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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0593**

State of Minnesota,
Respondent,

vs.

Feon Stone,
Appellant.

**Filed July 28, 2009
Reversed and remanded
Kalitowski, Judge**

Ramsey County District Court
File No. K4-07-3359

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Kalitowski, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant Feon Stone challenges his sentence for attempted first-degree burglary, arguing that the district court abused its discretion by imposing the sentence consecutive to an 86-month sentence for manslaughter. Appellant also argues that his aggregate sentence is disproportionate to his offenses and unfairly exaggerates the criminality of his conduct. Because the district court's imposition of a consecutive sentence for attempted first-degree burglary was not permitted under the guidelines, we reverse and remand for resentencing.

DECISION

Appellant argues that the district court abused its discretion because (1) attempted first-degree burglary is not eligible for permissive consecutive sentencing, and (2) the consecutive sentence for attempted first-degree burglary is a departure and no grounds were found for departure. We agree.

We will not reverse a district court's decision to impose consecutive sentences unless there has been a clear abuse of discretion. *Neal v. State*, 658 N.W.2d 536, 548 (Minn. 2003). However, the district court's "interpretation of the sentencing guidelines is reviewed de novo." *State v. Jones*, 587 N.W.2d 854, 855 (Minn. App. 1999), *review denied* (Minn. Mar. 16, 1999).

Following an incident occurring on September 13, 2007, appellant pleaded guilty to attempted burglary in the first degree. A presentencing report indicated that under the guidelines there was a presumptive commit of 19.5 months for the attempted burglary

conviction. At the time of appellant's guilty plea to the attempted burglary charge, he had already pleaded guilty to first-degree manslaughter in 2006, for which he was sentenced to 86 months' imprisonment, but granted a dispositional departure placing him on probation for 15 years.

Appellant's sentencing hearing for the attempted burglary conviction was scheduled for January 4, 2008. Earlier that morning, appellant's 86-month sentence for manslaughter was executed. Consequently, at the sentencing hearing, the state argued for the imposition of a consecutive sentence. Appellant argued for a concurrent sentence of 19.5 months. The district court determined that imposition of a consecutive sentence was within its discretion and imposed a consecutive sentence of one year and one day for the attempted first-degree burglary conviction.

Generally, concurrent sentencing is presumptive when an offender is convicted of multiple current offenses or when there are prior felony sentences which have not expired or been discharged. Minn. Sent. Guidelines II.F. But the sentencing guidelines also provide that consecutive sentences are permissive in some circumstances. *Id.* One set of circumstances is that consecutive sentences are permissive for current felony and multiple felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences found in section VI of the guidelines. Minn. Sent. Guidelines II.F.1, 2. The use of consecutive sentences in situations not outlined by the guidelines constitutes a departure that requires written reasons. Minn. Sent. Guidelines II.F.

In *State v. Johnson*, we held that the imposition of permissive consecutive sentences for two counts of attempted second-degree murder was error. 756 N.W.2d 883,

896 (Minn. App. 2008), *review denied* (Minn. Dec. 23, 2008). The basis for our conclusion was that attempted second-degree murder is not listed in section VI of the sentencing guidelines and, therefore, is not eligible for permissive consecutive sentencing. *Id.* at 895-96.

Here, *Johnson* compels our conclusion that the district court abused its discretion. Attempted first-degree burglary is not listed in section VI of the sentencing guidelines. Minn. Sent. Guidelines VI. Consequently, appellant's attempted burglary conviction is not eligible for permissive consecutive sentencing. Therefore, we conclude that the district court abused its discretion by imposing a consecutive sentence and we reverse and remand for resentencing.

Because the district court did not consider appellant's sentence a departure, the district court did not provide written reasons to support a departure. Thus, under *State v. Geller*, no departure may be imposed on remand. 665 N.W.2d 514, 517 (Minn. 2003) (holding that if the district court fails to state reason for departure, the proper remedy is remand for the imposition of the presumptive sentence).

Finally, because we reverse and remand for resentencing we do not reach appellant's argument that his sentence is disproportionate to his offenses and unfairly exaggerates the criminality of his conduct.

Reversed and remanded for resentencing.