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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2003**

David Laurence Hodges, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 24, 2020
Affirmed
Schellhas, Judge***

Ramsey County District Court
File No. 62-CR-10-6204

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Schellhas, Judge.

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant David Laurence Hodges appeals from an order denying postconviction relief. Appellant argues that his sentence is illegal and must be corrected because the parties were mistaken about appellant's criminal-history score at the time of his guilty plea. Appellant alternatively argues that he must be permitted to withdraw his guilty plea because he received ineffective assistance of counsel. We affirm.

FACTS

On August 6, 2010, Ramsey County charged Hodges with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(1) (2008). As a result of this investigation, on October 5, 2010, Hennepin County charged Hodges with first-degree criminal sexual conduct on a separate case.¹ On April 25, 2011, Hodges entered into a plea agreement where he would plead guilty to first-degree criminal sexual conduct in both counties, settling both cases. The parties agreed to the presumed sentencing range for a person with a criminal-history score of five—between 260 and 306 months.

On April 25, 2011, Hodges pleaded guilty to first-degree criminal sexual conduct in Ramsey County. The district court found that Hodges knowingly and voluntarily waived his rights and found the factual basis for the guilty plea to be sufficient. The district court did not accept the guilty plea at that hearing. On May 6, 2011, Hodges pleaded guilty to

¹ The record does not reflect that the victim was the same in each case.

first-degree criminal sexual conduct in Hennepin County and was sentenced to 156 months in prison.

On August 3, 2011, Hodges appeared in Ramsey County for sentencing. The district court asked if there were any corrections that needed to be made to the presentence investigation report (PSI) and informed the parties that it had also reviewed the addendum to the PSI. The PSI that the Ramsey County District Court reviewed before sentencing Hodges revealed that he had a criminal-history score of four. The applicable guidelines sentence for a person with a criminal-history score of four was 199-281 months' imprisonment. Concerning the PSI, the state noted for the court that it had "double or triple checked on the custody status point with Corrections," and that there was not a "custody status point, as we had hoped at the time of the plea." The state explained that the parties "agreed that we would be arguing within a range of 260 to 306 months," and with the corrected criminal-history score "the top of the box for this offense is 281 months, which is within the range that we anticipated." The state recommended that the district court sentence Hodges to 281 months in prison, which was a top-of-the-box sentence. The state argued this was appropriate because of "the nature of the [victim's] injuries," the particular cruelty with which Hodges treated the victim, and because Hodges continued to deny responsibility for the offense. Hodges's counsel asked the court to accept Hodges's guilty plea and asked the court to sentence Hodges "within the range that we've agreed, which is

260 to the top of the box.” The district court accepted Hodges’s guilty plea and sentenced him to 281 months in prison to be served concurrently with his Hennepin County sentence.²

Hodges did not appeal from his conviction. Two years later, on August 5, 2013, Hodges filed his first postconviction petition seeking to withdraw his guilty plea or amend his sentence. Hodges argued, among other things, that his guilty plea was invalid because of a mutual mistake about his criminal-history score. The district court denied Hodges’s petition for postconviction relief, and it found that Hodges’s “sentence was within the agreement he originally reached with the state.” On appeal, we affirmed the denial of Hodges’s petition for postconviction relief, explaining that the mutual mistake about Hodges’s criminal-history score “did not render [his] plea unintelligent where the actual range was lower than the anticipated range and the resulting sentence was within the anticipated range.” *Hodges v. State*, No. A13-2207, 2014 WL 3558335, at *4 (Minn. App. July 21, 2014), *review denied* (Minn. Sept. 24, 2014).³

² The 2009 Sentencing Guidelines Grid, used to determine Hodges’s presumptive sentencing range, was later found to be incorrect and corrected. Under the corrected 2009 Sentencing Guidelines Grid, the maximum sentence to which Hodges could be sentenced was 280 months. On March 27, 2012, Hodges’s sentence was amended to 280 months.

³ Hodges has since filed two petitions for postconviction relief, one motion to modify his sentence, one motion to reconsider the denial of a postconviction petition, and one motion to correct his sentence or, in the alternative, withdraw his guilty plea. The district court has denied all of his filings. In its August 25, 2016 order, the district court stated that it “will not entertain and the clerks will not accept any further motion[s] to resentence or motions to readdress the sentence[s] that are based on the current sentence being illegal or unauthorized by law or outside the plea agreement.” Hodges has since undertaken two additional appeals. The first, in February 2016, was dismissed after Hodges filed a motion to withdraw and dismiss the appeal. The second, in October 2016, was dismissed because Hodges was attempting to appeal from a non-appealable order.

On August 20, 2019, Hodges filed a motion to correct his sentence or, in the alternative, for postconviction relief. Hodges argued that his sentence was illegal because “[i]t was calculated based on an incorrect criminal[-]history score.” Hodges also argued “that he be allowed to withdraw his plea to avoid a manifest injustice due to receiving the ineffective assistance during plea bargaining.” Hodges made additional arguments, including that his motion should not be treated as a petition for postconviction relief, that he should not be precluded from obtaining relief, that his motion is not procedurally barred, and that his motion is not time-barred.

On October 17, 2019, the district court denied Hodges’s motion. The district court rejected his illegal sentence and plea withdrawal arguments stating, “In this case the court sentenced [Hodges] to a presumptive sentence based on the correct criminal[-]history score range and the applicable guidelines sentence.” The district court also rejected Hodges’s remaining arguments as procedurally barred or time-barred under *State v. Knaffla*, 243 N.W.2d 737 (Minn. 1976).

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying Hodges’s illegal-sentence claim.

Hodges argues that “the district [court] essentially disregards the fact that [his] pleas were entered based on an incorrect understanding of his criminal[-]history score, and that when that error was discovered, nothing was done to determine what impact, if any, it

would have [on his] plea agreement.” Hodges contends that his sentence was based on an incorrect criminal-history score and is therefore illegal.

“The court may at any time correct a sentence not authorized by law.” Minn. R. Crim. P. 27.03, subd. 9. “For a sentence to be unauthorized, it must be contrary to law or applicable statutes.” *State v. Schnagl*, 859 N.W.2d 297, 301 (Minn. 2015). “[A] sentence based on an incorrect criminal-history score falls within the scope of the rule because such a sentence is one that is not authorized by law.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). “[W]hen a defendant files a motion under Minn. R. Crim. P. 27.03, subd. 9, to correct a sentence after the time for direct appeal has passed, the defendant bears the burden of proving that his or her sentence was based on an incorrect criminal-history score.” *Id.* at 743. “We review a district court’s denial of a motion to correct a sentence under Minn. R. Crim. P. 27.03, subd. 9, for an abuse of discretion.” *Evans v. State*, 880 N.W.2d 357, 359 (Minn. 2016).

The district court found “[t]he sentence received by [Hodges] was indeed within the appropriate sentencing guidelines with an accurate criminal[-]history score. In fact, this sentence was less tha[n] that contemplated at the time of [his] plea.” The district court continued, explaining, “the court sentenced [Hodges] to a presumptive sentence based on the correct criminal-history score range and the applicable guideline sentence. There is no error and no miscalculation in the applicable sentencing guideline.”

The district court’s determination is supported by the record. At the time that Hodges entered his guilty plea, the parties believed him to have a criminal-history score of five. The district court deferred acceptance of Hodges’s guilty plea and did not sentence

Hodges until approximately three months later. Prior to the sentencing hearing, Hodges submitted to a PSI, which the district court reviewed. At the start of the sentencing hearing, the district court asked for any additions or corrections to the PSI. The parties had none, but the state did bring to the district court's attention the change in Hodges's criminal-history score. The state noted:

We agreed that we would be arguing within a range of 260 to 306 months, and in this—as things have turned out, the top of the box for this offense is 281 months, which is within the range that we anticipated. So the [s]tate is recommending that the [c]ourt sentence at the top of the box in this matter.

The state argued for a top-of-the-box sentence because of “the nature of the injuries” and the particularly cruel treatment of the victim, as well as because of Hodges's continuous denial of responsibility for the offense. Hodges's counsel asked the district court to accept his guilty plea and sentence him “within the range that we've agreed, which is 260 to the top of the box.” The district court accepted his guilty plea, adjudicated him guilty of first-degree criminal sexual conduct, and sentenced him “consistent with the Minnesota Sentencing Guidelines, and that is a commit to the Commissioner of Corrections for a period of 281 months.” The district court noted that the sentence is warranted “because it's within the guidelines, but there certainly were some aggravating factors in this matter that could have been found by a jury.”

Hodges claims that recent cases that are similar to his have made his sentence unauthorized. He then cites to *Rosales-Mireles v. United States*, 138 S. Ct. 1897 (2018); *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016); and *State v. Provost*, 901 N.W.2d 199 (Minn. App. 2017). However, these cases are inapposite because, unlike here,

the defendant was sentenced based on an *incorrect* criminal-history score and thus the sentences needed to be corrected.

It is clear from the record that when Hodges was sentenced, he was sentenced based on his correct criminal-history score of four. Additionally, we previously held that Hodges's plea was valid. *Hodges*, 2014 WL 3558335, at *3-6. In that appeal, we determined that "the parties' mutual mistake regarding the presumptive sentencing range did not render [appellant]'s plea unintelligent where the actual range was lower than the anticipated range and the resulting sentence was within the anticipated range." *Id.* at *4. The district court did not abuse its discretion in denying Hodges's illegal-sentence claim because the record reflects that his sentence is not illegal and is authorized by law.⁴

II. The district court did not abuse its discretion in finding Hodges's ineffective-assistance-of-counsel claims *Knaffla* barred.

Hodges next argues that the district court erred in denying his ineffective-assistance-of-counsel claims. We review the denial of a postconviction petition for an abuse of discretion. *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016). "We review the postconviction court's legal conclusions de novo and its findings of fact for clear error." *Id.* "We do not reverse the postconviction court unless the postconviction court exercised its discretion in an arbitrary and capricious manner, based its rulings on an erroneous view of the law, or made clearly erroneous factual findings." *Brown v. State*, 863 N.W.2d 781, 786 (Minn. 2015) (quotation omitted).

⁴ The state also made an argument that appellant was attempting to collaterally attack the validity of his guilty plea using his illegal-sentence claim. To the extent that this may be true, Hodges's claim is also barred.

The district court found Hodges's ineffective-assistance-of-counsel claims to be procedurally barred under *Knaffla*. Explaining that Hodges's claims were "not novel" and that he "wished to have the identical issues that were raised on appeal re-litigated based on case law since the issues were decided." The district court noted that "[t]here is no interest[s] of justice exception based on new case law."

"The *Knaffla* rule provides that when a petition for postconviction relief follows a direct appeal of a conviction, all claims raised in the direct appeal and all claims of which the defendant knew or should have known at the time of the direct appeal are procedurally barred." *Buckingham v. State*, 799 N.W.2d 229, 231 (Minn. 2011). "The *Knaffla* rule also bars consideration of claims that *were raised*, or could have been raised, in a previous postconviction petition." *Hooper v. State*, 838 N.W.2d 775, 787 (Minn. 2013). This includes ineffective-assistance-of-counsel claims. *Zornes v. State*, 880 N.W.2d 363, 369 (Minn. 2016).

Hodges argues that his trial counsel was ineffective because counsel failed to provide appellant with "any information about how [the change in his criminal-history score] would impact him, or given any choice on how to proceed." In his appeal, Hodges does not appear to make any direct argument concerning his appellate counsel, but does cite case law that pertains to ineffective assistance of appellate counsel.

Because Hodges did not take a direct appeal from his conviction, his first opportunity to raise any ineffective-assistance-of-counsel claims related to his trial counsel was in his first postconviction petition and appeal. His first opportunity to raise any ineffective-assistance-of-counsel claims related to his appellate counsel was in his second

postconviction petition. Hodges has failed to raise this claim until his sixth postconviction petition. At this point, his claim is procedurally barred. He knew or should have known that these claims existed and failed to raise them at an earlier point. Therefore these claims are *Knaffla* barred.

Two exceptions to the *Knaffla* rule exist: “(1) the defendant presents a novel legal issue or (2) the interests of justice require the court to consider the claim.” *Hooper*, 838 N.W.2d at 787 (quotation omitted).

The first exception is not present here because “[a]n ineffective[-]assistance[-]of-counsel claim is not a novel legal claim.” *Schleicher v. State*, 718 N.W.2d 440, 447-48 (Minn. 2006).

The second exception is also not present in Hodges’s case. “The interests-of-justice exception is available only in rare and exceptional situations.” *Hooper v. State*, 888 N.W.2d 138, 142 (Minn. 2016). “Under the interests-of-justice exception to the *Knaffla* rule, the court may review a claim as fairness requires when the claim has substantive merit and the petitioner did not deliberately and inexcusably fail to raise the issue in the direct appeal or a previous postconviction petition.” *Colbert v. State*, 870 N.W.2d 616, 626 (Minn. 2015).

In his reply brief, Hodges argues that the interests of justice require that the court address the merits of his claim because of recently decided case law. For this he again cites *Rosales-Mireles*, 138 S. Ct. at 1897, *Molina-Martinez*, 136 S. Ct. at 1338, and *Provost*, 901 N.W.2d at 199. Hodges states that these cases “were not available to [him] at an earlier time” and then states that “the interests[-]of[-]justice exception is satisfied.” For the interests-of-justice exception to apply, “[t]he claim must relate to an injustice that delayed

the filing of the petition, not to the substantive merit of the petition.” *Hooper*, 888 N.W.2d at 142. Because these cases relate to the substantive merit of his petition and not to an injustice in the delay of filing this petition, the interests-of-justice exception also does not apply. The district court did not err in determining that his claims of ineffective-assistance-of-counsel are procedurally barred.⁵

Affirmed.

⁵ The district court also found that Hodges’s claims are time-barred. Hodges makes no claims on appeal that his claims are not time-barred. An issue not addressed in an appellant’s brief is deemed forfeited. *Wayne v. State*, 860 N.W.2d 702, 704 n.2 (Minn. 2015).