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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1081**

State of Minnesota,
Respondent,

vs.

Angel Hernandez-Espinoza,
Appellant

**Filed June 2, 2014
Affirmed
Worke, Judge**

Hennepin County District Court
File No. 27-CR-12-23435

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Cleary, Chief Judge; and Larkin, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the sentence imposed on his conviction for conspiracy to commit first-degree controlled substance crime, asserting that the district court abused its

discretion by imposing a 172-month sentence, a double durational departure from the presumptive sentence. We affirm.

FACTS

In 2012, appellant Angel Hernandez-Espinoza (Hernandez) was charged with first-degree conspiracy to commit controlled-substance crime. Hernandez pleaded guilty to the offense, the state gave notice of intent to seek an upward durational sentencing departure, and Hernandez waived his right to a sentencing jury. At his plea hearing, Hernandez admitted that during the charging period he had various conversations and meetings with a confidential informant, later revealed to be Douglas Galteco, and an undercover police officer about selling methamphetamine to the undercover officer, including one sale that involved two pounds of methamphetamine valued at \$30,000. He also admitted that on one occasion, he sent a runner to deliver four ounces of methamphetamine after arranging for the delivery, and that others involved in selling drugs with him included Pedro Ayala-Leyva, Antonio Baradon,¹ and Hernandez's brother, Eulogio Hernandez.

At Hernandez's sentencing hearing, Galteco and Federal Bureau of Investigation (FBI) special agent Andrew Mento, Jr. testified for the state. Galteco described how he became associated with Hernandez by selling methamphetamine for him on behalf of Ayala-Leyva, describing Hernandez as Ayala-Leyva's supplier and business friend. He started ordering drugs from Hernandez at a price of \$1,000 per ounce in quarter- or half-

¹ In the district court record, "Baradon" is also spelled "Baridon."

pound amounts that were either paid for or “fronted” by Hernandez and delivered by Jose Carreon. During a one-month period, Galteco purchased methamphetamine from Hernandez about 12 times and sold six to nine pounds of methamphetamine. He was eventually apprehended by law enforcement and cooperated by maintaining contact with Hernandez. Galteco also testified to having contact with or buying drugs from Hernandez on specific dates, including a May 15 purchase of four ounces of methamphetamine delivered by Carreon; a May 31 meeting with Hernandez and his bodyguard, Baradon, to discuss the \$10,000 debt Galteco owed for methamphetamine Hernandez provided; arranging to buy two pounds of methamphetamine for \$30,000; and having his car taken for the \$6,000 debt remainder after the FBI gave him money to repay part of the \$10,000 debt.

Special agent Mento testified that during execution of a search warrant at Ayala-Leyva’s Brooklyn Park address, he saw Hernandez’s name prominently listed in Ayala-Leyva’s drug notebook. The largest dollar amount listed in the notebook for Hernandez was \$26,000. Mento described the same arrangement and contacts between Hernandez and Ayala-Leyva that Galteco referenced in his testimony and also described a final meeting between the undercover officer, Hernandez, and Eulogio Hernandez, at which they agreed on the \$30,000 sale of two pounds of methamphetamine. After the meeting, Hernandez was arrested, and law enforcement executed a search warrant at two apartments in St. Paul. At one apartment used by Carreon as his residence, law enforcement found a notebook of drug notes and \$60,000 in drug proceeds. At the other

apartment, registered to Baradon, law enforcement found over a pound of methamphetamine and items used to process the drug. According to Mento, Hernandez funded both apartments.

The district court found the testimony of Galteco and Mento credible, and at the end of the sentencing hearing, found on the record that aggravating factors existed to independently support a double durational departure from the presumptive sentence. The district court imposed a 172-month sentence, a double durational departure from the 86-month presumptive sentence. Minn. Sent. Guidelines 4 (2012). This appeal follows.

D E C I S I O N

The sentencing guidelines contain a nonexclusive list of aggravating factors that may justify a sentencing departure. Minn. Sent. Guidelines 2.D.2.b (2012). “Generally, appellate courts review sentences that depart from the presumptive guidelines range for an abuse of discretion.” *Dillon v. State*, 781 N.W.2d 588, 594 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court has discretion to depart only if aggravating or mitigating circumstances exist. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). Only one aggravating factor is necessary to justify a double-durational departure. *State v. O’Brien*, 369 N.W.2d 525, 527 (Minn. 1985). “[W]hether a particular reason for an upward departure is permissible is a question of law, which is subject to a de novo standard of review.” *State v. Yaritz*, 791 N.W.2d 138, 143 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. Feb. 23, 2011).

Group of three or more

The sentencing guidelines provide that a “substantial and compelling circumstance” exists for departure if “[t]he offender committed the crime as part of a group of three or more persons who all actively participated in the crime.” Minn. Sent. Guidelines 2.D.2.b(10). At his plea hearing, Hernandez named five others who were involved in the drug operation, and he described their various roles. At the sentencing hearing, Galteco and Mento described a large-scale drug operation involving the same individuals. The number of individuals involved in the drug operation shows that the crime was “significantly more serious than that typically involved” in other controlled-substances crimes. *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002).

Hernandez argues that his crime, which involved a conspiracy, included as an element of the offense that it was committed by more than one person, so that for sentencing purposes that factor cannot be used to support an upward durational departure. *See State v. McIntosh*, 641 N.W.2d 3, 12 (Minn. 2002) (warning against use of offense departure criteria to establish major controlled-substance offense when doing so “duplicates an element of the offense”). But a conspiracy only requires more than one person, Minn. Stat. § 152.096 (2012), and the guidelines require a group of three or more for a sentencing departure. Minn. Sent. Guidelines 2.D.2.b(10). Because the departure factor requires more people than a conspiracy offense requires, the departure factor is not duplicative of the element of the offense. The addition of individuals other than those required to establish the minimum elements of the offense demonstrates that the offense

was more serious than the typical offense, showing a valid basis for a durational sentencing departure. *See State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). For this reason, the district court did not abuse its discretion by applying this factor in deciding to impose a durational departure.

Major controlled-substance offense

Commission of a major controlled-substance offense is also a substantial and compelling circumstance that can support an upward sentencing departure. Minn. Sent. Guidelines 2.D.2.b(5). To be considered a major controlled-substance offense, two or more of the following factors must be present:

- (a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so; or
- (b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
- (c) the offense involved the manufacture of controlled substances for use by other parties; or
- (d) the offender knowingly possessed a firearm during the commission of the offense; or
- (e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
- (f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or
- (g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional).

Id. The district court found that four factors were present: (1) the offense involved at least three separate transactions where methamphetamine was sold; (2) the offense

involved the manufacture of a controlled substance for use by other parties; (3) Hernandez was a high level drug dealer; and (4) the offense involved a high degree of sophistication and planning.

These factors support a durational departure. First, the offense involved at least three transactions at which methamphetamine was possessed with intent to sell. Hernandez admitted to more than three such transactions at his plea hearing. Hernandez's argument that the transactions he admitted to were elements of the offense is incorrect; Hernandez needed to make only one sale of methamphetamine to be convicted of conspiracy to commit first-degree controlled substance crime. *See* Minn. Stat. § 152.021 (2012) (defining first-degree controlled substance offense to include sale of methamphetamine "on one or more occasions"). Second, the offense involved the manufacture of methamphetamine. Hernandez paid for and controlled the apartment in which numerous items of paraphernalia for the manufacture of methamphetamine were found. The evidence was sufficient to link him to this aspect of the drug operation. Third, the evidence supported that Hernandez was a high-ranking person in the drug operation; he directed the activities of others in all aspects of the operation, including financial, supply and distribution, sales, housing, and enforcement. Finally, the offense involved a high degree of sophistication and planning, as demonstrated by all of the above. The four factors found by the district court support its decision to depart at sentencing because the offense was a major controlled-substance offense.

High risk crime

The district court also justified the sentencing departure because Hernandez's conduct placed a number of people at risk. Mento testified that the quantity of methamphetamine found following Hernandez's arrest would provide 2,300 individual hits. Hernandez admitted to selling at least triple that amount during the charging period. As noted by the district court, methamphetamine is known to be extremely addictive and can result in severe physical and mental harm to users, and is harmful to a community. The amount of methamphetamine involved in this case is exponentially greater than the amount for a typical first-degree offense. While this high-risk-to-others factor is not included among the factors that may be used as reasons for departure, the list is nonexclusive. Minn. Sent. Guidelines 2.D.2. This factor has been applied in other cases involving placing others at risk of harm. *See State v. Edwards*, 774 N.W.2d 596, 607 (Minn. 2009) (upholding upward durational departure for first-degree assault conviction that "generated significant risk of bodily harm to a large number of people"); *State v. Ford*, 539 N.W.2d 214, 230 (Minn. 1995) (upholding upward durational departure for murder where "[t]he defendant's conduct put a number of people at risk"). This factor also supports the sentencing departure.

Other durational departure cases

The sentencing departure in this case is not disproportionate and does not unfairly exaggerate the criminality of Hernandez's conduct. *See State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007). Based on our review, the sentence is also consistent with

the facts of other cases involving sentencing departures in major controlled-substance crimes. *See, e.g., State v. Rodriguez*, 754 N.W.2d 672, 685 (Minn. 2008) (upholding 120-month durational departure from presumptive 158-month sentence); *State v. Osborne*, 715 N.W.2d 436, 439 (Minn. 2006) (upholding 67-month departure from presumptive 158-month sentence); *McIntosh*, 641 N.W.2d at 8 (upholding 24-month departure from presumptive 98-month sentence).

Affirmed.