STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1071

State of Minnesota,
Respondent,

vs.

Kabba Kangbateh,
Appellant.

Filed November 18, 2013
Affirmed
Stauber, Judge

Ramsey County District Court
File No. 62CR105352

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

* 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

STAUBER, Judge

On appeal from his sentence for second-degree attempted murder, following the reversal of his conviction of second-degree attempted murder for the benefit of a gang and a remand with instructions to sentence appellant for second-degree attempted murder, appellant argues that the district court abused its discretion when on remand it sentenced appellant to 165 months in prison, the same sentence that was imposed for his conviction that was reversed, despite the current conviction being for a lesser offense. We affirm.

FACTS

Appellant Kabba Kangbateh was charged with attempted second-degree murder for the benefit of a gang, attempted second-degree murder, second-degree assault for the benefit of a gang, and second-degree assault. Following a jury trial, appellant was found guilty of all four offenses. The district court then sentenced appellant to the presumptive middle-of-the-box 165-month prison term for his conviction of attempted second-degree murder for the benefit of a gang.

On appeal, this court found insufficient evidence to support appellant's convictions of attempted second-degree murder for the benefit of a gang, and second-degree assault for the benefit of a gang. *State v. Kangbateh*, No. A11-2147, 2012 WL 5990229, at *5 (Minn. App. Dec. 3, 2012). The court, however, upheld appellant's convictions of attempted second-degree murder and second-degree assault. *Id.* The court then remanded with instructions to resentence appellant for the "most serious remaining conviction, attempted second-degree murder." *Id.* at 6.

On remand, the state requested a top-of-the-box sentence because of the "brutality of the crime," and appellant requested a sentence at the "low end of the guidelines." The district court then re-imposed the 165-month sentence, which was 12 months above the 153-month middle-of-the-box guidelines sentence, but below the top-of-the-box guidelines sentence. This appeal followed.

D E C I S I O N

Appellant challenges the district court's imposition of a 165-month sentence for his conviction of attempted second-degree murder. The district court enjoys broad discretion in sentencing matters. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). Appellate courts "will not generally review a district court's exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range," and "[p]resumptive sentences are seldom overturned." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. July 20, 2010). Only in the "rare" case will this court reverse a district court's imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant was convicted of attempted second-degree murder and has a criminal history score of zero. Under the sentencing guidelines, the presumptive sentence for appellant's offense with his criminal-history score falls within a range of 130.5-183.5 months, and has a presumptive mid-box term of 153 months. Minn. Sent. Guidelines II.G.; IV (sentencing guidelines grid) (2010). Any sentence within this range constitutes a presumptive sentence. *See* Minn. Sent. Guidelines II, IV (2010) (noting that the presumptive sentence is determined by locating the appropriate cell of the sentencing

guidelines grid containing the ranges of months, "within which a judge may sentence without the sentence being deemed a departure"); *State v. Jackson*, 749 N.W.2d 353, 359 n.2 (Minn. 2008) ("All three numbers in any given cell constitute an acceptable sentence . . . ."). And, a sentence within the range provided in the appropriate box on the sentencing guidelines grid is not a departure from the presumptive sentence, and is therefore not an abuse of discretion. *Delk*, 781 N.W.2d at 428-29.

Appellant argues that because the district court originally imposed a 165-month middle-of-the-box sentence for his conviction of attempted second-degree murder for the benefit of a gang, the district court abused its discretion by imposing the same sentence on remand for his conviction of attempted second-degree murder, which is a lesser offense. We disagree. A district court may not impose a longer sentence than the sentence originally imposed when a defendant is granted a new trial or when an appellate court sets aside a sentence and remands for resentencing. *See State v. Prudhomme*, 303 Minn. 376, 380, 228 N.W.2d 243, 246 (1975). "To do so would have the effect of punishing [the] defendant for exercising his right to appeal from the sentence." *State v. Wallace*, 327 N.W.2d 85, 88 (Minn. 1982).

However, the rule set forth in *Prudhomme* is not based on constitutional grounds, but on procedural fairness and public policy. 303 Minn. at 380, 228 N.W.2d at 246. And *Prudhomme* "stands for the proposition that a sentence on remand may not exceed the length of the original sentence for *that particular crime*." *Delk*, 781 N.W.2d at 429 (emphasis added).

Here, appellant was originally sentenced for attempted second-degree murder for the benefit of a gang, not attempted second-degree murder; a sentence for attempted second-degree murder was not previously set. Moreover, appellant's sentence is no longer than the original sentence. The fact that appellant's sentence is no longer than the original sentence alleviates any public policy concerns discussed in *Prudhomme* and *Wallace*. And appellant cites no caselaw prohibiting a district court from imposing the same sentence on a lesser charge. Finally, the sentence imposed by the district court is not a departure from the presumptive sentence. *See* Minn. Sent. Guidelines II, IV (2010) (noting that the presumptive sentence is determined by locating the appropriate cell of the sentencing guidelines grid containing the ranges of months, "within which a judge may sentence without the sentence being deemed a departure"). Therefore, the district court did not abuse its discretion by sentencing appellant to 165 months in prison.

Appellant further argues that the district court's sentence was an abuse of discretion because it was based on inappropriate factors. But the district court imposed the presumptive sentence. "[T]he district court is not required to explain its reasons for imposing a presumptive sentence." *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013). Thus, any of the reasons provided by the district court when it imposed appellant's sentence are irrelevant.

Affirmed.