

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-633**

State of Minnesota,
Respondent,

vs.

Daniel M. Castillo,
Appellant.

**Filed January 15, 2008
Reversed and remanded
Hudson, Judge**

Steele County District Court
File No. K6-05-1240

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101-2134; and

Douglas L. Ruth, Steele County Attorney, 303 South Cedar, Owatonna, Minnesota 55060 (for respondent)

John M. Stuart, State Public Defender, Sean Michael McGuire, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this sentencing appeal, appellant Daniel Castillo challenges the district court's sua sponte decision to impose consecutive guidelines sentences of 60 and 98 months following appellant's guilty pleas to one count of drive-by shooting of an occupied target and one count of felon in possession of a firearm. Because we conclude that the reasons given by the district court for its sentencing departure do not justify the departure, and because the record does not contain sufficient evidence to justify the departure, we reverse and remand for the imposition of concurrent sentences.

FACTS

Appellant Daniel Castillo pleaded guilty in Steele County District Court to one count of drive-by shooting of an occupied target in violation of Minn. Stat. § 609.66, subd. 1e(b) (2004), and one count of felon in possession of a firearm in violation of Minn. Stat. § 609.165, subd. 1b(a) (2004). Appellant's plea agreement provided that the felon-in-possession charge would be sentenced first and that the prosecution would not seek more than 98 months of confinement, the presumptive guidelines sentence for the drive-by shooting charge.

At sentencing, the prosecutor restated the agreement to recommend a 98-month sentence. The defense attorney stated that the felon-in-possession charge, which required a mandatory, 60-month sentence, was not on the permissive, consecutive sentencing list. He stated that there would be concurrent sentencing and that the second-degree assault

drive-by shooting was a level-eight offense, which called for a 98-month sentence with appellant's criminal-history score of five.

The district court imposed a 60-month sentence on the felon-in-possession charge and a 98-month sentence on the drive-by shooting charge, but, sua sponte, made the sentences consecutive. The district court stated on the record that it based the imposition of consecutive sentencing on "the seriousness of [the] offense and the fact that [appellant had] been involved in this same conduct previously." This appeal follows. The state has not filed a brief, and this court determines the case on its merits under Minn. R. Civ. App. P. 142.03.

DECISION

Generally, concurrent sentencing is presumptive when an offender is convicted of multiple current offenses. Minn. Sent. Guidelines II.F. In certain situations listed in the guidelines, consecutive sentencing is presumptive; in other listed situations, consecutive sentencing is permissive. *Id.* "[I]mposition of consecutive sentences for reasons other than those set forth in Minn. Sent. Guidelines II.F. constitutes a [sentencing] departure . . . and requires the existence of substantial and compelling reasons identified on the record by the district court." *State v. Rannow*, 703 N.W.2d 575, 579 (Minn. App. 2005).

The sentencing guidelines allow permissive consecutive sentencing for multiple current offenses if both are on the list for permissive consecutive sentencing. Minn. Sent. Guidelines II.F., VI. The drive-by shooting offense is on that list, but the felon-in-possession offense is not. Minn. Sent. Guidelines VI. Therefore, under the guidelines, the district court's imposition of consecutive sentencing was a departure. Minn. Sent.

Guidelines II.F. We review the decision to depart from the sentencing guidelines under an abuse-of-discretion standard. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002).

If a district court decides to depart from the sentencing guidelines, “it must articulate substantial and compelling reasons justifying the departure.” *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999). The district court must weigh “whether the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). The court is required to “state, on the record, findings of fact as to the reasons for departure” and to file a departure report with the guidelines commission. Minn. R. Crim. P. 27.03, subd. 4(C).

Appellant argues that the district court abused its discretion by imposing consecutive sentencing without articulating any grounds for departure or filing a departure report. The Minnesota Supreme Court has provided guidelines for reviewing courts to ensure compliance with the requirement that departures have adequate support in the record:

1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.
2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.
3. If the reasons given justify the departure, the departure will be allowed.
4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.
5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

Williams v. State, 361 N.W.2d 840, 844 (Minn. 1985). Under *Williams*, the district court's failure to file a departure report does not necessarily preclude a sentencing departure. *See id.* at 843-44 (holding that district court's stated reasons on the record justifying the sentencing departure "suffice[d] as a departure report"). And the district court articulated reasons on the record for the departure, thereby satisfying the first requirement in *Williams*.

But the district court's stated reasons for imposing consecutive sentencing do not justify the departure. Factors "already taken into account by the legislature in determining the degree of seriousness of the offense" are "inappropriate bases for departure." *Taylor v. State*, 670 N.W.2d 584, 589 (Minn. 2003). The district court's stated reason for departing, the "seriousness of th[e] offense," does not provide an adequate reason for departure because it was already taken into account in the guidelines sentence for that offense. Similarly, the "fact that [appellant had] been involved in the same conduct previously" relates to appellant's criminal-history score, which was already reflected in the calculation of his guidelines sentence.

Because the district court's stated reasons for departure were inadequate, we examine the record to determine whether it supports a departure. *See Williams*, 361 N.W.2d at 844. The district court may impose an upward departure based on an offender's status as a "dangerous offender who commits a third violent crime" if a factfinder determines that the offender is a danger to public safety. Minn. Stat. § 609.1095, subd. 2 (Supp. 2005); Minn. Sent. Guidelines II.D.2.b(8). The record shows that

appellant pleaded guilty to two counts of second-degree assault arising from his participation in a drive-by shooting in 2001. But the dangerous-offender statute defines a “prior conviction” as a “conviction that occurred before the offender committed the next felony resulting in a conviction and before the offense for which the offender is being sentenced under this section.” Minn. Stat. § 609.1095, subd. 1(c) (Supp. 2005). Thus, the statute requires two sequential convictions before the district court may apply the statute to impose an upward durational departure for a third conviction. *See State v. Huston*, 616 N.W.2d 282, 284 (Minn. App. 2000) (explaining sequential requirement for multiple convictions under similar career-offender statute, Minn. Stat. § 609.1095, subd. 4 (1998)). This sequencing requirement is meant to exclude “prejudicial use of multiple convictions resulting from a short crime spree” and to allow postconviction opportunities for reform before the next offense. *Id.* Therefore, because both of appellant’s previous felony convictions, which arose out of the same incident, could not be counted toward establishing the sequential-conviction requirement under the dangerous-offender statute, the record contains insufficient support for an upward departure on that basis. Further, the record does not support an upward departure on the basis of aggravating factors. Minn. Sent. Guidelines II.D.2.b. Because the district court failed to provide adequate reasons for the departure, and because the record lacks sufficient evidence to justify the departure, we conclude that the district court abused its discretion by imposing consecutive sentences. We therefore reverse and remand for the imposition of concurrent sentences.

Appellant also argues that the district court erred by imposing consecutive sentences without appellant waiving his rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); by failing to sentence appellant, if consecutive sentencing was authorized, using a zero criminal history score for the drive-by shooting offense; and by violating appellant's plea agreement. Because we have concluded that appellant is entitled to sentencing relief, we need not consider these alternative arguments. Further, the record does not show that appellant moved for withdrawal of his plea. Because this issue was not raised in the district court, we decline to consider it on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Reversed and remanded.