STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1227

State of Minnesota,
Respondent,

vs.

Gary Lynn Underdahl,
Appellant.

Filed December 7, 2010
Reversed
Toussaint, Judge

Polk County District Court
File No. 60-CR-06-5343

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, MN 56716 (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora K. Gaitas, St. Paul, MN (for appellant)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

TOUSSAINT, Judge

This appeal is from a resentencing order issued after this court reversed an upward departure on appellant Gary Lynn Underdahl's felon-in-possession conviction and

remanded for imposition of the presumptive 60-month sentence. Because the resentencing order denies appellant the possibility of supervised release and creates an ambiguity regarding jail credit, we reverse.

D E C I S I O N

This appeal involves the interpretation of Minn. Stat. § 609.11, subd. 6 (2006), which denies an offender convicted of certain "dangerous weapon" offenses, including appellant's felon-in-possession offense, various forms of "early release." Statutory interpretation presents a question of law that we review de novo. *State v. Al-Naseer*, 734 N.W.2d 679, 683 (Minn. 2007).

Appellant was convicted in 2006 of felon in possession of a firearm and sentenced to 120 months in prison, an upward durational departure from the 60-month presumptive sentence. This court reversed the sentencing departure, concluding that none of the aggravating factors supporting the departure were valid, and remanded for imposition of the presumptive 60-month sentence. *State v. Underdahl*, No. A07-454 (Minn. App. Aug. 5, 2008), *review denied* (Minn. Oct. 29, 2008). The district court issued an order resentencing appellant to 60 months in prison and allowing him "jail credit for all the time he has served in connection with this case." The court, however, later issued an amended warrant of commitment indicating that credit for time served was unavailable. After the Minnesota Department of Corrections (DOC) notified the district court of appellant's impending eligibility for supervised release, the court issued a second amended warrant of commitment, stating that, pursuant to Minn. Stat. § 609.11, subd. 6, appellant was not eligible for supervised release.

First, with regard to custody credit, there does not appear to be any question that appropriate credit was given. Appellant argues only that the district court erred "to the extent" it denied him credit for time spent in prison in connection with the current felon-in-possession conviction. Respondent State of Minnesota agrees that appellant is entitled to credit for that time, but the state argues he should not receive credit for time in custody on his earlier offenses. Appellant does not claim entitlement to such credit. There is no indication in the record that appellant has been denied credit for time served in connection with this offense or been given credit for time served on another offense, which would be improper because appellant's current sentence was made consecutive. Both the letter from the DOC to the district court and the DOC's calculation of appellant's supervised release date and expiration date indicate that proper custody credit has been given.

As to the district court's denial of supervised release under Minn. Stat. § 609.11, subd. 6, the parties disagree on the appropriate construction of that statute. The statute reads as follows:

> **No early release**. Any defendant convicted and sentenced as required by this section is not eligible for probation, parole, discharge, or *supervised release* until that person has served the *full term of imprisonment* as provided by law, notwithstanding the provisions of sections 242.19, 243.05, 244.04, 609.12 and 609.135.

Minn. Stat. § 609.11, subd. 6 (emphasis added). Appellant argues that, although he was "convicted and sentenced" under section 609.11, this provision does not apply to deny him "supervised release" in the form of the one-third of his sentence automatically deducted from his overall sentence. *See* Minn. Stat. § 244.05, subd. 1b(a) (2006)

(defining term of supervised release for post-1993 felonies). The state, however, argues that the statute unambiguously includes "supervised release" as one form of "early release" that is prohibited.

The term "early release" is not defined by statute. It has been used in combination with "supervised release." *State ex rel. Morrow v. LaFleur*, 590 N.W.2d 787, 793 (Minn. 1999) (discussing inmate's entitlement to "early supervised release"), *overruled on other grounds as recognized by Johnson v. Fabian*, 735 N.W.2d 295, 305 (Minn. 2007). But by statute "supervised release" refers to the term served "upon completion of the inmate's term of imprisonment." Minn. Stat. § 244.05, subd. 1b(a). For post-1993 felonies, "term of imprisonment" refers to "the period of time equal to two-thirds of the inmate's executed sentence." Minn. Stat. § 244.01, subd. 1(8).

The DOC argues that these definitions of "supervised release" and "term of imprisonment" apply only to chapter 244. But the statute does not state that the definitions apply *exclusively* to that chapter. *See* Minn. Stat. § 244.01, subd. 1 ("For purposes of sections 244.01 to 244.11, the following terms shall have the meanings given them."). In general, statutes that are *in pari materia* should be read together. *See generally State v. Lucas*, 589 N.W.2d 91, 94 (Minn. 1999) (holding that statutes with common purposes and subject matter should be read together). The sentencing provisions in chapter 244 involve the same subject matter as the sentencing provisions in chapter 609, and the particular sentences imposed under chapter 609 are calculated according to the provisions in chapter 244. Thus, the terms that are used in each should

be given the same meaning.[1]

This conclusion is also supported by legislative history. When the legislature in 1993 enacted the provisions in section 244.05 regarding the "term of imprisonment" and the period of "supervised release," it simultaneously removed most of the references in chapter 609 to "term of imprisonment," as previously used to refer to the entire sentence. 1993 Minn. Laws ch. 326, art. 9, §§ 3, 6, art. 13, §§ 23-35. This change presumably reflected a recognition that the same terms must have the same meanings in each chapter.

Thus, we must construe section 609.11, subdivision 6, by interpreting both "supervised release" and "term of imprisonment" as they are used in chapter 244. The problem, however, is that the terms "supervised release" and "term of imprisonment" are used in Minn. Stat. § 244.05 as mutually exclusive parts of a criminal sentence. But in section 609.11, subdivision 6, they are treated as potentially overlapping parts of the sentence. By definition in chapter 244, the "supervised release" term is served *after* the "term of imprisonment." But at least under the state's construction of section 609.11, subdivision 6, "supervised release" is a term the offender could, but for that subdivision, begin serving *before* the "full" term of imprisonment is complete.

Section 609.11, subdivision 6, bars "early release" only *before* the "full term of imprisonment" has been served. Thus, in section 609.11, subdivision 6, as it is written,

[1] This court recently issued an unpublished opinion coming to the opposite conclusion. *State v. Leathers*, No. A09-926, 2010 WL 2265601 (Minn. App. June 8, 2010), *review granted* (Minn. Aug. 24, 2010). *Leathers* notes that section 244.01, subdivision 1 provides that the definitions contained in that statute are "[f]or purposes of sections 244.01 to 244.11." *Id.* at *8. But the statute lacks language of exclusion, as noted above, and therefore we are unsure of the persuasive value of *Leathers*, particularly given the supreme court's grant of further review.

the two terms cannot both be used completely in accordance with their chapter 244 meanings. If in section 609.11, subdivision 6, "supervised release" means the presumptive one-third of the sentence served on release, as it does in chapter 244, then it is barred to offenders like appellant. But "supervised release" is not served *before* the term of imprisonment has been fully served; it is served *after* that point. Therefore, it is not a form of "early release."

The state argues that because the adjective "full" has been attached to "term of imprisonment," it is that phrase, not "supervised release," that has a different meaning in section 609.11, subdivision 6. But the state's argument is that under this provision appellant must serve the entire sentence pronounced by the court. That amounts to saying that the adjective "full" transforms "term of imprisonment" into "sentence." That would be contrary to the 1993 legislative changes, which replaced "sentence" with "term of imprisonment" in chapter 609.

Perhaps more significantly, the state's argument, which would mean "supervised release" is unavailable to appellant and similar offenders, would create a conflict with section 244.05, subdivision 1b, which mandates that "supervised release" be served by "every inmate," with the exception, not applicable here, of certain inmates serving life sentences. Minn. Stat. § 244.05, subds. 1b, 4, 5.

The proscription against "early release" in section 609.11, subdivision 6, concludes with a clause stating, "notwithstanding the provisions of sections 242.19, 243.05, 244.04, 609.12 and 609.135." The provisions listed relate to juvenile offender discharge (section 242.19), conditional release (section 243.05), "good time" (section

244.04), parole (section 609.12), and probation (section 609.135). The supervised-release statute, Minn. Stat. § 244.05, is not listed among these statutory provisions. It could be argued that the legislature merely failed to replace the reference to the "good time" statute with the "supervised release" statute that succeeded it. On the other hand, the failure to reference the current supervised-release statute may indicate more than a mere failure to update the statutory reference.

In summary, there are arguments both for and against barring supervised release under Minn. Stat. § 609.11, subd. 6. But several factors persuade us that no such bar was intended. First, "supervised release" is mandatory, under Minn. Stat. § 244.05, subd. 1b, except for life sentences, and therefore cannot, consistent with that provision, be barred by section 609.11, subdivision 6. Second, the rule of lenity applies, despite the DOC's argument that section 609.11, subdivision 6, is unambiguous, because the terms "supervised release" and "term of imprisonment" by themselves create an ambiguity. *See generally State v. Lubitz*, 472 N.W.2d 131, 133 (Minn. 1991) (noting mandatory minimum sentencing statute had to be construed against state). Finally, the history of the legislative amendments to chapter 244 and chapter 609 supports appellant's argument that Minn. Stat. § 609.11, subd. 6 must be read in light of the division of a sentence between the supervised release term and the term of imprisonment in Minn. Stat. § 244.05, subd. 1. Therefore, the district court's denial of supervised release must be reversed.

Reversed.