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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1943**

Joshua Lee Jones, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 19, 2019
Affirmed
Florey, Judge**

Olmsted County District Court
File No. 55-CR-14-3607
Rice County District Court
File No. 66-CR-15-646

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant argues that the district court unlawfully imposed ten-year conditional-release terms when sentencing him for two failure-to-register offenses and that the postconviction court erred by treating his motion to correct his sentences and vacate those conditional-release terms as an untimely petition for postconviction relief. Because the postconviction court properly deemed appellant's motion as an untimely petition for postconviction relief, we affirm.

FACTS

In 2005, appellant Joshua Lee Jones was convicted of third-degree criminal sexual conduct and was therefore required to register as a predatory offender. Approximately eight years later, in November 2013, police responded to a domestic incident at an apartment in Rochester and received reports that appellant was living at the apartment in violation of his registration requirements. Appellant was charged in Olmsted County with failure to register, terroristic threats, and domestic assault. Months later, appellant was charged in Rice County with failure to register. It was alleged that he reported a change of address to an apartment in Faribault, but was not residing at that location.

In May 2015, appellant entered into "a global plea agreement" wherein he pleaded guilty to the Rice County failure-to-register charge, the Olmsted County failure-to-register and domestic-assault charges, and a misdemeanor-theft charge in a separate file. In exchange, the remaining charges in those files, as well as charges in a number of other files, were dismissed. It was agreed that the parties would recommend 24-month

concurrent sentences on the failure-to-register offenses, which the parties understood to be mandatory minimum sentences.

Appellant was represented by counsel during the plea. His counsel stated that appellant understood he was assigned a risk-level three at the time of his registration offenses, and he would, therefore, be placed on conditional release for a period of ten years following his release from prison. When questioned by the court, appellant stated that he understood the plea and that he would be giving up his right to a jury trial. He also stated that he understood a conditional-release period was applicable and that he had talked over that issue with his lawyer. In establishing a factual basis for the plea, appellant was twice asked if he was assigned a risk-level three at the time of the offenses to which he was pleading guilty, and he twice responded, “Yes.”

Appellant also signed and tendered to the district court a plea petition. It indicated that he understood he was waiving his right to a jury trial “on the issue of guilt.” It also indicated that he understood he was assigned a risk-level three when he violated his registration requirements and would be subject to ten years of conditional release.

In July 2015, appellant was sentenced to 24 months’ imprisonment on the Rice County failure-to-register offense, and he was given a ten-year conditional-release term. Appellant was sentenced to 24 months’ imprisonment on the Olmsted County failure-to-register offense, to be served concurrently with the Rice County sentence, and he was given a ten-year conditional-release term.¹

¹ Appellant was given a 365-day concurrent sentence for the domestic-assault offense.

In July 2018, appellant moved, separately, to correct his Rice and Olmsted County sentences pursuant to Minn. R. Crim. P. 27.03, subd. 9, and those motions were consolidated. Appellant asserted that he did not receive a jury determination on his offender-risk level and did not waive his right to a jury finding on that fact, and therefore his ten-year conditional-release terms were unlawfully imposed. *See State v. Her*, 862 N.W.2d 692, 693 (Minn. 2015) (holding that whether a defendant is a risk-level-three offender is a fact that must be admitted by the defendant or found by a jury before a court may impose a ten-year conditional-release term under Minn. Stat. § 243.166, subd. 5a (2014)).

The district court denied appellant’s motion to correct his sentences. The court concluded that appellant’s conditional-release terms were “an integral part” of his plea agreement, and “the [s]tate would be deprived of [the] benefit of the bargain” if the terms were vacated. Therefore, the court concluded that a motion to correct appellant’s sentence was not the proper vehicle for relief; rather, appellant’s “exclusive remedy [was] a petition for postconviction relief” under Minn. Stat. § 590.01 (2018).² The district court concluded, however, that appellant was time barred from seeking relief under section 590.01. This appeal followed.

D E C I S I O N

A district court must impose a ten-year period of conditional release for any person who commits a failure-to-register violation while assigned a risk-level three. *See Minn.*

² While we cite the most recent version of the postconviction statute, we note that the language of section 590.01 has not changed during the times relevant to this appeal.

Stat. § 243.166, subd. 5a (Supp. 2013).³ In April 2015, the supreme court held that a district court may not impose such a term unless the defendant admits that he was a risk-level three at the time of the offense, or a jury makes that finding. *Her*, 862 N.W.2d at 693.

Appellant argues that, although he admitted he was a risk-level three at the time of his offenses, he did not *specifically* waive his right to a jury finding on that issue, and his sentence was, therefore, unauthorized, and he was permitted to seek relief via a motion to correct his sentence. We need not reach the merits of appellant's waiver argument. Presuming, but not deciding, that appellant was entitled to a specific waiver of his right to a jury determination on his risk-level, and accepting that his sentence was therefore unauthorized, appellant is still not entitled to relief.⁴ The district court properly treated appellant's motion as an untimely petition for postconviction relief because the ten-year conditional-release terms that appellant sought to vacate were an integral part of appellant's plea agreement.

³ We cite the 2013 version of section 243.166, subdivision 5a, the version in effect at the time of appellant's Olmsted County offenses. We note that the language of section 243.166, subdivision 5a, has not changed since the 2013 version.

⁴ While we resolve this appeal on the grounds that appellant's motion was properly deemed an untimely postconviction petition, we note a potential shortcoming in appellant's argument. In *State v. Kuhlmann*, a defendant stipulated to having previous convictions that satisfied elements of his charged offenses. 806 N.W.2d 844, 846-47 (Minn. 2011). The supreme court determined that the defendant did not validly waive his right to a jury trial on the previous-conviction elements, but under plain-error review, the defendant was not entitled to relief for lack of prejudice. *Id.* at 850, 853. We cannot help but notice the similarities between *Kuhlmann* and this case. With no challenge to the accuracy of his plea, appellant effectively frames his challenge as an attack on a procedural error, and any prejudice is suspect as appellant admitted, during his plea, to having been a risk-level-three offender at the time of his offenses.

There are two alternative means of challenging a sentence, each subject to different procedural requirements. *Washington v. State*, 845 N.W.2d 205, 210 (Minn. App. 2014). First, an offender may move the district court to “at any time correct a sentence not authorized by law.” Minn. R. Crim. P. 27.03, subd. 9; see *Townsend v. State*, 834 N.W.2d 736, 738-39 (Minn. 2013). Second, an offender can petition for relief under section 590.01, which provides that “‘a person convicted of a crime, who claims . . . the sentence . . . made violated the person’s rights under the Constitution or laws of the United States or of [Minnesota]’ may ‘commence a proceeding to secure relief by filing a petition [to] . . . correct the sentence.’” *Townsend*, 834 N.W.2d at 739 (quoting Minn. Stat. § 590.01, subd. 1(1)). Section 590.01 contains heightened procedural requirements, such as time limits on when a petition may be filed. See Minn. Stat. § 590.01, subd. 4.

“A person who brings what is, in substance, a challenge to a criminal conviction cannot use [r]ule 27.03, subdivision 9, to circumvent the procedural requirements of the postconviction statute.” *Wayne v. State*, 870 N.W.2d 389, 391 (Minn. 2015). In this vein, postconviction courts are permitted, in some instances, to treat a motion under rule 27.03 as a petition under section 590.01. See *id.* A determination of whether the postconviction court properly treated appellant’s motion as a petition for postconviction relief presents “issues regarding the interpretation of a procedural rule and statute, questions subject to de novo review.” *State v. Coles*, 862 N.W.2d 477, 479 (Minn. 2015).

In *Reynolds v. State*, the supreme court held that the imposition of a ten-year conditional-release term under section 243.166, subdivision 5a, without a jury’s offender-risk-level finding or a defendant’s risk-level admission, represents an unauthorized

sentence, properly challenged via a rule 27.03 motion. 888 N.W.2d 125, 130 (Minn. 2016). However, this case is distinguishable from *Reynolds*. Appellant’s conditional-release terms were imposed pursuant to a plea agreement, whereas in *Reynolds*, the conditional-release term was imposed via a sua sponte modification of the defendant’s sentence. *Id.* at 128; see *State v. Meger*, 901 N.W.2d 418, 420 (Minn. 2017) (involving district court’s imposition of ten-year conditional release term months after sentencing); *State v. Franson*, 921 N.W.2d 783, 784-85 (Minn. App. 2018) (involving district court’s imposition of ten-year conditional-release term months after sentencing), *review denied* (Minn. Feb. 27, 2019).

In *State v. Coles*, the supreme court considered whether the defendant could challenge his upward-departure sentence under rule 27.03 when the sentence was part of a plea agreement in which the state agreed to dismiss other pending charges. 862 N.W.2d 477, 478-79 (Minn. 2015). The *Coles* court concluded that when a defendant’s motion to correct his sentence implicates the plea agreement, including the state’s dismissal of other pending charges, the exclusive remedy is postconviction relief. *Id.* at 481-82. The *Coles* court reasoned that if the defendant’s sentence was modified, as he requested, “the terms of the plea agreement the parties reached will, in effect, have been rejected,” and in such circumstances, the defendant must “be given a chance to withdraw his plea of guilty.” *Id.* at 480 (quotation omitted); see Minn. R. Crim. P. 15.04, subd. 3(2) (noting that “the district court judge must reject or accept the plea of guilty on the terms of the plea agreement,” and “[i]f the court rejects the plea agreement, it must advise the parties in open court and then call upon the defendant to either affirm or withdraw the plea.”). Based on the

aforementioned reasoning, the supreme court concluded that the defendant's motion, in *Coles*, affected more than just the sentence.

Like *Coles*, appellant's rule 27.03 motion implicates more than his sentence; it implicates his plea agreement. Accordingly, a rule 27.03 motion was unavailable, and the postconviction court properly considered appellant's motion as a petition for postconviction relief. Appellant acknowledges that what the parties agreed to, as part of their plea agreement, presents a fact issue, reviewed for clear error. See *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) ("What the parties agreed to involves an issue of fact to be resolved by the district court."); see also *Dobbins v. State*, 788 N.W.2d 719, 725 (Minn. 2010) (stating that factual findings will not be reversed unless clearly erroneous).

The district court found that the conditional-release terms were part of the plea agreement. This finding is supported by both the plea transcript and plea petition, and is not clearly erroneous. The portion of the signed plea petition setting forth the parties' agreement stated that appellant understood "that, as a predatory offender, [he] was assigned to risk level III at the times [he] [was] alleged to have violated" the registration statute, and he understood that after he was "released from prison, the Commissioner [would] place [him] on conditional release for 10 years in accordance with Minn. Stat. 243.166 Subd. 5a." The conditional-release terms were "a material part of the negotiation." See *Evans v. State*, 880 N.W.2d 357, 359-60 (Minn. 2016). As such, the district court properly determined that, because appellant's motion implicated his plea, he could not seek relief under rule 27.03.

Appellant attempts to distinguish *Coles*. He notes that the defendant in *Coles* agreed to the dismissal of a more serious charge, and potential sentence, in exchange for a plea to a lesser charge, and a shorter, though upwardly departed, sentence. Appellant asserts that the sentence in *Coles* was therefore a negotiated term of the plea agreement. He asserts that the state “did not bargain” for his conditional-release terms. However, the district court found otherwise, and the record supports this finding. The ten-year conditional-release terms were expressly incorporated into the agreement portion of the plea petition. Further, the state dismissed numerous charges as part of the agreement.

Appellant, relying on *Reynolds*, also argues that application of the postconviction time bar violates the separation of powers doctrine. In *Reynolds*, the supreme court noted that sentencing is generally a judicial function, and therefore, “[t]o the extent that the limitations period in Minn. Stat. § 590.01, subd. 4, interferes with the process laid out in [rule 27.03, subdivision 9], the statute violates the separation of powers.” 888 N.W.2d at 132-33. This case does not implicate the separation of powers doctrine because appellant is not merely challenging his sentence. He is, in effect, challenging his plea and conviction.

Affirmed.