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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0976**

Rhonda Renee Jones, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed April 13, 2020
Affirmed
Florey, Judge**

St. Louis County District Court
File No. 69DU-CR-14-3177

Beau D. McGraw, McGraw Law Firm, P.A., Lake Elmo, Minnesota (for appellant)

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

Mark S. Rubin, St. Louis County Attorney, Jonathan D. Holets, Assistant County Attorney,
Duluth, Minnesota (for respondent)

Considered and decided by Cleary, Presiding Chief Judge; Larkin, Judge; and
Florey, Judge.

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

FLOREY, Judge

This is an appeal from the district court's summary denial of appellant's petition for postconviction relief. Appellant sought resentencing on a theory of ineffective assistance of counsel. The district court summarily denied appellant's petition as both untimely and

substantively insufficient to support an ineffective-assistance-of-counsel claim. We affirm.

FACTS

In 2014, appellant Rhonda Jones was charged with a controlled-substance crime in the first degree. Jones pleaded guilty pursuant to a plea agreement and, in July 2015, was sentenced to the presumptive 158 months imprisonment. Three months later, Jones filed a direct appeal with this court. Thereafter, Jones was appointed appellate counsel, who advised her to voluntarily withdraw the pending appeal because she did not seem to have a viable claim to appeal. In February 2016, Jones filed a signed notice of voluntary dismissal, and this court dismissed her appeal. Over three years later, in April 2019, Jones filed the petition for postconviction relief at issue in the instant appeal.

Jones's petition asserted ineffective assistance of counsel, pointing exclusively to her appellate counsel's advice to withdraw her direct appeal. She argued that this was ineffective assistance because she filed the notice to dismiss approximately three months prior to the effective date of the Drug Sentencing Reform Act (DSRA). Jones asserted in her petition that her presumptive sentence under the DSRA would have been less than that which she received, and that she would have been eligible for re-sentencing had she not dismissed her appeal. Her petition cites the Minnesota Supreme Court's holding in *Kirby* that criminal defendants may be resentenced under the DSRA if their cases were pending when it went into effect. Therefore, she argued, she was prejudiced by her attorney's advice to dismiss her appeal—thereby effectively finalizing her case—shortly before the DSRA's effective date. The district court denied Jones' postconviction petition without an

evidentiary hearing, finding it both untimely filed and substantively deficient. This appeal followed.

DECISION

This court reviews the denial of a postconviction petition for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). “We review legal issues de novo, but on factual issues our review is limited to whether there is sufficient evidence in the record to sustain the postconviction court’s findings.” *Id.* (quotation omitted). Claims of ineffective assistance of counsel present mixed questions of law and fact and therefore are reviewed de novo. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012).

The district court denied Jones’s petition, in part, on the basis that it was untimely. The deadlines applicable to postconviction petitions are provided for in Minn. Stat. § 590.01, subd. 4 (2018). Subdivision 4(a) requires that petitions for postconviction relief be filed within two years of the dismissal of direct appeal or, if no appeal is filed, the entry of judgment or sentence. *Id.*, subd. 4(a). Subdivision 4(b) enumerates five exceptions to the two-year deadline in 4(a). *Id.*, subd. 4(b); *Hannon v. State*, 889 N.W.2d 789, 792-93 (Minn. 2017). These exceptions, however, are subject to their own statute of limitations: subdivision 4(c) requires that the petition invoking a subdivision 4(b) exception must be brought “within two years of the date the claim arises.” Minn. Stat. § 590.01, subd. 4(c). A claim arises, for the purposes of the subdivision 4(c) statute of limitations, “when the petitioner knew or should have known that he had a claim.” *Hannon*, 889 N.W.2d at 793 (quotation omitted). We turn first to the issues concerning the timeliness of Jones’s petition.

Jones concedes that her petition was filed after the standard two-year deadline provided in subdivision 4(a). She argues, however, that one of the exceptions should apply—namely, that which permits a postconviction petition where “the petitioner established to the satisfaction of the court that the petition is not frivolous and is in the interest of justice.” Minn. Stat. § 590.01, subd. 4(b)(5). As for the two-year limitation on the availability of this exception, Jones argues that her claim did not arise until July 26, 2017—when the Minnesota Supreme Court released its decisions in *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017) and *State v. Otto*, 899 N.W.2d 501 (Minn. 2017). Her claim arose from these decisions, she argues, because the court held that, per the amelioration doctrine, criminal defendants may avail themselves of the new sentencing rules in the DSRA if their cases were not finalized at the time it was put into effect. Jones asserts that her ability to be resentenced under the DSRA—an ability that went unrealized due to her attorney’s ineffective assistance—was confirmed only after the *Kirby* amelioration rule was announced. She argues that since her claim arose with the *Kirby* decision in July 2017, her petition—filed April 2019—is within the exception-specific two-year limitation under subdivision 4(c). The state challenges the applicability of any exception, arguing that Jones failed to assert any basis for a time exception

We first note that Jones did not raise this, or any, argument with the district court regarding the exceptions to the standard two-year limitation. Because the state also failed to raise the time limits in section 590.01, the district court briefly considered the subdivision 4(b) exceptions on its own initiative and concluded that Jones’s petition was untimely. *Weitzel v. State*, 883 N.W.2d 553, 560 (Minn. 2016) (“[W]hen the State fails to

raise the time limits set forth in section 590.01, subdivision 4(a) and (c), the postconviction court has the discretion to consider the time limits on its own motion in order to control its docket.”). Because Jones argues that an exception to the deadline applies for the first time on this appeal, she has forfeited this issue. *State v. Bakken*, 871 N.W.2d 418, 422 (Minn. App. 2015) (“Generally, litigants are bound on appeal by the theory or theories upon which the action was actually tried below, and an appellate court will not consider matters not argued to and considered by the district court.” (citation omitted)), *aff’d*, 883 N.W.2d 264 (Minn. 2016). Even if Jones had not forfeited this argument, her petition would still be untimely.

The Minnesota Supreme Court has said that the interest-of-justice exception is to be applied in exceptional cases only. *Odell v. State*, 931 N.W.2d 103, 106 (Minn. 2019) (“A claim under this exception . . . applies only in exceptional and extraordinary situations.”). Jones identifies a variety of factors that prior Minnesota cases have considered when deciding whether the interest-of-justice exception applies. However, a requirement to which she does not refer is that “[a] claim under this exception must relate to an injustice *that delayed the filing of the petition*, not to the substantive merit of the petition.” *Id.* (emphasis added). The only injustice Jones alleges concerns her appellate counsel’s advice to withdraw her appeal shortly before the DSRA went into effect. Even if this were an injustice, it does not relate to, much less justify, Jones’s untimely filing.

Moreover, Jones agrees that the standard time limit began running with the dismissal of her appeal on February 25, 2016, and that it therefore expired two years later—February 25, 2018. Even if her claims did arise from the *Kirby* and *Otto* decisions, those opinions

were released on July 26, 2017, and Jones offers no reason for her failure to file during the nearly seven-month period between then and the expiration of the standard two-year deadline—much less allege an injustice that could potentially qualify her petition for the extraordinary exception to that statute of limitations. That her claims may have arisen from *Kirby* and *Otto* is immaterial, as this is only relevant to the time-bar in subdivision 4(c)—that which applies to petitions accepted under one of the enumerated exceptions—not to the standard 4(a) deadline to which those exceptions apply in the first place.

Even if we were to assume that Jones has a meritorious ineffective-assistance claim, that her appellate counsel’s conduct amounts to an injustice, that her claim did in fact arise from the *Kirby* and *Otto* decisions, and that this is otherwise an “exceptional and extraordinary situation,” the fact remains that she had over six months to file her petition under the standard timeframe in subdivision 4(a), failed to do so, and has not alleged an injustice that might justify that failure and qualify her petition for the interest-of-justice exception. Therefore, had Jones argued this issue below and preserved it for appeal, we still would affirm the district court’s dismissal of her petition as untimely.

Because we agree with the district court that Jones’s petition was untimely, we need not consider the merits of Jones’s ineffective-assistance-of-counsel claim.

Affirmed.