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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-142**

State of Minnesota,
Respondent,

vs.

Bernard Antonio Prince,
Appellant.

**Filed December 7, 2010
Reversed and remanded
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-09-5776

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges his 60-month consecutive sentence for possession of child pornography on the basis that the sentence constituted a durational departure and was not

properly supported by any aggravating factors. We agree, and we reverse and remand for resentencing consistent with the Minnesota Sentencing Guidelines.

FACTS

Appellant Bernard Prince pleaded guilty to one count of possession of child pornography in violation of Minn. Stat. § 617.247, subd. 4(a) (2008), after police discovered a pornographic video of his 13-year-old nephew on his mobile phone. Appellant admitted that he is “like a father figure” to his nephew, that he was in a position of authority over him, and that the video was recorded in his nephew’s home. Appellant also admitted that at the time of the conduct, he was on probation for a conviction of being a felon in possession of a firearm, subject to a 60-month stayed sentence.

Pursuant to the parties’ plea agreement, the district court revoked appellant’s probation, executed his 60-month sentence on his felon-in-possession conviction, and sentenced appellant to a consecutive term of 60 months on his child-pornography conviction. The court concluded that “this is an upward departure from the Minnesota Sentencing Guidelines because these will run consecutive to each other.” After appellant waived *Blakely*, the court found that two aggravating factors supported the upward departure: appellant was in a position of authority over the victim; and appellant violated the victim’s zone of privacy because the video was recorded in the victim’s home.

The record reflects uncertainty at the time of sentencing about whether the 60-month sentence for child-pornography constituted a durational departure, as well as a departure as to consecutive sentencing. Initially, the prosecutor stated that the 60-month

sentence would be a durational departure. Later, the district court questioned whether the sentence constituted a durational departure or merely a “dispositional” departure since the sentences would be running consecutively.¹ In response, the prosecutor stated that there was no durational departure because a 60-month sentence was within the presumptive guidelines range based on appellant’s criminal-history score of five. Ultimately, the district court did not treat the 60-month sentence for child-pornography as a durational departure and made no express findings about aggravating factors that would support an upward-durational-departure sentence. This appeal follows.

DECISION

This court reviews a district court’s decision to depart from the presumptive sentence provided by the Minnesota Sentencing Guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). If the district court departs from the presumptive sentence, it must “make written findings of fact as to the reasons for departure,” Minn. Stat. § 244.10, subd. 2 (2008), and must also state those reasons on the record, Minn. R. Crim. P. 27.03, subd. 4(C). “If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.” *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

¹ We note that a departure with respect to consecutive service is actually neither a “dispositional” nor a “durational” departure. *See State v. Yang*, 774 N.W.2d 539, 564 (Minn. 2009) (distinguishing between a dispositional departure, a durational departure, and a departure “with respect to consecutive service” (quotation omitted)); Minn. Sent. Guidelines cmt. II.C.01 (2008) (defining “disposition” as “whether or not the sentence should be executed” and “duration” as “the length of the sentence”).

Departure as to Consecutive Service of Sentence

The district court directed that appellant's child-pornography sentence be served consecutively to his unexpired felon-in-possession sentence. "[W]hen there is a prior felony sentence which has not expired or been discharged, concurrent sentencing is presumptive" unless the sentencing guidelines expressly provide otherwise. Minn. Sent. Guidelines II.F (2008). Imposition of a consecutive sentence when a concurrent sentence is presumptive "constitutes a departure from the guidelines and requires written reasons." *Id.*

Here, appellant had a prior felony sentence on his felon-in-possession conviction which had not yet expired or been discharged, but none of the circumstances that provide for a consecutive sentence under the guidelines was present. *See* Minn. Sent. Guidelines II.F.1, .2. The district court therefore correctly concluded that the imposition of a consecutive sentence on appellant's child-pornography conviction constituted a departure from the guidelines. And the court properly supported the departure by finding two aggravating factors: appellant was in a position of authority over the victim; and appellant violated the victim's zone of privacy. Appellant does not contest the propriety of the departure as to consecutive service.

Durational Departure

Appellant argues that the district court abused its discretion by sentencing him to 60 months on the consecutive sentence for child pornography without recognizing that the 60-month sentence constituted an upward durational departure from the sentencing guidelines and without supporting the departure with any findings of aggravating factors.

For a defendant with a criminal-history score of five, a 60-month sentence for possession of child pornography would normally be within the guidelines range. *See* Minn. Sent. Guidelines IV, V (2008). But when a district court imposes a *non-presumptive* consecutive sentence, “a zero criminal history score . . . shall be used in determining the presumptive duration.” Minn. Sent. Guidelines II.F.2. If the district court then departs from this presumptive duration, it must support the departure with additional reasons. *See* Minn. Sent. Guidelines cmt. II.F.202 (2008) (providing that where a consecutive sentence has been imposed, the district court “may also pronounce durational and dispositional departures both upward and downward . . . *if reasons for departure are cited*,” and that “[t]he reasons *for each type of departure should be specifically cited*” (emphasis added)). “The purpose of this procedure is to count an individual’s criminal history score only one time in the computation of consecutive sentence durations.” Minn. Sent. Guidelines II.F.2.

Appellant’s child-pornography conviction carried a severity level of G. Minn. Sent. Guidelines V. Based on a criminal-history score of zero, the presumptive sentence duration for a severity-level-G offense was 15 months. Minn. Sent. Guidelines IV. The district court therefore durationally departed upward from the guidelines when it sentenced appellant to 60 months’ imprisonment,² and the court was required to state

² Although the presumptive sentence for a severity-level-G offense with a criminal-history score of zero was 15 months *stayed*, consecutive sentences are presumptively executed. *See State v. Watkins*, 650 N.W.2d 738, 742 (Minn. App. 2002) (“[T]he presumptive disposition for a permissive consecutive sentence is *always* an executed sentence.”); Minn. Sent. Guidelines II.F.2 (providing only that the presumptive *duration* of a consecutive sentence is to be calculated based on a criminal-history score of zero).

reasons for the departure on the record at the time of sentencing. Because the court stated no reasons for this departure on the record, the departure is not allowed. The district court therefore abused its discretion by sentencing appellant to the upward-durational-departure sentence of 60 months for possession of child pornography.

The state argues that the aggravating factors found by the district court to support the non-presumptive consecutive sentencing should be deemed sufficient to support both departures or to support a theoretical concurrent sentence with a double durational departure, resulting in the same aggregate sentence of 120 months. But the district court was clear that the aggravating factors it found were in support of the departure as to consecutive service, and when it inquired later whether there was a durational departure as well, the state advised it that there was no durational departure. Nothing in the record suggests that the district court intended, or would have allowed, a departure from the guidelines on the duration of appellant's sentence. The state's argument lacks merit.

Remedy

When a district court fails to state reasons on the record to support its sentencing departure, this court may not remand the case to the district court "for another opportunity to state the reasons for departure." *State v. Rannow*, 703 N.W.2d 575, 580 (Minn. App. 2005) (citing *Geller*, 665 N.W.2d at 517). "Instead, a reviewing court must remand to the district court for imposition of the presumptive guidelines sentence." *Id.* (citing *Geller*, 665 N.W.2d at 517). Here, because the district court sentenced appellant consecutively, the presumptive duration of the child-pornography sentence is 15 months.

See Minn. Sent. Guidelines II.F.2, IV, V. We remand to the district court for imposition of that sentence.

The state argues that, on remand, it is entitled to move the district court to vacate the plea on the basis that there was a “mutual mistake of fact” as to the guidelines sentence, and that it would not have agreed to a plea bargain involving only a 15-month consecutive sentence. The state relies on *State v. Lewis*, in which the supreme court held that “where the district court finds no compelling or substantial circumstances supporting an upward departure in the sentence that was agreed upon in a plea agreement, it may consider motions to vacate the conviction and the plea agreement.” 656 N.W.2d 535, 539 (Minn. 2003). But six months later in *Geller*, the supreme court made clear that, on remand after reversal of an unsupported departure, a district court does not have another opportunity to find reasons to support the departure. *Rannow*, 703 N.W.2d at 580 (discussing *Geller*, 665 N.W.2d at 517).

In *Rannow*, this court addressed the interaction of *Geller* and *Lewis*. *Id.* This court first acknowledged that *Lewis* “authorized the district court to consider motions to vacate the conviction and plea agreement if it could not find substantial and compelling circumstances to support the departure from the sentencing guidelines.” *Id.* But this court continued:

Nevertheless, *Geller*’s mandate is clear: ‘[A]bsent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed.’ Given the breadth of this most recent holding, we follow the rule announced in *Geller* and remand for imposition of a sentence that does not constitute a departure from the sentencing guidelines.

Id. (quoting *Geller*, 665 N.W.2d at 517) (citation omitted; alteration in original). This court then stated that “[o]n remand, the greatest sentence duration that the district court can impose” is one consistent with the guidelines. *Id.*

We are bound to apply the same rule here. The district court must be limited on remand to imposition of the 15-month consecutive sentence provided by the guidelines, resulting in an aggregate sentence of 75 months, and the state shall not be permitted to move to vacate the plea agreement. 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.

Reversed and remanded.