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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1307**

State of Minnesota,
Respondent,

vs.

David Lee Barnes,
Appellant.

**Filed February 4, 2013
Reversed and remanded
Stoneburner, Judge**

Hennepin County District Court
File Nos. 27-CR-08-2217, 27-CR-08-4512, 27-CR-0836033

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Anders J. Erickson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Hudson, Judge; and
Kirk, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

On appeal after remand for resentencing, appellant argues that the district court erred by sentencing him to a longer sentence than was originally imposed. We reverse and remand.

FACTS

In September 2009, pursuant to a plea agreement that capped possible prison time at 240 months, appellant David Lee Barnes pleaded guilty to two counts of first-degree aggravated robbery, occurring on December 18, 2007; one count of first-degree aggravated robbery, occurring on January 2, 2008; and one count each of first-degree aggravated robbery and first-degree assault, occurring on January 11, 2008. The district court imposed concurrent sentences of 78, 98, 108, and 108 months for each of the four aggravated robbery convictions and a concurrent term of 144 months for the first-degree assault conviction, for a total term of 144 months in prison.¹ The district court ordered the sentences to be consecutive to an imposed-but-not-served 78-month federal prison sentence.²

¹ In imposing this sentence, the district court started with a criminal-history score of three and used the *Hernandez* method for the subsequent offenses, which, under the sentencing guidelines, increases the presumptive duration of each subsequently imposed sentence. See *State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981).

² The record establishes that the federal court did not indicate whether Barnes's federal sentence would be concurrent with or consecutive to his state sentences, but an agreement between federal and state authorities called for Barnes to serve his state sentences before the federal sentence.

Barnes petitioned for postconviction relief, challenging the sentences on several grounds. The postconviction court granted partial relief, acknowledging that the district court had erred by failing to use a criminal-history score of zero in calculating the duration of the state sentences consecutive to the federal sentence. The postconviction court resentenced Barnes to concurrent terms of 48, 58, 78, 88, and 144 months, starting with a criminal-history score of zero and using the *Hernandez* method to increase his criminal-history score for each conviction beyond the first. The postconviction court again ordered the concurrent state sentences consecutive to the federal sentence.

Barnes appealed, arguing that imposing the state sentences consecutive to the federal sentence constituted a departure from the guidelines for which the district court did not provide a valid basis. Because this court had recently held that the guidelines do not include federal offenses in the list of felony convictions for which consecutive sentences are permissive, we agreed that Barnes's sentence constituted a departure that required written justification. *Barnes v. State*, No. A11-0652, 2012 WL 686089, at *3-4 (Minn. App. Mar. 5, 2012) (citing *State v. Hahn*, 799 N.W.2d 25, 36-37 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011)), *review denied* (Minn. June 27, 2012). This court reversed and remanded "for resentencing consistent with *Hahn* and the sentencing guidelines." *Id.* at *4.

On remand, the district court sentenced Barnes to 189 months in state prison concurrent with Barnes's 78-month federal prison sentence. The district court rejected Barnes's argument that it could not sentence him to more than 144 months, stating that its

original sentence was “a total sentence of 222 months, when you add the state time and the consecutive federal time.” This appeal followed.

D E C I S I O N

This court reviews the district court’s sentencing decision for an abuse of discretion. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). On resentencing after a sentence has been set aside in a successful sentencing appeal, the district court “may not impose a more severe penalty than the sentence which it previously imposed.” *State v. Wallace*, 327 N.W.2d 85, 88 (Minn. 1982). This rule is based on “procedural fairness and principles of public policy.” *State v. Prudhomme*, 303 Minn. 376, 380, 228 N.W.2d 243, 246 (1975).

The state argues that because the district court’s “clear original intention” was to impose a total sentence of 222 months, the imposition of 189 months does not violate the prohibition on imposing a harsher sentence after a successful sentencing appeal; rather, it in fact constitutes a less severe sentence. But the state has not cited any authority for the assertion that a state district court can be presumed to have imposed a previously imposed federal sentence or that the previously imposed federal sentence becomes part of a state sentence. And, despite the district court’s expressed concern about the impact of the federal sentence on the total length of Barnes’s incarceration, the district court plainly and repeatedly stated that a total of 144 months is the appropriate length of sentence for Barnes’s state convictions. Moreover, although on remand the district court ordered that Barnes serve his state sentences concurrently with his federal sentence, “the discretion of a federal sentencing court cannot be limited by a state court’s judgment.” *Hendrix v.*

Norris, 81 F.3d 805, 807 (8th Cir. 1996). And because, by agreement of federal and state authorities, Barnes is to serve his state sentences prior to serving his federal sentence, Barnes will serve his entire state prison term regardless of whether his federal sentence is concurrent or consecutive.

The district court originally imposed a 144-month sentence for Barnes's state convictions; it did not impose a 222-month sentence. The district court erred by imposing a 189-month sentence on remand because 189 months exceeds the 144 months originally imposed for Barnes's state convictions. We reverse and remand to the district court for resentencing. On remand, Barnes's sentences for the state convictions shall not exceed a total of 144 months.

We find no merit in the issues raised by Barnes in his pro se supplemental brief.

Reversed and remanded.