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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0054**

Michael Allen Bauer, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 28, 2017
Affirmed
Bjorkman, Judge**

Hennepin County District Court
File No. 27-CR-09-43534

Elyssa B. Danahy, Hellmuth & Johnson, PLLC, Edina, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jean Burdorf, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

Appellant challenges the denial of his untimely petition for postconviction relief, arguing that the interests-of-justice exception to the two-year statute of limitations applies. We affirm.

FACTS

In August 2009, Minneapolis Police Officer Dale Hanson was conducting an investigation into child-pornography distribution. On August 12, he discovered a computer that was using a peer-to-peer network to share files of suspected child pornography. Officer Hanson connected to the computer remotely, confirmed the files contained child pornography, and downloaded six images. After using the IP address to identify the Internet service provider, he used an administrative subpoena to obtain the name and address of the service subscriber. Appellant Michael Allen Bauer was the subscriber.

During a warranted search of Bauer's apartment, law enforcement seized a computer and two external hard drives. Officer Hanson conducted a forensic analysis and discovered 807 child-pornography files on the devices. He also discovered the computer could be accessed remotely using a program called TeamViewer. Officer Hanson prepared a chart summarizing when the TeamViewer program was active. The program was generally activated in the morning and turned off in the evening. Many of the child-pornography files were downloaded while TeamViewer was active.

Respondent State of Minnesota charged Bauer with six counts of possession of pornographic work involving a minor. The case proceeded to a jury trial and Bauer testified

in his own defense. He admitted that he lived alone, but testified that he commonly let friends stay at his apartment and use his computer. He denied having a TeamViewer account and indicated it would have been impossible for him to access his computer remotely during the times shown on Officer Hanson's chart because he was at work.¹ The jury found Bauer guilty on all counts.

On April 26, 2011, the district court sentenced Bauer to 43 months in prison. Bauer did not file a direct appeal. On July 28, 2016, Bauer filed a petition for postconviction relief based on ineffective assistance of counsel. The district court denied the petition as untimely without an evidentiary hearing. Bauer appeals.

DECISION

We review the denial of a petition for postconviction relief for an abuse of discretion. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A person seeking postconviction relief must file a petition within two years of the later of “(1) the entry of judgment of conviction or sentence if no direct appeal is filed; or (2) an appellate court’s disposition of petitioner’s direct appeal.” Minn. Stat. § 590.01, subd. 4(a) (2014). A district court may hear an otherwise untimely petition only if the petitioner establishes that exceptional circumstances prevented him from filing within the two-year statute of limitations. *See id.*, subd. 4(b) (2014) (listing five exceptions). A petitioner invoking the interests-of-justice exception must file his petition “within two years of the date the claim arises.” *Id.*, subd. 4(c) (2014). A claim arises when the petitioner “knew or should have

¹ At the time of his arrest, Bauer worked at a large law firm that prohibited the use of such software.

known” he had an interests-of-justice claim. *Sanchez v. State*, 816 N.W.2d 550, 558-60 (Minn. 2012). The date a claim arises under the interests-of-justice exception is a question of fact, which we review for clear error. *Id.* at 560.

Bauer does not challenge the determination that he filed his petition outside the two-year time limit. But he argues his petition should be considered in the interests of justice because he received ineffective assistance of counsel. He asserts his counsel was ineffective because he did not understand the highly technical nature of the state’s evidence and therefore could not effectively cross-examine Officer Hanson, and because he did not retain an independent expert to review the forensic evidence. Bauer’s argument is unpersuasive for two reasons.

First, the interests-of-justice exception applies when the claimed injustice caused the petitioner to miss the two-year filing deadline. *Id.* at 557. This requires a showing separate from the substance of the petition:

When the only injustice claimed is identical to the substance of the petition, and the substance of the petition is based on something that happened before or at the time a conviction became final, the injustice simply cannot have caused the petitioner to miss the 2-year time limit in subdivision 4(a), and therefore is not the type of injustice contemplated by the interests-of-justice exception in subdivision 4(b)(5).

Id. Bauer does not identify any injustice that caused him to miss the two-year statute of limitations. Indeed, his claimed injustice is identical to the substance of his petition—that he received ineffective assistance of counsel at trial. Accordingly, the interests-of-justice exception is inapplicable.

Second, the interests-of-justice exception only applies to petitions filed within two years of the date the petitioner “knew or should have known” of the claim. *Id.* at 560. Bauer argues that he did not know he had a claim until he consulted his current attorney in June 2015. But we apply an objective standard to when a petitioner knew or should have known about a claim. *See Greer v. State*, 836 N.W.2d 520, 523 (Minn. 2013) (declining to abandon the objective standard established in *Sanchez* in favor of a subjective rule). And the record supports the district court’s finding that under the objective standard Bauer should have known about the allegedly ineffective representation at the time of trial. As Bauer notes, his trial counsel admitted during trial that he did not understand all of the technology involved. And Bauer was clearly aware that counsel did not retain an independent expert to review the forensic evidence. Accordingly, the district court’s finding that Bauer should have known of the claim at the time of trial is not clearly erroneous. On this record, the district court did not abuse its discretion in denying Bauer’s postconviction petition as untimely.

Affirmed.