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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1303**

State of Minnesota,
Respondent,

vs.

Michael David Franklin,
Appellant.

**Filed May 12, 2009
Affirmed
Connolly, Judge**

Polk County District Court
File No. K1-98-1199; K8-98-1359

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

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

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant argues that the district court abused its discretion by failing to grant his motion to reduce his sentence because his offenses were sentenced in the wrong order. Because appellant agreed to a specific prison term on the offense of conspiracy, thereby making any error in the order of sentencing the other offenses harmless, we affirm.

FACTS

The facts in this case are largely undisputed. On December 18, 1998, appellant Michael David Franklin pleaded guilty in Polk County File Number K1-98-1199 to one count of felony conspiracy and one count of felony controlled-substance crime in the second degree and in Polk County File Number K8-98-1359 to four separate counts of felony theft. All of these guilty pleas were entered pursuant to a plea agreement, which provided in relevant part that “[o]n Count 1 of the Complaint [conspiracy]. . . [appellant] will be sentenced to 180 months in prison, which is an upward durational sentencing departure. However, execution of this sentence will be stayed, and [appellant] will be placed on supervised probation for up to forty (40) years.” The plea agreement went on to explain that appellant would be sentenced pursuant to the Minnesota Sentencing Guidelines on the remaining counts.

On December 28, 1998, appellant was sentenced pursuant to the plea agreement.¹ The district court sentenced appellant according to the Minnesota Sentencing Guidelines

¹ At the time that appellant entered his guilty pleas, and was sentenced in this case, district courts were authorized to impose departures from the Minnesota Sentencing

on the five counts, excluding conspiracy, pursuant to the plea agreement. These five counts were properly sentenced according to the offense date. Lastly, appellant was sentenced to 180 months on the conspiracy count.

In 2007, the district court executed appellant's 180-month prison sentence after he violated the terms and conditions of his probation. In response, appellant filed a motion to correct his sentence from 180 months to 132 months, arguing that the district court sentenced his offenses in the wrong order and contrary to the terms of his plea agreement. The district court denied appellant's motion, and this appeal follows.

DECISION

“When multiple current offenses are sentenced on the same day before the same judge, sentencing shall occur in the order in which the offenses occurred.” Minn. Sent. Guidelines II.B.101. Appellant argues that because the district court incorrectly failed to sentence him in the order in which the offenses occurred, it abused its discretion in denying his motion to correct the sentence. Respondent asserts that appellant explicitly agreed to the 180-month conspiracy-count sentence.²

“A motion for correction [of a sentence] is addressed to the district court's discretion and will be reversed on appeal only when discretion is not properly exercised

Guidelines pursuant to a plea agreement. *See State v. Givens*, 544 N.W.2d 774, 777 (Minn. 1996) (“Accordingly, today we hold that defendants may relinquish their right to be sentenced under the guidelines.”), *superseded by statute*, Minn. Stat. § 244.09, subd. 5(2) (2008). By agreeing to the plea agreement, appellant waived his right to be sentenced on the conspiracy count according to the sentencing guidelines.

² It appears that it would have been proper to sentence the conspiracy count first had no plea agreement existed.

and the sentence is unauthorized by law.” *State v. Cook*, 617 N.W.2d 417, 419 (Minn. App. 2000), *review denied* (Minn. Nov. 21, 2000).

Appellant argues that the plea agreement called for a 22-month upward departure from the guidelines sentence for conspiracy. Appellant contends that he should have been sentenced on all offenses in the order in which they occurred. This means that he would have been sentenced first for the conspiracy offense. Since the presumptive guideline sentence for this offense was 110 months, and because he had agreed to a 22-month upward departure, he argues that he should have received a 132-month sentence on the conspiracy count. Appellant asserts that when the conspiracy count was sentenced last, instead of first, the presumptive sentence was 158 months, and when the 22-month upward durational departure was added in, he was improperly sentenced to 180 months. This argument is misplaced.

The 180-month sentence imposed on the conspiracy conviction was an upward durational departure to which appellant had specifically agreed pursuant to the plea agreement. Execution of this sentence was stayed, and appellant was placed on supervised probation for up to 40 years. This was a dispositional departure. Thus, appellant agreed to an upward durational departure in exchange for a dispositional departure. The district court succinctly summarized the proper analysis:

[Appellant’s] argument . . . ignores the plain and definite terms of the plea agreement. The plea agreement called for [appellant] to receive a specific sentence of 180 months in prison for Conspiracy, not a 22-month departure from the presumptive guideline sentence for the offense. There was absolutely no mention made at the time of [appellant’s] plea, his sentencing, or in the plea offer letter of

the sentence being a 22-month departure. [Appellant] acknowledged that he would be receiving a 180-month sentence, and testified that he went over the terms of the plea agreement with his attorney. (Guilty Plea Transcript, page 13). [Appellant's] claim that the plea agreement called for a 22-month departure from the sentencing guidelines is an attempt to rewrite the terms of the plea agreement.

Moreover, the Court's failure to sentence [appellant] for his crimes in the order that they occurred did not affect his sentence for conspiracy. Regardless of the order in which [appellant] was sentenced for his crimes, the plea agreement called for a 180-month prison sentence for conspiracy. This is precisely the sentence [appellant] agreed to in the plea agreement and received.

In its thorough and well-written order, the district court further articulated that if it was an error to sentence the conspiracy count last, any such error was harmless. We agree. Therefore, the district court did not abuse its discretion by denying appellant's motion to correct his sentence.

Appellant also submitted a pro se supplemental brief. Appellant's arguments are either addressed elsewhere in this opinion or are without merit.

Affirmed.