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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1251**

State of Minnesota,
Respondent,

vs.

Scott Dean Rodahl,
Appellant.

**Filed April 29, 2008
Affirmed
Schellhas, Judge**

Polk County District Court
File No. CR-06-5398

Lori Swanson, Attorney General, Bremer Tower, Suite 1800, 445 Minnesota Street,
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Lawrence Hammerling, Chief Appellate Public Defender, Mark F. Anderson, Assistant
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appellant)

Considered and decided by Klaphake, Presiding Judge; Schellhas, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges sentences imposed for three convictions. His primary argument is that the district court abused its discretion by departing from the sentencing guidelines. He argues the district court abused its discretion by imposing an upward-durational departure in his sentences and by imposing the sentences consecutive to a prior sentence after finding consecutive sentencing was presumptive under the guidelines. Concluding that the district court did not abuse its discretion and that appellant presents no other basis for relief, we affirm.

FACTS

On December 11, 2006, appellant Scott Dean Rodahl appeared with a court-appointed public defender and pleaded guilty to check forgery, theft by check, and theft by misrepresentation in exchange for dismissal of two other similar charges. All of the offenses occurred while appellant was on supervised release for a felony conviction. Appellant has a long history of similar offenses. His presentence investigation revealed 12 prior felonies and four prior misdemeanors, most of which were offenses related to check forgery. A sentencing hearing was scheduled in early February 2007.

Appellant appeared for sentencing in early February with his court-appointed counsel and requested a five-week continuance so that he could complete a chemical-dependency evaluation. The district court granted appellant's request and continued the sentencing hearing for five weeks. Appellant appeared for sentencing in March, discharged his court-appointed public defender and requested an additional continuance

so that he could obtain private counsel. The district court granted appellant's request and continued the sentencing hearing for two weeks. Appellant appeared for sentencing later in March without counsel and told the court he needed additional time to come up with funds to hire private counsel. The district court denied appellant's request for an additional continuance, proceeded with sentencing, furloughed appellant for one week so that he could visit his son, and ordered him to begin serving his sentences on April 2, 2007.¹

On each of appellant's convictions, the district court committed appellant to the Minnesota Commissioner of Corrections for 60 months as a career offender, noting that: (1) appellant had more than five prior felony convictions; (2) his offenses demonstrated a pattern of criminal conduct; and (3) he had previously been sentenced as a career offender. The court imposed the sentences concurrent to one another, but after finding that consecutive sentencing was presumptive under the sentencing guidelines, the court imposed the sentences consecutive to a prior sentence for a separate conviction. Because the court imposed the new sentences consecutive to the prior sentence, the court denied appellant credit for 255 days he had served on his prior sentence.

Appellant challenges his sentences in two respects. He asks this court to reduce the duration of his sentences under Minn. Stat. § 244.11, subd. 2(b) (2006), and argues that the district court erred in its determination that consecutive sentencing was presumptive and by imposing consecutive sentences.

¹ We note discrepancies between the procedural history contained in appellant's brief and a transcript of the March 26, 2007 sentencing hearing. The procedural history contained in this opinion is taken from the transcript of the March 26 sentencing hearing.

DECISION

This court reviews a sentence to determine “whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b) (2006). We may dismiss or affirm the appeal, or vacate or set aside the sentence, and also may direct entry of an appropriate sentence or order further proceedings. *Id.* This review is conducted under the abuse-of-discretion standard. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). A district court abuses its discretion when a sentence unfairly exaggerates the criminality of the defendant’s conduct. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). We “generally will not interfere with sentences that are within the presumptive sentence range.” *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982). “Thus, although we have the authority, if the circumstances warrant, to modify a sentence that is within the presumptive sentence range, we generally will not exercise that authority absent compelling circumstances.” *Id.*

The district court sentenced appellant to three concurrent 60-month sentences, one for each of his three convictions. The parties do not dispute that these sentences constitute an upward-durational departure by the district court imposed because of appellant’s status as a career offender under Minn. Stat. § 609.1095, subd. 4 (2006). And there is no dispute over the application of the career-offender statute. The parties’ only dispute relates to the duration of the sentences imposed.

To apply the abuse-of-discretion standard in this context, we look to the sentencing court’s rationale to determine whether, in departing from the presumptive

sentences, it pronounced sentences proportional to the severity of the offenses. *State v. Richardson*, 670 N.W.2d 267, 285 (Minn. 2003). *Richardson* provides a format for our review that includes five rules: (1) if no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed; (2) if reasons supporting the departure are stated, we will examine the record to determine if the reasons given justify the departure; (3) if the reasons given justify the departure, we will allow it; (4) if the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify the departure, the departure will be affirmed; and (5) if the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed. *Id.* (citing *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003)). After applying the rules set forth in *Richardson*, we conclude that the district court did not abuse its discretion. First, reasons for the departure were stated on the record. Appellant is a career offender and committed new offenses while on supervised release from prison on a separate felony conviction. Second, the reasons given justify the upward-durational departure. The new offenses show a pattern of similar criminal actions taken by appellant in the same geographical area for nearly 20 years. Despite significant involvement with the correctional system, appellant failed to modify his behavior. Because the reasons given by the district court for the departures justify them, we will allow them. We conclude the district court did not abuse its discretion in its upward-durational departure.

Appellant next argues that contrary to the district court's determination that consecutive sentencing was presumptive, his new sentences should have been imposed

concurrent to his prior sentence because concurrent sentencing was presumptive. Appellant's prior sentence has now expired so the issue is whether appellant will receive credit for 255 days served on the prior sentence before the district court imposed its new sentences. Interpretation of the sentencing guidelines is reviewed de novo. *State v. Rouland*, 685 N.W.2d 706, 708 (Minn. App. 2004), *review denied* (Minn. Nov. 23, 2004).

Because we “generally will not interfere with sentences that are within the presumptive sentence range,” *Freyer*, 328 N.W.2d at 142, we first decide whether consecutive sentencing was presumptive. If it was, the sentences will not be modified absent “compelling circumstances.” 328 N.W.2d at 142. Appellant argues that it was presumptive to impose the sentences concurrent to his older sentence. The state argues consecutive sentences were presumptive.

Under the sentencing guidelines, consecutive sentences are presumptive “when the conviction is for a crime committed by an offender . . . on supervised release.” Minn. Sent. Guidelines II.F. However, consecutive sentences are only presumptive “when the presumptive disposition for the current offense(s) is commitment to the Commissioner of Corrections.” *Id.* Further, *concurrent* sentences will be presumptive if “the total time to serve in prison would be longer if a concurrent sentence is imposed.” *Id.* Appellant argues that concurrent sentences were presumptive because they would result in more time in prison and because the new offenses do not have a presumptive sentence of commitment.

To determine which form of sentencing was presumptive, we must determine which form of sentencing results in more “total time to serve in prison.” Under

concurrent sentencing for appellant's level II offenses committed with a criminal-history score of six or more, the presumptive duration of appellant's sentences is 21 months. Minn. Sent. Guidelines IV. Terms of 21 months carry presumptive terms of imprisonment of 14 months.² *Id.* Under these terms, if appellant had begun his sentences on April 2, 2007, he would have been sentenced to serve a total of 428 days. But the "total time in prison" actually served under concurrent sentencing would be shorter than 428 days because he would receive credit for 255 days served on his prior sentence, resulting in "total time to serve in prison" of 173 days.

The duration of a presumptive consecutive sentence is calculated with a criminal-history score of one rather than the actual criminal history score of the offender. Minn. Sent. Guidelines II.F. With a criminal-history score of one, the duration of appellant's presumptive sentences for his level II offenses is one year and one day, stayed, with a term of imprisonment of eight months. Minn. Sent. Guidelines IV. If appellant served the terms beginning on April 2, 2007, the result would be 245 days of imprisonment. Even without including the 255 days served by appellant on his prior sentence, for which appellant would not get credit, the total time to serve in prison under consecutive terms (245 days) is greater than the total time to serve in prison under concurrent terms (173 days). Appellant's argument that concurrent sentencing was presumptive because it

² Appellant argues that the presumptive sentence should be used in the calculation, and not the term of imprisonment, which would decrease the number of days served. This assertion is contrary to the comments to the guidelines. In Minn. Sent. Guidelines cmt. II.F.03, which includes an example calculation of a consecutive sentence that is shorter than a concurrent sentence, the term of imprisonment is used, rather than the presumptive sentence.

resulted in more “total time to serve in prison” is incorrect and, consequently, we reject appellant’s argument.

Appellant next argues that the presumptive disposition was not commitment to the Minnesota Commissioner of Corrections and that consecutive sentencing was therefore not presumptive. Appellant relies on the fact that when his sentences are calculated with a criminal-history score of one, they result in presumptive sentences of one year and one day, stayed, rather than commitment to the commissioner of corrections. Appellant argues that because the presumptive consecutive sentences are for stayed time, not commitment, the consecutive sentences constitute a departure. Appellant’s argument is unpersuasive. In *State v. Holmes*, 719 N.W.2d 904, 908 n.8 (Minn. 2006), the supreme court stated that section II.F. “requires that [a] criminalhistory score should be reduced only for purposes of determining the presumptive *duration* of the consecutive sentence.” In this case, pursuant to *Holmes*, the criminal-history score of one should only be used to determine the presumptive duration, not to identify the presumptive disposition. The presumptive sentence using appellant’s actual criminal-history score is commitment to the commissioner of corrections for 21 months. Minn. Sent. Guidelines IV. Appellant is therefore incorrect in his argument that his presumptive sentence was not for commitment to the commissioner of corrections.

Because consecutive sentencing was presumptive, we will not interfere with it absent “compelling circumstances.” *Freyer*, 328 N.W.2d at 142. Here no compelling circumstances exist. This is a straightforward case involving a career offender who, consistent with a longstanding pattern of criminal conduct, committed additional offenses

while on supervised release from prison. These circumstances are not compelling circumstances that would justify interference with the district court's upward-durational departure; rather, they are precisely the type of circumstances in which consecutive sentencing is appropriate under the sentencing guidelines.

Appellant submitted a pro se supplemental brief that raised additional arguments in support of his appeal. None of the arguments presents a basis for relief. We address only appellant's argument that appearing with counsel at the time of sentencing is mandatory under the law.

The right to counsel does include the right to be represented at a sentencing hearing. *Mempa v. Rhay*, 389 U.S. 128, 137, 88 S. Ct. 254, 258 (1967) (determining that right to counsel exists at sentencing because substantial rights of accused may be affected). But this right includes "a fair opportunity to secure counsel of [a defendant's] choice," not "the unbridled right to be represented by counsel of [a defendant's] choice." *State v. Vance*, 254 N.W.2d 353, 355-56 (Minn. 1977). Continuances of sentencing hearings in order to allow for substitution of counsel, as occurred in this case, should "be granted only if exceptional circumstances exist and the demand is timely and reasonably made." *Id.* When appellant requested a continuance on March 26, 2007, to obtain private counsel, he had already been granted a two-week continuance for that purpose and that continuance followed a five-week continuance so that appellant would have time to obtain a chemical-dependency assessment.

When claiming his right to counsel was violated, a defendant also has to show that he was prejudiced by the lack of counsel. *State v. Gallagher*, 275 N.W.2d 803, 808

(Minn. 1979) (citing *McClain v. Swenson*, 435 F.2d 327 (8th Cir. 1970), which holds that *Mempa* requires a showing of prejudice).

In this case, the third request for a continuance to obtain private counsel was properly denied and no prejudice has been claimed or shown from the lack of counsel at sentencing. Appellant's third request for a continuance was properly denied because no exceptional circumstances were present that would warrant another continuance.

Affirmed.