STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0473

State of Minnesota,
Respondent,

vs.

Bret Hannam,
Appellant.

Filed May 12, 2009
Affirmed in part, reversed in part,
vacated in part, and remanded
Klaphake, Judge

Mower County District Court
File No. CR-06-1233

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

Jeremy L. Clinefelter, Assistant Mower County Attorney, 201 First Street NE, Austin, MN 55912 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Jodie Lee Carlson, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Klaphake, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving 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

KLAPHAKE, Judge

Appellant Bret Hannam was convicted of four counts of possession of a firearm by an ineligible person, Minn. Stat. § 624.713, subds. 1(b), 2(b) (2004). He claims that the district court erred in refusing to suppress evidence obtained from his camper and by separately sentencing him for each offense when the offenses were part of the same behavioral incident, and abused its discretion by declining to grant his motion for a downward durational departure at sentencing. Appellant submitted a separate pro se brief challenging the district court's factual determinations supporting its suppression order. Because we conclude that the district court's factual findings were not clearly erroneous and its evidentiary rulings were proper, we affirm on those issues. But because the court erred by imposing multiple sentences when the offenses arose out of the same behavioral incident and because appellant's sentence amounted to an unconstitutional upward departure without the aid of a sentencing jury, we reverse in part, vacating appellant's sentences on three of the convictions, and remanding for resentencing.

D E C I S I O N

1. Fourth Amendment Claim

Appellant contends that the arresting officer, Sergeant Steven Sandvik, violated his Fourth Amendment privacy rights by acting without a search warrant to observe firearms in his camper after he had been arrested on a probation violation and removed from the property. "Under the [F]ourth [A]mendment, warrantless searches and seizures are *per se* unreasonable unless they fall under an established exception." *State v. Vang*,

636 N.W.2d 329, 333 (Minn. App. 2001) (quotation omitted). Under the plain view exception to the warrant requirement, law enforcement may "seize an item in plain view if 1) police were lawfully in a position from which they viewed the object, 2) the object's incriminating character was immediately apparent, and 3) the officers had a lawful right of access to the object." *State v. Zimmer*, 642 N.W.2d 753, 755-56 (Minn. App. 2003) (quotation omitted), *review denied* (Minn. June 26, 2002). In reviewing the legality of a search, an appellate court "will not reverse the district court's findings unless they are clearly erroneous or contrary to law." *State v. Licari*, 659 N.W.2d 243, 250 (Minn. 2003) (quotation omitted).

We agree with the district court's determination that under the plain view exception to the warrant requirement, Sergeant Sandvik was in a lawful position to view the subject firearms in appellant's camper. The court found that as Sandvik was leaving the property, appellant's sister, Beth Slapnicher, decided to unlock appellant's camper to look for a family pet. When Slapnicher opened the camper door, Sandvik could see some of the firearms from his vantage point. While Sandvik may have earlier suggested that Slapnicher open the camper, the record establishes that this suggestion was made only to ensure that the pet was not locked in the camper. Sandvik did not order Slapnicher to unlock the camper in his presence, and, consistent with the district court's factual findings, he was merely in the vicinity of the camper when Slapnicher unlocked it. Under these circumstances, no Fourth Amendment violation occurred. *See State v. Jorgensen*, 660 N.W.2d 127, 132 (Minn. 2003) (concluding that police presence during defendant's sister's break-in of defendant's garage did not constitute Fourth Amendment

violation when police had no prior knowledge of break-in, did not encourage break-in, and took no active part in break-in). The privacy guarantees of the Fourth Amendment apply only to those acting on behalf of the government, but not to private individuals. *State v. Buswell*, 460 N.W.2d 614, 617-18 (Minn. 1990) (stating, "a private search, even if unreasonable, will not result in evidence seized being suppressed because there is no constitutional violation").

2. Sentencing for Separate Offenses

Subject to certain exceptions, "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses[.]" Minn. Stat. § 609.035, subd. 1 (2008). There is a specific exception for firearms offenses, however. Under Minn. Stat. § 609.035, subd. 3 (2008), "a prosecution for or conviction of a violation of [possession of a firearm by an ineligible person] is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct."

Appellant argues that he should receive only one sentence for the offense of being a felon in possession of a firearm because the four identical offenses for which he was convicted arose out of a single behavioral incident. When the defendant is charged with more than one firearms offense, the firearms exception contained in Minn. Stat. § 609.035, subd. 3, does not apply. The "any other crime" language of Minn. Stat. § 609.035, subd. 3, is a reference to a non-firearms offense. We conclude that this interpretation is consistent with the legislative purpose to punish more severely offenders who are ineligible to possess a weapon and who commit "other crimes" while possessing

a firearm. Under these circumstances, we remand for the district court to vacate three of appellant's firearms sentences, because they arose out of the same behavioral incident.

3. Durational Sentencing Departure

Generally, a district court's decision to depart from a presumptive sentence is reviewed for an abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). A district court has discretion to depart only if aggravating or mitigating circumstances exist. *Id.*

Appellant argues that the district court abused its discretion by denying his motion for a downward durational departure because the determination that he had used a firearm during the commission of a prior burglary offense, which was used at sentencing for appellant's current offense to impose a statutorily mandated 60-month sentence, was made by a judge rather than by a jury, in violation of the principles of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). Under *Blakely*, the presumptive guidelines sentence is the "maximum sentence a judge may impose *solely on the basis of facts reflected in the jury verdict or admitted by the defendant*." *Id.*, 542 U.S. at 303, 124 S. Ct. at 2537. An exception to the *Blakely* rule applies, however, when the "fact of a prior conviction . . . increases the penalty for a crime beyond the prescribed statutory maximum[;]" under those circumstances, there is no requirement that the fact of the prior conviction be submitted to a jury. *Id.*, 542 U.S. at 301, 124 S. Ct. at 2536 (quotation omitted).

In *State v. Barker*, 705 N.W.2d 768, 772-73 (Minn. 2005), the supreme court held that a district court's imposition of an upward durational departure for a controlled

substance offense under Minn. Stat. § 609.11, subd. 5 (2004) (setting forth minimum sentences for offenses involving firearms), was unconstitutional because it authorized an "upward durational departure . . . without the aid of a jury or admission by the defendant." In *Barker*, the appellant was convicted of one count of fifth-degree possession of a controlled substance while possessing a firearm, and the firearm possession aspect of the offense subjected him to a mandatory minimum 36-month sentence under Minn. Stat. § 609.11, subd. 5(a). *Id.* at 770. There, the supreme court concluded that the mandatory minimum sentence requirement was the functional equivalent of an aggravating factor that enhanced the appellant's otherwise presumptive sentence, and that the factual basis for imposition of this enhanced sentence must be found by a jury. *Id.* at 772.

Here, appellant was sentenced under Minn. Stat. § 609.11, subd. 5(b), which provides that a defendant who is convicted of a firearms offense under § 624.713, subd. 1 "shall be committed to the commissioner of corrections for not less than five years." Under the sentencing guidelines, appellant, who had a criminal history score of one, committed a level six offense, which is subject to a 27-month sentence. Minn. Sent. Guidelines IV, V. Thus, appellant was subject to an "aggravated sentence" to the extent that he did not receive the presumptive guidelines sentence. The state did not offer evidence to show that appellant's prior first-degree burglary conviction was committed with a weapon, and the offense of first-degree burglary may be committed with or without a weapon, depending on the facts of each case. Minn. Stat. § 609.582, subd. 1 (2008). Thus, appellant's sentence was unconstitutional because the facts that supported

his "aggravated" sentence were made "without the aid of a jury." *See Barker*,705 N.W.2d at 773.

4. Pro Se Claims

Appellant submitted a pro se brief that appears to challenge factual determinations made by the district court in support of its suppression order. Based on our review of the record, we conclude that the district court's findings are supported by the evidence at the omnibus hearing and are not clearly erroneous. *See State v. Hussong*, 739 N.W.2d 922, 925 (Minn. App. 2007) (in reviewing a pretrial suppression order, an appellate court "will not reverse the district court's factual findings . . . unless they are clearly erroneous"). For this reason, we conclude that appellant's pro se arguments are without merit.

Affirmed in part, reversed in part, vacated in part, and remanded.