

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1717**

Felicia Tonette Sherrod, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 7, 2009
Reversed and remanded
Kalitowski, Judge**

Hennepin County District Court
File Nos. 27-CR-07-106995, 27-CR-07-032982

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

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Felicia T. Sherrod challenges her consecutive sentences for felony theft from a person and simple robbery, in violation of Minn. Stat. §§ 609.52, subd. 2(1)

(2006) and 609.24 (2006) respectively, imposed pursuant to a plea agreement. Appellant argues that her sentences are unlawful because her convictions do not qualify for consecutive sentencing under the sentencing guidelines. We reverse and remand.

D E C I S I O N

On appeal, the decision of the postconviction court is reviewed only to determine whether there is sufficient evidence to support the postconviction court's findings, and the postconviction court's decision will not be disturbed absent an abuse of discretion. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). "However, we review issues of law de novo." *Id.*

Under the sentencing guidelines, concurrent sentencing is generally presumptive. Minn. Sent. Guidelines II.F. But if an offender is on conditional release when he or she commits a crime, then consecutive sentencing is presumptive. *Id.* We conclude that the criteria for presumptive consecutive sentencing were not satisfied here.

Two statutory definitions of "conditional release" include probation, but these definitions are limited to the particular sections within which they are contained and have not been incorporated into the sentencing guidelines. *See* Minn. Stat. §§ 241.065 (2006) (definition limited to the conditional release data system statute), 244.195 (2006) (definition limited to detention and release statute). At the time appellant committed the August 16, 2007 robbery, she was on probation from a May 2007 theft conviction, but she was not on conditional release. Thus, she was not eligible for imposition of a presumptive consecutive sentence for crimes committed while on conditional release. We conclude that the district court abused its discretion in determining that presumptive

consecutive sentencing was appropriate. In addition, the state does not argue that permissive consecutive sentencing was appropriate here and we conclude that the requirements for permissive consecutive sentencing are not satisfied.

Appellant also argues that the postconviction court abused its discretion by concluding that the sentence was lawful because it was executed pursuant to a negotiated plea agreement. We agree.

Because neither presumptive nor permissive consecutive sentencing was appropriate under section II.F. of the guidelines, consecutive sentencing here constituted a departure. *See* Minn. Sent. Guidelines II.F. (“The use of consecutive sentences in any other case constitutes a departure from the guidelines and requires written reasons pursuant to Minn. Stat. § 244.10, subd. 2 and section II.D of the guidelines.”) Negotiated plea agreements that include a sentencing departure are justified under the sentencing guidelines in cases where substantial and compelling circumstances exist. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). “A plea agreement standing alone, however, does not create such circumstances in its own right. Rather, when reviewing a plea agreement that includes a sentencing departure, the court must determine whether the offense of conviction reflects any aggravating or mitigating circumstances that warrant a departure.” *Id.* For felony convictions, the district court must state, on the record, findings of fact as to the reasons for departure. Minn. R. Crim. P. 27.03, subd. 4(C), *cited in State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

Here, the postconviction court stated that “[i]f in fact [consecutive sentencing] constitutes a departure . . . and additional reasons were necessary to support the

departure, the court finds that the victim in the pled Simple Robbery case was within her zone of privacy within her secure apartment building, and was also a vulnerable victim due [to] her age and infirmity.” But *Geller* requires the sentencing court to state the reasons for a departure on the record at the time of sentencing and holds that a postconviction court’s findings of aggravating factors will not satisfy this requirement. 665 N.W.2d at 517. Here, the district court did not find, on the record, any aggravating factors to support the departure at the time of sentencing. We therefore conclude that the requirements of *Misquadace* and *Geller* were not satisfied and accordingly, we reverse and remand this matter for resentencing. On remand, the district court has the discretion to consider a motion by the state to vacate the plea and plea agreement and reinstate the original charges. *State v. Lewis*, 656 N.W.2d 535, 539 (Minn. 2003).

Reversed and remanded.