STATE OF MINNESOTA
IN COURT OF APPEALS
A24-1570

State of Minnesota,
Respondent,

vs.

Thomas Jay Shern,
Appellant.

Filed April 21, 2025
Affirmed
Jesson, Judge[*]

Polk County District Court
File No. 60-CR-18-1832

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Wheelock, Judge; and Jesson, Judge.

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

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Thomas Jay Shern challenges a probation-revocation decision, arguing that the district court erred by imposing an executed felony sentence consecutive to his gross misdemeanor sentences, thereby denying him jail credit to which he is entitled. Because appellant's challenge to the sentences which resulted from his probation revocation was procedurally defective and untimely, we affirm.

FACTS

In February 2019, appellant pleaded guilty to a charge of controlled substance crime in the second degree—sale within a prohibited zone. The plea agreement provided a guideline sentence, stayed, consecutive to two year-long gross-misdemeanor sentences in other files, and probation for ten years. On April 2, 2019, appellant received a dispositional departure, and the district court imposed a bottom-of-the-box sentence of 58 months in prison, stayed, consecutive to the two executed gross-misdemeanor sentences. On April 28, 2019, he was released from custody in the two gross-misdemeanor cases. He did not file a direct appeal challenging his conviction and sentence for the controlled substance crime.

Later that year, in October 2019, appellant was charged with controlled-substance crime in the third degree—possession within a prohibited zone, and fourth-degree driving while impaired—body containing schedule I/II controlled substance. A probation violation report was also filed. When he failed to appear for court in February 2020, he was charged

with felony failure-to-appear for court and a warrant was issued for his arrest. He appeared in court in December 2021 on the warrant, and his conditions of release were revoked.

In April 2022, appellant pleaded guilty in two other files in exchange for execution of the 58-month sentence first imposed in 2019. At the hearing he requested and received a furlough for May 5-7, 2022, to attend his grandfather's funeral, and sentencing was scheduled for May 10, 2022. But appellant did not return from the furlough and he did not appear in court for his sentencing hearing. He was charged with felony escape-from-custody and felony failure-to-appear for court.

He next appeared in court in December 2023 on a warrant, and his conditions of release were revoked. In July 2024, he appeared in court, fired his attorney, and announced his intention to proceed self-represented; he also claimed that he was seeking a new trial because his counsel had been ineffective. The consecutive 58-month sentence imposed in April 2022 was again imposed, with a consecutive 90-day sentence and concurrent 39-month and 17-month sentences, with 349 days of jail credit.

On appeal, appellant challenges his sentence, arguing that he is entitled to jail credit for an additional 187 days he served on the executed gross-misdemeanor charges because, if his gross-misdemeanor convictions had been felony convictions, his stayed 58-month sentence for the second-degree controlled-substance crime would have been concurrent, and that a sentence consecutive to the gross-misdemeanor sentences was not allowed.

DECISION

Appellant's challenge to the consecutive sentence first imposed in April 2019 is in effect a challenge to the plea agreement made in February 2019 and it is both untimely and

procedurally defective.[1] Issues involving the interpretation and enforcement of plea agreements, like this one, are matters of law that we review de novo. *See State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000) (citation omitted).

Altering a sentence imposed as the result of a plea agreement is not merely an alteration of a sentence; it is actually a modification of the plea agreement itself. If a sentence imposed pursuant to a plea agreement is modified, "the terms of the plea agreement the parties reached will, in effect, have been rejected." *State v. Coles*, 862 N.W.2d 477, 480 (Minn. 2015) (quotation omitted). When a sentence is imposed as part of a plea agreement, a challenge to that sentence involves not only the sentence but the plea agreement as well. *Id.* at 481. Therefore, the challenge "is properly viewed as a petition for postconviction relief under Minn. Stat. § 590.01, not as a motion to correct a sentence under [Minn. R. Crim. P.] 27.03." *Id.* at 482. Thus, because a defendant's "motion to correct his sentence implicates his plea agreement, [the defendant's] exclusive remedy is a petition for postconviction relief." *Id.* at 477.

The district court was aware of this and told appellant: "Procedurally, you've not filed any motion that's properly before the Court today to attempt to take any action to challenge or attack the sentence that was imposed over five years ago . . . . [T]here's

[1] Because we affirm on these grounds, we do not reach the issue of appellant's jail time. We note, however, that when appellant said his attorney, whom he had just fired, told him that he had 515 days of jail credit, the prosecutor explained that the attorney had relied on a mistaken report from probation which had failed to realize that appellant was not entitled to jail credit from the earlier gross-misdemeanor sentences on the consecutive 58-month sentence.

nothing before the Court procedurally to attack that original item." We agree with the district court's assessment: appellant's challenge to his 2019 sentence could only be made in a postconviction petition, not in a probation-revocation proceeding like the one before us.

Moreover, "[i]n felony and gross misdemeanor cases, an appeal by the defendant must be filed within 90 days after final judgment or entry of the order being appealed." Minn. R. Crim. P. 28.02, subd. 4(3)(a). Since appellant did not challenge either his conviction or his sentence within 90 days of the date they were imposed in 2019, they became final after 90 days. The district court also addressed the untimeliness of appellant's challenge to his sentence: "The Court believes that any appellate period . . . [began on] April 2, 2019, [and] those ships sailed a long time ago," and "the two-year window often contemplated by the post-conviction relief statute is already expired—well, quite some time ago." We agree that appellant's right to challenge his guilty plea or the plea agreement in a petition for postconviction relief expired two years after the entry of judgment of conviction or the sentence.

In sum, appellant never filed the requisite petition for the postconviction relief he is seeking, and the period during which he could have filed a petition has expired. We therefore affirm his sentence

Affirmed.