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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-813**

State of Minnesota,
Respondent,

vs.

Marcus Aaron Smith,
Appellant.

**Filed April 30, 2012
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Washington County District Court
File No. 82-CR-10-366

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

Peter Orput, Washington County Attorney, Karin L. McCarthy, Assistant County
Attorney, Stillwater, Minnesota (for respondent)

Marcus Aaron Smith, Bayport, Minnesota (pro se appellant)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Halbrooks, Judge; and Crippen,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

This dispute concerns the propriety of Marcus Smith's prison sentence for one of his more-than fifteen domestic violence related offenses against the same victim. Smith, who committed this offense from prison, has been convicted of assault, felony harassment, stalking, and violations of orders for protection. When he violated the protective order in this instance, he was already serving a five-year prison term for one of the assaults. He pleaded guilty to felony violation of an order for protection, asked the district court for a downward sentencing departure, and received a delay in his sentencing so that he might prove (by finally abstaining from contacting the victim) that his pending departure request was justified. But he failed, contacting the victim again from prison, this time indirectly through his cousin. The district court completed its sentencing decision, denying Smith's departure motion and assigning Smith to a 15-month prison term consecutive to all his other sentences. Smith appeals, challenging the consecutive nature of his sentence and the calculation of his criminal history score. He also contends that the district court judge improperly inserted himself into the plea negotiations. Because the district court's consecutive sentencing decision was within its discretion and the judge did not improperly enter the plea negotiations, we affirm in part. But because the district court mistakenly calculated Smith's criminal history score, we reverse in part and remand for resentencing under a criminal history score of zero.

FACTS

By December 2009 Marcus Smith had been arrested for, charged with, and convicted of at least 15 offenses dating back to September 2000 arising from his domestic relationship with J.H. While Smith was in prison for several of the offenses, on December 22, 2009, J.H. reported to the Forest Lake police department that Smith had telephoned her five times that day. An active order for protection prohibited Smith from contacting J.H. by any means—in person, by telephone, by letter, or through a third party. J.H. answered one of the five calls and recognized Smith as the caller. He told her he loved her and that he would not be contacting her anymore. Two days before, on December 20, J.H. had reported other violations of the order.

Smith's calls occurred during his 60-month prison sentence for a third-degree assault conviction against J.H. He had also been sentenced two months earlier for an additional 23 and 15 months, respectively, for felony harassment and felony violation of an order for protection. Smith's record of offenses against J.H. included domestic assault, assault, violating orders for protection, harassment, and stalking.

Based on his December 22 conduct, the state charged Smith with felony violation of an order for protection because he had violated two or more orders within 10 years of a previous conviction under Minnesota Statutes section 518B.01, subdivision 14(d)(1) (2008). And in a separate complaint, the state also charged Smith with two counts of felony violation of an order for protection under Minnesota Statutes section 518B.01, subdivision 14(d)(1) for the violations that took place on December 20. Smith pleaded

guilty to two counts of felony violation of an order for protection, one in this case (for the December 22 conduct) and one in the other (for the December 20 conduct).

Sentencing occurred on the same day he pleaded guilty. Smith then acknowledged through counsel that the presumptive sentence for each count was 15 months in prison to be served consecutive to each other and also consecutive to the extant sentence, but he asked the district court to consider departing downward. He specifically requested that the sentences for the December 20 and 22 offenses run concurrently with each other, and better yet, concurrently also with his extant sentences. He argued that he would not likely contact J.H. again, because in the prior 10 months before sentencing, he had made no contact with her. He also noted that he had been enrolled in the restorative justice program, earned his GED, and had been receiving psychological treatment. He emphasized that the last call he had made to J.H. was nonthreatening, saying only “I’m sorry, I love you, and I’m not going to contact you anymore.” He added that he had been triggered to call J.H. because he had received some paperwork that inadvertently contained her telephone number. The state argued that the two new 15-month sentences should run consecutively to each other and to the extant sentences because of Smith’s 15 prior qualified domestic convictions within the previous 10 years, the offenses were serious, he was previously denied a departure on a different conviction, and he had repeatedly failed to follow the orders for protection.

The district court accepted Smith’s guilty pleas for both the December 20 and 22 violations. For the December 20 conduct it sentenced Smith to 15 months in prison to run consecutive to any sentence he was then serving. But it delayed the sentencing in this

case, for the December 22 conduct, for about one year, giving Smith the opportunity to demonstrate his promise not to violate the order for protection again and to achieve the downward departure he was seeking. The district court set his new sentencing to occur on September 23, 2011.

But the district court did not wait until that date to sentence Smith. That's because on January 20, 2011, the state moved for Smith's sentencing after it learned that J.H. had received a telephone call from Smith through a third party. According to a police report attached to the state's motion, J.H. reported that she had been contacted from a restricted number four times on September 29 and 30. She identified the caller as Jeffrey Funchie, Smith's cousin. J.H. answered the first call, and Funchie told her that he had gotten her number from Smith and was calling to see how she was doing. J.H. did not answer the next two calls, but she answered the fourth and during it, Funchie acknowledged that Smith had asked him to call her.

Police could not quickly determine the number from which the telephone calls to J.H. had originated. But they investigated Funchie's number and, with the help of prison officials who were "one hundred percent certain" that Smith had called Funchie from prison, they concluded that Smith had called Funchie and prompted him to contact J.H.

The district court sentenced Smith in February 2011. At the sentencing hearing, Smith denied having made third-party contact with J.H. The district court weighed the evidence and was persuaded against Smith's denials:

I am convinced that there has been by you or through you a violation of my direct admonition to you and the reason that I delayed sentencing was to see if you were going to be true to

your word of not having any further contact. And I think this record establishes to my satisfaction under my sentencing order that that did happen, so I intend to impose a sentence.

The district court sentenced Smith to 15 months in prison based on a criminal history score of one, consecutive to his 15-month sentence for the conviction arising from the December 20 offense, as well as consecutive to all ongoing sentences. By imposing a 15-month sentence, the district court effectively rejected Smith's request for a downward departure. Smith appeals.

DECISION

I

Smith argues that the district court abused its discretion by imposing consecutive sentencing and by calculating his criminal history score to be one rather than zero. Only the second argument persuades us to reverse for a sentence recalculation.

The consecutive nature of Smith's presently challenged sentence touches on two separate components to Smith's overall sentencing, specifically, his sentence in relation to the sentence he was already serving and his sentence in relation to the December 20 conduct, which he had not yet begun serving. Smith concedes that consecutive sentencing was presumed as between the now-challenged sentence and the sentences he was serving at the time he was sentenced. *See* Minn. Sent. Guidelines II.F.1 (2010). But he asserts that consecutive rather than concurrent sentencing was only permissive, rather than presumptive, as between the now-challenged sentence and his sentence for the December 20 behavior. Whether the consecutive sentencing was permissive or presumptive as between the two December offenses also affects both whether the district court abused its

discretion by imposing the sentences consecutively and whether it erred by using a criminal history score of one. So we will address the question of presumption first.

Concurrent rather than consecutive sentencing is generally presumptive when an offender is convicted of multiple new offenses or when he has a prior felony sentence that is not yet discharged. Minn. Sent. Guidelines II.F. But consecutive sentencing is presumed when the conviction is for a crime committed while serving an executed prison sentence. Minn. Sent. Guidelines II.F.1. Consecutive sentences are permissive, however, rather than presumptive, for “[m]ultiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences found in Section VI.” Minn. Sent. Guidelines II.F.2.b. Section six identifies violations of an order for protection under Minnesota Statutes section 518B.01, subdivision 14(d) as calling for a permissive consecutive sentence. Minn. Sent. Guidelines VI (2010).

Based on the sentencing guidelines, Smith’s argument appears to be correct that his sentence in this case is presumptively consecutive to the sentence he was already serving but permissively consecutive to his sentence for his conviction for the December 20 offense. This is because consecutive sentences are presumptive “to the sentence being served by the offender *at the time* the . . . new offense was committed.” Minn. Sent. Guidelines II.F.1 (emphasis added); *see also State v. Collins*, 580 N.W.2d 36, 44–45 (Minn. App. 1998), *review denied* (Minn. July 16, 1998) (holding defendant convicted and sentenced for two offenses while imprisoned on another sentence and who had not begun serving his sentence for his first conviction may permissively but not presumptively receive consecutive sentencing). Smith was not yet serving his sentence

for the December 20 offense when he committed the December 22 offense. It was permissive, not presumptive, that Smith's two December 2009 offenses be assigned consecutive sentencing.

That the district court was merely permitted to sentence Smith consecutively does not resolve the challenge. Smith argues further that the district court abused its discretion by imposing his sentence consecutively to the sentences he was already serving and to his sentence in the December 20 matter. The sentences outlined in the Minnesota Sentencing Guidelines are presumed appropriate for the crimes to which they apply. Minn. Sent. Guidelines II.D (2010). The district court lacks the discretion to depart from the guideline sentence unless the defendant identifies substantial and compelling circumstances to support the departure. Minn. Sent. Guidelines II.D; *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). But if those circumstances are present, the decision whether to depart from the sentencing guidelines rests within the district court's discretion and we will not disturb its decision absent an abuse of that discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Based on that standard, it has become axiomatic that only in rare cases will we reverse a district court's decision not to depart from the presumptive sentence. *Id.* This is not the rare case.

Smith does not convince us that substantial and compelling circumstances support departing from his presumptively consecutive sentence as between his new sentence and the one he was serving when he received it. We easily dismiss Smith's contention that the allegation of third-party contact by Smith was insufficiently proven to undermine his request for concurrent sentencing; the district court judge was satisfied that the record

established that third-party contact had occurred, and we agree that the record adequately supports the finding.

The district court considered the arguments presented for and against departing. We cannot say that it abused its discretion not to depart in light of Smith's failure to change his behavior as promised, his repeated failure to follow the orders for protection, and his remarkably lengthy history of domestic-relations convictions. In a show of leniency and latitude the district court arranged to defer sentencing for a full year to allow Smith the chance to earn his requested downward departure; all he had to do was avoid contact with J.H. as ordered. The district court certainly did not abuse its discretion by imposing Smith's sentence consecutively to the sentences he was already serving. Similarly, no compelling circumstance argues for concurrent sentencing in relation to the sentence that invites only permissive consecutive sentencing.

Smith argues that the district court erred by using a criminal history score of one when it imposed his sentence in this case consecutive to the sentence in the December 20 case. Smith did not raise this issue at the sentencing hearing in February 2011, but a sentence can be corrected at any time if it rests on an incorrect criminal history score. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). Interpretation of the sentencing guidelines is a question of law, which we review de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

Smith argues correctly that the district court erred by using a criminal history score of one in sentencing this case consecutive to the 15-month sentence in the December 20 case because a consecutive sentence is only permissive. *See Minn. Sent.*

Guidelines II.F.2.6. Under the sentencing guidelines a criminal history score of zero is used to determine the length of a permissive consecutive sentence. Minn. Sent. Guidelines II.F.2. Smith's argument is supported by *Collins*, 580 N.W.2d at 45, and we are satisfied that he is correct. We conclude that the district court erred by applying a criminal history score of one rather than zero when it imposed Smith's sentence in this case.

II

Smith submitted a separate brief in which he also contends that the district court judge improperly inserted himself into the plea negotiation by promising him a downward departure. Smith relies on *State v. Moe*, 479 N.W.2d 427 (Minn. App. 1992), *review denied* (Minn. Feb. 10, 1992), and *State v. Anyanwu*, 681 N.W.2d 411 (Minn. App. 2004). This case is unlike both of those cases. Rather than suggesting undue entanglement, the circumstances here indicate that the district court accepted Smith's plea before deciding to delay the sentencing for about a year to see "whether or not [Smith's] word is good and whether or not [Smith] can avoid [his] own decision making and clearly and truly decide that this woman wants no contact with [him] ever, ever, under any circumstance." The district court judge never promised Smith a particular sentence. The judge merely acted patiently and leniently rather than precipitously, deferring judgment for a year to test the quality of Smith's claim that substantial and compelling circumstances warranted a downward departure. The state, not Smith, objected to the

sentencing delay. Anyway, the district court judge did not improperly insert himself into the plea discussions.

Affirmed in part, reversed in part, and remanded.