STATE OF MINNESOTA
IN COURT OF APPEALS
A13-2409

State of Minnesota,
Respondent,

vs.

Anthony Michael Bishop,
Appellant.

Filed June 9, 2014
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-08-44663

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Kirk, Judge; and Reyes, Judge.

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

KIRK, Judge

Appellant was convicted of failing to register as a predatory offender and the district court imposed a sentence. Several months later, the district court amended appellant's sentence to include a ten-year conditional-release term that was required under Minn. Stat. § 609.3455, subd. 8 (2006). Appellant argues that the district court abused its discretion when it denied his motion to correct his sentence by vacating the ten-year conditional-release term. We affirm.

FACTS

Appellant Anthony Michael Bishop is required to register as a predatory offender because of his conviction of first-degree criminal sexual conduct. In June 2008, appellant registered with the Minneapolis Police Department as homeless, which required him to register with the department on a weekly basis. In September, respondent State of Minnesota charged appellant with felony failure to register as a predatory offender, alleging that that he failed to register between July 7 and August 15.

In November, appellant pleaded guilty to the charge. In a pre-plea investigation report, a probation officer noted that appellant had been designated a risk-level-III offender. The district court accepted appellant's guilty plea and imposed a sentence. In a letter dated January 5, 2009, an employee of the Minnesota Department of Corrections (DOC) requested that the district court amend appellant's sentence to include the ten-year conditional-release term required under Minn. Stat. § 609.3455, subd. 8, because appellant was a risk-level-III offender at the time of the offense. *See* Minn. Stat.

§ 243.166, subd. 5a (2006) (requiring the district court to place an individual assigned to risk level III at the time of the offense on probation for ten years after his release from prison). A few days later, the district court modified appellant's sentence to include the required ten-year conditional-release term. Appellant later moved to withdraw his guilty plea, and the district court denied the motion.

In August 2013, appellant moved to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, requesting that the district court vacate the ten-year conditional-release term. The district court denied the motion. This appeal follows.

D E C I S I O N

I. The district court erred by finding that appellant's motion to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, was time-barred.

The district court construed appellant's motion to correct his sentence under rule 27.03, subdivision 9, as a postconviction petition. Although the district court addressed the merits of appellant's motion under rule 27.03, subdivision 9, it also determined that appellant's postconviction petition was time-barred because it was filed almost four years after his conviction and sentence became final. Appellate courts review the interpretation of a procedural rule de novo. *Johnson v. State*, 801 N.W.2d 173, 176 (Minn. 2011). This court will not reverse a district court's factual findings unless they are clearly erroneous. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). We will not reverse a district court's denial of a postconviction petition absent an abuse of discretion. *Id.*

Under Minn. Stat. § 590.01, subd. 4(a) (2012), a district court may not consider a petition for postconviction relief if it was "filed more than two years after . . . the entry of

judgment of conviction or sentence if no direct appeal is filed." But rule 27.03, subdivision 9, provides that a district "court may at any time correct a sentence not authorized by law." The Minnesota Supreme Court has not determined whether the two-year time bar applies to motions to correct a sentence under rule 27.03, subdivision 9. *Townsend v. State*, 834 N.W.2d 736, 739 (Minn. 2013). But this court has held that the two-year time bar "does not apply to motions properly filed under" rule 27.03, subdivision 9. *Vazquez v. State*, 822 N.W.2d 313, 318 (Minn. App. 2012). A district court may choose to treat a motion filed under rule 27.03, subdivision 9, as a postconviction petition, but it is not required to do so. *State v. Amundson*, 828 N.W.2d 747, 751 (Minn. App. 2013).

Here, appellant moved to correct his sentence under rule 27.03, subdivision 9, not in a postconviction motion under section 590.01. And appellant argued in his motion that his sentence was contrary to law, which is an argument that this court has held a defendant is allowed to raise in a rule 27.03, subdivision 9, motion. *Washington v. State*, 845 N.W.2d 205, 214 (Minn. App. 2014). Because appellant's rule 27.03, subdivision 9, motion was properly filed, we conclude that the two-year time bar does not apply. We therefore address the merits of appellant's argument.

II. The district court did not abuse its discretion by denying appellant's motion to correct his sentence.

Appellant challenges the district court's denial of his motion to correct his sentence under rule 27.03, subdivision 9, arguing that the district court's imposition of a ten-year conditional-release term was unauthorized by law. "This court will not reverse

the district court's denial of a motion brought under rule 27.03, subdivision 9, to correct a sentence, unless the district court abused its discretion or the original sentence was unauthorized by law." *Amundson*, 828 N.W.2d at 752.

Under the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment to the United States Constitution, a defendant is entitled to have a jury determine that he is guilty of each element of the crime with which he is charged. *Apprendi v. New Jersey*, 530 U.S. 466, 476-77, 120 S. Ct. 2348, 2355-56 (2000). "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490, 120 S. Ct. at 2363-64. The United States Supreme Court has held that the "statutory maximum" is the maximum sentence a court may impose based on the facts the defendant admitted or that are reflected in the jury verdict. *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004).

In Minnesota, the maximum sentence that a district court may impose is the presumptive sentence prescribed by the Minnesota Sentencing Guidelines. *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005). The Minnesota Supreme Court has also held that, in addition to the prior-conviction exception identified in *Apprendi*, a defendant's custody status, including the fact that he is "on probation at the time of the current offense arises from, and is so essentially analogous to, the fact of a prior conviction, that constitutional considerations do not require it to be determined by a jury." *State v. Allen*, 706 N.W.2d 40, 47-48 (Minn. 2005); *see also State v. Brooks*, 690 N.W.2d 160, 163-64 (Minn. App. 2004) (holding that the determination of a defendant's

criminal-history score is analogous to the prior-conviction exception), *review denied* (Minn. Dec. 13, 2005).

Appellant argues that the ten-year conditional-release term that the district court imposed violates *Apprendi* because it increases his sentence based on his risk-level-III status, which is a fact that he did not admit to or waive, and was not found by a jury. Appellant contends that a risk-level assignment is distinguishable from a prior conviction or custody status, and therefore is not exempt from the requirements of *Apprendi* and *Blakely*. He argues that this is so because an offender's risk level does not flow directly from his sentence for his prior conviction and cannot be determined simply by reviewing court records related to that conviction.

This court recently addressed these arguments in *State v. Her*, 843 N.W.2d 590 (Minn. App. 2014), *review granted* (Minn. Apr. 29, 2014). Like appellant, Her was a risk-level-III offender who was convicted of failing to register as a predatory offender. *Her*, 843 N.W.2d at 592. The district court imposed the presumptive sentence as well as the ten-year conditional-release term required by Minn. Stat. § 243.166, subd. 5a, and Her moved to vacate the conditional-release term. *Id.* On appeal, this court concluded that the conditional-release term was part of Her's statutory-maximum sentence, a conclusion that it determined was consistent with *State v. Jones*, 659 N.W.2d 748 (Minn. 2003). *Id.* at 594. In *Jones*, the supreme court held that the district court's imposition of a conditional-release term violated *Apprendi* because it was predicated on post-jury judicial findings. 659 N.W.2d at 752. However, the supreme court also determined that

the imposition of a conditional-release term based on the defendant's sex-offender status was a mandatory requirement of the defendant's statutory-maximum sentence. *Id.* at 753.

In *Her*, this court further concluded that a defendant's "risk level is analogous to the fact of a prior conviction or probation status, such that its existence at the time of a registration violation is not constitutionally required to be found by a jury." 843 N.W.2d at 596. In arriving at this conclusion, this court noted that a defendant's risk level, like probation, is a direct consequence of a conviction and that the underlying rationale behind the supreme court's decision that a defendant's custody status falls within the prior-conviction exception also applies to a defendant's risk level. *Id.* at 595. This court determined that a defendant's risk level is readily determined by reviewing state records, like a defendant's prior conviction or probation status. *Id.*

We are unpersuaded by appellant's arguments, which are contrary to *Her*. The record shows that appellant was designated a risk-level-III offender at the time the district court sentenced him for failing to register as a predatory offender. Given appellant's risk level and the offense with which he was charged, the district court was required to impose a ten-year conditional-release period under Minn. Stat. § 243.166, subd. 5a. Although the district court initially did not impose the statutorily required conditional-release period, it issued an order adding it to appellant's sentence approximately two months after his sentencing.[1] As this court held in *Her*, the conditional-release period

[1] The district court's delay in imposing the conditional-release period did not violate appellant's due process rights because he had notice that a correction was required and he had "not developed a crystallized expectation as to the finality of his sentence." *See Martinek v. State*, 678 N.W.2d 714, 718 (Minn. App. 2004).

was part of appellant's statutory-maximum sentence and his risk-level-III status was not constitutionally required to be found by a jury. Therefore, the district court did not abuse its discretion by denying appellant's motion to correct his sentence.

III. Appellant's pro se arguments do not have merit.

In appellant's pro se supplemental brief, he contends that he was not advised of his right to appeal his conviction or that his risk-level status could be used against him. We construe these arguments as an ineffective-assistance-of-counsel claim. To prevail on a claim of ineffective assistance of counsel, appellant "has the burden of demonstrating that (1) his counsel's representation fell below an objective standard of reasonableness and (2) a reasonable probability that the outcome would have been different but for counsel's errors." *State v. Ture*, 632 N.W.2d 621, 632 (Minn. 2001). We conclude that appellant has not met his burden of demonstrating that he received ineffective assistance of counsel because, although he presents some argument, he does not attempt to establish the elements of an ineffective-assistance-of-counsel claim. *See id.*

Appellant also argues that he was illegally sentenced because he was not charged with violating Minn. Stat. § 243.166, subd. 5a, which he also argues is unconstitutional. We conclude that appellant waived this argument because he does not cite any legal authority in support of his arguments. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002) (stating that appellate courts may deem a pro se appellant's arguments waived if the arguments in his pro se supplemental brief are not supported by argument or citation to legal authority).

Affirmed.