

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1044**

Victor Demetrius Cole, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 1, 2021
Affirmed
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-07-002210

Victor Demetrius Cole, Moose Lake, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Frisch, Presiding Judge; Segal, Chief Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant challenges the district court's denial of his motion to correct and reduce his sentence. As relevant here, appellant pleaded guilty to and was sentenced for two crimes—aiding and abetting second-degree murder and aiding and abetting attempted

first-degree murder. In his motion, filed almost 12 years after his sentencing, appellant claimed that he should not have been sentenced for both crimes because they arose out of the same course of conduct and his sentence unfairly exaggerates the criminality of his offenses. Because we conclude that Cole's motion is both time-barred and fails on the merits, we affirm.

FACTS

Appellant Victor Demetrius Cole challenges the district court's order denying his motion to correct his sentences for aiding and abetting murder and aiding and abetting the attempted murder of two victims. The following summarizes the district court's findings and the evidence received at the plea and sentencing hearings.

On November 22, 2006, Cole and Wayne Armstrong-Morrow met with S.A. and J.K. in a car to sell them marijuana. Both S.A. and J.K. were shot in the head with a 9-millimeter Glock pistol. S.A. died in the car and police found J.K. lying on the street bleeding from a neck wound. Witnesses heard gunshots and then saw Cole and Armstrong-Morrow running from the car. Cole was later heard saying that he had to shoot the victims because they were always arguing with him. In a post-*Miranda* statement, Armstrong-Morrow stated that Cole had shot both victims.

Cole was indicted by a grand jury on counts of first-degree murder, attempted first-degree murder, and third-degree sale of a controlled substance. After trial commenced, Cole accepted the state's offer for a plea agreement and pleaded guilty to aiding and abetting the second-degree intentional murder of S.A., aiding and abetting the attempted first-degree murder of J.K., and third-degree sale of a controlled substance. The

plea agreement included the specific sentences that he would receive, including an upward durational departure for aiding and abetting the attempted murder of J.K.¹ The district court accepted the plea agreement and, in April 2008, sentenced Cole in accordance with the plea agreement to 261 months in prison for aiding and abetting the murder of S.A.; a consecutive 240-month sentence for aiding and abetting the attempted murder of J.K., stayed for 20 years; and a 33-month concurrent sentence for the sale of a controlled substance. The remaining charges were dismissed.

In February 2020, Cole filed a motion in district court to correct and reduce his sentence under Minn. R. Crim. P. 27.03, subd. 9, arguing that his sentence is unauthorized by law because he received multiple sentences for offenses arising out of a single course of conduct. The district court denied in part and granted in part Cole's motion. The court held that (1) the prohibition against multiple convictions arising out of the same course of conduct under Minn. Stat. § 609.035 (2006) does not apply because there were multiple victims, (2) Cole's consecutive sentences for aiding and abetting murder and aiding and abetting attempted murder did not unfairly exaggerate the criminality of his conduct, and (3) Cole should not have been sentenced for third-degree sale of a controlled substance because it was part of the same behavioral incident. Accordingly, the district court maintained Cole's sentences for aiding and abetting murder and aiding and abetting

¹ The upward departure on the aiding and abetting attempted-murder conviction was based on the facts that Cole left the victim bleeding with a gunshot wound without calling for medical help and that the offense occurred during the commission of a drug sale.

attempted murder, but vacated his sentence for third-degree sale of a controlled substance.² Cole appeals.

DECISION

I. Cole’s motion must be treated as a petition for postconviction relief because his sentence was part of a negotiated plea agreement and his motion is time-barred.

Cole argues that the district court abused its discretion by denying his motion to correct his sentence. We review a district court’s denial of a motion to correct a sentence for abuse of discretion. *Townsend v. State*, 834 N.W.2d 736, 738 (Minn. 2013). “Specifically, we review the district court’s legal conclusions de novo and its factual findings under the clearly erroneous standard.” *Id.* The defendant bears the burden of proving the illegality of his sentence. *Williams v. State*, 910 N.W.2d 736, 742-43 (Minn. 2018).

The Minnesota Rules of Criminal Procedure provide that a “sentence not authorized by law” may be corrected at any time. Minn. R. Crim. P. 27.03, subd. 9. The state argues that this rule is not applicable because Cole’s sentence was negotiated as part of his plea agreement. The state maintains that the motion must be treated as a petition for postconviction relief and, as such, is time-barred.³ We agree.

² The state did not appeal the district court’s order vacating the sentence for the third-degree sale conviction.

³ We note that the district court did not reach this issue and based its decision on the merits of Cole’s argument, which we address below. This court, nevertheless, “can affirm the denial of postconviction relief on grounds other than those on which the postconviction court relied.” *Dukes v. State*, 718 N.W.2d 920, 921-22 (Minn. 2006).

The Minnesota Supreme Court has made clear that Minn. R. Crim. P. 27.03, subd. 9, does not apply to sentences imposed pursuant to a plea agreement where the sentence was negotiated as part of the agreement. *State v. Coles*, 862 N.W.2d 477, 481 (Minn. 2015). In *Coles*, the supreme court reviewed a defendant's motion to correct his sentence brought more than two years after his conviction became final. *Id.* at 479. The defendant was sentenced pursuant to the terms of a plea agreement where the state agreed to dismiss several charges, and the defendant agreed to receive a sentence involving an upward durational departure on a lesser charge. *Id.* at 477. The issue presented to the supreme court was whether the defendant, given that the sentence was negotiated as part of a plea agreement, "may challenge his sentence in a motion to correct his sentence, [under] Minn. R. Crim. P. 27.03, subd. 9 . . . or whether his challenge must be brought in a petition for postconviction relief, [under] Minn. Stat. § 590.01, subd. 1." *Id.* at 477-78.

The supreme court determined that, "[i]n contrast to the comprehensive language of section 590.01 [relating to petitions for postconviction relief], the plain language of Rule 27.03 is limited to sentences." *Id.* at 480. The court reasoned that, because the defendant entered into a negotiated plea agreement accepted by the district court, if the defendant's sentence was modified, "'the terms of the plea agreement' the parties reached will, in effect, have been rejected." *Id.* "If the defendant succeeds in reducing his or her sentence, he or she retains the benefit of the reduced criminal charge but the State no longer receives the benefit of the longer sentence." *Id.* at 481. The court noted that, since the sentence was part and parcel of a negotiated plea agreement, the defendant's motion to reduce the sentence necessarily impacted more than "simply the sentence." *Id.* at 481-82.

Consequently, the supreme court concluded that rule 27.03 was not applicable because the sentence implicated the plea agreement itself, and that the motion must therefore be treated as a petition for postconviction relief. *Id.*

The sentences here were also imposed as part of a negotiated plea agreement and thus present the same scenario as in *State v. Coles*. Two weeks of the trial had already elapsed by the time the plea agreement was presented to the court. Cole was being tried on charges of first-degree murder and attempted first-degree murder and was facing a life sentence if convicted of the murder charge. During the plea hearing, the district court characterized the plea agreement as “a very favorable negotiation for the defendant.” Since this plea agreement contained both reduced charges and an agreement on the specific sentences to be imposed, including the upward durational departure on the aiding and abetting attempted-murder charge, Cole’s motion does not impact “simply the sentence” and, as in *Coles*, rule 27.03 does not apply. Because his request for correction of his sentence implicates the plea agreement itself, Cole’s motion must be construed as a petition for postconviction relief under chapter 590 of the Minnesota statutes.

Section 590.01 of the postconviction statute provides that “[n]o petition for postconviction relief may be 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). Because Cole filed his motion almost 12 years after the entry of his sentence and did not file a direct appeal, his motion is barred by the two-year limitations period set out in Minn. Stat. § 590.01, subd. 4 (2018). Therefore, the district court did not abuse its discretion by denying Cole’s motion to correct or reduce his sentence.

II. In addition to being time-barred, Cole's claims fail on the merits.

Were we to review Cole's arguments on the merits, they would fail. First, with regard to his argument that he should not have been sentenced for both aiding and abetting the murder of S.A. and aiding and abetting the attempted murder of J.K., multiple sentences are appropriate when the crime involves multiple victims, even when the offenses arise out of a single behavioral incident. *State v. Skipintheway*, 717 N.W.2d 423, 426 (Minn. 2006). Here, there were two victims and thus it was appropriate to impose two sentences.

Cole also contends that imposing consecutive sentences for the two crimes, aiding and abetting the murder of S.A. and aiding and abetting the attempted murder of J.K., unfairly exaggerates the criminality of his conduct because sentencing him to both "effectively doubled his sentence." His sentence for aiding and abetting attempted murder, however, was stayed. Thus, if Cole satisfies the conditions of the stayed sentence, he will only serve a prison sentence for one of the crimes.⁴

Moreover, consecutive sentences under comparable circumstances have been affirmed as reasonable in many other cases. For example, in *State v. Cruz-Ramirez*, the supreme court held that a sentence of life in prison for first-degree murder, plus three consecutive 186-month sentences for attempted first-degree murder of the other victims,

⁴ The conditions for Cole's stayed sentence are: (1) he "pay restitution to [J.K.] for his medical expenses caused by the shooting, to the extent that they're not paid by insurance or some other third-party medical provider"; (2) he remain law-abiding; (3) he has no possession of firearms; (4) he have no controlled-substance offenses; and (5) he has "no contact with [J.K.]."

did not unfairly exaggerate the criminality of his conduct. 771 N.W.2d 497, 501, 512 (Minn. 2009). The court noted that “we have upheld similar sentences before.” *Id.* at 512.

Here, Cole challenges his stayed 240-month sentence for aiding and abetting attempted first-degree murder. Because Cole’s sentence was stayed, as opposed to executed, Cole’s sentence is arguably more lenient than Cruz’s consecutive, executed 186-month sentence for the same offense. In addition, we note, as did the district court, that Cole’s “bottom of the Minnesota Sentencing Guideline box” for the aiding and abetting murder conviction must be balanced against the upward durational departure for the aiding and abetting attempted-murder conviction. Finally, Cole agreed to the upward durational departure as part of his plea agreement and expressly waived his right to a trial on the facts underlying the upward departure.

Because Cole’s sentence was consistent with past sentences received by other offenders for similar offenses, the sentence does not unfairly exaggerate the criminality of his conduct. *State v. Alger*, 941 N.W.2d 396, 403 (Minn. 2020). Therefore, the district court did not abuse its discretion in upholding Cole’s sentences on the two aiding and abetting convictions.

Affirmed.