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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1422**

Gregory Cooper Fraction, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 26, 2009
Affirmed
Shumaker, Judge**

Clay County District Court
File No. 14-K8-04-001794

Gregory Cooper Fraction, OID # 176921, MCF Moose Lake, 1000 Lake Shore Drive,
Moose Lake, MN 55767 (pro se appellant)

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

Brian J. Melton, Clay County Attorney, 807 N. 11th Street, P.O. Box 280, Moorhead,
MN 56560 (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and
Poritsky, 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.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant argues that the district court incorrectly resentenced him after this court vacated two of his convictions for aiding and abetting drug sales. He argues (1) that the district court violated his rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), by relying on the aggravating factors from his initial sentencing in departing upwards from the guidelines sentence; (2) that the aggravating factors related directly to the vacated aiding-and-abetting convictions; (3) that the aggravating factors duplicate elements of his offenses; and (4) that the district court used the same reasons to justify the assignment of a severity level to his offense and to support the upward departure. We affirm.

FACTS

Appellant Gregory Cooper Fraction was a drug dealer and member of a group that sold crack cocaine in the Fargo-Moorhead area from early in 2003 to September of 2004, when the members of the group were arrested. A jury found Fraction guilty of racketeering; conspiracy; sale of a controlled substance on February 28, 2004; sale of a controlled substance on July 26, 2004; aiding and abetting a drug sale on March 16, 2004, made by Marvin Fraction; aiding and abetting a drug sale on March 16, 2004, made by Charles Fraction; and aiding and abetting a June 14, 2004 sale by Christopher Lee.

Immediately after the jury returned its verdicts, a separate jury-sentencing proceeding began. At its conclusion, the jury found that aggravating factors existed, namely, that the offense was a major controlled-substance offense, that Fraction

“committed the crime as part of a group of three or more persons who all actively participated in the crime,”¹ that Fraction committed a violent crime by committing the offense of second-degree controlled-substance crime—sale, that he had two or more prior convictions for violent crimes (including simple robbery and manslaughter), and that he is a danger to public safety.

The court assigned Fraction’s unranked racketeering conviction a severity level of IX, and sentenced him to 210 months in prison for racketeering, which was an upward durational departure from the sentencing guidelines. Additionally, the district court sentenced Fraction to concurrent terms of 176 months for each of the two drug-sale convictions, which were also upward durational departures; 45 months for each of the three aiding-and-abetting convictions, which were presumptive sentences under the sentencing guidelines; and 51 months for the conspiracy conviction, which was also a presumptive sentence.

Fraction filed a direct appeal, claiming numerous errors. We affirmed in part and reversed in part. *State v. Fraction*, No. A05-588, 2006 WL 1984588, at *1 (Minn. App. July 18, 2006), *review denied* (Minn. Dec. 12, 2006). In particular, we concluded that the evidence was not sufficient to support Fraction’s convictions of aiding and abetting the sale by Charles Fraction on March 16, 2004, and the sale by Christopher Lee on June 14,

¹ This factor was listed on the same special interrogatory form as the major controlled-substance-offense aggravator. As Fraction notes this factor is not identified in the Minnesota Sentencing Guidelines as one of the circumstances that can be used to justify the use of the major controlled-substance-offense aggravator under Minn. Sent. Guidelines II.D.2.b.(5); rather, it is listed as a separate aggravating factor in Minn. Sent. Guidelines II.D.2.b.(10).

2004. *Id.* at *5. We then vacated the convictions of and sentences for those two offenses. *Id.* But we affirmed Fraction's other convictions, including that of aiding and abetting the drug sale by Marvin Fraction on March 16, 2004. *Id.* The Minnesota Supreme Court denied Fraction's petition for review.

At a resentencing hearing, the district court resentenced Fraction and imposed the original sentences, with the same departures, on each of the remaining convictions: 210 months for the racketeering conviction, 176 months for each of the two drug-sale convictions, 45 months for the remaining aiding-and-abetting conviction, and 51 months for the conspiracy conviction. All sentences were to run concurrently.

Fraction then filed a petition for postconviction relief, challenging his sentence. The district court denied his petition without a hearing. This pro se appeal followed.

D E C I S I O N

"The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). "We review a postconviction court's findings to determine whether there is sufficient evidentiary support in the record" and "will not reverse th[ose] findings unless they are clearly erroneous." *Id.* Issues of law are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). A postconviction court is not required to hold an evidentiary hearing "unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990). A postconviction petitioner has the burden of establishing the facts alleged in the petition by a fair preponderance of the evidence. Minn. Stat. § 590.04, subd. 3 (2008).

I

Fraction first argues that, in resentencing him, the district court violated his rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), because the district court relied on the same aggravating factors used to justify the departure in his initial sentence, even though this court had reversed two of his aiding-and-abetting convictions. Fraction seems to suggest that all of his convictions and all of the aggravating factors were “entangled” together, such that the elimination of his two aiding-and-abetting convictions means that the jury never found that the aggravating factors were supported by the remaining convictions.

In *Blakely*, the United States Supreme Court held that the Sixth Amendment to the United States Constitution guarantees the right to have a jury determine beyond a reasonable doubt any fact, other than a prior conviction, that increases punishment for an offense beyond the statutory maximum sentence allowed. 542 U.S. at 303-05, 124 S. Ct. at 2537-38. In *State v. Shattuck*, the Minnesota Supreme Court applied *Blakely* and concluded that, for felonies other than first-degree murder, the presumptive sentence set forth in the Minnesota Sentencing Guidelines is the maximum sentence a judge may impose without further jury findings. 704 N.W.2d 131, 141 (Minn. 2005). Thus, an upward durational departure based on judicial findings of aggravating factors was held to violate the defendant’s right to a trial by jury. *Id.*

In this case, the jury found beyond a reasonable doubt that four aggravating factors existed. Originally, Fraction was sentenced to upward departures on the drug sales and racketeering convictions. These convictions, along with their respective sentences,

remained after we vacated two of Fraction's aiding-and-abetting convictions. After resentencing, Fraction was left with the same, original sentences on the remaining convictions. Fraction has identified no authority indicating that this procedure was improper. Fraction received a jury determination on the aggravating factors; there were no new issues involved in his resentencing; he was resentenced for the same crimes; and the upward durational departures were based on the jury's previous determination. Fraction's *Blakely* rights were not violated.

II

For his second claim, Fraction similarly argues that the aggravating factors related directly to the aiding-and-abetting convictions, which were reversed and vacated due to insufficient evidence, and that therefore the district court erred by relying on those factors. In particular, Fraction attacks the finding that his racketeering offense was a major controlled-substance offense.

The Minnesota Sentencing Guidelines state that the commission of a major controlled-substance offense may be considered an aggravating factor that justifies sentencing departure. Minn. Sent. Guidelines II.D.2.b.(5). The guidelines describe a major controlled-substance offense as "an offense or series of offenses related to trafficking in controlled substances under circumstances more onerous than the usual offense," occurring where two or more specified circumstances are present. *Id.*

In this case, the jury found beyond a reasonable doubt that Fraction's offense was a major controlled-substance offense because the following circumstances were present:

- (1) "the offense involved at least three separate transactions wherein controlled

substances were sold, transferred, or possessed with intent to do so”; (2) “the offense involved the manufacture of controlled substances for use by other parties”; (3) “the offender knowingly possessed a firearm during the commission of the offense”; (4) “the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy”; and (5) “the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement.” Only two of these circumstances are needed to support the use of the major controlled-substance-offense aggravator. Minn. Sent. Guidelines II.D.2.b.(5).

Here, it is clear that at least two of the circumstances are not directly dependent upon the aiding-and-abetting convictions. First, the jury’s finding that Fraction occupied a high position within the drug-distribution hierarchy is not dependent upon the vacated aiding-and-abetting convictions. Second, possession of a firearm is not related to the aiding-and-abetting convictions. Although Fraction contends that there is no evidence that he knowingly possessed a firearm, the record supports the jury’s finding: The firearm purportedly possessed by Fraction was admitted at trial. A detective testified that the gun was obtained after one of Fraction’s female friends, D.G., told him where it was; and D.G. testified that Fraction kept a gun, along with some drugs, at her apartment. Fraction’s brother testified that Fraction told him to go to D.G.’s apartment to obtain drugs in order to raise money for Fraction’s bail and that while he was there he found the drugs and gun hidden together at D.G.’s apartment. Finally, another witness testified that he saw Fraction holding a gun, specifically a nine millimeter.

III

Fraction next argues that some of the circumstances found by the jury when determining that his crime was a major controlled-substance offense are also elements of his racketeering conviction.

A sentencing departure must be justified by substantial and compelling circumstances in the record. *State v. Losh*, 721 N.W.2d 886, 895 (Minn. 2006). The reasons used to justify a sentencing departure must not themselves be the elements of the underlying crime. *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008). “And conduct underlying one conviction cannot be relied on ‘to support departure on a sentence for a separate conviction.’” *Id.* (quoting *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000)).

As already stated, the commission of a major controlled-substance offense may be considered an aggravating factor that justifies a sentencing departure. Minn. Sent. Guidelines II.D.2.b.(5). We have concluded that a district court errs in using a major controlled-substance offense to justify a departure if the aggravating factors duplicate elements of the crime, or if they are not supported by the evidence, or if two or more of the specified factors are not present. *State v. Heath*, 685 N.W.2d 48, 63 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004). And when the record on appeal does not contain sufficient evidence that a drug offense qualifies as a major controlled-substance offense under Minn. Sent. Guidelines II.D.2.b.(5), the supreme court has reversed the sentence and remanded with instructions to vacate the departure and impose the

presumptive sentence under the guidelines. *State v. McIntosh*, 641 N.W.2d 3, 12 (Minn. 2002).

Under Minnesota law, a person is guilty of racketeering if the person is “employed by or associated with an enterprise and intentionally conducts or participates in the affairs of the enterprise by participating in a pattern of criminal activity.” Minn. Stat. § 609.903, subd. 1(1) (2002). “A defendant convicted of racketeering whose criminal conduct is aggravated by two or more of the factors set out in the sentencing guidelines for major controlled-substance offenses has not committed a ‘typical’ offense and may be subjected to an upward durational departure at sentencing.” *State v. Kujak*, 639 N.W.2d 878, 880 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002).

Fraction concedes that at least one of the circumstances found by the jury, namely possession of a firearm, does not duplicate any elements of his crime. Minn. Sent. Guidelines II.D.2.b.(5)(d). Thus, only one other circumstance need be present to support the major controlled-substance-offense aggravator. Minn. Sent. Guidelines II.D.2.b.(5).

Here, the jury found that Fraction “occupied a high position in the drug distribution hierarchy.” Minn. Sent. Guidelines II.D.2.b.(5)(e). Fraction argues that this circumstance duplicates an element of his racketeering offense, because racketeering requires participation in an enterprise, and an enterprise, by definition, requires that its members function in some kind of decision-making structure. But the mere fact that an enterprise has some structure is not tantamount to Fraction’s occupation of a “high position” within that structure. *See State v. Huynh*, 519 N.W.2d 191, 196 (Minn. 1994) (stating that “enterprise” is an organization whose “members function[] under some sort

of decision making arrangement or structure”). Furthermore, the record supports the jury’s conclusion that Fraction held a “high position” within the group. As we previously observed, the evidence of appellant’s leadership role in the group was “overwhelming.” *Fraction*, 2006 WL 1984588, at*4. He was responsible for obtaining drugs in Chicago and Minneapolis and bringing them to Fargo-Moorhead; he advised other group members on the sale of drugs; and he had a role in distributing the drugs among the group members. *Id.* at *7.

At least two of the circumstances found by the jury in concluding that Fraction’s offense was a major controlled-substance offense do not duplicate the elements of Fraction’s racketeering offense.

IV

Fraction also asserts that the reasons used by the court in assigning the severity level to his unranked racketeering offense were the same reasons used to justify an upward departure. The same conduct or circumstance may not be used both to assign a severity level and to support an upward departure as an aggravating factor. *See Kenard*, 606 N.W.2d at 443 n.3 (“[C]onduct [used in assigning severity] cannot be relied on to justify an upward departure.”); *State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983) (explaining that upward departures may not rest on elements that determined the severity level of the crime).

But even if we were to agree with Fraction’s claim and conclude that the district court, when assigning the severity level, considered some of the factors that could have justified a departure, we would not reverse Fraction’s sentence. The district court did not

consider Fraction's possession of a firearm or his occupation of a high position in the drug-distribution hierarchy when it assigned the severity level to Fraction's racketeering offense. These two circumstances justify the use of the major controlled-substance-offense aggravator and are sufficient to support the departure in this case. *See State v. Rodriguez*, 738 N.W.2d 422, 428 (Minn. App. 2007) (observing that only two of the circumstances were required to find that the offense was a major controlled-substance offense), *aff'd*, 754 N.W.2d 672 (Minn. 2008).

Furthermore, as noted in the district court's order denying postconviction relief, the jury found additional aggravating factors existed. Fraction has not shown that these other factors were used by the court in assigning a severity level for racketeering. A single aggravating factor may justify an upward durational departure. *State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985); *accord State v. Dominguez*, 663 N.W.2d 563, 567 (Minn. App. 2003) (affirming upward departure because defendant challenged only two of three aggravating factors and the remaining factor supported the departure). Here, the district court relied on all of the jury's findings when it sentenced Fraction originally and reaffirmed those bases for departure when it resentenced Fraction on the racketeering and other remaining convictions.

The district court properly resentenced Fraction following this court's decision. Therefore, we conclude that the district court did not abuse its discretion by denying Fraction's petition for postconviction relief.

Affirmed.