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Minn. Stat. § 480A.08, subd. 3 (2012).

STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1753

Trinidad Perez-Carrino, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 5, 2014
Affirmed
Hudson, Judge

Ramsey County District Court
File No. 62-CR-08-18952

Trinidad Perez-Carrino, Bayport, Minnesota (pro se appellant)

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

John Choi, Ramsey County Attorney, Laura Rosenthal, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Hudson, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal from denial of his motion to correct an unlawful sentence, appellant argues that the district court erred by applying the wrong sentencing guidelines and applying his sentences consecutively instead of concurrently. We affirm.

FACTS

Following a jury trial in 2009, appellant Trinidad Perez-Carrino was convicted of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(e)(i) (2000) and kidnapping to facilitate felony or flight under Minn. Stat. § 609.25, subd. 1(2) (2000). *State v. Carrino*, A09-2338, 2010 WL 4286214, at *1 (Minn. App. Nov. 2, 2010), *review denied* (Minn. Jan. 26, 2011). The charges arose after appellant offered to drive two women home from a Minneapolis bar in 2001 but would not let them out of his vehicle; appellant also sexually assaulted one of the women on the roadside. *Id.*

Appellant was sentenced to 144 months' incarceration for the criminal sexual conduct and a consecutive sentence of 52 months' incarceration for kidnapping. Appellant appealed the convictions and they were affirmed by this court. *Id*. The district court denied appellant's subsequent motion for correction of an unlawful sentence under Minn. R. Crim. P. 27.03, subd. 9. This appeal follows.

D E C I S I O N

I

Appellant argues that his sentence constitutes an unlawful upward departure from the presumptive sentence for his convictions. Appellant also claims that the district court erred by applying the current sentencing guidelines, rather than the 2000 guidelines, which were in effect at the time of his offense in June 2001. The denial of a motion to correct an unlawful sentence will be reversed only if the district court's discretion was not properly exercised 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).

Criminal Sexual Conduct

Appellant correctly asserts that the 2000 sentencing guidelines were in effect at the time of the offense and thus control the presumptive sentence in his case. *See* Minn. Sent. Guidelines 3.G (2012). At the time of sentencing, appellant had a criminal history score of 0; first-degree criminal sexual conduct convictions carried a severity level of 8 under the 2000 guidelines. Minn. Sent. Guidelines IV (2000). Appellant claims that the presumptive sentence for this offense under the 2000 guidelines grid was 86 months. But the 2000 guidelines also included a footnote for first-degree criminal sexual conduct offenses stating that "[p]ursuant to [Minn. Stat. §]609.342, subd. 2, the presumptive sentence for Criminal Sexual Conduct in the First Degree is a minimum of 144 months." *Id*. n.2. Minn. Stat. § 609.342, subd. 2(b) (2000) states:

> Unless a longer mandatory minimum sentence is otherwise required by law or the sentencing guidelines provide for a longer presumptive executed sentence, the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of violating this section. Sentencing a person in a manner other than that described in this paragraph is a departure from the sentencing guidelines.

Despite appellant's assertion to the contrary, nothing in section 609.342 indicates that the 144-month sentence applies only to repeat offenders. Thus, appellant's sentence of 144 months for first-degree criminal sexual conduct was the presumptive sentence under the 2000 guidelines and therefore did not constitute an upward departure.

Kidnapping

Based on appellant's criminal history score of 0, the presumptive sentencing range for kidnapping in the 2000 sentencing guidelines was 44–52 months. Minn. Sent.

Guidelines IV (2000). Appellant argues that his 52-month sentence for kidnapping represented an upward departure from the middle-of-the-box sentence of 48 months. But the district court has discretion to impose a sentence at the top end of the presumptive-sentence range; such a sentence is not considered a departure from the guidelines. *State v. Delk*, 781 N.W.2d 426, 428–29 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Thus, appellant's sentence for kidnapping was not an upward departure.

II

Appellant argues that the imposition of consecutive sentences constituted an upward departure from the sentencing guidelines because the crime of kidnapping was incidental to the crime of criminal sexual conduct, or, in the alternative, that his two sentences should have been imposed concurrently because they were part of a single behavioral incident. "If a kidnapping is completely incidental to another offense and the imposition of a separate conviction for kidnapping unfairly exaggerates the criminality of a defendant's conduct, the kidnapping conviction and sentence may be vacated." *State v. Swanson*, 707 N.W.2d 645, 659–60 (Minn. 2006).[1] The decision to impose consecutive sentences is reviewed for an abuse of discretion. *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007).

Here, the kidnapping was not incidental to the crime of criminal sexual conduct. Appellant drove two victims in his car for approximately two hours before stopping on

[1] Although we address it briefly, it is not clear that the incidental-kidnapping rule applies to appellant's case since his offense occurred in 2001 and the rule was introduced by case law in 2003. *See State v. Smith*, 669 N.W.2d 19, 32 (Minn. 2003), *overruled on other grounds by State v. Leake*, 669 N.W.2d 312 (Minn. 2005).

the side of the road to perpetrate a sexual and physical assault on one of the victims. *Carrino*, 2010 WL 4286214, at *1. The cases appellant cites are not analogous. *See State v. Smith*, 669 N.W.2d 19, 32–33 (holding that a kidnapping was incidental to a murder where the defendant blocked the doorway to the room where the murder occurred); *State v. Welch*, 675 N.W.2d 615, 619 (Minn. 2004) (holding that a kidnapping was incidental where the confinement that formed the basis of the kidnapping charge was the same "force and coercion" that supported the criminal sexual conduct charge). The act of driving the two victims in his car was distinct from the act of sexual assault that occurred on the roadside. The district court also noted the extreme violence involved in the crimes, the "horrific impact" upon the victims, and appellant's continued unwillingness to tell the truth. The consecutive sentences did not unfairly exaggerate the criminality of appellant's conduct.

In addition, it is irrelevant whether appellant's crimes were part of a single behavioral incident, because consecutive sentences for his crimes were permissible under the law at the time he was sentenced. Minn. Stat. § 609.251 (2000) provided that a "conviction of the crime of kidnapping is not a bar to conviction of or punishment for any other crime committed during the time of the kidnapping." Minn. Stat. § 609.035, subd. 6 (2000), similarly provided that defendants convicted of certain criminal sexual conduct offenses, including Minn. Stat. § 609.342, subd. 1(e)(i), could be convicted for other crimes committed as part of the same conduct and given consecutive sentences. The 2000 sentencing guidelines also permitted consecutive sentences where a defendant was convicted of multiple felonies for crimes against persons. Minn. Sent. Guidelines

II.F (2000). Accordingly, the imposition of consecutive sentences in this case was not an upward departure requiring findings of "aggravating factors" as appellant claims and the district court did not abuse its discretion. *See State v. Alvarez*, 820 N.W.2d 601, 622 (Minn. App. 2012), *aff'd on other grounds sub. nom. State v. Castillo-Alvarez*, 836 N.W.2d 527 (Minn. 2013) (concluding that the district court was not required to state its reasons for departure when it imposed consecutive sentences for kidnapping and second-degree murder).

Affirmed.