STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0613

Blong Xiong, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 8, 2007
Affirmed
Muehlberg, Judge*

Ramsey County District Court
File No. K6-03-3614

Blong Xiong, CCA/Prairie Correctional Facility, #215364, Box 500, Appleton, MN 56208 (pro se 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, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Considered and decided by Hudson, Presiding Judge; Kalitowski, Judge; and Muehlberg, Judge.

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

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

MUEHLBERG, Judge

On appeal from an order denying a postconviction petition challenging his conviction and sentence for first-degree criminal sexual conduct, appellant argues that (1) the district court erred in ruling that sexual penetration and sexual contact with a person under the age of 13 are alternative means of committing the offense; and (2) under the sentencing guidelines, he should have received a 48-month sentence. Because appellant's claims are barred by the *Knaffla* rule, we affirm.

FACTS

In September 2003, appellant Blong Xiong was charged with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2002), and one count of criminal sexual conduct in the first degree: a crime committed for the benefit of a gang, in violation of Minn. Stat. §§ 609.342, subd. 1(a), .229, subd. 2 (2002). A jury found appellant guilty of the charged offenses and the district court sentenced appellant to 156 months' imprisonment for the crime of criminal sexual conduct committed for the benefit of a gang. Appellant challenged his conviction claiming there had been errors in the admission of evidence, in limitation of defense cross-examination, and in the jury instructions. This court affirmed appellant's conviction in *State v. Xiong*, No. A04-2413 (Minn. App. Mar. 21, 2006), *review denied* (Minn. May 24, 2006).

In February 2007, appellant filed a petition for postconviction relief claiming that (1) one of his two convictions for criminal sexual conduct should be vacated because he was entitled to conviction of only the lesser offense; (2) the jury should have been

instructed that sexual contact with a victim and sexual penetration constituted separate offenses; (3) his sentence should be reduced because it was not the presumptive guidelines sentence and violated his constitutional rights under *Blakely*;[1] and (4) the state failed to disclose *Brady*[2] material. The district court vacated appellant's conviction for count one, criminal sexual conduct. But the district court denied appellant's request for relief with respect to his remaining claims. Shortly thereafter, appellant filed another petition for postconviction relief, claiming that his sentence was incorrect. The district court denied the petition in its entirety on the basis that all of the issues raised by appellant were raised in appellant's previous petition for postconviction relief and, therefore, were barred by the rule set forth in *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). This appeal followed.

D E C I S I O N

On review of a postconviction decision, this court determines whether there is sufficient evidence to support the postconviction court's findings. *White v. State*, 711 N.W.2d 106, 109 (Minn. 2006). The postconviction court's decision will not be overturned unless the court has abused its discretion. *Id.* A postconviction court's legal determinations are reviewed de novo, but its factual findings will not be set aside unless they are clearly erroneous. *Schleicher v. State*, 718 N.W.2d 440, 445 (Minn. 2006).

Appellant argues that (1) the district court erred in ruling that sexual penetration and sexual contact of a person under the age of 13 are alternative means of committing

[1] *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).
[2] *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).

the offense; and (2) he is entitled to a lighter sentence. We disagree. Appellant's claims were known or should have been known at the time of his direct appeal. Generally, a petitioner is prohibited from raising in a petition for postconviction relief claims that were raised on direct appeal or that were known or should have been known at the time of direct appeal. *Boitnott v. State*, 640 N.W.2d 626, 630 (Minn. 2002); *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). Two exceptions to the *Knaffla* rule permit review when (1) the interests of justice require review; or (2) a claim is so novel that the legal basis for the appeal was not available on direct appeal. *Perry v. State*, 731 N.W.2d 143, 146 (Minn. 2007). Because these two exceptions do not apply, we conclude, as did the district court, that the issues raised by appellant are barred by the *Knaffla* rule.

We also note that even if the issues raised by appellant were not barred by the *Knaffla* rule, they are without merit. Appellant argues that the district court erred in ruling that sexual penetration and sexual contact of a person under the age of 13 are alternative means of committing the offense. But the statute provides: "A person who engages in sexual penetration with another person, *or* in sexual contact with a person under 13 years of age . . . , is guilty of criminal sexual conduct in the first degree if . . . the complainant is under 13 years of age and the actor is more than 36 months older than the complainant." Minn. Stat. § 609.342, subd. 1(a) (2002) (emphasis added). Thus, there is no merit to the claim that the jury should have been told that sexual contact and sexual penetration were separate offenses.

Appellant also contends that under the sentencing guidelines, he is entitled to a sentence of 48 months. But under the statute, the presumptive sentence for a conviction of first-degree criminal sexual conduct is 144 months:

> Unless a longer mandatory minimum sentence is otherwise required by law or the sentencing guidelines provide for a longer presumptive executed sentence, the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of violating this section. Sentencing a person in a manner other than that described in this paragraph is a departure from the sentencing guidelines.

Minn. Stat. § 609.342, subd. 2(b) (2002). When a defendant is convicted of the crime of first-degree criminal sexual conduct for the benefit of a gang, the sentencing guidelines provide for an additional 12 months' imprisonment. Minn. Sent. Guidelines II.G. Thus, the presumptive sentence for conviction of first-degree criminal sexual conduct for the benefit of a gang is 156 months. *See id.* Appellant received a sentence of 156 months' imprisonment. The district court did not err in sentencing appellant.

Affirmed.