STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1481

Keith Eugene Washington, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 1, 2013
Affirmed
Peterson, Judge

Chisago County District Court
File No. 13-CR-04-137

Keith Eugene Washington, Bayport, Minnesota (pro se appellant)

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

Janet Reiter, Chisago County Attorney, Beth A. Beaman, Assistant County Attorney, Center City, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich, Judge.

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

PETERSON, Judge

In this appeal from a district court order that denied appellant's motion to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, appellant argues that the district

court erred by ruling that his claim is procedurally barred. Because we conclude that appellant's claim that his sentence is not authorized by law lacks merit, we affirm.

FACTS

In October 2005, pro se appellant Keith Eugene Washington was convicted of attempted first-degree assault, second-degree assault, third-degree assault, and fourth-degree assault for assaulting a correctional officer on August 1, 2004, while incarcerated at the Rush City Correctional Facility. Appellant waived his right to a jury trial and his right to have a jury find the facts necessary to impose a sentencing departure, and, after a bench trial, the district court found appellant guilty. The sentencing court found that aggravating factors warranted an upward durational departure from the presumptive 60-month sentence for attempted first-degree assault and imposed a 96-month sentence to be served consecutively to the sentence that appellant was already serving.

On direct appeal, this court affirmed appellant's convictions of attempted first-degree assault and second-degree assault and his sentence, but held that the sentencing court erred in convicting appellant of third-degree assault and fourth-degree assault because they are lesser degrees of second-degree assault. *State v. Washington*, No. A06-932, 2007 WL 2416867, at *2-6 (Minn. App. Aug. 28, 2007), *review denied* (Minn. Nov. 13, 2007). Appellant then sought postconviction relief, arguing, in part, that the upward durational sentencing departure was unlawful without a jury finding to justify the departure. The postconviction court denied relief, and this court affirmed, holding that appellant's challenge to his sentence was barred by *State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976), because it had been raised in his direct appeal and rejected

by this court. *Washington v. State*, No. A09-439, 2009 WL 4796645, at *1 (Minn. App. Dec. 15, 2009). Appellant raised the same issue in a petition to the United States District Court for a writ of habeas corpus, which was denied.

In June 2012, appellant moved the state district court to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, arguing that the sentence is unlawful. The district court acknowledged that this court previously held that appellant's sentence is lawful and concluded that, under *Johnson v. State*, 801 N.W.2d 173 (Minn. 2011), appellant's motion under rule 27.03, subd. 9, is barred from review.

In this appeal, appellant challenges the district court's conclusion that his motion is barred.

D E C I S I O N

Appellant argues that the district court erred in denying his motion to correct his sentence under rule 27.03, subd. 9, because his sentence is unlawful. The district court determined that the lawfulness of appellant's sentence has been fully litigated in a direct appeal, in a postconviction proceeding, and in a habeas corpus proceeding and, consequently, under *Johnson*, appellant's motion is barred from review. *Johnson* does not support this determination.

In *Johnson*, the appellant filed a motion to correct or reduce his sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9, in which he also raised issues regarding the validity of his guilty plea, alleging that (1) his plea agreement lacked a sufficient factual basis for the crime on which he was sentenced, (2) he did not know the terms of the plea agreement before the guilty-plea hearing, and (3) the court sentenced him for first-degree

murder but cited to the second-degree-murder statute. 801 N.W.2d at 175. After concluding that the sentencing court incorrectly cited the second-degree-murder statute when imposing a sentence for first-degree murder, the district court corrected the sentence pursuant to Minn. R. Crim. P. 27.03, subd. 10,[1] to reflect the appropriate first-degree-murder statute. *Id.* As to the other two reasons for requesting relief, the district court concluded that the motion was properly treated as a postconviction proceeding and that the rule from *Knaffla* barred the appellant from raising claims that were not raised, but should have been known, at the time of his first petition for postconviction relief. *Id.*

On appeal to the supreme court, the appellant contended that the district court erred in concluding that his claims challenging the validity of his conviction were barred under *Knaffla*. *Id.* The supreme court noted: "Because he obtained relief on the sentencing issue, [the appellant] does not continue to claim that the court imposed an illegal sentence. The only remaining issues in the case concern the validity of his guilty plea." *Id.* The supreme court then analyzed Minn. R. Crim. P. 27.03, subd. 9, which states that a "court may at any time correct a sentence not authorized by law." *Id.* at 176. The supreme court determined that "the plain language of the rule does not allow a defendant to challenge his conviction" and that the appellant's "exclusive remedy for review of his claims is in a proceeding for postconviction relief, not in a proceeding to correct a sentence under Rule 27.03, subd. 9." *Id.*

[1] Minn. R. Crim. P. 27.03, subd. 10, provides, "Clerical mistakes in a judgment, order, or in the record arising from oversight or omission may be corrected by the court at any time, or after notice if ordered by the court."

Rather than requiring the appellant to restate his claims in a proceeding for postconviction relief, the supreme court considered the substance of his arguments and applied the statutory provisions governing petitions for postconviction relief as if the appellant had petitioned for postconviction relief. *Id.* The court ultimately concluded that the appellant's petition was untimely and should not be considered on the merits. *Id.* at 177.

In *Johnson*, the supreme court considered the substance of arguments made in support of a motion captioned as one to correct or reduce a sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9, as if the arguments had been made in support of a petition for postconviction relief. *Id.* at 175-76. *Johnson*, however, does not support the principle that any motion to correct an unauthorized sentence brought pursuant to Minn. R. Crim. P. 27.03, subd. 9, may be treated as a petition for postconviction relief. *Johnson* did not involve a claim that the sentencing court imposed an illegal sentence; the issues raised in *Johnson* concerned only the validity of a guilty plea.

Appellant contends that his sentence is unlawful because his offense occurred on August 1, 2004, and, as the basis for the upward departure, the sentencing court impermissibly applied Minn. Stat. § 609.1095, subd. 2 (Supp. 2005), which was not in effect at the time of appellant's offense. Unlike the claims considered by the supreme court in *Johnson*, which concerned the validity of a guilty plea, appellant's claim challenges the legality of his sentence. Consequently, the claim is not barred from review.

Under Minn. R. Crim. P. 27.03, subd. 9, a "court may at any time correct a sentence not authorized by law." On an appeal from a district court's denial of a motion to correct a sentence, we may review the sentence imposed "to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subds. 2(b), 3(2) (2012). When considering a challenge to a sentence under rule 27.03, subdivision 9, "this court will not reevaluate a sentence if the district court's discretion has been properly exercised and the sentence is authorized by law." *Anderson v. State*, 794 N.W.2d 137, 139 (Minn. App. 2011) (quotation omitted), *review denied* (Minn. Apr. 27, 2011).

The sentencing court imposed an upward durational departure based, in part, on Minn. Stat. § 609.1095, subd. 2, which provides for increased sentences for dangerous offenders who commit a third violent crime. The 2004 version of that statute, which is the version that applies to appellant's offense, provides:

> Whenever a person is convicted of a violent crime that is a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment sentence, the judge may impose an aggravated durational departure from the presumptive imprisonment sentence up to the statutory maximum sentence if the offender was at least 18 years old at the time the felony was committed, and:
>
> (1) the court determines on the record at the time of sentencing that the offender has two or more prior convictions for violent crimes; and
>
> (2) the court finds that the offender is a danger to public safety and specifies on the record the basis for the finding . . . .

Minn. Stat. § 609.1095, subd. 2 (2004).

Following the release of the United States Supreme Court's opinion in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the Minnesota Legislature amended Minn. Stat. § 609.1095, subd. 2(2), in 2005 to require that the "factfinder," rather than the "court," determine "that the offender is a danger to public safety." 2005 Minn. Laws ch. 136, art. 16, § 11, at 1118 (codified at Minn. Stat. § 609.1095, subd. 2(2) (Supp. 2005)). This amendment, however, applies only to crimes committed on or after August 1, 2005. 2005 Minn. Laws ch. 136, art. 16, § 11, at 1118.

In the sentencing order supporting the upward departure, the sentencing court quoted the 2005 version of the statute. But on appellant's direct appeal, this court expressly held that the 2005 version of Minn. Stat. § 609.1095, subd. 2, does not apply to appellant's sentence. *Washington*, 2007 WL 2416867, at *3 n.2.[2] This court concluded that, "[b]ecause appellant's offense occurred before [August 1, 2005], the amended version of Minn. Stat. § 609.1095 is not applicable here." *Id.* This court affirmed the upward departure under *State v. Chauvin*, 723 N.W.2d 20, 27 (Minn. 2006), because appellant validly waived his right to a sentencing jury and the district court had authority to accept appellant's waiver and depart from the presumptive sentence. *Id.* at *4.

Although the sentencing court quoted the 2005 version of the statute, the sentence imposed is authorized under the 2004 version of the statute, which applies to appellant's

[2] Some confusion may stem from this court's error in the fact section of the opinion in which we stated that appellant's offense occurred on August 1, 2005. *Washington*, 2007 WL 2416867, at *1. But this court's analysis and conclusion demonstrate an understanding that the offense took place on August 1, 2004. *Id.* at *4 n.2.

offense. Because appellant's sentence is authorized by law, there is no basis to grant his motion to correct the sentence under rule 27.03, subd. 9.

Affirmed.