STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1514

State of Minnesota,
Respondent,

vs.

Tarun Solorzano-O'Brien,
a/k/a Mario Patino,
Appellant.

Filed April 5, 2011
Affirmed
Klaphake, Judge

Hennepin County District Court
File No. 27-CR-06-074377

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, 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 Larkin, Presiding Judge; Klaphake, Judge; and Minge, Judge.

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

KLAPHAKE, Judge

Appellant Tarun Solorzano-O'Brien challenges his sentence on his conviction of aiding and abetting an offender after the fact for the benefit of a gang, Minn. Stat.

§§ 609.495, subd. 3, .229, subd. 2 (2004), arguing that the district court abused its discretion by assigning a severity level X to this crime, which is not ranked under the Minnesota Sentencing Guidelines.

Because the district court specified its reasons for assigning a severity level X to this offense, and its reasons are supported by the record, we affirm.

D E C I S I O N

We previously remanded this sentencing issue to the district court "either for re-sentencing or for findings supporting the district court's assignment of the severity level." *State v. Patino*,[1] No. A08-1005, 2009 WL 2225440 at *2-3 (Minn. App. July 28, 2009). After remand, the district court issued an order reciting its reasons for assigning severity level X to the offense and confirming appellant's sentence of 176 months. We review the district court's severity level determination for an abuse of discretion. *State v. Bertsch*, 707 N.W.2d 660, 666 (Minn. 2006).

The Minnesota Sentencing Guidelines outline the procedure for sentencing offenders. The presumptive sentence for an offender is a calculation that uses the severity level assigned to the offense and the offender's criminal history score. *State v. Kenard*, 606 N.W.2d 440, 442 (Minn. 2000); Minn. Sent. Guidelines II.C (2005). Although most offenses are given a severity level ranking by the guidelines, some are unranked. *Id.*; *see* Minn. Sent. Guidelines II.A & cmt. II.A.05 (2005). When the district court imposes a sentence for an unranked offense, it exercises its discretion by assigning

[1] Appellant was originally charged under the name Mario Patino, a name he used in an earlier prosecution. Appellant's proper name is Tarun Solorzano-O'Brien.

an appropriate severity level and specifying on the record its reasons for assigning a particular severity level. *Id.*

In *Kenard*, the supreme court suggested a number of factors that the district court should consider when assigning a severity level to an unranked offense: (1) the gravity of the conduct underlying the proof of the elements of the offense; (2) the severity level of ranked offenses that are similar to the unranked offense; (3) the "severity level assigned to other offenders for the same unranked offense; and [(4)] the severity level assigned to other offenders who engaged in similar conduct." 606 N.W.2d at 443. This list is non-exclusive and no one factor is controlling. *Bertsch*, 707 N.W.2d at 666.

On remand, the district court gave its rationale for assigning a severity level X to this offense: (1) the district court specifically considered the *Kenard* factors; (2) the district court concluded that appellant is the oldest of the codefendants and exercised a certain influence on the others, most of whom were minors at the time of the offense; (3) the victim's family was afraid to attend the sentencing hearing because they feared retaliation by the Surenos 13 gang; (4) appellant had instructed the others to say nothing to anyone about the murder and "had provided untruthful and misleading information to the homicide detectives, thus obstructing the investigation"; (5) appellant admitted being in the car with his codefendants; during the drive, appellant's codefendants called the victim in order to lure him out of his house; (6) the district court considered other offenses with similar elements, specifically Minn. Stat. § 609.495, subd. 1 (2004), which is a severity level I offense, but concluded that the circumstances of this matter differed significantly enough to justify a higher ranking; and (7) the district court reviewed a

number of other district court cases that involved similar conduct and found that these were ranked as severity level X offenses.

Appellant argues that the district court erred by considering matters outside of the factual basis for the plea placed on the record, primarily the presentence investigation. But specific conduct underlying proof of the elements of the crime can be used when making severity level determinations, including matters that could not be relied upon to justify an upward sentencing departure. *Kenard*, 606 N.W.2d at 443 n.3.

Appellant also contends that the district court ignored cases involving similar conduct that resulted in a lower severity ranking, including *Kenard* and *State v. Skipintheday*, 704 N.W.2d 177, 183 (Minn. App. 2005), *aff'd* 717 N.W.2d 423 (Minn. 2006), both of which were convictions for aiding and abetting an offender after the fact to first-degree murder, and both of which received a severity level VIII. But we review the district court's determination for an abuse of discretion. The district court's findings here demonstrate that it considered the *Kenard* factors and provided sufficient reasons for its decision that are based on the record. We conclude that the district court did not abuse its discretion.

Appellant filed a pro se brief raising a number of issues, including: (1) ineffective assistance of trial counsel; (2) district court error for not dismissing the indictment; (3) district court error in determining the severity level for this unranked offense; (4) district court error for not permitting withdrawal of his guilty plea; and (5) prosecutorial misconduct.

This is an appeal following a remand. "[W]hen a case returns to an appellate court after remand, the matters raised and resolved in the original appeal that resulted in the remand, and any claims that were known but not raised in the original appeal will not be considered." *State v. Martin*, 723 N.W.2d 613, 626 (Minn. 2006). Because appellant's pro se issues were raised and considered in his direct appeal, they are beyond the scope of this appeal.

Affirmed.