STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1964

State of Minnesota,
Respondent,

vs.

Jerome Eugene Vann,
Appellant.

Filed August 24, 2010
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-K3-07-003045

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Marie L. Wolf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Halbrooks, Judge; and Worke, Judge.

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

JOHNSON, Judge

A Ramsey County jury found Jerome Eugene Vann guilty of sexually assaulting his adult daughter. The district court sentenced him to 180 months of imprisonment. This court reversed the sentence due to an erroneous criminal-history score and remanded for resentencing. The district court again sentenced Vann to 180 months of imprisonment, this time on the basis of two aggravating factors. Vann argues that the aggravating factors are invalid bases for the upward departure. We conclude that the first aggravating factor is invalid, that the second aggravating factor is valid, and that the 180-month sentence should be affirmed.

FACTS

In July 2007, Vann and his then-22-year-old daughter, S.J., attended a party together. S.J. was drunk and either fell asleep or passed out as Vann was driving home. *State v. Vann*, No. A08-1000, 2009 WL 2431978, at *1 (Minn. App. Aug. 11, 2009), *review denied* (Minn. Oct. 28, 2009).

> S.J. testified that at some point, she became aware of someone touching her. She was lying face down on her stomach, with her legs hanging out of the opened passenger seat door. She soon realized that Vann was standing outside the passenger side of the car, digitally penetrating her vagina with his fingers. S.J. heard Vann stating "this is some good p---y" and "you know Daddy's going to tear . . . your a-- up right."

Id. At some later point in time, S.J. became alert and sat up, and Vann "quickly pulled up his pants." *Id*. S.J. reported the incident to police the next day. *Id*.

The state charged Vann with third- and fourth-degree criminal sexual conduct, violations of Minn. Stat. §§ 609.344, subd. 1(d), .345, subd. 1(d) (2006). A jury found him guilty of both offenses. *Id*. at *1-2. The district court calculated Vann's criminal-history score to be six and, accordingly, derived a presumptive guidelines sentence of 180 months of imprisonment. *Id.* at *2. After a sentencing trial, the jury found that the state had proved one aggravating factor: "Was the Defendant in a position of trust with [S.J.] on July 26, 2007?" On the basis of that aggravating factor, the state moved for an upward durational departure. Because the statutory maximum, however, was the same as the presumptive guidelines sentence, the state withdrew its motion for an upward departure, and the district court sentenced Vann to 180 months of imprisonment. *Id*.

On appeal, this court affirmed Vann's conviction but reversed his sentence because of an error in the calculation of his criminal-history score. *Id.* at *5. On remand, the district court recalculated Vann's criminal-history score to be four, which means that the presumptive guidelines sentence is 117 months. The district court departed upward from the presumptive guidelines range and again imposed a sentence of 180 months. The district court relied on two aggravating factors: first, that Vann was in a position of trust and, second, that he has a prior conviction in which the victim was injured. Vann appeals.

D E C I S I O N

I. Upward Durational Departure

Vann argues that the two aggravating factors on which the district court relied when departing upward from the presumptive guidelines sentence are invalid bases for a departure in this case.

A district court must order the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. (2006). "'Substantial and compelling' circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009). The sentencing guidelines provide a nonexclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines II.D.2.(b). Whether a particular reason for an upward departure is permissible is a question of law, which is subject to a *de novo* standard of review. *State v. Vance*, 765 N.W.2d 390, 394 (Minn. 2009); *Dillon v. State*, 781 N.W.2d 588, 595, (Minn. App. 2010), *review denied* (Minn. July 20, 2010); *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009). A district court's decision to depart from the sentencing guidelines based on permissible grounds is reviewed for an abuse of discretion. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001); *Dillon*, 781 N.W.2d at 595-96.

In *Edwards*, the supreme court reaffirmed "several principles to assist the district court in determining what facts are available for departure." 774 N.W.2d at 602 (quotation marks omitted). "First, the district court may not base an upward departure on facts necessary to prove elements of the offense being sentenced." *Id*.; *see also State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008); *State v. Blanche*, 696 N.W.2d 351, 378-79 (Minn. 2005). "Second, the district court may not base an upward departure on facts that, while not necessary to satisfy the elements of the offense in question, were nonetheless contemplated by the legislature when it set the punishment for the offense being sentenced." *Edwards*, 774 N.W.2d at 602 (citing *State v. Stanke*, 764 N.W.2d 824, 827-28 (Minn. 2009)). Third, a district court may not base an upward departure on facts underlying a separate offense, charged or uncharged. *Id*.; *see also Jones*, 745 N.W.2d at 849-50.

In addition, the supreme court recently clarified the respective roles of the jury and the district court in determining whether an upward departure is appropriate. In *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009), the supreme court examined whether the aggravating factor of particular cruelty "is an 'additional fact' which must be submitted to the jurors in a *Blakely* trial or a 'reason' which explains why the additional facts provide the district court a substantial and compelling reason" to depart from the presumptive sentence. *Id*. at 920. The supreme court concluded that "the particular-cruelty aggravating factor is a reason that explains why the additional facts found by the jury provide the district court a substantial and compelling basis" for a sentencing

departure. *Id.* Accordingly, the supreme court held "that a district court must submit to a jury the question of whether the State has proven beyond a reasonable doubt the existence of additional facts . . . which support reasons for departure." *Id.* at 921. But "whether those additional facts provide the district court a reason to depart does not involve a factual determination and, therefore, need not be submitted to a jury." *Id.*

A. Abuse of Position of Trust

The supreme court has recognized the aggravating factor of a defendant's "abuse of his position of trust and authority" over an adult victim in a criminal-sexual-conduct offense. In *State v. Lee*, 494 N.W.2d 475 (Minn. 1992), a Hmong community leader and vocational-school teacher raped two women in the Hmong community. *Id.* at 476, 482. The supreme court explained that "the defendant clearly abused his position of authority at [the vocational school] and his position as a leader in the Hmong community to maneuver the complainants into situations where he could sexually assault them." *Id.* at 482; *see also State v. Campbell*, 367 N.W.2d 454, 461 (Minn. 1985) (affirming upward departure in part because defendant "violated a position of trust").

Vann argues that the aggravating factor of abuse of position of trust is invalid in this case for four reasons: (1) the aggravating factor is inapplicable because there was no "power imbalance" between Vann and S.J.; (2) the jury did not find that he *abused* his position of trust; (3) the aggravating factor is a reason or explanation for the upward departure, which must be found by the district court (not an underlying fact or

circumstance, which must be found by the sentencing jury); and (4) the aggravating factor is based in part on elements of the offense.

1. Absence of Power Imbalance

Vann argues that the aggravating factor of abuse of a position of trust is inapplicable to this case because there was no "power imbalance" between Vann and S.J. Vann concedes that abuse of a position of trust may form the basis for an upward departure in a case of criminal sexual assault of an adult victim, but he contends that it is applicable only if there existed a "power imbalance" between the assailant and the victim. Vann does not cite any caselaw imposing this requirement on the aggravating factor of abuse of position of trust, and we are not aware of any such authority. Although such a requirement may logically be imposed on the aggravating factor of abuse of position of *power*, it would be somewhat anomalous to impose such a requirement on the aggravating factor of abuse of position of *trust*. The supreme court's opinion in *Lee* did not impose any such requirement. Thus, application of the aggravating factor of abuse of position of trust is not foreclosed by the absence of a power imbalance.

2. Finding of Abuse of Position of Trust

Vann next argues that the aggravating factor of abuse of a position of trust is invalid because the district court did not state, and the sentencing jury did not find, that he *abused* his position of trust. The caselaw consistently refers to the aggravating factor as "abuse" of a defendant's "position of trust and authority." *See, e.g.*, *Lee*, 494 N.W.2d at 482; *State v. Carpenter*, 459 N.W.2d 121, 128 (Minn. 1990); *cf. Campbell*, 367

N.W.2d at 461 ("violate"). Accordingly, we agree with Vann that the district court was required to state, and the sentencing jury was required to find, that he abused his position of trust.

But that is not what happened. The district court stated only that "the defendant was in a position of trust with [S.J.] on July 26, 2007 as found by the jury in its special verdict." The sentencing jury was asked, "Was the Defendant in a position of trust with [S.J.] on July 26, 2007?" The district court never stated, and the sentencing jury never found, that Vann *abused* a position of trust. Thus, the aggravating factor of abuse of a position of trust is invalid in this case because "the district court's reasons for departure are improper or inadequate." *Edwards*, 774 N.W.2d at 601 (quotation omitted). Furthermore, the aggravating factor of abuse of a position of trust is invalid in this case because the sentencing jury's finding was "insufficient to support the aggravated sentence." *Carse v. State*, 778 N.W.2d 361, 373 (Minn. App. 2010), *review denied* (Minn. Apr. 20, 2010).

As stated above, Vann also argues that the aggravating factor of abuse of a position of trust is invalid in this case because it is a reason or explanation for the upward departure (not an underlying fact or circumstance), which must be found by the district court (not by the sentencing jury). In addition, Vann argues in his *pro se* supplemental brief that this aggravating factor is impermissible because the aggravating factor is based in part on elements of the offense. We need not analyze these two arguments because we already have concluded that the aggravating factor is invalid in this case.

B. Prior Conviction in Which Victim Was Injured

A district court may depart upward from the presumptive sentence if "[t]he current conviction is for a criminal sexual conduct offense or an offense in which the victim was otherwise injured and there is a prior felony conviction for a criminal sexual conduct offense or an offense in which the victim was otherwise injured." Minn. Sent. Guidelines II.D.2.b.(3). Vann argues that this aggravating factor is invalid in this case for two reasons: (1) the district court improperly made findings of fact concerning his prior convictions, and (2) the district court relied on his prior conviction of first-degree assault when calculating his criminal-history score.

1. Factfinding

Vann argues that the district court erred by improperly making findings of fact concerning his prior convictions. At the sentencing hearing, the state asserted that Vann had a prior conviction of first-degree assault. The district court referred to Vann's prior conviction of first-degree assault, which requires great bodily harm, and stated that "there's a prior felony conviction for an offense in which the victim was otherwise injured." Vann does not challenge the existence of the prior conviction of first-degree assault. Rather, he contends that the district court engaged in improper factfinding when it determined that the victim of the first-degree assault was injured. He argues that a sentencing jury must make the determination that a prior conviction included injury to the victim.

In *State v. Wiskow*, 774 N.W.2d 612 (Minn. App. 2009), the appellant argued that a district court's determination that an out-of-state conviction was a violent crime fell within the prior-conviction exception to *Blakely* and *Apprendi*. *Id*. at 615-16. We stated, "As long as the district court's determination is based on the elements of the conviction offense or plea admissions related to those elements, both of which are necessarily established by the record of the prior conviction, the determination falls within the prior-conviction exception." *Id*. at 616. We thus concluded that Wiskow's right to a jury trial was violated because the district court relied on an unproven statement in a presentence investigation to determine that the out-of-state conviction was a violent crime. *Id*. at 619-20.

In this case, the district court record reveals that Vann was convicted of first-degree assault and attempted second-degree murder in 1984. The record does not include a citation to the specific statute setting forth the offenses of which Vann was convicted. In 1984, the statute setting forth the offense of first-degree assault provided, "Whoever assaults another and inflicts great bodily harm may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both." Minn. Stat. § 609.221 (1984). In 1984, "great bodily harm" was defined to mean "bodily injury which creates a high probability of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily harm." Minn. Stat. § 609.02, subd. 8 (1984). As we explained in *Wiskow*, "As long as the district

court's determination is based on the *elements* of the conviction offense . . . the determination falls within the prior-conviction exception." 774 N.W.2d at 616 (emphasis added). One of the elements of the offense of first-degree assault at the time of Vann's conviction was that the victim suffered "great bodily harm," which necessarily includes "bodily injury." Minn. Stat. §§ 609.02, subd. 8, .221. In light of the requirements of the statute in effect at the time of the prior offense of first-degree assault, no factfinding is necessary to determine that "the victim" of Vann's first-degree-assault "was . . . injured." Minn. Sent. Guidelines II.D.2.b.(3).

Thus, the district court did not err by determining that Vann has a prior conviction in which the victim was injured.

2. Double-Counting

Vann also argues that the district court erred by relying on the aggravating factor of having a prior conviction in which the victim was injured because his prior conviction of first-degree assault also was used to calculate his criminal-history score. "Generally, a defendant's criminal history cannot be used as a reason for departure since that history is part of the determination of the presumptive sentence." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Despite this general rule, the supreme court has held that guideline II.D.2.b.(3), which recognizes the aggravating factor of having a prior conviction in which the victim was injured, permits a prior conviction to be used to support an upward departure. *Id.* Thus, the district court did not err by using Vann's prior conviction of

first-degree assault both to calculate his criminal-history score and to support its application of this aggravating factor.

C. Appellate Remedy

We have concluded that one aggravating factor is invalid (abuse of position of trust) and one aggravating factor is valid (having a prior conviction in which the victim was injured). The next question is whether Vann is entitled to reversal and resentencing.

"'When a reviewing court concludes that a district court based a departure on both valid and invalid factors, a remand is required unless it determines the district court would have imposed the same sentence absent reliance on the invalid factors.'" *Vance*, 765 N.W.2d at 395 (quoting *Koon v. United States*, 518 U.S. 81, 113, 116 S. Ct. 2035, 2053-54 (1996)). When making that determination, "we consider the weight given to the invalid factor and whether any remaining factors found by the court independently justify the departure." *Stanke*, 764 N.W.2d at 828; *see also State v. Mohamed*, 779 N.W.2d 93, 100 (Minn. App. 2010), *review denied* (Minn. May 18, 2010).

In this case, the district court initially sentenced Vann to 180 months of imprisonment, which the district court understood to be within the presumptive sentencing range, as calculated by the district court at that time. *Vann*, 2009 WL 2431978, at *2. After this court reversed and remanded for resentencing in light of the incorrect criminal-history score, *see id.* at *5, the district court again sentenced Vann to 180 months, which is an upward departure from the presumptive sentencing range. The district court stated that it was departing upward based on two aggravating factors

without making any comment that one aggravating factor was more significant than the other.

The district court consistently imposed 180-month sentences on Vann regardless of the number of applicable aggravating factors. The district court sentenced Vann to 180 months when it understood that *no* aggravating factors applied and when it understood that *two* aggravating factors applied. In these circumstances, it is not difficult to determine that the district court would have imposed a 180-month sentence at resentencing if it had understood that only *one* aggravating factor applies. Thus, we conclude that "the district court would have imposed the same sentence absent reliance on the invalid factors." *Vance*, 765 N.W.2d at 395 (quotation omitted). Although Vann contends that the aggravating factor of having a prior conviction in which the victim was injured cannot be the sole aggravating factor supporting an upward departure, the supreme court has held that it may, by itself, support an upward departure. *Peake*, 366 N.W.2d at 301; *State v. Williams*, 337 N.W.2d 689, 691 (Minn. 1983); *State v. Lindsey*, 314 N.W.2d 823, 825 (Minn. 1982). Therefore, a remand is not required.

II. Additional *Pro Se* Arguments

Vann presents two additional arguments in his pro se supplemental brief.

A. Decay of Prior Convictions

Vann argues that the district court erred by relying on his prior convictions of attempted murder and assault when calculating his criminal-history score because those convictions are more than 10 years old.

The version of the sentencing guidelines in effect at the time Vann committed the current offense states, "Prior felony sentences or stays of imposition following felony convictions will not be used in computing the criminal history score if a period of *fifteen years* has elapsed since the date of discharge from or expiration of the sentence, to the date of the current offense." Minn. Sent. Guidelines II.B.1.f. (2006) (emphasis added). Vann was discharged from the attempted-murder conviction in November 1994 and the assault conviction in May 1996. Thus, for each prior conviction, the current offense occurred within 15 years of the discharge of the sentence.

Vann further contends that applying the 15-year decay provision to his criminal-history score violates the Ex Post Facto Clause of the United States Constitution because a 10-year decay provision was in effect at the time of the earlier convictions. *See* U.S. Const. art. I, §§ 9, cl. 3, 10, cl. 1. The sentencing guidelines provide generally that "[m]odifications to the [guidelines] will be applied to offenders whose date of offense is on or after the specified modification effective date." Minn. Sent. Guidelines III.F. On July 26, 2007, when Vann committed the present offense, the guidelines provided for a 15-year decay provision. Minn. Sent. Guidelines II.B.1.f. The same provision is in the current version of the guidelines. Minn. Sent. Guidelines II.B.1.f. (2010). The Ex Post Facto Clause requires only that "the statute in effect at the time [the defendant] acted did not warn him" what the presumptive sentence would be for his crime. *Miller v. Florida*, 482 U.S. 423, 426-27, 435-36, 107 S. Ct. 2446, 2449, 2454 (1987). As required by the Ex Post Facto Clause, Vann was warned that his prior conviction of first-degree assault

could be used to enhance the crime he committed in July 2007. We are not aware of any caselaw holding that a state violates the Ex Post Facto Clause by increasing a defendant's sentence for a current conviction based on sentencing guidelines that were revised after the defendant's prior convictions. Thus, the district court did not violate the Ex Post Facto Clause by applying the 15-year decay provision when calculating Vann's criminal history.

B. Conditional Release

Vann also argues that the district court erred by imposing a 10-year term of conditional release because he does not have a prior conviction for criminal sexual conduct. Vann's argument relies on obsolete statutes and caselaw. Since 2005, a ten-year period of conditional release must be imposed on anyone convicted of criminal sexual conduct. Minn. Stat. § 609.3455, subds. 6, 8 (2006); 2005 Minn. Laws ch. 136, art. 2, § 21, at 931-32. Vann was convicted of engaging in criminal sexual conduct on July 26, 2007. Thus, the ten-year term of conditional release applies.

Vann further argues that the district court erred by imposing the term of conditional release without any factfinding by a sentencing jury in violation of *Apprendi* and *Blakely*. But *Apprendi* does not forbid the imposition of a term of conditional release if a "conditional release term is authorized on the basis of the jury verdict, and does not require any additional findings of fact to be made by the district court." *State v. Jones* 659 N.W.2d 748, 753 (Minn. 2003). The relevant statute provides:

> Notwithstanding the statutory maximum sentence otherwise applicable to the offense and unless a longer

> conditional release term is required in subdivision 7, when a court commits an offender to the custody of the commissioner of corrections for a violation of section 609.342, 609.343, 609.344, 609.345, or 609.3453, the court shall provide that, after the offender has completed the sentence imposed, the commissioner shall place the offender on conditional release for ten years, minus the time the offender served on supervised release.

Minn. Stat. § 609.3455, subd. 6. A district court may impose a term of conditional release if a defendant has been convicted of an offense in one of the specified statutory provisions. That requirement is satisfied in this case. No additional fact-finding is required. Thus, the district court did not err by imposing a term of conditional release without submitting an additional question to the sentencing jury.

Affirmed.