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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0628**

State of Minnesota,
Appellant,

vs.

Justin White,
Respondent.

**Filed January 27, 2009
Reversed and remanded
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-07-024740

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

Mike Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for appellant)

Justin White, OID #225213, MCF-Lino Lakes, 7525 Fourth Avenue, Lino Lakes, MN 55014 (pro se respondent)

Considered and decided by Schellhas, Presiding Judge; Johnson, Judge; and Crippen, Judge.*

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

UNPUBLISHED OPINION

JOHNSON, Judge

Justin White pleaded guilty to a felony charge of being a prohibited person in possession of a firearm. The district court sentenced White to 54 months, which is a downward durational departure from the statutory mandatory minimum sentence of 60 months. On appeal, the state argues that the district court erred because a sentence of not less than 60 months is required. We agree and, therefore, reverse and remand.

FACTS

On January 9, 2008, White pleaded guilty to being a prohibited person in possession of a firearm in violation of Minn. Stat. §§ 624.713, subds. 1(b), 2(b), 609.11 (2006). The district court expressed its intention to impose a sentence of 54 months of imprisonment on that charge. The state objected to the proposed sentence on the ground that White was subject to a mandatory minimum prison sentence of 60 months. Notwithstanding the objection, the district court imposed an executed sentence of 54 months of imprisonment. The state appeals.

DECISION

The state argues that the district court erred by granting White a downward durational departure from the statutory mandatory minimum sentence of 60 months. Specifically, the state argues that the 54-month prison sentence is erroneous because subdivisions 5(b) and 8(b) of section 609.11 of the Minnesota Statutes require that White be sentenced to not less than 60 months of imprisonment. Whether a statute requires a

“mandatory minimum term of incarceration is a question of statutory construction which this court reviews de novo.” *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004).

Absent a legislative determination to the contrary, it is presumed that crimes do not have minimum sentences. *State v. Ronquist*, 600 N.W.2d 444, 446 (Minn. 1999). The legislature has codified this principle in a statute that states, “All commitments to the commissioner of corrections for imprisonment of the defendant are without minimum terms . . . except as otherwise provided in this chapter.” Minn. Stat. § 609.11, subd. 1.

White’s sentence is governed by a statute that provides, “Any defendant convicted of violating section 609.165 or 624.713, subdivision 1, clause (b), shall be committed to the commissioner of corrections for not less than five years” Minn. Stat. § 609.11, subd. 5(b). In addition, another subdivision of the same section provides:

The court may not, on its own motion or the prosecutor’s motion, sentence a defendant without regard to the mandatory minimum sentences established by this section if the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon.

Minn. Stat. § 609.11, subd. 8(b). White has a prior conviction of unlawful possession of a pistol. At sentencing, the state objected to the 54-month sentence on the basis of subdivision 8(b), and White did not dispute the state’s contention that subdivision 8(b) applies, thereby essentially conceding that his prior conviction makes him subject to enhanced sentencing pursuant to section 609.11, subdivision 8(b).

The plain language of subdivisions 5(b) and 8(b) compels the conclusion that the district court erred by imposing a sentence of only 54 months. That conclusion is

buttressed by *State v. Sheppard*, 587 N.W.2d 53 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999), in which this court considered whether section 609.11, subdivision 8(b), allowed a district court to depart downward from the mandatory minimum sentence established by subdivision 5(b). *Id.* at 54-56. At the time, section 609.11, subdivision 5(b), required a term of 18 months for a person convicted of a violation of section 624.713, subdivision 1(b), which was Sheppard's offense. *Id.* at 55. The district court imposed a sentence greater than 18 months but stayed execution of the sentence for five years. *Id.* at 54. This court held that the stay of execution violated the statutory mandatory minimum sentence. *Id.* at 56-57. We explained that "section 609.11, subd. 8(b), is a clear statement of the intention of the legislature" and that "the legislature has mandated that courts have no discretion to depart from minimum sentences under those circumstances described in section 609.11, subd. 8(b)." *Id.* at 56.

In light of the factual record in this case, section 609.11, subdivisions 5(b) and 8(b), require an executed prison sentence of not less than 60 months. *See Sheppard*, 587 N.W.2d at 56. The district court erred by imposing an executed sentence of only 54 months. Therefore, the sentence is reversed, and the case is remanded. On remand, the district court shall confirm that the factual predicates of subdivision 8(b) are satisfied and, if so, impose an executed prison sentence of not less than 60 months.

Reversed and remanded.