd. 4, to require petitions to explicitly identify any deadline exception on which the petition relies. *Nestell v. State*, 758 N.W.2d 610, 614 (Minn. App. 2008) (holding that petitions must “expressly [] identify the applicable exception” to avoid summary dismissal as untimely). McMath did not specify the interests-of-justice exception in his petition and therefore did not comply with *Nestell*'s pleading requirement.

Also, the statute requires any petition that invokes an exception to the time limits to be filed within two years after the date the claim arises. Minn. Stat. § 590.01, subd. 4(c) (2008). The bases of McMath's claims were known from the time he pleaded guilty and did not involve a recent discovery.

Finally, as discussed in section I, McMath's claims lack merit. Even if the pleading requirement and the time limit for exceptions had been met, McMath has failed to show that his petition is not frivolous and warrants relief. The district court did not abuse its discretion by concluding that McMath's third petition was time-barred and by denying it without an evidentiary hearing.

Affirmed.