STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1818

Steven Paul Patchen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 13, 2020
Affirmed
Bratvold, Judge

Anoka County District Court
File No. 02-CR-17-3448

Cathryn Middlebrook, Chief Appellate Public Defender, Sara, J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Bratvold, Judge; and Slieter, Judge.

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

BRATVOLD, Judge

In this appeal from an order denying postconviction relief, appellant argues that the district court's decision to *Hernandize* his convictions when sentencing him for three

second-degree criminal-sexual-conduct offenses "resulted in an excessive sentence." We conclude that the district court did not abuse its discretion when it *Hernandized* appellant's convictions and imposed a 234-month prison sentence for his third conviction. Appellant also filed a pro se supplemental brief, which fails to make a cogent legal argument or cite legal authority. Thus, we affirm.

FACTS

In 2013, appellant Steven Paul Patchen invited his family members, including his three minor-aged granddaughters, to live with him in his Coon Rapids home. Starting around June 2013, Patchen sexually abused his three granddaughters, who reported the abuse to their parents in June 2017. The parents contacted law enforcement.

On June 6, 2017, respondent State of Minnesota charged Patchen with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(h)(iii) (2012) (counts one and two), and second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(h)(iii) (2012) (count three).

Roughly five months later, Patchen and the state entered into a plea agreement. At the plea hearing, the state summarized the agreement, in which the state promised to amend counts one and two to second-degree criminal sexual conduct, and Patchen agreed to plead guilty to three counts of second-degree criminal sexual conduct. The agreement also provided that "[g]iven *Hernandizing* those offenses, the State and Defense is understanding Mr. Patchen would enter [c]ount 3 . . . with a criminal history score of 4." Finally, the parties agreed they would ask the district court to sentence Patchen on count three between "the midpoint to the high end of the guidelines range," which was 195 months to 234

months. The district court asked Patchen whether the agreement "sound[ed] like the plea agreement that [he] considered" and if it was his "understanding of what [he] want[s] to do today," and Patchen responded, "Yes, Your Honor."

At the plea hearing, Patchen testified he sexually touched each of his three granddaughter's genital areas many times and on different dates. Patchen admitted to having sexual contact with one of the children "three, maybe four times a week" over the course of "[a] couple of years." The district court found that Patchen "knowingly and voluntarily waived [his] rights," found the factual basis adequate, and deferred acceptance of Patchen's guilty plea until sentencing.

Patchen participated in a presentence investigation (PSI) and a psychosexual evaluation. The PSI report recommended a 195-month sentence on count three. The psychosexual evaluation report recommended sex-offender treatment. Our review of both confidential reports shows that Patchen blamed his victims and minimized his role in the abuse.

At the February 2018 sentencing hearing, the district court accepted Patchen's guilty plea and convicted him of all three counts. The district court stated it had the PSI report, the psychosexual-evaluation report, and victim-impact statements, and asked if either party had any corrections. Neither party did. Patchen then argued for a "bottom of the box" sentence, and the state argued for a 234-month sentence. The district court committed Patchen to the commissioner of corrections for concurrent sentences of 90 months on count one using a criminal-history score of zero, 130 months on count two using a

criminal-history score of two, and 234 months on count three using a criminal-history score of four.

On August 5, 2019, Patchen moved pro se to correct his sentence, arguing that the district court "erred in calculating petitioner[']s criminal history score" and that his sentence is "excessive and disproportionate to the crime."[1] The state opposed Patchen's motion. On October 7, the district court treated the motion as a petition for postconviction relief under Minn. Stat. § 590.01 (2018), and denied relief. The court determined, first, that the district court calculated Patchen's criminal-history score correctly, and second, that Patchen's 234-month sentence was "within the guidelines range, was contemplated by the terms of the plea agreement and was lawful." Patchen appeals.

D E C I S I O N

Patchen argues that the postconviction court abused its discretion in denying relief because "the use of the *Hernandez* method resulted in a 234-month sentence that was excessive and not warranted." The state responds that Patchen forfeited the argument because he did not raise it in his postconviction motion, and alternatively, the state argues that the sentence imposed was within the district court's discretion.

I. Patchen challenges the district court's decision to *Hernandize* his convictions for the first time on appeal.

In his postconviction motion, Patchen challenged the district court's calculation of his criminal-history score. The postconviction court determined that the district court

[1] The district court notified the state public defender's office, who asked Patchen if he wanted to be represented by their office. Patchen accepted representation, and his attorney informed the district court that she would not be filing additional arguments.

correctly calculated his criminal-history score under *Hernandez v. State*, 311 N.W.2d 478, 481 (Minn. 1981). In *Hernandez*, the Minnesota Supreme Court approved sentencing an offender for multiple convictions in one proceeding if the underlying offenses "were not part of a single behavioral incident" and "did not involve the same victims." *Id.* This means that a district court may sentence an offender for the first conviction, and consider that conviction as a prior offense when calculating the offender's criminal-history score for sentencing the next conviction. The Minnesota Sentencing Guidelines define "*Hernandize*" as "the unofficial term for the process . . . of counting criminal history when multiple offenses are sentenced on the same day before the same court." Minn. Sent. Guidelines 1.B.10 (2017).

On appeal, Patchen argues that the district court abused its discretion when it *Hernandized* his convictions at sentencing. In his brief to this court, Patchen no longer challenges the accuracy of his criminal-history score, as he did in his postconviction motion. Rather, Patchen argues that the district court's use of the *Hernandez* method resulted in an excessive sentence, an issue that he raises for the first time on appeal. Generally, in an appeal from the order denying postconviction relief, we only consider issues presented to and decided by the postconviction court. *See Griffin v. State*, 883 N.W.2d 282, 285-86 (Minn. 2016) (declining consideration of appellant's claim not raised in his postconviction petition and not considered by the postconviction court); *see also Brocks v. State*, 753 N.W.2d 672, 676 (Minn. 2008) (refusing to address a claim that appellant did not present in his postconviction petition and that the postconviction court did not consider).

But we may consider an issue raised for the first time on appeal "when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal." *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996); *see also Johnson v. State*, 673 N.W.2d 144, 147 (Minn. 2004) ("The waiver rule is not absolute."). Here, the parties have fully briefed the *Hernandez* issue, so our consideration would not "unfairly surprise" either party. *Roby*, 547 N.W.2d at 357. And we have an adequate record to review the issue. *See Johnson*, 673 N.W.2d at 147 ("One purpose of this [forfeiture] rule is to encourage the development of a factual basis for claims at the district court level."). For these reasons, we will review Patchen's claim that the district court abused its discretion when it *Hernandized* his convictions at sentencing.

II. The district court did not abuse its discretion when it *Hernandized* Patchen's convictions at sentencing and imposed a 234-month sentence for the third conviction.

We review a district court's determination of a criminal-history score for abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). And we review a postconviction court's "summary denial of a petition for postconviction relief for an abuse of discretion." *Taylor v. State*, 910 N.W.2d 35, 37-38 (Minn. 2018) (quotation omitted). A postconviction court's legal determinations are reviewed de novo. *Staunton v. State*, 842 N.W.2d 3, 6 (Minn. 2014). Taking together these rules on our standard of review, we will not reverse a postconviction court's decision unless it "exercised its discretion in an arbitrary or capricious manner, based its ruling on an

erroneous view of the law, or made clearly erroneous factual findings." *Taylor*, 910 N.W.2d at 38 (quoting *Reed v. State*, 793 N.W.2d 725, 729 (Minn. 2010)).

Patchen argues that the district court abused its discretion when it *Hernandized* his convictions at sentencing and imposed a 234-month sentence for the third conviction because the sentence unfairly exaggerated the criminality of his conduct. Patchen asks this court to vacate his sentence and remand with instructions for the district court to impose a 130-month sentence. The state responds that the district court's use of the *Hernandez* method was within its discretion, as was the 234-month sentence for count three.

Patchen acknowledges, and we agree, that the district court was not required to use the *Hernandez* method. But the decision to do so lies within a district court's discretion. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) ("The *Hernandez* method may be used by the trial court, in its discretion, when a person is being sentenced on the same day for multiple separate acts."); *see also State v. Pittel*, 518 N.W.2d 606, 608 (Minn. 1994) (stating that the district court "was free to use the *Hernandez* method" when it sentenced defendant for multiple theft convictions).

Caselaw recognizes important policy reasons for giving district courts discretion to *Hernandize* multiple convictions during one sentencing hearing. Before *Hernandez*, a district court had to sentence a defendant convicted of multiples offenses at separate hearings so that prior convictions could be included in a defendant's criminal-history score. In short, the *Hernandez* method promotes judicial efficiency. *See State v. Gould*, 562 N.W.2d 518, 520 (Minn. 1997) (explaining that the supreme court has recognized that the *Hernandez* method promotes "the interests of judicial economy").

But a district court is permitted to *Hernandize* only under certain circumstances, as discussed in the sentencing guidelines and caselaw. Minn. Sent. Guidelines 2.B.1.e.(1)-(2) (2017). For example, a district court may *Hernandize* only when imposing concurrent sentences and when the convictions involved multiple victims, and cannot *Hernandize* when sentencing multiple convictions that "arise from a single course of conduct." *Id.*; *see State v. Moore*, 340 N.W.2d 671, 673 (Minn. 1983) ("The *Hernandez* method of applying a defendant's criminal history score may be used only when sentencing concurrently."); *Hernandez*, 311 N.W.2d at 479 (stating offenses must involve different victims).

Patchen does not contend that the district court contravened the sentencing guidelines and applicable caselaw when it *Hernandized* his convictions at sentencing. Patchen's convictions arose from separate behavioral incidents with multiple victims, and his sentences are concurrent. Therefore, the district court followed applicable law. *See Hernandez*, 311 N.W.2d at 481; *see also* Minn. Sent. Guidelines 2.B.1.e. And, although it is not required, the parties' plea agreement anticipated *Hernandizing* Patchen's convictions. At the plea hearing, the state specified that the parties' "understanding" was that Patchen "would enter Count 3" with "a criminal history score of 4" given "*Hernandizing*" the offenses. And Patchen agreed that he understood the plea agreement.

Patchen argues that the district court's decision to impose a 234-month sentence was an abuse of discretion. We disagree, for three reasons. First, the parties contemplated that the state would argue for a 234-month sentence in the plea agreement, which provided that the parties would ask the district court to impose a sentence between 195 and 234

months. Patchen's written plea agreement provided that the "state will argue for 234" months and "[d]efense will argue for 195" months.

Second, we are not persuaded by Patchen's argument that his sentence conflicts with the sentencing guidelines' twin goals of equity and fairness. Patchen correctly states that the purpose of the Minnesota Sentencing Guidelines is to "promote uniformity, proportionality, rationality, and predictability in sentencing," and that, to further these goals, "departures from the presumptive guidelines sentence are discouraged." *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011) (quotation omitted). And we recognize that a district court cannot use the *Hernandez* method "to achieve a substantive result not intended by the guidelines." *See Van Ruler*, 378 N.W.2d at 80 (citing *Hernandez*, 311 N.W.2d at 481). But the district court imposed a sentence within the presumptive guidelines range of 166 to 234 months for a second-degree criminal-sexual-conduct offense with a criminal-history score of four and a severity level B. Minn. Sent. Guidelines 4.B (2017). Patchen's sentence was not a departure and, therefore, his sentence satisfied the purposes of the sentencing guidelines.

Third, the record supports the district court's decision to *Hernandize* Patchen's convictions and impose a 234-month sentence for count three. Patchen contends that 234 months was "unnecessary" and that a shorter sentence was more "appropriate" because of his remorse, his "wish to limit any further pain to the victims," his interest in getting help, his minimal criminal history, and his age. The state responds that the record supports the 234-month sentence because Patchen "continued to minimize his conduct," and he blamed the victims for his conduct.

We agree with the state. Patchen repeatedly abused his three minor granddaughters, while living in the same home, over a period of roughly four years. During the PSI and psychosexual evaluation, Patchen minimized his role in the abusive conduct. The district court heard victim-impact statements that detailed the deeply destructive ways that Patchen's conduct has affected the victim's lives. Thus, the district court acted within its discretion when it imposed a 234-month sentence for Patchen's third conviction.

Patchen also asks this court to remand with instructions for the district court to impose a 130-month sentence, which would be a downward departure from the presumptive guidelines sentence for count three. Patchen argues that Minn. Stat. § 244.11, subd. 2(b) (2018), authorizes this court "to review and modify a sentence that is unreasonable or excessive." The state contends that section 244.11 only applies to appeals from conviction under Minn. R. Crim. P. 28.01 or from motions to correct or modify a sentence under Minn. R. Crim. P. 27.03, subd. 9, therefore, this court cannot modify Patchen's sentence because he appeals from an order denying postconviction relief.

We reject Patchen's argument because we cannot impose a downward durational departure. Appellate courts "have discretion to modify a sentence in the interest of fairness and uniformity." *Neal v. State*, 658 N.W.2d 536, 546 (Minn. 2003). But modifying Patchen's sentence to 130 months would be a downward departure from the presumptive sentence, meaning it must be based on mitigating factors. *See* Minn. Sent. Guidelines 2.D.3.a. (2017); *State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016) (stating a district court must find that at least one mitigating factor "provides a substantial and compelling reason to depart from the presumptive guidelines sentence"). We are not a fact-finding

court and cannot impose a downward departure. *See State v. Weaver*, 796 N.W.2d 561, 573 (Minn. App. 2011), *review denied* (Minn. July 19, 2011) (stating this court may determine whether departure reasons are supported by sufficient record evidence but may not "engage in impermissible fact-finding"); *State v. Pickett*, 358 N.W.2d 38, 39 (Minn. 1984) ("The discretion to depart or not to depart is for the trial court to exercise"). Therefore, we reject Patchen's request to modify his sentence.

III. We do not consider Patchen's argument in his pro se supplemental brief.

We do not understand Patchen's pro se supplemental brief as raising a separate issue from his primary brief to this court. In his pro se supplemental brief, Patchen apologizes for his conduct and mentions two cases that he argues are factually similar to his case and demonstrate that he "did not receive the same fair and just sentence received by the above mentioned cases." The state responds that Patchen's argument "is legally irrelevant" because "[s]entences are reviewed on a case-by-case basis."

Patchen does not include case names or case numbers, and does not provide enough information for this court to identify the cases he describes. Patchen also cites no legal authority to support his argument that "the sentence handed down by the district court was very unfair and exaggerated the criminality of [his] crime." Because Patchen's pro se supplemental brief is unsupported by either argument or legal authority, we do not consider it. *State v. Bartylla*, 755 N.W.2d 8, 22-23 (Minn. 2008) ("We will not consider pro se claims on appeal that are unsupported by either arguments or citations to legal authority.").

Affirmed.