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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0743**

State of Minnesota,
Respondent,

vs.

Paul Michael Hackbarth,
Appellant.

**Filed June 9, 2009
Reversed and remanded
Shumaker, Judge**

Anoka County District Court
File No. 02-K0-03-000496

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

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Lawrence Hammerling, Chief Appellate Public Defender, Theodora A. Gaitas, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

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

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant (1) challenges the district court's authority to vacate his plea of guilty and conviction over his objection, (2) argues that the prosecution and trial following the order to vacate his plea and conviction violated the prohibition on double jeopardy, (3) claims that he was subjected to vindictive prosecution, and (4) argues that his sentences violate the prohibition on multiple sentences. Because we conclude that the district court erred by vacating appellant's plea of guilty and conviction, we reverse and remand. We do not reach appellant's other claims.

FACTS

We are asked to decide the appropriate remedy when the district court imposes a sentence under a plea agreement, but in violation of the sentencing guidelines, and then, over the defendant's objection, vacates the plea and the sentence and allows a trial on the original charges and on charges added through an amendment to the complaint.

Appellant Paul Michael Hackbarth admits that he attempted to carjack J.M.'s car as she returned to it after shopping at a store in Fridley. She got into her car and put her purse on the seat next to her. Then Hackbarth opened the passenger door, sat next to J.M., and told her to drive. She yelled for help and tried to get out of the car, but Hackbarth grabbed her, punched her in the eye, and tried to take her keys. He then quickly got out and ran off. Later, the police arrested him.

The state originally charged Hackbarth with kidnapping and assault and then later added charges of attempted kidnapping and simple robbery. The parties reached a plea

agreement by which Hackbarth agreed to plead guilty to simple robbery in exchange for the dismissal of the remaining charges stemming from the attempted carjacking and of an unrelated felony escape charge. As part of the plea agreement, Hackbarth was to be sentenced to an executed term of 20 months, to be served consecutively to a 74-month executed sentence on an unrelated drug charge. Because the factual basis for Hackbarth's plea did not support the simple robbery charge, the state amended the complaint to charge attempted simple robbery, and the plea agreement was orally revised to reflect the plea of guilty to the charge of attempted simple robbery.

The presumptive sentence for attempted simple robbery, considering Hackbarth's criminal history score of 6, was an executed 24-month concurrent term. Thus, the consecutive sentence constituted a departure from the sentencing guidelines. Although the prosecutor noted the departure at the time of the plea, he identified no substantial and compelling circumstances to support it. The district court sentenced Hackbarth in accordance with the plea agreement but failed to identify any substantial and compelling circumstances to justify the sentencing departure.

Two years later, Hackbarth petitioned for postconviction relief to modify his sentence so as to impose the presumptive term. He did not seek to withdraw his plea nor did he challenge his conviction. The state opposed the petition and requested the district court to specify departure reasons for the consecutive sentence, or, alternatively, to consider the state's motion to vacate the plea and the plea agreement.

The court denied Hackbarth's petition, denied the state's request to provide departure reasons, and gave leave to the state to move to vacate the plea and the

agreement. The court told Hackbarth that if the state did not move to vacate the plea and the agreement, the court would grant the sentence modification. On the other hand, the court explained, if the state brought the motion, Hackbarth could either “ratify his previous plea agreement and withdraw his post conviction relief petition,” or he could “respond to the State’s motion.”

The state moved to vacate the plea and the agreement. Hackbarth opposed the motion. The court granted the motion and ordered the matter to resume “on all the original charges encompassed by the plea agreement,” namely, kidnapping, assault, and felony escape. The case was set for jury trial.

Before the trial began, the state amended the complaint to charge Hackbarth with two counts of kidnapping, two counts of attempted kidnapping, one count of aggravated robbery, one count of attempted aggravated robbery, and one count of attempted motor vehicle theft. The jury found Hackbarth guilty of all counts except aggravated robbery. As to the kidnapping charges, the jury found that Hackbarth had released J.M. in a safe place.

The court held a separate jury proceeding to determine the existence of aggravating circumstances to support a sentencing departure. The jury found that the state had failed to prove any aggravating circumstances.

Hackbarth moved to vacate the convictions, arguing that the district court lacked authority to vacate his plea over his objection and that the post-plea prosecution infringed his protection against double jeopardy. The court denied his motion and sentenced him to 49 months in prison for attempted aggravated robbery and 1 year and 1 day for

attempted motor vehicle theft, to be served concurrently, and a consecutive term of 21 months in prison on one count of kidnapping. Hackbarth appealed.

DECISION

We begin our discussion by noting that the consecutive sentence originally imposed under the plea agreement was impermissible. The presumptive sentence called for a concurrent term. Minn. Sent. Guidelines II.F. A sentence in excess of the presumptive sentence is lawful only if it is supported by substantial and compelling aggravating circumstances. Minn. Sent. Guidelines II.D; *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). The court must identify such circumstances on the record. Minn. Sent. Guidelines II.D.; Minn. R. Crim. P. 27.03, subd. 4(c) (stating that the district court is required to state the reasons for departure on the record); *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (holding that a sentencing departure is not permitted absent reasons articulated on the record at sentencing). The mere fact that a defendant has agreed to a departure from the presumptive sentence will not be sufficient to justify the departure. *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002).

The sentencing guidelines were in effect at the time of Hackbarth's plea and sentencing in October 2003. *Misquadace* had been decided several months previously. Nevertheless, the state failed at any point to identify aggravating circumstances to support the departure. Similarly, the district court failed to identify any aggravating circumstances to make Hackbarth's sentence a lawful one. Nothing in the record at the time of the plea, the sentencing, or the postconviction proceedings shows the existence of any circumstances that would make the sentence legal. That no aggravating

circumstances ever existed is attested to by the jury's determination in the sentencing-issue phase of the trial. The inexplicable refusal of the prosecution and the court to follow the sentencing laws set in motion a series of proceedings that culminated with this appeal, presenting the question of how to rectify the original imposition of an illegal sentence.

The district court's power to vacate a plea in a criminal case stems from its "inherent power to protect the integrity of the judicial process." *United States v. Britt*, 917 F.2d 353, 355 n.2 (8th Cir. 1990). Whether the district court may, in a given situation, vacate a plea of guilty and a judgment of conviction is a question of law, which we review de novo. *State v. Spraggins*, 742 N.W.2d 1, 3 (Minn. App. 2007).

Hackbarth argues that the district court erred by vacating his plea of guilty over his objection. The state, relying on *State v. Lewis*, 656 N.W.2d 535 (Minn. 2003), contends that, when "the plea agreement and the conviction are enmeshed, the court may entertain a motion to vacate the plea and the plea agreement, resetting the matter for trial." *Cf. State v. Meredyk*, 754 N.W.2d 596, 603 (Minn. App. 2008) ("Plea agreements can be intricate, and alteration of one condition may alter the nature of the entire agreement.")

In *Lewis*, the defendant pleaded guilty in exchange for a stayed sentence which was longer than that permitted under the sentencing guidelines. 656 N.W.2d at 536. He appealed, arguing that the departure was not supported by the requisite aggravating circumstances. *Id.* at 537. This court affirmed the conviction but reversed the sentence and remanded with instructions to the district court to impose the presumptive sentence, citing the authority in *Misquadace*. *State v. Lewis*, No. C7-01-1788, 2002 WL 1275790,

at *4 (Minn. App. June 11, 2002), *aff'd in part and rev'd in part*, 656 N.W.2d 535 (Minn. 2003).

On review, the supreme court held that the court of appeals had “read[] *Misquadace* too narrowly,” explaining that *Misquadace* did not address the issue of whether, on remand, the district court can reconsider the conviction component of a plea agreement when there are no aggravating circumstances to support a departure. *Lewis*, 656 N.W.2d at 538. The supreme court concluded that if the conviction and sentencing components of a plea agreement are “interrelated” and there are no grounds for a departure, the district court may consider what effect a modification of the sentence will have on the plea agreement. *Id.* at 539. The supreme court remanded and indicated that the district court could consider a motion to vacate the conviction if no departure circumstances were found. *Id.* In passing, the supreme court noted that a vacation of a conviction under the circumstances of the case could raise double-jeopardy concerns. *Id.* at 539 n.3.

After *Lewis*, the supreme court decided *Geller*, 665 N.W.2d 514. In *Geller*, the district court imposed an upward durational departure in the sentence without giving reasons for the departure. *Id.* at 515. In reviewing that error, the supreme court reaffirmed its holding in *Williams v. State*, 361 N.W.2d 840, (Minn. 1985), that “[i]f no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.” *Id.* at 516-17 (quoting *Williams*, 361 N.W.2d at 844). Characterizing this rule as “clear,” the supreme court remanded the case to the district court with instructions to impose the presumptive sentence. *Id.* at 517. In doing so, the supreme court

acknowledged a line of court of appeals decisions allowing the district court on remand to place departure reasons on the record when it failed to do so initially. Although the supreme court did not expressly overrule those cases, it stated that “[those cases] notwithstanding, we conclude that the first rule we set out in *Williams* is clear.” *Id.*

The supreme court did not address either *Misquadace* or *Lewis* in *Geller*, but it is difficult to discern any rule emerging from *Geller* other than this: When no reasons for a departure are given, no departure is allowed, and the presumptive sentence must be imposed. With that rule, which the supreme court called “clear,” it would be contradictory to conclude that the district court may do something other than impose the presumptive sentence, such as vacating the plea and conviction and holding a trial on the original charges.

Treating the *Geller* rule as a clear mandate, we held in *State v. Rannow*, 703 N.W.2d 575 (Minn. App. 2005), that the court’s upward sentencing departure without stated reasons after an *Alford* plea was illegal, even though it was part of a plea agreement. Accordingly, we “follow[ed] the rule announced in *Geller* and remand[ed] for imposition of a sentence that d[id] not constitute a departure from the sentencing guidelines.” *Id.* at 580. The fact that the improper departure was part of a plea bargain did not ameliorate the impropriety. Furthermore, *Geller* made no exceptions for improper sentences that result from plea bargains.

Finally, in *Spraggins*, we held that the district court does not have authority sua sponte to vacate a plea of guilty and a conviction in light of a postconviction petition to modify an unsupported departure that was part of a plea agreement. 742 N.W.2d. at 6-7.

We explained that “[o]ther jurisdictions have uniformly held that courts do not have authority to vacate a defendant’s guilty plea over his objection.” *Id.* at 5. For example, in *United States v. Patterson*, 381 F.3d 859 (9th Cir. 2004), the appellate court held that the district court “is not free to vacate the plea *either on the government’s motion or sua sponte*” and “did not have authority to vacate the plea over [the defendant’s] objections.” 381 F.3d at 865, *quoted in Spraggins*, 742 N.W.2d at 5 (first emphasis added).

Thus, *Geller* provides the remedy here. By agreeing to a plea bargain that involved the imposition of an illegal sentence, the state assumed the risk of both a challenge and a reversal on appeal. The convictions obtained through Hackbarth’s trial must be reversed; his initial plea must be reinstated; and the district court must impose the presumptive sentence for attempted simple robbery by making that sentence concurrent with, rather than consecutive to, the drug-related sentence noted in the plea agreement.

Because our decision is dispositive of the appeal, we do not reach Hackbarth’s claims of a double-jeopardy violation, prosecutorial vindictiveness, and illegal multiple sentences.

Reversed and remanded.