

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-852**

State of Minnesota,
Respondent,

vs.

Jacquet Deon Munn,
Appellant.

**Filed June 11, 2012
Reversed and remanded
Collins, Judge***

Hennepin County District Court
File No. 27-CR-10-16612

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

Michael O. Freeman, Hennepin County Attorney, Thomas A. Weist, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins,
Judge.

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

UNPUBLISHED OPINION

COLLINS, Judge

In this direct sentencing appeal, appellant argues that (1) the district court erred by failing to use a zero criminal-history score when calculating the duration of the second of two permissive-consecutive sentences or to state any reason supporting a departure from the sentencing guidelines, and (2) he should be permitted to withdraw his pleas. We reverse and remand.

FACTS

Jacquet Munn was charged in April 2010 with two counts of first-degree criminal sexual conduct, one count of third-degree criminal sexual conduct (using force or coercion), one count of possessing a firearm as a prohibited person, and one count of second-degree assault.

Munn pleaded guilty to the third-degree criminal sexual conduct and firearm possession charges. The plea agreement contemplated sentences totaling 240 months. As stated by the prosecutor at the plea hearing,

the agreement to this case is as follows: The defendant would be entering a plea of guilty to count three of the criminal complaint, that's criminal sexual conduct in the third degree. It would be a guidelines sentence of 180 months executed, less any credit for time served.

He would also plead guilty to count four of the criminal complaint, prohibited person. He would receive a guideline sentence of 60 months consecutive.

Munn was sentenced on January 25, 2011. After first adjudicating Munn guilty of possessing a firearm as a prohibited person, the district court imposed and executed a

sentence of 60 months. After next adjudicating Munn guilty of third-degree criminal sexual conduct, the district court imposed and executed a sentence of 180 months, consecutive to the 60-month sentence, totaling 240 months. No reason for a departure from the sentencing guidelines was placed on the record. This appeal followed.

D E C I S I O N

I.

This court may review a “sentence imposed or stayed 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) (2010). A district court’s decision to depart from the sentencing guidelines’ presumptive sentence is reviewed for an abuse of discretion. *See State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). “Statutory construction and interpretation of the sentencing guidelines are subject to de novo review.” *State v. Johnson*, 770 N.W.2d 564, 565 (Minn. App. 2009).

Generally, sentences imposed for multiple offenses committed in a single behavioral incident are presumptively concurrent. *State v. Crocker*, 409 N.W.2d 840, 845 (Minn. 1987). However, this presumption does not apply when, as here, one of the sentences is for criminal sexual conduct committed with force or violence. Minn. Stat. § 609.035 subds. 3, 6 (2010). For example,

a prosecution or conviction for committing a violation of sections 609.342 to 609.345 with force or violence is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct. If an offender is punished for more than one crime as authorized by

this subdivision and the court imposes consecutive sentences for the crimes, the consecutive sentences are not a departure from the Sentencing Guidelines.

Id., subd. 6. The sentencing guidelines are consistent with this statute, stating that consecutive sentences are always permissive when sentencing a “current felony conviction for . . . Criminal Sexual Conduct in the First through Fourth Degrees with force or violence.” Minn. Sent. Guidelines II.F.2.f. (2008). Here, it is undisputed that consecutive sentencing was permissive and not erroneous.

“When consecutive sentences are imposed, offenses are sentenced in the order in which they occurred.” *Id.* II.F. Here, it is undisputed that the chronological order of sentencing was not erroneous.

The sentencing guidelines provide that for any offense permissively sentenced consecutive to another offense, “a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration. The purpose of this procedure is to count an individual’s criminal history score only one time in the computation of consecutive sentence durations.” *Id.* II.F.2. Munn argues that the district court’s failure to use a zero criminal-history score to determine the duration of the sentence for criminal sexual conduct imposed consecutive to the sentence for firearm possession, without stating any reason for a departure from the guidelines, is reversible error. We must agree.

Munn’s criminal-history score was six. If not a consecutive sentence, the presumptive sentence for Munn’s third-degree criminal-sexual-conduct offense would have been 153-180 months. Minn. Sent. Guidelines IV (2008). But, using a zero

criminal-history score, the presumptive-consecutive sentence for the offense was 41-58 months. *Id.* It is reversible error for a district court to impose permissive-consecutive sentences without using a zero criminal-history score to calculate the duration of the consecutive sentence. *Johnson*, 770 N.W.2d at 566. We conclude that the sentence imposed by the district court was a de facto departure from the sentencing guidelines.

While departure from the sentencing guidelines is generally permissible, if a sentencing court chooses to depart it must “disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.” Minn. Sent. Guidelines II.D. (2008); *see also* Minn. R. Crim. P. 27.03, subd. 4(c). “If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.” *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). Here, the district court did not provide any reasons on the record supporting the departure. While it appears that the district court intended to honor the plea agreement by imposing the total sentence of 240 months, a plea agreement cannot of itself form the basis for a sentencing departure. *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002).

II.

In his pro se supplemental brief, Munn argues that he should be permitted to withdraw his pleas because there was a mutual mistake regarding the criminal-history score used in calculating the duration of his permissive-consecutive sentence. Mutual mistake as to a defendant’s criminal-history score may justify permitting withdrawal of a guilty plea. *State v. DeZeler*, 427 N.W.2d 231, 234-35 (Minn. 1988). However, because

we are remanding the case to the district court, we decline to reach the merits of this argument.

If Munn persists in seeking leave to withdraw his pleas on remand, the district court may determine to grant such a motion; otherwise, the district court must resentence Munn according to the sentencing guidelines. *State v. Benson*, 330 N.W.2d 879, 880-81 (Minn. 1983). In *Benson*, the sentence resulted in an unjustified departure and the state appealed, seeking resentencing. *Id.* at 880. The court stated that the defendant's mistaken belief regarding his presumptive sentence at the plea hearing and prior to sentencing was "not a ground for the [sentencing] departure but would be a ground for letting him withdraw the guilty plea and stand trial on the original charges." *Id.* The court reversed and remanded the sentence for *either* plea withdrawal or resentencing. *Id.* at 880-81.

If Munn seeks to withdraw his plea on remand he will be required to show either that there was a mistake that was both genuinely mutual and formed the basis of the guilty plea, *see DeZeler*, 427 N.W.2d at 234-35, or that the plea was otherwise invalid, *see Carey v. State*, 765 N.W.2d 396, 400-01 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009).

If Munn is resented on remand, the appropriate sentence is the presumptive guidelines sentence, which requires use of a zero criminal-history score when calculating the duration of a permissive-consecutive sentence.¹ *See State v. Geller*, 665 N.W.2d 514,

¹ The state argues that the district court should be directed to either (1) re-sentence the convictions consecutively but in reverse-chronological order to better reflect the plea

517 (Minn. 2003) (holding that when a district court fails to state reasons for departure on the record at sentencing it is improper to give the district court another opportunity to state such reasons on remand; instead, the district court must impose the presumptive sentence); *State v. Rannow*, 703 N.W.2d 575, 579-80 (Minn. App. 2005) (holding that where the district court fails to use zero criminal-history score when calculating the duration of a permissive-consecutive sentence and states no reasons for departure, the sentence must be reversed and remanded for resentencing that does not constitute a departure from the guidelines); *Johnson*, 770 N.W.2d at 566 (holding that where the district court failed to use zero criminal-history score when calculating the duration of a permissive-consecutive sentence, the sentence must be reversed and remanded for resentencing using zero criminal-history score).

Reversed and remanded.

agreement, or (2) re-sentence the convictions concurrently. In support of concurrent sentencing, the state cites comment II.F.105 of the guidelines which provides that “[i]n certain situations a concurrent sentence would result in an offender serving longer in prison than a consecutive sentence and in such situations a concurrent sentence is presumptive.” Minn. Sent. Guidelines cmt. 11.F.105 (2008). The state did not assert or argue either of these sentencing alternatives before the district court and we decline to address the merits of these arguments. An appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).