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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1991**

State of Minnesota,
Respondent,

vs.

Kevin Michael Roban,
Appellant.

**Filed January 6, 2009
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Hennepin County District Court
File No. 07010584

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mike Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, 875 Summit Avenue, Room 254, St. Paul, MN 55105 (for appellant)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Kevin Michael Roban caused a serious automobile accident when he lost control of his vehicle at highway speeds while severely intoxicated. He killed two occupants of

an oncoming vehicle and seriously injured a third occupant. He pleaded guilty to 12 offenses. The district court imposed three consecutive prison sentences of 78 months, 48 months, and one year and one day, respectively, for a total of 138 months and one day.

On appeal, Roban challenges the consecutive nature of the third sentence, arguing that it should run concurrently with the first and second sentences. He also argues that the cumulative length of his sentences unfairly exaggerates the criminality of his offenses. We conclude that the sentencing guidelines do not permit the third sentence to run consecutively to the first and second sentences. We also conclude that the two remaining consecutive sentences do not unfairly exaggerate the criminality of Roban's offenses. Therefore, we affirm in part, reverse in part, and remand for resentencing.

FACTS

On December 17, 2006, Roban drank alcoholic beverages and smoked marijuana at a party in the city of St. Paul. After the party, Roban drove himself and his girlfriend toward their home in the city of Coon Rapids. Because Roban was swerving, his girlfriend asked him to pull over so that she could drive, but Roban refused. While driving in the northbound lanes of State Highway 252, near the intersection of 81st Avenue in the city of Brooklyn Park, Roban lost control of the car, crossed the median, and collided with an oncoming car. Two passengers in the oncoming car, John Everson and Jillian Banks, died, and a third passenger suffered serious injuries. Law enforcement officers collected a blood sample from Roban, which revealed an alcohol concentration of .23.

The state charged Roban with 12 offenses, four relating to each of his victims. Roban entered a *Norgaard* plea of guilty to all 12 counts. *See State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961) (permitting defendant to plead guilty while claiming loss of memory of crime due to intoxication). At sentencing, the district court imposed sentences on three offenses, two counts (counts 1 and 5) of criminal vehicular homicide in violation of Minn. Stat. § 609.21, subd. 1(2)(i) (2006), for the deaths of Everson and Banks, and one count (count 9) of criminal vehicular operation resulting in substantial bodily harm in violation of Minn. Stat. § 609.21, subd. 2a(2)(i) (2006), for the injuries suffered by the third victim. Before imposing sentences, the district court considered, among other things, victim-impact statements by 12 individuals and Roban's statement of remorse. Roban moved for a downward dispositional departure, requesting that the court impose an executed sentence of 78 months on count 1 but impose stayed sentences on count 5 and count 9. The district court denied Roban's motion and imposed executed, consecutive sentences of 78 months on count 1, 48 months on count 5, and one year and one day on count 9, for a total of 138 months and one day. Roban appeals.

D E C I S I O N

I. Consecutive Sentencing

Roban argues that the district court erred by sentencing him consecutively on count 9, criminal vehicular operation resulting in substantial bodily harm. He contends that the third sentence should run concurrently with the first and second sentences. The

interpretation of the sentencing guidelines is a question of law, which this court reviews de novo. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007).

“Multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences found in Section VI may be sentenced consecutively to each other.” Minn. Sent. Guidelines II.F.2. All three offenses for which Roban was sentenced are listed in Section VI. Thus, as a general rule, all three of the offenses are eligible for permissive consecutive sentencing.

The general rule, however, is qualified: “Consecutive sentences are permissive under the above criteria . . . only when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections as determined under the procedures outlined in section II.C.” Minn. Sent. Guidelines II.F. Sentences within the shaded part of the sentencing grid in section IV are presumptively stayed, and sentences outside the shaded part of the grid are presumptively executed. Minn. Sent. Guidelines II.C. Criminal vehicular homicide, a level-8 offense, is outside the shaded part of the sentencing guidelines grid, which means that a sentence for such an offense is presumptively executed. Accordingly, Roban’s two convictions of criminal vehicular homicide are eligible for permissive consecutive sentencing. This much is not in dispute.

The specific issue raised by Roban is whether the sentence on the third offense, count 9, is presumptively executed such that the offense is eligible for permissive consecutive sentencing. The district court held that section II.F.2 of the sentencing guidelines permits consecutive sentencing for all three offenses and, accordingly, did not consider whether aggravating factors justify an upward durational departure on any of the

offenses. Criminal vehicular operation resulting in substantial bodily injury in violation of Minn. Stat. § 609.21, subd. 2a (2006), is a level-3 offense. Because Roban's criminal history score is less than 4, the presumptive guidelines sentence for Roban's conviction on count 9 is within the shaded part of the sentencing grid in section IV, which means that it is presumptively stayed. Because the sentence on count 9 is presumptively stayed, and because of the exception in section II.F., the third offense is not eligible for permissive consecutive sentencing pursuant to the general rule of section II.F.2 of the sentencing guidelines.

The state argues that the third offense is eligible for permissive consecutive sentencing because of this court's decision in *State v. Watkins*, 650 N.W.2d 738 (Minn. App. 2002), in which we held that "the presumptive disposition for a permissive consecutive sentence is *always* an executed sentence." *Id.* at 742. Roban, on the other hand, argues that the *Watkins* court misinterpreted section II.F. of the sentencing guidelines. *Watkins* addresses the issue whether a permissive consecutive sentence should be executed or stayed. *Id.* at 741-42; *see also State v. Chaklos*, 528 N.W.2d 225, 227-28 (Minn. 1995). The issue raised by Roban, however, is controlled by *State v. Rannow*, 703 N.W.2d 575 (Minn. App. 2005), in which the district court imposed consecutive sentences on five offenses without stating reasons for a departure from the guidelines. *Id.* at 578. This court reversed on the ground that three of the five sentences were presumptively stayed and, thus, not eligible for permissive consecutive sentencing, which the court stated is available "only under the limited circumstances listed in Minn. Sent. Guidelines II.F." *Id.* at 579. *Rannow* is directly on point because the district court

in that case, like the district court in this case, imposed consecutive sentences pursuant to section II.F.2 of the guidelines. *Rannow*, 703 N.W.2d at 577-78. It does not appear that either party brought *Rannow* to the attention of the district court in this case.

In the absence of aggravating factors to support a departure, the sentence on count 9 must run concurrently with the consecutive sentences on counts 1 and 5. Accordingly, we remand to the district court for imposition of the presumptive sentence on count 9, which is a stayed concurrent sentence of one year and one day. *See State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003) (holding that if district court fails to state reasons for departure, proper remedy is remand for imposition of presumptive sentence); *Rannow*, 703 N.W.2d at 580 (remanding for imposition of presumptive sentence pursuant to *Geller*).

II. Proportionality of Punishment

Roban argues that the two consecutive sentences, as well as the cumulative length of those two sentences, unfairly exaggerate the criminality of his offenses. Because we have concluded that the sentence on count 9 should be concurrent, our analysis assumes that only the sentences on counts 1 and 5 will run consecutive to each other. We review this issue for abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 660 (Minn. 2006).

A district court may impose “multiple sentences for multiple crimes arising out of a single behavioral incident if: (1) the crimes affect multiple victims; and (2) multiple sentences do not unfairly exaggerate the criminality of the defendant’s conduct.” *State v. Skipinthewednesday*, 717 N.W.2d 423, 426 (Minn. 2006); *see also State v. Hough*, 585 N.W.2d

393, 397 (Minn. 1998). The first element of this test is satisfied because there were three victims of Roban's offenses.

With respect to whether the second element of this test is satisfied, the Minnesota courts have not provided a single test for determining whether a sentence unfairly exaggerates the criminality of the sentenced offense, but our review is "guided by past sentences imposed on other offenders." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted). Our comparison must focus on sentences imposed upon "similarly-situated offenders." *State v. Blanche*, 696 N.W.2d 351, 379 (Minn. 2005). In performing this inquiry, we are mindful that a district court judge "sits with a unique perspective on all stages of a case, including sentencing, and . . . is in the best position to evaluate the offender's conduct and weigh sentencing options." *Hough*, 585 N.W.2d at 397.

The supreme court has affirmed the imposition of consecutive sentences for criminal driving offenses resulting in death. *See Chaklos*, 528 N.W.2d at 227-28 (approving consecutive sentences of 21 and 12 months for defendant who rear-ended vehicle, killing one occupant and injuring another). The supreme court also has "consistently affirmed the imposition of consecutive . . . sentences where a defendant was convicted of multiple-victim homicides." *McLaughlin*, 725 N.W.2d at 715. Thus, there is precedent supporting the imposition of consecutive sentences on count 1 and count 5 in this case.

Roban argues that whether his sentence unfairly exaggerates the criminality of his offenses should be based on his conduct rather than the suffering of his victims. *See*

State v. Kissner, 541 N.W.2d 317, 322 (Minn. App. 1995), *review denied* (Minn. Feb. 9, 1996). Here, Roban's conduct was egregious. He had an alcohol concentration of .23, nearly three times the legal limit. He also had smoked marijuana prior to the accident. Roban did not have a valid driver's license. Shortly before the accident, Roban's girlfriend asked him to pull over so that she could drive because he had been swerving, but he refused. Roban had a history of chemical dependency and repeated failures to complete treatment programs. At the time of the crash, Roban was on probation for several offenses and had been ordered to complete chemical-dependency treatment. In light of this conduct, we conclude that the imposition of consecutive, rather than concurrent, sentences on counts 1 and 5 does not unfairly exaggerate the criminality of Roban's offenses.

Upon remand, the total length of Roban's prison sentences will be 126 months. The district court imposed a 78-month sentence on count 1 and a 48-month sentence on count 5, which are the presumptive sentences under the sentencing guidelines. Minn. Sent. Guidelines II.F., IV. The supreme court has affirmed the imposition of multiple, consecutive sentences of presumptive length for a case involving criminal vehicular offense. *See Chaklos*, 528 N.W.2d at 227-28 (affirming consecutive presumptive sentences of 21 and 12 months for criminal vehicular homicide and criminal vehicular operation under 1992 sentencing guidelines, for total of 33 months). In other cases, the appellate courts have affirmed the imposition of multiple sentences of presumptive length. *See, e.g., State v. Gartland*, 330 N.W.2d 881, 883 (Minn. 1983) (affirming presumptive sentences of 18 and 23 months for two counts of criminal negligence

resulting in death under 1982 sentencing guidelines); *State v. Pelawa*, 590 N.W.2d 142, 150 (Minn. App. 1999) (affirming guidelines sentences of 50 months and 48 months for two counts of vehicular homicide), *review denied* (Minn. Apr. 28, 1999), *overruled on other grounds*, *State v. Al-Naseer*, 690 N.W.2d 744, 752 (Minn. 2005); *Kissner*, 541 N.W.2d at 319-20 (affirming presumptive sentences of 58 months, 78 months, 88 months, and 19 months for three counts of criminal vehicular homicide and one count of criminal vehicular operation causing substantial bodily harm). Roban has not cited any caselaw in which an appellate court has reversed consecutive presumptive sentences of similar cumulative length or for similar crimes. That the total length of Roban's sentences is longer than the cases cited above is due to the fact that the legislature has increased penalties for criminal-vehicular offenses over the years. Thus, the circumstances of this case do not compel the conclusion that Roban's sentences unfairly exaggerate the criminality of his offenses.

When considering the deference that a reviewing court gives to the district court's "unique perspective" and opportunity to "evaluate the offender's conduct and weigh sentencing options," the district court did not abuse its discretion by imposing consecutive sentences of presumptive length on count 1 and count 5. *See Hough*, 585 N.W.2d at 397.

Affirmed in part, reversed in part, and remanded.