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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0052**

Walter Johann Happel, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 22, 2019
Affirmed
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-14-3581

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
State Public Defender, St. Paul, Minnesota (for appellant)

Keith M. Ellison, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Adam Petras, Assistant County Attorney, St. Paul,
Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Schellhas, Judge; and Florey,
Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing that the district court erred by dismissing his petition as statutorily time-barred and imposing an upward durational departure during sentencing. We affirm.

FACTS

In 2014, law enforcement officers investigated appellant Walter Johann Happel for interfering with the privacy of minors. Following this investigation, the state charged appellant with multiple sex offenses in eight separate case files, each involving a different victim. The parties entered into a negotiated plea agreement in March 2015. Appellant entered a plea of guilty to felony first-degree criminal sexual conduct for sexual penetration with a child under the age of 13 while appellant was more than 36 years older than the victim, and amended charges of second-degree intrafamilial sexual abuse and fourth-degree intrafamilial sexual abuse. Appellant also entered an *Alford* plea to surreptitious interference with the privacy of a minor. The remaining charges were dismissed. The parties agreed that appellant would serve a term of 120 months in prison, which constituted an upward durational departure from the presumptive guidelines sentence.

Pursuant to the plea agreement, the district court sentenced appellant to 120 months in prison for first-degree criminal sexual conduct, representing an upward departure. The district court determined that the departure was justified because appellant was in a position of authority over the victim, the crime caused the victim severe psychological harm, and

appellant agreed to the sentence at the plea hearing. The district court also imposed concurrent sentences on the remaining charges. Appellant did not appeal his convictions.

Nearly two years after his conviction, appellant filed a “placeholder” petition for postconviction relief. Several months later, appellant filed a supplemental petition for postconviction relief, abandoning the issues identified in the original petition and raising new issues. The district court dismissed the petition as untimely, and this appeal follows.

D E C I S I O N

I. Legal Standard

We review a denial of postconviction relief to determine whether the district court abused its discretion by making a decision that “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) (quotation omitted). The district court’s factual determinations are reviewed under a clearly-erroneous standard and will not be reversed unless they lack factual support in the record. *State v. Vang*, 847 N.W.2d 248, 266 (Minn. 2014). Legal issues are reviewed de novo. *Vance v. State*, 752 N.W.2d 509, 512 (Minn. 2008). Assessment of the validity of a guilty plea presents a question of law. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

II. Appellant’s Postconviction Petition Is Time-Barred

We first determine that the district court did not err by denying appellant’s postconviction petition as untimely. The postconviction statute bars petitions “filed more than two years after . . . the entry of judgment of conviction or sentence if no direct appeal is filed.” Minn. Stat. § 590.01, subd. 4(a)(1) (2018); *see also Lussier v. State*, 821 N.W.2d

581, 586 n.2 (Minn. 2012) (applying the timeliness requirement of section 590.01 to a postconviction challenge). Appellant did not file a direct appeal of his convictions. Appellant was sentenced on May 7, 2015, with the two-year filing period expiring on May 7, 2017.

Appellant filed what can be characterized as a “placeholder” petition on May 4, 2017, within the two-year statutory deadline. The original petition asserted that appellant’s guilty plea was not knowing, voluntary, or accurate. The petition did not contain a statement of facts supporting his contention that his guilty plea was invalid. Nearly three months later, and after the two-year deadline passed, appellant filed a supplemental petition challenging his sentence.¹ The supplemental petition abandoned the claim that his guilty plea was invalid and argued instead that there were not sufficient facts in the record justifying the upward departure and the district court did not make appropriate factual findings to support its reasons for ordering the departure. The district court determined that the supplemental petition was time-barred because it “raised the entirely new issue of the validity of [appellant’s] sentence” and bore no relationship to the original filed petition. The district court further determined that even if the petition was timely, the sentence was valid because appellant admitted “sufficient details to support the court’s findings regarding aggravating factors.”

¹ The petition also challenged the validity of the *Alford* plea. However, appellant did not provide any factual support for this argument, and we therefore consider the argument forfeited. See *State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (considering arguments forfeited when they are unsupported by facts in the record and contain no citation to relevant legal authority).

We agree. We acknowledge that postconviction petitions should be “liberally construe[d]” and courts must “look to the substance thereof and waive any irregularities or defects in form.” Minn. Stat. § 590.03 (2018); *see also Wallace v. State*, 820 N.W.2d 843, 849 (Minn. 2012) (noting that courts must liberally construe postconviction petitions). However, the postconviction statute should not be interpreted so liberally that it permits a petitioner to

simply file a petition devoid of substance right before the time deadline and wait for the postconviction court to provide a new deadline to fill in the blanks. Such a process is contrary to the statute, encourages delay, and curtails the ability of postconviction courts to dispose of meritless claims.

Matakis v. State, 862 N.W.2d 33, 41 n.8 (Minn. 2015).

Here, appellant’s original petition was so “devoid of substance” that it failed to satisfy the requirements of the postconviction statute. *Id.* A petition for postconviction relief must contain a statement of the facts, the grounds on which the petition is based, and the relief sought. Minn. Stat. § 590.02, subd. 1(1) (2018). The petitioner bears the burden of alleging facts entitling him to relief. *Carridine v. State*, 867 N.W.2d 488, 492 (Minn. 2015). “Although a petition for postconviction relief is ‘liberally construe[d],’ when no facts are alleged in the petition, the postconviction court can only conclude that the facts are undisputed.” *Rossberg v. State*, 874 N.W.2d 786, 791 (Minn. 2016) (citing *Matakis*, 862 N.W.2d at 37). Unsupported claims are forfeited, and “when a petition simply lists legal claims without alleging supporting facts, a postconviction court does not abuse its discretion by denying the petition.” *Id.*

Appellant failed to include factual support for the requested relief in his original petition. Because the petition “consisted of conclusory allegations without factual support,” it failed to satisfy the requirements of the statute. *Id.* With the district court’s permission, appellant filed a supplemental petition for postconviction relief in July 2017, nearly three months later.² But the supplemental petition did not correct the deficiencies in the initial petition. Instead, it raised entirely new issues that, if permitted, would have the effect of “encourag[ing] delay” and “curtail[ing] the ability of postconviction courts to dispose of meritless claims.” *Matakis*, 862 N.W.2d at 41 n.8. The district court did not err by rejecting it.

Appellant argues that his supplemental petition was within the scope of the initial petition because a challenge to the validity of the sentence is related to the plea agreement itself. Appellant relies on *State v. Coles*, which recognizes that an appellant’s request for relief from a prison sentence implicates the underlying plea agreement. 862 N.W.2d 477, 481 (Minn. 2015). But appellant’s reliance on *Coles* is misplaced. *Coles* involved a motion under Minnesota Rule of Criminal Procedure 27.03 to correct his sentence. *Id.* at 479. Rule 27 motions, if properly filed, are not subject to the two-year procedural bar in Minn. Stat. § 590.01, subd. 4. *Reynolds v. State*, 888 N.W.2d 125, 133 (Minn. 2016). Here,

² Appellant argues that his supplemental petition is proper under Minn. Stat. § 509.03, which provides that a district court “may permit amendments” to a petition. Appellant argues that he filed a supplemental petition before the district court reached a decision on the merits, as permitted under the postconviction statute. However, we note that while section 509.03 *permits* the district court to allow an amendment, it does not *require* the court to do so. See Minn. Stat. § 645.44, subd. 15 (2018) (noting that “may” is permissive). Here, the district court found that the supplemental petition was time-barred because it was unrelated to the original petition. We discern no error in the district court’s decision.

however, appellant never argued the issues involving the upward departure as a rule 27.03, subdivision 9 motion to correct his sentence. As such, *Coles* does not bear on the distinct issue raised here—whether, and how, a supplemental petition under Minn. Stat. § 590.01, subd. 4, relates back to a flawed “placeholder” petition—and is not persuasive.

Because the initial petition did not satisfy the requirements of the postconviction statute and the supplemental petition raised entirely new issues, we agree with the district court that appellant’s supplemental petition was statutorily time-barred.

III. Sufficient Evidence in the Record Supports an Upward Departure

Having determined that appellant’s supplemental petition is not timely, we need not reach the merits of his appeal. Nevertheless we consider the merits of the argument in the interests of justice and judicial economy because the district court considered them. The district court considered the merits of appellant’s arguments related to the sentencing issues, despite its determination that the supplemental petition was time-barred. We likewise address the merits of the petition and review the district court’s analysis.

Appellant argues that the district court abused its discretion by imposing an upward durational departure. This case arises from the investigation of allegations that appellant interfered with the privacy of students at a school where he worked as a janitor. In 2014, officers received a report that appellant watched a student through the bathroom stall while the student was using the toilet. After the initial report, more students came forward describing similar incidents. One student reported that appellant watched him through the cracks in the bathroom stall and watched him while he was urinating. A second student reported that appellant followed him and his friends into the bathroom and “just stared at

the boys” while they were urinating, causing them to feel “uncomfortable.” Two additional boys reported that appellant watched them while they used the urinals and came into the bathroom “a lot” to watch the boys. A fifth student reported that appellant followed him into the bathroom and used the urinal next to him on at least five occasions and looked at his penis. A sixth student stated that appellant watched him through the cracks in the bathroom stall, causing him to feel uncomfortable going into the bathroom by himself. A seventh student reported that appellant followed him into the bathroom on several occasions, watched him while he urinated, looked at his penis, and once followed the child partway down the school hallway after he left the bathroom. Law enforcement officers also investigated a report that appellant sexually assaulted B.J.S., a friend of appellant’s son and a student at the school.

The district court sentenced appellant to 120 months in prison, which constitutes an upward departure from the sentencing guidelines. A trial court may depart from the guidelines “only when substantial and compelling circumstances are present.” *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003). “Substantial and compelling circumstances are present when the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Abrahamson*, 758 N.W.2d 332, 337-38 (Minn. App. 2008) (quotation omitted). Where the district court states its reasons for departure on the record, we determine if the reasons justify the departure; if they do, the departure will be affirmed. *Id.* at 338. We review a district court’s decision to depart from the presumptive sentence for an abuse of discretion. *Taylor*, 670 N.W.2d at 588.

Appellant argues that an upward durational departure was unjustified because the district court did not conduct a judicial sentencing trial or find aggravating circumstances to have been proven beyond a reasonable doubt. Generally, “any facts supporting a departure above the maximum guidelines sentence requires either a jury to find those facts beyond a reasonable doubt or the defendant to admit to those facts.” *State v. Bradley*, 906 N.W.2d 856, 858 (Minn. App. 2017), *review denied* (Minn. Feb. 28, 2018); *see also Blakely v. Washington*, 542 U.S. 296, 301, 124 S. Ct. 2531, 2536 (2004). However, a defendant may waive his right to a jury trial concerning those factors and submit them to the judge for a decision. *Blakely*, 542 U.S. at 310, 124 S. Ct. at 2541.

Appellant expressly waived his right to a jury trial on the *Blakely* sentencing factors. During the plea petition hearing, defense counsel asked appellant if he understood that there was “every reason to believe that the prosecutor is going to give notice of his intent to seek aggravating factors.” Appellant stated that he understood. Appellant also agreed that he understood that he “could be sentenced without regard or without limitation to the sentencing guidelines.” Following defense counsel’s questions, the district court judge turned to appellant and the following exchange occurred:

COURT: If you were found guilty at trial then the jury would have to determine a second or further issue and that is whether or not . . . aggravated factors existed for an upward departure or a longer prison sentence than normal?

APPELLANT: I understand.

COURT: And you want to give up your right to have that sentencing jury?

APPELLANT: Yeah, right.

The record explicitly supports the determination that appellant waived his right to a sentencing jury on aggravating factors and, as discussed below, admitted to facts supporting an aggravated sentence.

a. Position of Authority

The district court did not abuse its discretion when it sentenced appellant to an upward departure because sufficient evidence in the record establishes that appellant was in a position of authority over his victim, B.J.S. Appellant entered a plea of guilty to felony first-degree criminal sexual conduct for fondling B.J.S.’s penis, performing oral sex on B.J.S., and forcing B.J.S. to put his penis in appellant’s anus by sitting on B.J.S. In the order denying postconviction relief, the district court determined that appellant admitted to the existence of facts supporting this aggravating factor. The court also noted that appellant was in his mid-thirties at the time, and that “[t]his is clearly the commission of an act while in a position of authority over the 10 year old neighbor boy.” The record supports the district court’s determination that appellant admitted facts supporting the existence of an aggravating factor.

Appellant argues that this factor was already contemplated by the legislature when it set the penalty for the criminal-sexual-conduct charge and cannot justify an aggravating-factor finding now.³ We disagree. We acknowledge caselaw stating that “the fact that the

³ In *State v. Jones*, the supreme court prescribed a number of limitations on what facts could be relied upon for an upward departure. 745 N.W.2d 845, 849 (Minn. 2008) (stating that departures cannot be based on uncharged or dismissed offenses or on offenses of which the defendant was acquitted). However, current law permits a district court to order an aggravated sentence based on “any aggravating factor arising from the same course of conduct.” Minn. Stat. § 244.10, subd. 5a(b) (2018); see also *State v. Fleming*, 883 N.W.2d

victim was young and the defendant was in a position of authority over [the victim] are not grounds for departure because those facts were considered by the legislature in determining the severity of the offense.” *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983). But here, appellant was charged with first-degree criminal sexual conduct in violation of section 609.342, subd. 1(a), which criminalizes sexual contact when the complainant is under 13 years of age and the actor is more than 36 months older than the victim. Minn. Stat. § 609.342, subd. 1(a) (2014). Appellant was *not* charged under subdivision 1(b), which prohibits sexual contact when a complainant is between 13 and 16 years of age and the actor is more than 48 months older than the complainant *and* in a position of authority over the complainant. *Id.*, subd. 1(b) (2016).

The record supports a determination that appellant was in a position of authority over B.J.S. “Position of authority includes . . . a person who is charged with any duty or responsibility for the health, welfare, or supervision of a child, either independently or through another, no matter how brief, at the time of the act.” Minn. Stat. § 609.341, subd. 10 (2014). Under the statute, position of authority is “broadly defined.” *State v. Willette*, 421 N.W.2d 342, 345 (Minn. App. 1988), *review denied* (Minn. May 16, 1988). Appellant was a janitor at the school B.J.S. attended. On one occasion, B.J.S. stayed overnight at appellant’s home, a place within appellant’s exclusive control. B.J.S. was under appellant’s care, and appellant was charged with supervising the child. Minnesota courts

790, 797 (Minn. 2016) (concluding that section 244.10, subd. 5a(b) “allows a court to base an upward sentencing departure on any aggravating factor, even if the aggravating factor relates, or arises in connection with another offense committed during the same course of conduct”).

have found that a position of authority exists when an individual exercises a degree of protection over a child. *See, e.g., State v. Bird*, 292 N.W.2d 3 (Minn. 1980) (care of relative). The evidence supports a determination that appellant was in a position of authority over B.J.S.

b. Unusual Psychological Harm

We further determine that the district court did not abuse its discretion when it concluded that an upward departure was warranted because the victim suffered great emotional and psychological harm. “Psychological and emotional injury may justify [an] upward departure.” *State v. Allen*, 482 N.W.2d 228, 233 (Minn. App. 1992), *review denied* (Minn. Apr. 13, 1992).

Sufficient evidence in the record establishes that appellant caused B.J.S. great psychological harm. An upward durational departure based on psychological harm will be affirmed where the victim experiences depression, worsening relationships, trouble sleeping, lost trust in others, and the need for professional psychological therapy. *Id.* These consequences are present here. B.J.S. provided the district court with a victim impact statement at the sentencing hearing. B.J.S. stated that he has been unable to trust people, “men in particular,” and noted that “[b]ecause of what [appellant] has done to me it has affected my relationship with my own father and several others that I should have been able to look up to and trust.” B.J.S. has worked with social services, group homes, and psychiatric hospitals to learn “how to deal with [his] emotions and feelings.” B.J.S. explained that re-living the events of the past in the criminal proceeding “brought back so much pain,” put his life “into a path of destruction,” and caused him to spend months with

a psychiatrist. B.J.S. stated that as a victim, “the pain is never over. We [victims] have to suffer every day. And for some like me it has only gotten worse.”

B.J.S.’s victim impact statement details his worsening relationships with family members, the loss of trust he experienced with others, and his need for ongoing professional psychological therapy. This evidence supports a finding that the victim suffered permanent psychological harm warranting an upward departure from the presumptive sentence. *See Allen*, 482 N.W.2d at 233.

c. Alternative Basis for Departure

Lastly, we conclude that an alternative ground supports the court’s sentencing decision. A reviewing court will uphold a sentence if the record contains other grounds to justify the departure. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). Here, the predatory nature of the crime further justifies departure. Grooming behaviors, such as planning, manipulation, and orchestrating overnight stay-overs, are appropriate aggravating factors justifying departure. *See State v. Yaritz*, 791 N.W.2d 138, 146 (Minn. App. 2010) (recognizing that a high degree of planning is an aggravating factor), *review denied* (Minn. Feb. 23, 2011); *State v. Sebasky*, 547 N.W.2d 93, 96, 101 (Minn. App. 1996) (noting that planning and manipulating are valid aggravating factors in departure case), *review denied* (Minn. June 19, 1996); *State v. Bates*, 507 N.W.2d 847, 854 (Minn. App. 1993) (noting that planning and manipulation are aggravating factors in child sex-abuse cases), *review denied* (Minn. Dec. 27, 1993); *State v. Kindem*, 338 N.W.2d 9, 17-18 (Minn. 1983) (noting that planning is an appropriate aggravating factor justifying departure). Sufficient evidence in the record supports a determination that appellant targeted and

manipulated B.J.S. for the purpose of sexually penetrating him. This alternative basis further justifies a departure from the sentencing guidelines.

In sum, we determine that multiple bases for an upward durational departure exist, including that appellant was in a position of authority over his victim, his crime caused the victim unusual psychological harm, and appellant's crime showed a pattern of planning and manipulation. Therefore, the district court's imposition of an upward durational departure at sentencing does not constitute an abuse of discretion, and we affirm.

Affirmed.