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STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1965

Tony Dejuan Jackson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 1, 2010
Affirmed; motion denied
Harten, Judge[*]

Washington County District Court
File No. 82-K2-97-2580

Tony Dejuan Jackson, Bayport, Minnesota (pro se appellant)

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

Doug Johnson, Washington County Attorney, Michael Hutchinson, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Minge, Judge; and Harten, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving 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

HARTEN, Judge

Pro se appellant challenges the district court's denial of his postconviction petition. The district court denied appellant's claims as *Knaffla* barred. We affirm.

FACTS

On 4 May 1997, appellant Tony Dejuan Jackson sexually assaulted and raped an 18-year-old woman in Washington County, after she let him into her home to use the phone.[1] Appellant threatened to kill her, handcuffed her hands behind her back, and had vaginal intercourse with her two or three times. A jury convicted him of first-degree criminal sexual conduct, first-degree burglary, second-degree assault, and false imprisonment.

The district court sentenced appellant to 182 months for first-degree criminal sexual conduct, which represented a double upward departure, and to a consecutive sentence of 48 months for first-degree burglary. The district court specifically stated that its departure was based on the existence of multiple aggravating factors *and* on its determination that appellant was a patterned sex offender under Minn. Stat. § 609.1352 (1996). The district court remarked that "no matter which of these I use I come up with the same sentence."

We affirmed appellant's conviction and sentence on direct appeal. *State v. Jackson*, 596 N.W.2d 262, 267 (Minn. App. 1999), *review denied* (Minn. 25 Aug. 1999)

[1] This was the first in a series of rapes that appellant committed in three different counties over a period of several weeks in May 1997. These crimes resulted in three separate convictions and sentences.

("*Jackson I*"). Appellant previously challenged the district court's denial of his first four postconviction petitions. *Jackson v. State*, No. A08-745 (Minn. App. 11 Mar. 2009) (order op.), *review denied* (Minn. 19 May 2009), *cert. denied* (5 Oct. 2009); *Jackson v. State*, No. A06-1691 (Minn. App. 11 July 2007) (order op.), *review denied* (Minn. 26 Sept. 2007), *cert. denied* (19 Feb. 2008); *Jackson v. State*, No. A05-991 (Minn. App. 19 July 2005) (order), *review denied* (Minn. 28 Sept. 2005); *Jackson v. State*, No. CX-01-36 (Minn. App. 17 July 2001), *review denied* (Minn. 11 Sept. 2001). The instant appeal is from the district court's denial of appellant's fifth postconviction petition.

D E C I S I O N

In a postconviction proceeding, "all matters" raised in a direct appeal, and "all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief." *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976). "Additionally, matters raised or known but not raised in an earlier petition for postconviction relief will generally not be considered in subsequent petitions for postconviction relief." *Powers v. State*, 731 N.W.2d 499, 501 (Minn. 2007). There are two exceptions to *Knaffla*: (1) if a novel legal issue is presented, a petitioner is excused from the failure to raise it in a previous proceeding, *Case v. State*, 364 N.W.2d 797, 800 (Minn. 1985); and (2) a district court may consider an issue in the interests of justice or if "fairness requires," *Fox v. State*, 474 N.W.2d 821, 825 (Minn. 1991).

1. Challenge to Sentencing Based on Aggravating Factors

Appellant claims that his aggravated sentence is not authorized by law in light of *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008) (departure from guidelines sentence

cannot be based on uncharged criminal conduct). Appellant specifically contested the sentencing departure on direct appeal, and we concluded that the departure was proper and supported by aggravating factors. *Jackson I*, 596 N.W.2d at 267. This first claim is thus barred by *Knaffla*.

Even if not initially barred, this claim would not fit within the exceptions because it is not novel and is without merit. The supreme court's 2008 *Jackson* decision does not state a new rule of law but merely reiterates a rule that had previously existed: a departure cannot be based on uncharged criminal conduct. *See Jackson*, 749 N.W.2d at 357 (citing *State v. Simon*, 520 N.W.2d 393, 394 (Minn. 1994) and *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002)). While the supreme court's 2008 *Jackson* decision may call into question some of the factors cited by the district court in this case, such as zone of privacy, other factors remain valid, including treating the victim with particular cruelty, multiple penetrations, and particular vulnerability of the victim. Thus, even under *Jackson*, the sentencing departure imposed on appellant was supported by permissible aggravating factors.

2. Challenge to Sentencing Under Patterned Sex Offender Statute

Appellant challenges the district court's determination that he met the criteria to be sentenced as a patterned sex offender under Minn. Stat. § 609.1352. This claim was clearly known at the time of his direct appeal and could have been raised on direct appeal or in any one of appellant's previous postconviction petitions. Thus, unless appellant can show that an exception applies, this claim is barred by *Knaffla*.

Appellant asserts that (1) he is entitled to review of the district court's determination that a double upward departure was warranted under the patterned sex offender statute, even though departure was justified by application of aggravating factors, because departure under the patterned sex offender statute will result in an additional period of conditional release after he completes his sentence;[2] and (2) because he is "actually innocent" of the patterned sex offender findings required by statute, his repeated efforts to correct his unauthorized sentence have been unlawfully rejected.

But the bases for appellant's challenge to his sentencing under the patterned sex offender statute are neither novel nor new. The statutory requirements set out in Minn. Stat. § 609.1352 were clear at the time of appellant's sentencing. And appellant was well aware of the evidence relied on by the district court, which included the presentence investigation report (PSI) and the March 1998 psychosexual evaluation prepared by Dr. James Wojcik, Ph.D, for Washington County. Appellant could have much earlier challenged the sufficiency of the evidence to support the court's findings.

Nor has appellant shown that his current claim should be considered under the interests of justice exception to *Knaffla*. Appellant's claim lacks merit. At sentencing, the district court specifically found that appellant met the criteria to be sentenced as a patterned sex offender, based on the evidence presented at trial, on Dr. Wojcik's psychosexual evaluation, and on the PSI. Appellant has submitted several documents

[2] Appellant is correct in noting that the sex offender statute imposes a ten-year conditional release period, *see* Minn. Stat. § 609.1352, subd. 5, that is not imposed on an upward departure based on aggravating circumstances. *See State v. Bueno*, 543 N.W.2d 634, 635 (Minn. 1996).

from his Dakota County file,[3] which suggest that Dr. Wojcik's psychosexual evaluation for Washington County did not address the issue of patterned sex offender. But the sentencing judge indicated at sentencing that he had thoroughly reviewed the record, which included Dr. Wojcik's evaluation, and that he was "compelled" to find that appellant was a patterned sex offender. Appellant's claim that he is "actually innocent" of the findings required under the patterned sex offender statute because the evidence did not support those findings is without merit.

Moreover, appellant is unable to show that he did not "deliberately and inexcusably" fail to raise the issue on direct appeal or in an earlier postconviction petition. *See Spears v. State*, 725 N.W.2d 696, 700, 701 (Minn. 2006) (concluding that defendant did not deliberately and inexcusably fail to earlier raise *Apprendi* claim that had merit, when *Apprendi* was announced during pendency of his direct appeal and he promptly sought to raise claim). Appellant has had multiple opportunities over the past 12 years to challenge the district court's patterned sex offender findings.

Appellant complains that he has demonstrated "time and time again to both the district court and [c]ourt of [a]ppeals, that he is actually innocent of the patterned sex offender finding made by the trial judge." But this assertion merely emphasizes the many

[3] In its respondent's brief, the state requests that this court strike Appendices A, B, and C of appellant's brief, which contain documents related to appellant's Dakota County conviction. The state claims that these documents are not relevant and were not part of the district court file in this case. But, as appellant notes in his reply brief, these documents were attached to his fifth postconviction petition and were considered by the district court. Because the documents are part of the record on appeal, the state's request is denied. *See* Minn. R. Civ. App. P. 110.01 (record on appeal consists of "papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any").

times appellant has raised this particular argument and his ongoing refusal to accept the rulings made by the district court and the state appellate courts. When, as here, there has been substantial delay in raising a claim and when a petitioner has manifestly misused the postconviction remedy, the interests of justice exception to *Knaffla* is not met. *See Hale v. State*, 566 N.W.2d 923, 928 (Minn. 1997) (postconviction court properly ordered summary denial against petitioner who had filed direct appeal and three postconviction petitions, and had waited four years before filing third petition).[4]

We affirm the district court's denial of appellant's fifth postconviction petition.

Affirmed; motion denied.

[4] We note that the district court also could have dismissed this fifth postconviction petition under the two-year statute of limitations. Minn. Stat. § 590.01, subd. 4(a)(2) (2008) ("No petition for postconviction relief may be filed more than two years after . . . an appellate court's disposition of the petitioner's direct appeal."). Appellant's conviction became final before August 1, 2005, and absent applicability of one of the statutory exceptions, he had until August 1, 2007 to file his postconviction petition. *See Nestell v. State*, 758 N.W.2d 610, 613-14 (Minn. App. 2008). Because the district court did not dismiss the petition on this basis and because the state did not argue this as a basis for dismissal, we will not sua sponte apply the statutory deadline to this case.