STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1411

State of Minnesota,
Respondent,

vs.

Raine Cee Neiss,
Appellant.

Filed June 20, 2011
Reversed and remanded
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-07-23388

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford Colbert, Amanda Hegstrom, Certified Student Attorney, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Bjorkman, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

BJORKMAN, Judge

Appellant challenges his sentence, arguing that the district court erred by imposing an aggravated sentence based on jury interrogatories that violate *State v. Rourke*, 773 N.W.2d 913 (Minn. 2009). We agree and reverse and remand.

FACTS

In October 2007, appellant Raine Neiss was convicted of second-degree intentional murder and commission of a crime for the benefit of a gang.[1] As to sentencing, the district court submitted special interrogatories asking the jury to determine whether the victim was "particularly vulnerable due to his physical injury and inability to defend himself" and whether Neiss knew or should have known that the victim was particularly vulnerable; the jury responded affirmatively to both interrogatories.[2] Based on those findings, the district court imposed a 375-month sentence for the murder conviction, an upward departure from the presumptive sentence range of 261 to 367 months. The district court also imposed a consecutive 24-month sentence for the conviction of crime for the benefit of a gang, for a total sentence of 399 months' imprisonment.

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[1] The facts underlying Neiss's convictions are set forth in *State v. Neiss*, No. A08-0326, 2009 WL 1046515, at *1-2 (Minn. App. Apr. 21, 2009), *review denied* (Minn. July 22, 2009).

[2] The district court also submitted interrogatories asking the jury to determine whether Neiss committed the offense as part of a group of three or more persons who all actively participated in the offense and whether Neiss committed the offense with particular cruelty. The jury responded affirmatively to the first interrogatory and negatively to the second.

Neiss appealed, and this court affirmed his convictions. *State v. Neiss*, No. A08-0326, 2009 WL 1046515, at *2-7 (Minn. App. Apr. 21, 2009), *review denied* (Minn. July 22, 2009). We rejected Neiss's arguments that the aggravated sentence was based on improper factors and insufficient evidence, but agreed that the district court erred in imposing sentences on both convictions. *Id.* at *8-10. Because the sentencing guidelines provide for the addition of 24 months to Neiss's presumptive sentence for the murder conviction, we reversed his sentence and remanded for the district court to "impose a single sentence, which should reflect a sentence of not more than 375 months, plus an additional 24 months, for a total of not more than 399 months." *Id.* at *9-10 (citing Minn. Stat. § 609.229, subd. 3(a) (2006), and Minn. Sent. Guidelines II.G (2006)).

While Neiss awaited resentencing, the supreme court decided *Rourke*, holding that a jury must decide whether the state proved "the existence of additional facts, which were neither admitted by the defendant, nor necessary to prove the elements of the offense, but which support reasons for departure." 773 N.W.2d at 921. At the resentencing hearing, the district court rejected Neiss's request for either a new sentencing trial or imposition of the presumptive sentence based on *Rourke* and our decision in *Carse v. State*, 778 N.W.2d 361, 373 (Minn. App. 2010) (applying *Rourke*), *review denied* (Minn. Apr. 20, 2010). The district court resentenced Neiss to 399 months for his second-degree murder conviction. This appeal follows.

D E C I S I O N

Neiss argues that the district court violated *Rourke* by imposing an aggravated sentence based on special interrogatories that asked the jury to determine whether the

victim was particularly vulnerable, rather than the existence of specific facts that could support this departure basis. Neiss's argument raises two distinct issues: (1) the applicability of *Rourke* and (2) if *Rourke* applies, whether Neiss's aggravated sentence violates *Rourke*. Both issues present questions of law, which we review de novo. *See Danforth v. State*, 761 N.W.2d 493, 495 (Minn. 2009). We address each issue in turn.

Applicability of *Rourke*

Neiss asserts that *Rourke* controls because his case was pending before the district court for resentencing when *Rourke* was decided. We agree. A decision of the Minnesota Supreme Court generally applies to criminal cases that are "pending" when the decision is announced. *O'Meara v. State*, 679 N.W.2d 334, 338 (Minn. 2004), *abrogated on other grounds by Danforth v. Minnesota*, 552 U.S. 264, 128 S. Ct. 1029 (2008). A case is "pending" until all rights to appeal and certiorari have been exhausted. *Id.* at 339. Although Neiss had exhausted his challenges to his convictions before *Rourke* was decided, his sentence was still before the district court on remand. And because Neiss had the right to appeal the sentence imposed on remand, his sentence was still pending within the meaning of *O'Meara*. *See State v. Fairbanks*, 688 N.W.2d 333, 337 (Minn. App. 2004) (applying *Blakely* in a post-remand sentencing appeal because the pre-*Blakely* remand for resentencing meant the sentence was pending under *O'Meara* when *Blakely* was decided), *review denied* (Minn. Dec. 13, 2005).

The state argues that even if Neiss's sentence was pending in some sense at the time *Rourke* was decided, *Rourke* is inapplicable because the validity of the sentencing interrogatories was outside the scope of the remand. We disagree. First, as our decision

in *Fairbanks* demonstrates, the critical issue is the appealability of the sentence, not the scope of remand. *See id.* at 335, 337 (applying *Blakely* on appeal from resentencing despite appellant's failure to argue Sixth Amendment right-to-jury-trial issue). Second, our remand instructions permitted consideration of *Rourke*. In this case, a sentence of more than 391 months is an aggravated sentence. *See* Minn. Stat. § 609.229, subd. 3(a); Minn. Sent. Guidelines II.G, IV (2006). Because we instructed the district court on remand to impose a single sentence of "not more than 399 months," the district court was permitted to reconsider whether and to what extent it would impose an aggravated sentence. And an aggravated sentence would necessarily rely on the challenged interrogatories.[3] Accordingly, the validity of those interrogatories was well within the scope of remand.

Review under *Rourke*

We next address whether the challenged interrogatories violate *Rourke*. In *Rourke*, the district court submitted the following special interrogatory to the jury: "Was [the victim] treated with particular cruelty on January 28, 2003?" 773 N.W.2d at 916. The supreme court held that this interrogatory was improper because aggravating factors such as particular cruelty are legal reasons for departing from the sentencing guidelines, not facts to be found by a jury. *Id.* at 920. Accordingly, a district court must submit

[3] The state asserts that the jury's finding that Neiss committed the offense as part of a group of three or more persons who all actively participated in the offense provides an alternate basis for the district court's departure. We disagree. This aggravating factor cannot be used when, as here, the defendant is convicted of a crime for the benefit of a gang. *See* Minn. Sent. Guidelines II.D.2.b(10) (permitting consideration of this aggravating factor), cmt. II.D.205 (stating that this aggravating factor "cannot be used when an offender has been convicted" of a crime for the benefit of a gang) (2006).

questions to a jury to determine whether the state has proven beyond a reasonable doubt the existence of facts, beyond those necessary to prove the elements of the offense, that the state alleges provide a substantial and compelling reason to depart from the sentencing guidelines. *Id.* at 915, 921. The district court then independently determines whether those additional facts provide a reason for departure. *Id.* at 921.

Here, as in *Rourke*, the interrogatories ask the jury to make findings as to the reasons for an aggravated sentence: "Was [the victim] particularly vulnerable due to his physical injury and inability to defend himself?" and "Did the Defendant know or should the Defendant have known that [the victim] was particularly vulnerable?" The state contends that these interrogatories do not violate *Rourke* because the jury was first required to determine whether the victim was physically injured and unable to defend himself—facts that would support a reason for departure. We disagree. Although the interrogatories could be construed as the state suggests, they also are reasonably susceptible to an interpretation that the victim's physical injury and inability to defend himself had been established, and the jury need only determine whether those facts made the victim particularly vulnerable. The record supports the second interpretation. During its deliberations, the jury asked the district court to elaborate on the phrase "particularly vulnerable." The question strongly suggests that the jury understood its focus was on the question of particular vulnerability, rather than on the underlying factual issues. And the district court clearly relied on the jury's determination as to particular vulnerability, stating that the basis for the upward departure was "the jury's finding of a particular vulnerability."

Because the record reflects that the jury concluded that a reason to depart is present without necessarily making findings as to the existence of additional facts that would support that reason for departure, Neiss's aggravated sentence violates *Rourke*. Accordingly, we reverse and remand for resentencing consistent with *Rourke*. We are aware that this second remand imposes a burden on the parties and the families affected by this case, but *Rourke* requires this result. As a practical matter, a decision not to convene a new sentencing jury on remand may lessen that burden. But we leave to the sound discretion of the district court, which is most familiar with this case, whether to impose a sentence within the presumptive range or convene a new sentencing jury and determine whether imposition of an aggravated sentence up to 399 months is warranted.

Reversed and remanded.