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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0029

Jude Wilson Halter, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 9, 2008
Affirmed
Bjorkman, Judge

Winona County District Court
File No. 85-CV-07-2304

Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Charles MacLean, Winona County Attorney, Thomas E. Gort, Assistant County Attorney, 171 West 3rd Street, Winona, MN 55987 (for respondent)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.[*]

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[*] Retired judge of the Minnesota Court of Appeals, serving 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 the district court's denial of his petition for postconviction relief, arguing that the sentencing court failed to state on the record the factors supporting his upward sentencing departure. Because there is a sufficient basis in the record to support the departure, we affirm.

FACTS

In the early morning on July 4, 2000, appellant Jude Halter forcefully entered a private residence in Winona and sexually assaulted a female who was asleep in the home. Halter handcuffed the victim and threatened her with a gun during the assault. On July 24, Halter entered a different residence in Winona with the intent to sexually assault another sleeping female. As Halter approached the bed, the female awoke and yelled out. Halter fled from the residence.

Halter was subsequently apprehended and charged with multiple counts of burglary, first-degree criminal sexual conduct, kidnapping, and fourth-degree criminal sexual conduct related to the two incidents. Halter pleaded guilty to first-degree criminal sexual conduct and first-degree burglary for the July 4 incident and to first-degree burglary and first-degree attempted criminal sexual conduct for the July 24 incident. The state agreed to dismiss the remaining charges.

The plea agreement also contained a joint sentencing recommendation, including a 129-month executed sentence for the first-degree criminal-sexual-conduct charge, which represented the presumptive sentence of 86 months plus a 50% aggravated durational

departure. Halter acknowledged at the plea hearing that he understood the joint recommendation and that it was what he expected to happen at sentencing.

At the sentencing hearing on April 1, 2003, the state outlined the bases for the agreed-to upward departure, explaining that the joint sentencing proposal

> presupposes a 50 percent aggravated durational departure for the completed offense on July 4th, 2000, and that upward durational departure is supported by the following aggravated factors:
>
> First, the defendant committed the crime within the victim's zone of privacy; right in the victim's bedroom; in the middle of the night; it was a violation of a place where she had every right to feel protected and safe;
>
> Second, the defendant committed this crime while threatening the use of both a semiautomatic handgun and a knife;
>
> Third, the defendant committed this crime with multiple penetrations; he twice entered her and twice ejaculated;
>
> Fourth, the defendant committed this crime with particular cruelty; you've heard the words: "Have a nice 4th of July." "You've made Winona proud tonight." "Thanks for leaving the window open for me." "I'll kill you if you report this to the police."
>
> And finally . . . this defendant committed this crime against a particularly vulnerable victim. As I said, he entered the [] victim's bedroom as she slept; he threatened her with a knife and a gun; he racked [a round] into the chamber of his semiautomatic handgun that he then pressed against her temple; and the defendant put handcuffs on the victim before the rape even began.

Defense counsel stated he did not "disagree with any of the aggravating factors that [the state] cited." The sentencing court did not restate the departure grounds on the record but stated it would do so in its written departure report and that the reasons "will essentially

be for the same or similar reasons as have been expressed in the recommendations that I have heard here today."

On July 20, 2007, Halter filed his second petition for postconviction relief,[1] arguing that the sentencing court failed to state on the record findings of fact to support its upward departure and erred in imposing a ten-year conditional-release period. The postconviction court affirmed the upward departure but amended the conditional-release period to five years. This appeal follows.

D E C I S I O N

On appeal from a decision by a postconviction court to deny relief, we review whether the court's findings are supported by sufficient evidence in the record and will not disturb the court's decision unless it constitutes an abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). But we review issues of law, including the interpretation of procedural rules, de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

Minn. R. Crim. P. 27.03, subd. 4(C), requires the district court to state, on the record, the factual basis for any sentence that departs from the sentencing guidelines applicable to the case. The rule is consistent with our supreme court's direction to comply with the sentencing guidelines: "If no reasons for departure are stated on the

[1] Halter filed his first postconviction petition in December 2004, seeking a reduction of his sentence to the presumptive guidelines sentence pursuant to *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). The postconviction court postponed its consideration of Halter's petition pending the supreme court's decision in *State v. Houston*, 702 N.W.2d 268, 273–74 (Minn. 2005) (holding that *Blakely* is not a "watershed" rule requiring retroactivity). Following *Houston*, Halter agreed that he was not entitled to postconviction relief pursuant to *Blakely* and dismissed his petition.

record at the time of sentencing, no departure will be allowed." *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). The requirement enables reviewing courts to meaningfully examine departures on appeal. *State v. Peterson*, 405 N.W.2d 545, 547 (Minn. App. 1987).

Halter argues that the postconviction court erred in denying his postconviction challenge to the upward sentencing departure because the sentencing court failed to state on the record the factors supporting the departure. We disagree. This is not a case in which we are left to speculate as to the departure grounds. The sentencing court stated that it was "inclined to adopt the joint recommendation that has been made in substantially all of its respects," and that

> although I have not specified the grounds that I'm relying upon [] for the aggravated durational departure . . ., I will do so in the departure reports to be filed with the Guidelines Commission, and they will essentially be for the same or similar reasons as have been expressed in the recommendations that I have heard here today.

The district court further stated, when confirming Halter's agreement to the recommended sentence:

> [G]iven everything that was presented in support of the [s]tate's position on sentencing here [and] given the number and nature of the identified aggravating circumstances that might be considered in determining the duration of your sentence for the most serious of these offenses here today, that there is a showing of grounds that would support substantially longer than a [50%] durational aggravated departure from the sentencing guidelines.

These statements identify the reasons for the departure with the requisite specificity to permit us to review them.

Moreover, the record evidence is sufficient to affirm the departure. *Williams*, 361 N.W.2d at 844; *see also State v. Martinson*, 671 N.W.2d 887, 894 (Minn. App. 2003) ("Even if the [sentencing] court's express findings were not explained with particularity, this court must affirm the departure if the record contains valid and sufficient reasons to support the departure."), *review denied* (Minn. Jan. 20, 2004).[2] Halter does not address this aspect of the analysis—that an aggravated sentencing departure may be affirmed even when the departure grounds are not expressed with particularity so long as there is sufficient evidence in the record to justify the departure. Instead, Halter cites *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003), in which the supreme court reversed this court's decision to remand and allow the sentencing court to place its departure grounds on the record after the fact. But Halter's reliance on *Geller* is misplaced; there is no indication that the record in *Geller* contains any expression of the reasons justifying the sentencing departure.

By contrast, here, the state explicitly outlined numerous factors justifying the upward departure at the sentencing hearing, including: (1) the assault was committed within the victim's zone of privacy; (2) the defendant threatened the victim with a gun and knife during the assault; (3) there were multiple penetrations; (4) the defendant committed the crime with particular cruelty; and (5) the assault was made upon a

[2] We note that if *Blakely* applied here, this court could not review the sufficiency of the evidence to justify the departure. *See State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008) (holding that pursuant to *Blakely*, when the district court states inadequate or improper reasons for a departure on the record, appellate courts no longer follow the past practice of independently reviewing the record for sufficient evidence to justify the departure because that is now a function for the jury, unless waived by the defendant).

particularly vulnerable victim. These factors are sufficient to support departure. *See State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982) (upward departure justified because rape occurred within victim's zone of privacy); *State v. Herberg*, 324 N.W.2d 346, 350 (Minn. 1982) (upward departure justified where rapist forced victim to submit to multiple penetrations); Minn. Sent. Guidelines II.D.2.b.(1)–(2) (fact that victim was particularly vulnerable and treated with particular cruelty included among nonexclusive list of aggravating factors that justify departure).

Additionally, defense counsel stated on the record at the sentencing hearing: "I don't disagree with any of the aggravating factors that [the state] cited to the Court. There's no way to minimize what happened, no way to minimize what he did." And Halter responded "yes" when asked by the sentencing court: "Today do you wish this Court to confirm your convictions and go forward for sentencing now as scheduled with the expectation that the sentencing will be substantially as recommended?" Based on this record, there is no doubt that the district court, prosecutor, defense attorney, and Halter himself were aware of the aggravating factors that justified the durational departure. Because Halter was able to evaluate his case and prepare his appeal, and we are likewise able to meaningfully review the departure, we conclude that the *Williams* requirements are met. *See Peterson*, 405 N.W.2d at 547.

Because the record plainly establishes the existence of aggravating factors to support the upward sentencing departure, the postconviction court did not err in denying Halter's petition.

Affirmed.