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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0867**

Wendy Sue Littlewolf, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 12, 2018
Affirmed
Kirk, Judge**

Mahnomen County District Court
File No. 44-CR-11-817

Bradford Colbert, St. Paul, Minnesota (for appellant)

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

Darlene Rivera Spalla, Mahnomen County Attorney, Mahnomen, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, Minnesota County Attorneys
Association, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Kirk, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

KIRK, Judge

Appellant challenges the district court's denial of her petition for postconviction relief, arguing that, despite its untimeliness, her petition should have been considered because she is innocent. We affirm.

FACTS

On October 21, 2011, appellant Wendy Sue Littlewolf was charged with one count of second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(1) (2010), alleged to have occurred on October 20. Appellant's case was tried by a jury on June 12-13, 2012. Appellant was convicted of second-degree possession of a controlled substance, and on July 5 she was sentenced to 84 months in prison.

Appellant did not file a direct appeal, but did file a petition for postconviction relief more than four years later on November 11, 2016. The district court denied appellant's postconviction petition as untimely. This appeal follows.

DECISION

"We review a denial of a petition for postconviction relief . . . for an abuse of discretion. A postconviction court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012) (citations and quotation omitted) (noting that we review findings of fact "under a clearly erroneous standard" and "legal conclusions de novo").

Here, the district court denied appellant's postconviction petition because it was untimely. Appellant acknowledges that she filed her postconviction petition after the two-year statute of limitations set out in Minn. Stat. § 590.01, subd. 4(a)(1) (2016), had expired. Minn. Stat. § 590.01, subd. 4(a)(1) ("No petition for postconviction relief may be filed more than two years after the later of . . . the entry of judgment of conviction or sentence if no direct appeal is filed . . ."). Furthermore, appellant does not argue that her petition qualified for review under one of the statutory exceptions listed in Minn. Stat. § 590.01, subd. 4(b) (2016).

Instead, appellant argues that her petition should not have been denied because she asserted "actual innocence," and therefore the due process clauses and prohibitions against cruel and unusual punishment found in the United States and Minnesota Constitutions entitle her to postconviction review. U.S. Const. amends. V, VIII, XIV; Minn. Const. art. I, §§ 5, 7. Appellant asserts that substantive due process requires review of her "sufficiency of the evidence" claim because she is innocent, and that she must be allowed to challenge her conviction in order to prevent continued cruel and unusual punishment.

Appellant also claims that the district court erred when it determined that under *Wayne v. State*, 866 N.W.2d 917 (Minn. 2015), the claim of actual innocence in her postconviction petition is subject to the two-year statute of limitations in Minn. Stat. § 590.01 (2016). In *Wayne*, the appellant relied on *McQuiggin v. Perkins*, 569 U.S. 383, 133 S. Ct. 1924 (2013), to support his argument that a claim of actual innocence is not subject to the two-year statute of limitations. 866 N.W.2d at 918-19. *McQuiggin* applied the miscarriage of justice exception and held that a claim of actual innocence was not

subject to a one-year statute of limitations for federal habeas petitions. 569 U.S. at 393-94, 133 S. Ct. at 1932. The *Wayne* court noted that a postconviction petition is “a creature of state statute, . . . governed by its own statutory time bar,” and held that *McQuiggin* did not apply to Wayne’s postconviction petition. 866 N.W.2d at 919. Appellant attempts to differentiate her argument from Wayne’s by asserting that the *Wayne* court declined to create an exception to the statute of limitations for claims of actual innocence, but that she “is not arguing for the creation of an exception to the statute of limitations. Rather, [she] is arguing that the Minnesota and U.S. Constitutions require that there be an exception.” This is a distinction without a difference, and the district court properly applied *Wayne*.

Moreover, even if appellant’s petition has been timely filed, a review of her brief reveals that, despite her attempt to reframe the issue, her challenge is actually to the sufficiency of the evidence supporting her conviction. Appellant argues that the state did not present sufficient evidence to prove beyond a reasonable doubt that her possession of a controlled substance was more than “fleeting,” and therefore failed to prove the element of possession under Minn. Stat. § 152.022, subd. 2(1). Appellant does not present a case for her actual innocence, and instead argues that her “fleeting” possession of the controlled substance was legally insufficient to prove that she possessed the drugs. Appellant asserts that in her case there is no difference between “actual innocence” and legal insufficiency. See *Bousley v. United States*, 523 U.S. 614, 623, 118 S. Ct. 1604, 1611 (1998) (“It is important to note in this regard that ‘actual innocence’ means factual innocence, not mere legal insufficiency.”). Minnesota law, and the record in this case, do not support appellant’s position.

First, the fleeting-control principle is not recognized in Minnesota law and is not applicable here. In other jurisdictions, fleeting control has been recognized as the principle that something more than momentary control of contraband may be necessary to establish possession. *See, e.g., Sanders v. State*, 563 So.2d 781, 783 (Fl. Dist. Ct. App. 1990) (“We are of the view that the momentary holding and looking at [a package of cocaine] in the manner and under the circumstances described here, without more, is insufficient to prove a criminal possession offense.”). A fleeting-control exception has not been recognized in any context in Minnesota, and has been expressly rejected in the contexts of gun and drug possession. *See In re Welfare of S.J.J.*, 755 N.W.2d 316, 318-19 (Minn. App. 2008) (holding that the statutory language of Minn. Stat. § 624.713 (2006) does not allow for a fleeting-control exception to illegal possession of a firearm); *see also Freeman v. State*, No. A15-2035, 2016 WL 4421203, at *3 (Minn. App. Aug. 22, 2016) (holding that, under the same reasoning used in *S.J.J.*, Minnesota law does not allow for a fleeting-control exception to drug possession), *review denied* (Minn. Nov. 15, 2016).¹

In *S.J.J.*, appellant argued that there was insufficient evidence to sustain his conviction for illegal possession of a firearm because “his possession of the firearm was so fleeting that it cannot be deemed as possession.” 755 N.W.2d at 318. This court recognized that the statutory language defining illegal possession of a firearm “does not permit or even mention ‘fleeting’ possession,” and “does not indicate that the possession of the weapon must be more than ‘brief’ or ‘temporary.’” *Id.* at 319. This court went on to note that it

¹ Although *Freeman* is unpublished and therefore is not precedential or binding on this court, we believe that it is highly persuasive to this appeal. Minn. Stat. § 480A.08, subd. 3(c) (2016).

“may not add to a statute what the legislature purposely omits or inadvertently overlooks.”

Id. (quotation omitted).

A similar argument was raised by the appellant in *Freeman*, a fifth-degree drug possession case. 2016 WL 4421203, at *2. This court noted in *Freeman* that, although there may be “sound reasons to differentiate firearm possession cases from drug possession cases, the reasoning used to reject the fleeting-control exception to firearms is applicable in this case because the relevant statutory provision did not create an exception.” *Id.* at *3. The same can be said of Minn. Stat. § 152.022, subd. 2(1), the statute under which appellant was convicted. We follow the reasoning of *S.J.J.* and reject appellant’s claim that the fleeting-control principle applies in his case.

Second, a review of the record reveals that there was more than enough evidence presented to the jury to prove beyond a reasonable doubt that appellant illegally possessed the controlled substance, even if the fleeting-control principle was applicable. In order to find appellant guilty of second-degree possession of a controlled substance, the jury had to conclude that the state proved beyond a reasonable doubt that appellant “unlawfully possess[ed] one or more mixtures of a total weight of six grams or more containing cocaine.” Minn. Stat. § 152.022, subd. 2(1). The state was required to prove that appellant “knowingly possessed” the cocaine by “knowingly exercis[ing] dominion and control over [it].” 10A *Minnesota Practice*, CRIMJIG 20.14 (2017).

In considering a claim of insufficient evidence, this court’s review “is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, [is] sufficient to permit the jurors to reach the verdict

which they did.” *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). We assume that “the jury believed the state’s witnesses and disbelieved any evidence to the contrary.” *State v. Moore*, 438 N.W.2d 101, 108 (Minn. 1989). The reviewing court will not disturb a verdict “if the jury, acting with due regard for the presumption of innocence and for the necessity of overcoming it by proof beyond a reasonable doubt, could reasonably conclude that [the] defendant was proven guilty of the offense charged.” *Bernhardt v. State*, 684 N.W.2d 465, 476-77 (Minn. 2004) (quotation omitted).

The evidence presented by the state at trial established that on October 20, 2011, appellant drove a car into the parking lot of the Mahnomen Health Center emergency room with her adult daughter, H.J., in the front passenger seat. H.J. was unresponsive. Medical staff brought H.J. into the emergency room and appellant followed. Appellant told staff that H.J. overdosed on gabapentin.

When medical staff undressed H.J., money fell out of one side of her bra and what was later determined to be a packet of cocaine bindles fell out of the other side. When appellant saw what the paramedic had, she said, “That’s mine, you need to give it to me,” and started yelling at staff because she wanted the packet. The paramedic moved to the other side of the room to assist with H.J., and appellant approached her, shoved her, and said, “You need to give that to me, it’s mine.” The paramedic refused and put the packet in her vest pocket. Appellant then slapped the paramedic across the head, shoved her, and reached into her pocket and took the packet before running out of the emergency room.

The Mahnomen County Sheriff intercepted appellant as she ran out of the emergency room. While the sheriff escorted her back to the emergency room, appellant

had both of her hands closed and the sheriff told her repeatedly to drop whatever was in them. Instead, appellant crossed her arms in front of her chest with her hands closed, then dropped to her knees, and put whatever was in her hands in her mouth. Eventually, appellant spit out three little pill-shaped bindles, and the sheriff seized them because he suspected that they contained narcotics.

Another officer conducted a NIK test on the substance in one of the bindles, which tested positive for cocaine. When the sheriff asked appellant whether she knew the bindles contained cocaine, she said that she did. Later, the sheriff asked appellant to empty her pockets and she removed money and additional bindles that looked like the ones she had concealed in her mouth. The Bureau of Criminal Apprehension determined that the 34 bindles seized from appellant contained 7.3 grams of a substance containing cocaine.

Assuming that the jury believed the state's witnesses, the jury could reasonably have concluded beyond a reasonable doubt that appellant knowingly exercised dominion or control over the cocaine, and that her possession was more than momentary control. On this record, even if appellant's postconviction petition was considered on its merits, she would not be entitled to have her conviction reversed.

Appellant's postconviction petition was untimely filed, and appellant has not established that an exception to the two-year statute of limitations applies in her case. Appellant's constitutional rights were not violated, and the district court did not abuse its discretion when it denied her postconviction petition as untimely.

Affirmed.