STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0531

State of Minnesota,
Respondent,

vs.

Colleen Louise Rieck,
Appellant.

Filed July 8, 2008
Affirmed
Lansing, Judge

Hennepin County District Court
File No. 06032313

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

LANSING, Judge

Colleen Rieck entered a negotiated plea of guilty to six counts of theft by swindle, waived her right to a jury determination of sentence-enhancement factors, and received the negotiated upward durational departure from the presumptive guidelines sentence. In this sentencing appeal, Rieck challenges the validity of two of the three factors that supported the upward departure for a major economic offense and argues that the prosecutor engaged in improper sentence manipulation in charging seven offenses rather than three. Because the facts and the law establish that the major-economic-offense factors are valid and because the prosecutor's charging process did not impermissibly manipulate Rieck's sentence, we affirm.

F A C T S

The state charged Colleen Rieck with six counts of theft by swindle and one count of attempted theft by swindle based on her theft of $885,113.18 over an eighteen-month period. Rieck was employed as a claims examiner for Wilson-McShane, a third-party administrator that handles labor-management trust funds. Wilson-McShane receives payments from employers, determines eligibility, pays health claims, and processes pensions. Rieck, whose job responsibilities included the payment of claims, fraudulently created accounts in her name using the social-security number of eligible participants. She then generated fictitious prescription and medical claims and created 415 fraudulent-claim checks which she made payable to herself. After an internal investigation, Wilson-

McShane reported to the Bloomington Police Department, in May 2006, that Rieck had embezzled an estimated $900,000.

Under a negotiated plea agreement, Rieck pleaded guilty to six of the seven counts—count one and counts three through seven—and the state dismissed count two, the attempt count. On count six the district court imposed the agreed-on executed sentence of an upward departure of 100 months from the guidelines sentence of fifty-seven months, and on count seven the district court imposed the agreed-on consecutive sentence of twenty-one-months, stayed for ten years. Because the stayed sentence was consecutive rather than concurrent, it also involved an upward departure from the sentencing guidelines. On the remaining counts, the district court imposed the presumptive sentences, with each sentence concurrent to count six.

The district court based the upward departure on its determination that counts six and seven involved multiple incidents, that the total amount for each count was substantially greater than the minimum loss specified in the statute, and that Rieck used her position at Wilson-McShane to facilitate the offenses.

Rieck argues that her sentence of 100 months on count six and her consecutive sentence on count seven must be reduced to concurrent sentences of fifty-seven months because two of the three departure factors were invalid. She also argues that the guidelines sentence is a product of prosecutorial manipulation and must therefore be reduced to a thirty-three-month probationary sentence.

D E C I S I O N

We review a departure from the Minnesota Sentencing Guidelines presumptive sentence for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006). Reversal is warranted only if the reasons for the departure are improper or inadequate. *State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008).

Under the sentencing guidelines, an upward departure may be imposed if the crime was a "major economic offense" and two or more of the following circumstances are present: (1) the offense involved multiple victims or multiple incidents, (2) the offense involved monetary loss substantially greater than the usual offense or the minimum loss specified in the statutes, (3) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time, (4) the defendant used her position to facilitate the commission of the offense, or (5) the defendant has been involved in conduct similar to the current offense. Minn. Sent. Guidelines II.D.2.b.(4). A "major economic offense" is defined as an "illegal act or series of illegal acts committed by other than physical means and by concealment or guile to obtain money or property, to avoid payment or loss of money or property, or to obtain business or professional advantage." *Id.*

The district court departed from the sentencing guidelines on counts six and seven. The district court found three circumstances supporting a departure from the presumptive sentence: (1) Rieck used her position at Wilson-McShane to facilitate the commission of the offenses, (2) there were multiple incidents involved in each of the offenses, and (3)

the amounts involved in the offenses were significantly greater than the $35,000 provided in the statute. We examine each of the factors separately.

First, the record unequivocally supports the district court's determination that Reick used her position as a claims examiner at Wilson-McShane to facilitate the offense. Reick does not dispute that the district court properly relied on this factor.

Second, the record supports the district court's determination that the offenses involved multiple incidents—count six included 78 fraudulent checks created on nineteen dates and count seven included 70 checks created on twelve dates.

Rieck argues that the existence of multiple incidents cannot support the upward departure because she was charged in a multiple-count complaint that aggregated multiple incidents. The complaint against Rieck contained seven counts. Count one alleged that, from January through June 2005, Rieck fraudulently created 71 checks which amounted to a total of $69,598.16. Count two alleged that, on May 8, 2006, Rieck attempted to embezzle in excess of $35,000. Count three alleged that, from July through December 2005, Rieck fraudulently created 111 checks which amounted to a total of $178,580.46. Count four alleged that, in January 2006, Rieck fraudulently created 33 checks which amounted to a total of $46,692.32. Count five alleged that, in February 2006, Rieck fraudulently created 52 checks which amounted to a total of $90,088.02. Count six alleged that, in March 2006, Rieck fraudulently created 78 checks which amounted to a total of $211,726.03. Count seven alleged that, in April 2006, Rieck fraudulently created 70 checks which amounted to a total of $292,408.19.

To support her argument, Rieck relies on *Thompson*, in which the supreme court determined that the district court abused its discretion by finding that an aggravated sentence was supported by the existence of multiple incidents. 720 N.W.2d at 830. The defendant in *Thompson* had been similarly charged with multiple counts of theft by swindle. *Id.* at 823. The supreme court held that the district court abused its discretion because it used the transactions charged under all nine counts to support the departure. *Id.* at 829-30. The supreme court determined: "the sentencing court's use of these transactions again to support its major economic offense finding amounted to using the *underlying conduct from one conviction for which Thompson was convicted to support the upward departures for separate convictions*." *Id.* (emphasis added).

In this case, unlike in *Thompson*, the district court in sentencing Rieck did not rely on the transactions charged under any of the other counts for imposing the upward departure on counts six and seven. The district court specifically found that there were multiple incidents of theft found in count six—78 checks on nineteen dates—and multiple incidents of theft found in count seven—70 checks on twelve dates. Thus, the district court did not double count incidents, and it properly found that counts six and seven involved multiple incidents.

Although an upward departure can be supported by the existence of only two of the circumstances listed in Minn. Sent. Guidelines II.D.2.b.(4), we note that the record also supports the district court's finding that the monetary loss was greater than the statutory minimum. The offenses involved monetary losses substantially greater than the

minimum loss of $35,000 specified in the statute—the loss in count six was $211,746.03 and the loss in count seven was $292,408.19.

Rieck again argues that this finding was improper under *Thompson* because it relies on double counting. But *Thompson* is distinguishable because it provides that a double-counting issue arises when the defendant is convicted of and sentenced for multiple counts and the district court uses the conduct underlying *one* count to support the aggravated factor on *another* count. 720 N.W.2d at 830. In this case, unlike in *Thompson*, the district court did not rely on any other count when determining that Rieck's conduct under count six involved a monetary amount substantially greater than the statutory minimum and similarly did not rely on any other count when making that determination under count seven. The district court found that the loss amount in count six was in excess of $211,000 and the loss amount in count seven was in excess of $292,000. The statute specifies a minimum loss amount of $35,000. Minn. Stat. § 609.52, subd. 3(1) (2004). Thus, the district court could properly find that count six and seven each involved losses substantially greater than the minimum loss amount specified in the statute. This finding provides additional support for the district court's decision to impose an upward departure.

Finally, Rieck argues that her sentence must be reduced because the state engaged in sentence manipulation when it aggregated the transactions in a way that allowed for convictions on six counts. She emphasizes that the state could have "aggregated the transactions into three counts" and that the theft-by-swindle statute does not specify how incidents should be aggregated. Our review of the record indicates that this issue was not

raised in the district court. When an issue has not been raised in the district court, it generally cannot be argued on appeal. *State v. Henderson*, 706 N.W.2d 758, 759 (Minn. 2005).

Even if Rieck had properly preserved the issue for appeal, her argument is not persuasive. The supreme court addressed prosecutorial discretion under the theft-by-swindle statute in *State v. Hanson*, 285 N.W.2d 483, 485 (Minn. 1979). As in this case, the appellant in *Hanson* challenged the prosecutor's discretion to aggregate theft offenses. *Id.* The supreme court rejected the challenge, reasoning that the statute puts a potential defendant on notice of the possible criminal penalties arising from her actions and "[i]f the defendant chooses to commit a series of thefts within 6 months, [she] subjects [her]self to the possibilities of trials and punishments for each theft, of a single trial and punishment for all thefts, or of trials and punishments for combinations of thefts." *Id.* The *Hanson* holding is consistent with the general rule that "a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion." *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996).

Rieck contends that *Hanson* has been contradicted by more recent cases which hold that sentence manipulation can occur when a statute "provides for wildly different penalties without proof of a different crime." For this proposition, she cites *State v. Ziemet*, 696 N.W.2d 791 (Minn. 2005); *State v. Folley*, 438 N.W.2d 372 (Minn. 1989); *State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007); and *State v. Craven*, 628 N.W.2d 632 (Minn. App. 2001), *review denied* (Minn.

Aug. 15, 2001). But these cases do not contradict *Hanson*, which specifically addresses the theft-by-swindle statute and holds that it does not give prosecutors "unfettered discretion to charge offenses." 285 N.W.2d at 485. The aggregation of Rieck's offenses was not an abuse of prosecutorial discretion or improper sentence manipulation.

Affirmed.