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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0329**

State of Minnesota,
Respondent,

vs.

Frank Jessie LaRose,
Appellant.

**Filed April 15, 2008
Affirmed in part, reversed in part, and remanded
Minge, Judge**

Cass County District Court
File No. CR-06-1115

Lori Swanson, Attorney General, Kelly O'Neill Moller, Assistant Attorney General, 1800
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Considered and decided by Kalitowski, Presiding Judge; Minge, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

MINGE, Judge

Appellant challenges the district court's (a) denial of his request for a downward
sentencing departure following a conviction for felony escape; (b) imposition of a

consecutive instead of a concurrent sentence for the escape conviction; and (c) failure to calculate the consecutive sentence using a criminal history score of zero. Because we conclude that the district court did not abuse its discretion in denying a downward departure or imposing a consecutive sentence, but erred in failing to use a criminal history score of zero when calculating the length of appellant's sentence for escape, we affirm in part, reverse in part, and remand for resentencing.

FACTS

Appellant Frank Jessie LaRose, who was 18 years old at the time of sentencing in this case, has a long history of juvenile offenses. In September 2005, LaRose pleaded guilty as an adult to being a felon in possession of a firearm and attempted aggravated robbery. The district court sentenced LaRose to 60 months, stayed execution of the sentence, and placed him on probation for ten years. Following an incident in which he was charged with assault and terroristic threats and an alcohol-related probation violation, LaRose was jailed and held pending a chemical-dependency evaluation and trial. The district court granted LaRose a furlough from jail to participate in an inpatient-treatment program and then continued the furlough to allow him to complete his treatment at the Thunderbird House in Duluth.

On May 2, 2006, LaRose left the Thunderbird House without staff permission and failed to return to the Cass County jail, thereby violating the terms of his furlough. LaRose was arrested and charged with felony escape from custody, in violation of Minn. Stat. § 609.485, subds. 2(1), 4(a)(1) (2004). In August 2006, LaRose pleaded guilty to the escape offense.

At the hearing for disposition on LaRose's probation violations and for sentencing on the new escape conviction, the state asked the district court to revoke probation, execute LaRose's 60-month stayed sentence, and sentence him consecutively for the escape violation. LaRose asked the district court to both continue his probation and place him on probation for the new offense.

The district court revoked LaRose's probation, executed his previously stayed 60-month sentence, and imposed a 21-month consecutive sentence for the escape conviction. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court abused its discretion by refusing to place LaRose on probation for the escape offense, thereby denying the request for a downward sentencing departure.

Rejection of a request for a departure from the sentencing guidelines is reviewed for abuse of discretion. *See State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). A district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *See* Minn. Sent. Guidelines II.D; *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7. Although "amenability to probation" is not listed in the comments to the guidelines, a district court may impose probation "in lieu of an executed sentence when the defendant is particularly

amenable to probation.” *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). In determining a defendant’s amenability to probation, the district court may consider the defendant’s age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Escape from custody under Minn. Stat. § 609.485, subd. 4(a)(1), is a severity-level-III offense. Minn. Sent. Guidelines V. The presumptive sentence for the conviction was 12 months executed for a criminal history score of zero. Minn. Sent. Guidelines IV. Accordingly, placing LaRose on probation would have represented a downward dispositional departure from the sentencing guidelines. *Id.*, II.D.

LaRose contends that substantial and compelling circumstances exist warranting his continued placement on probation. At the sentencing hearing, LaRose presented a pre-sentence psychological evaluation that recognized his diagnosis as bipolar and recommended further evaluation and treatment for the disorder. LaRose argued that the Department of Corrections would be unable to help him address challenges stemming from his mental health. LaRose emphasizes on appeal that the probation staff was willing to continue working with him, that his family would provide support, that he had successfully completed the Mash-Ka-Wisen treatment program, that he exhibited no violent or aggressive behavior during or after the escape from the Thunderbird House, and that there is no evidence that he engaged in any illegal behavior after his escape from Thunderbird House.

At the sentencing hearing, the prosecutor argued that LaRose not only violated his probation multiple times over the course of the preceding year, but he engaged in new

unlawful conduct. LaRose's extensive juvenile record, including parole violations related to the consumption of intoxicants and controlled substances, was also highlighted. Although the prosecutor acknowledged that probation was willing to work with LaRose, he recommended execution of the prior sentence and a consecutive sentence on the new escape charge.

LaRose's family and mental health circumstances are not listed as mitigating factors in the guidelines. See Minn. Sent. Guidelines II.D.2. However, this list is nonexclusive. *Id.* The district court had discretion to place LaRose on probation if it found that substantial grounds excused or mitigated LaRose's culpability, *id.*, II.D.2.a.(5), or that he was "particularly amenable to probation," *Gebeck*, 635 N.W.2d at 389.

The record indicates that the district court carefully considered probation. The district court discussed its decision as follows:

Mr. LaRose, this is a difficult decision, but I have to be concerned about public safety. And your record of crime does not make me feel comfortable that I can allow you to be a risk to public safety. It's just a matter of time before you really hurt somebody very badly.

The district court had continued an earlier hearing to allow for full review of LaRose's psychological evaluation before sentencing. Although the evaluation recommended continued assessment and mental health treatment, it also advised holding LaRose legally accountable for his conduct. The district court ultimately determined that LaRose's psychological report would be given to the Commissioner of Corrections. The district court observed that programs would be available in prison to treat mental illness and noted its hope that LaRose would take advantage of those services. It is apparent that the

district court weighed the parties' arguments and LaRose's condition in determining his sentence. We conclude that the district court did not abuse its discretion in denying LaRose a dispositional departure based upon the circumstances LaRose presented.

II.

The second issue is whether the district court unfairly exaggerated the criminality of LaRose's conduct by applying a permissive, consecutive sentence for the escape conviction.

"We will not reverse a district court's decision to impose a consecutive sentence unless there has been a clear abuse of discretion." *Neal v. State*, 658 N.W.2d 536, 548 (Minn. 2003). A district court's "decision regarding permissive, consecutive sentences will not be disturbed unless the resulting sentence unfairly exaggerates the criminality of the defendant's conduct." *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). In considering whether a sentence unfairly exaggerates the criminality of particular conduct, reviewing courts have found it helpful to compare sentences imposed in similar cases. *Neal*, 658 N.W.2d at 548; *State v. Rhoades*, 690 N.W.2d 135, 140 (Minn. App. 2004). The guidelines allow district courts to apply consecutive sentences for escape convictions from non-executed prison sentences. Minn. Sent. Guidelines cmt. II.F.04.

As noted above, LaRose does not challenge the district court's authority to apply a consecutive sentence for a felony escape conviction. But LaRose contends that a consecutive sentence unfairly exaggerates the criminality of his conduct because Thunderbird House was a halfway house and his leaving an unsecured facility represents the "least serious escape possible." He also points out that there was no indication of

violence or illegal acts committed either during or after the escape. However, we note that LaRose's presentence investigation report indicated that he had a history of escaping from juvenile facilities and that he violated probation several times. LaRose cites no court-established policy of imposing lighter sentences for certain escape violations. We conclude that the district court did not abuse its discretion or unfairly exaggerate the criminality of appellant's conduct by applying the permissive, consecutive sentence for the escape violation.

III.

The third issue is whether the district court erred by failing to reduce LaRose's criminal history score to zero before calculating the length of his permissive consecutive sentence.

Both parties acknowledge that consecutive sentencing is permissive for felony escape convictions in LaRose's situation. Minn. Sent. Guidelines II.F. In the case of a permissive, consecutive sentence, as is the case here, "for each offense sentenced consecutive to another offense . . . a zero criminal history score . . . shall be used in determining the presumptive duration." *Id.*

Once the district court exercised its discretion to impose a permissive, consecutive sentence for the escape conviction, the guidelines required the sentencing court to use a criminal history score of zero when calculating the presumptive duration. Here, the district court used a criminal history score of five and sentenced LaRose to 21 months instead of 12 months and one day. Accordingly, we affirm the district court's decision to

impose a consecutive, executed sentence, but we reverse the length of the sentence for escape and remand for imposition of the guideline consecutive sentence of 12 months and one day.

Affirmed in part, reversed in part, and remanded.

Dated: