STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0224

State of Minnesota,
Respondent,

vs.

Jose A. Padilla,
Appellant.

Filed March 24, 2009
Affirmed in part and reversed in part
Stoneburner, Judge

Kandiyohi County District Court
File No. CR051276

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

Boyd Beccue, Kandiyohi County Attorney, 415 Southwest Sixth Street, Box 1126, Willmar, MN 56201 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Collins, Judge.*

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

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

STONEBURNER, Judge

Appellant challenges the consecutive sentences imposed for convictions of drive-by shooting and first-degree assault, arguing that because the crimes were part of a single behavioral incident, the district court erred by sentencing him for both crimes. Appellant also challenges additional restitution imposed at resentencing. Because consecutive sentencing was permissive under the multiple-victim exception to the rule that only one sentence may be imposed for multiple crimes committed in one behavioral incident, we affirm the sentences. But because the additional amount of restitution imposed at resentencing is not supported by the record, we reverse as to that amount.

FACTS

For participation in the drive-by shootings of two mobile homes during which an occupant of one of the homes was shot, appellant Jose Padilla was found guilty of two counts of attempted second-degree murder (drive-by shooting) in violation of Minn. Stat. §§ 609.17, 609.19, subd. 1(2) (2006); first-degree assault in violation of Minn. Stat. § 609.221 (2006); two counts of drive-by shooting in violation of Minn. Stat. § 609.66, subd. 1e(a) & (b) (2006);[1] and receiving stolen property in violation of Minn. Stat. § 609.53 (2006). The district court imposed consecutive sentences for the two

[1] Minn. Stat. § 609.66, subd. 1e(a), refers, in relevant part, to shooting at a building and subdivision 1e(b), in relevant part, refers to the shooting at an occupied building. The charges distinguish the buildings by address and the complaint narrative makes it clear that there were several people in the Gorton Avenue mobile home when the shooting occurred (count four). The Regency Estates West mobile home referenced in count five, was unoccupied at the time of the shooting because the occupants had taken refuge at the Gorton Avenue home.

convictions of attempted second-degree murder, a concurrent sentence for receiving stolen property, and awarded restitution in the amount of $14,638.39.

Several days after sentencing, the owner of one of the mobile homes submitted a request for $10,000 in restitution. The district court issued an order denying the request, finding that the amount of the loss was known to the owner at the time of sentencing, the request was untimely, and the amount of the claim was unsubstantiated.

On direct appeal, this court reversed the convictions of attempted second-degree murder[2] and remanded for sentencing on the remaining convictions. On remand, the district court sentenced Padilla to 166 months for first-degree assault, a consecutive 52 months for drive-by shooting of an occupied building, and concurrent sentences of 36 months and 27 months for drive-by shooting of an unoccupied building and receiving stolen property. The district court also ordered Padilla to pay the $10,000 in restitution that had been denied in the district court's previous order. This appeal followed.

D E C I S I O N

I. Imposition of separate sentences for first-degree assault and drive-by shooting of an occupied building was permissible.

Padilla argues that the district court erred in imposing separate sentences for first-degree assault and drive-by shooting of an occupied building because the two crimes arose from a single behavioral incident. *See* Minn. Stat. § 609.035 (2006) (stating that if

[2] This court held that "because a person cannot *specifically intend* to cause the death of another by *recklessly* discharging a firearm at or toward [the victims], one cannot commit attempted second-degree murder [a specific intent crime] by drive-by shooting." *State v. Padilla*, CR-05-1276, 2007 WL 1746746, at *2 (Minn. App. June 19, 2007).

a person's conduct constitutes more than one offense, the person may be punished only for one of the offenses).

The state agrees that the two crimes arose from one behavioral incident, but argues that the judicially created "multiple victim" exception to Minn. Stat. § 609.035 applies to permit separate sentences. *See State v. Marquardt*, 294 N.W.2d 849, 850–51 (Minn. 1980) (stating that the rule is that "one sentence may be imposed per victim in multiple-victim cases so long as the multiple sentences do not unfairly exaggerate the criminality of the defendant's conduct").

In this case, Padilla does not argue that the criminality of his conduct is unfairly exaggerated by multiple sentences. Padilla argues only that his crimes did not involve multiple victims because the charges of first degree assault and drive-by shooting that were consecutively sentenced do not name multiple victims.

Padilla correctly argues that "if the individual counts [in the complaint] do not involve separate victims, the multiple victim exception does not apply," citing *State v. Johnson*, 653 N.W.2d 646, 653 (Minn. App. 2002) (noting that multiple-victim exception did not apply where defendant was sentenced for two charges involving the same victim). But *Johnson* does not require that the victims be named in the charges. In this case, the complaint narrative identifies at least six occupants of the occupied mobile home in addition to the victim who was shot, and the trial record establishes that there were eight people in this home at the time of the shooting. Plainly, the charge of drive-by shooting of an occupied home involved victims in addition to the victim of first-degree assault. There is no authority for Padilla's argument that the state's failure to name or otherwise

separately identify the victims in the charges precludes application of the multiple-victim exception to Minn. Stat. § 609.035, and we find no merit in this argument.

II. Imposition of consecutive sentences did not violate *Blakely v. Washington*.

Padilla also argues that the consecutive sentences violate his Sixth Amendment right to a jury trial under *Blakely v. Washington*, 542 U.S. 296, 313, 124 S. Ct. 2531, 2543 (2004) (requiring any fact that increases the penalty for a crime beyond the prescribed statutory maximum to be submitted to a jury and proven beyond a reasonable doubt). The application of *Blakely* to permissive consecutive sentencing is a question of law, reviewed de novo. *State v. Rannow*, 703 N.W.2d 575, 580 (Minn. App. 2005).

The United States Supreme Court has held that, in light of the historical practice and the authority of states to administer their criminal-justice systems, the Sixth Amendment does not prevent judges, rather than juries, from finding the facts necessary to impose consecutive, rather than concurrent sentences for multiple offenses. *Oregon v. Ice*, 129 S. Ct. 711, 716–20 (2009). And this court previously declined to apply *Blakely* to consecutive sentences. *State v. Senske*, 692 N.W.2d 743, 749 (Minn. App. 2005), *review denied* (Minn. May 17, 2005). There is no merit to Padilla's claim that the imposition of consecutive sentences for his convictions of separate crimes violated *Blakely*.

III. The district court abused its discretion by imposing a restitution award of an additional $10,000 on remand.

Padilla argues that the district court lacked authority to impose additional restitution at resentencing after remand from this court. A district court has broad

discretion in awarding restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). But "[q]uestions concerning the authority and jurisdiction of the [district] courts are legal issues subject to de novo review." *State v. Pflepsen*, 590 N.W.2d 759, 763 (Minn. 1999).

In *Plefpsen*, the supreme court concluded that on remand for resentencing after one of three convictions was reversed on appeal, the district court had authority to order restitution under the circumstances of that case. *Id.* at 768 (noting that ordering restitution was consistent with public policy, and the district court's initial failure to award restitution was based on a mistaken belief that a civil action that would address the victim's damages was pending). In this case, the district court awarded $10,000 in restitution that it had previously denied both as untimely and largely unsubstantiated.[3]

Minn. Stat. § 611A.04, subd. 1(a) (2006), requires that, when the amount of loss is known, a restitution request be filed three business days prior to sentencing.
In this case, the district court awarded the restitution on remand, concluding that the request was timely due to resentencing. We disagree. And even if we could conclude that resentencing made the request timely, the amount requested remained partially unsubstantiated. Therefore, we conclude that the district court abused its discretion by awarding an additional $10,000 in restitution. We reverse the award of additional restitution.

[3] The district court found that only $3,768.99 of the $10,000 claim was substantiated and that the claim was untimely.

IV. Arguments raised in Padilla's pro se supplemental brief are without merit.

In a pro se supplemental brief, Padilla argues that the evidence was insufficient to support the convictions of first-degree assault and receiving stolen property. There is no merit in Padilla's assertion that he did not cause great bodily harm to D.S., who was shot in the hand and the abdomen. And evidence that Padilla directed an accomplice to a location where the stolen gun was hidden is sufficient to refute Padilla's assertion that he did not know or have reason to know that there was stolen property in the van.

Padilla also claims that jail officials confiscated his legal papers, interfering with his ability to prepare for trial. "[A]n inmate claiming a violation of the right of access must make some showing of prejudice or actual injury before relief may be granted." *Kristian v. State*, 541 N.W.2d 623, 628 (Minn. App. 1996) (quotation omitted). "If the plaintiff does not demonstrate a detrimental impact to his ability to present his legal papers to the court, the claim must fail." *Id.* (quotation omitted). Padilla's entire argument consists of a mere allegation that jail officials took his legal papers before trial, interfering with his ability to prepare for trial. Padilla has not demonstrated prejudice or actual injury and therefore is not entitled to relief on this claim.

Padilla's assertion, for the first time in this second appeal, that he received ineffective assistance of trial counsel is barred by *State v. Knaffla*, 309 Minn. 246, 252–53, 243 N.W.2d 737, 741 (1976) (holding that claims that were known on direct appeal but not raised are generally barred unless the claim is novel or the interest of justice requires review). And there is no merit to Padilla's assertion that because count five cites portions of the drive-by-shooting statute that refer both to occupied and unoccupied

buildings, his conviction is invalid. The record shows that Padilla was convicted of count five for drive-by shooting of an unoccupied building.

Affirmed in part and reversed in part.