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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-652**

David Lee Barnes, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 5, 2012
Reversed and remanded
Halbrooks, Judge**

Hennepin County District Court
File Nos. 27-CR-08-2217, 27-CR-08-4512, 27-CR-08-36033

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

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

Considered and decided by Worke, Presiding Judge; Halbrooks, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the denial of his petition for postconviction relief, arguing
that the district court erred by departing from the sentencing guidelines by imposing his

state sentences to run consecutive to his existing federal sentence without providing valid, substantial, and compelling circumstances to justify the departure and, in the alternative, failing to obtain a proper waiver of his right to counsel. Appellant also raises several issues in a pro se supplemental brief. Because all of the crimes listed in section VI of the sentencing guidelines that would permit a consecutive sentence are Minnesota offenses and the prior felony in this case is a federal offense and because the imposition of consecutive state and federal sentences is a departure from the sentencing guidelines that is unsupported by findings, we reverse and remand.

FACTS

On December 18, 2007, appellant David Lee Barnes robbed the Edina Super Target and a Bloomington Walgreens; in both cases, he displayed what appeared to be a handgun and threatened to harm the cashier if she did not give him the money in the register. On December 12 and 17, 2007, and January 10, 2008, appellant committed armed bank robberies at three different TCF banks. On January 2, 2008, appellant committed a similar robbery at the Edina Cub Foods. On January 11, 2008, appellant was confronted by two loss-prevention employees at a Bloomington Wal-Mart as he was leaving the store with a stolen backpack filled with other stolen items. Appellant stabbed one of the employees in the arm and the other employee in the knee and then fled. Appellant was arrested on January 11, 2008, and subsequently charged in federal court for the bank robberies and charged in state court for the retail-store assaults and robberies.

After a February 2008 indictment in federal court on the three bank robberies, appellant pleaded guilty to one count of armed bank robbery and was sentenced to 78 months in prison. The arrangement between the federal and state authorities called for appellant to serve his Minnesota sentence before the federal sentence.

While the federal cases were being resolved, the state's charges against appellant were pending. The state charged appellant with five counts of aggravated first-degree robbery, four counts of second-degree assault, and one count of first-degree assault arising out of the retail-store robberies.

Appellant pleaded guilty in state court to four counts of first-degree aggravated robbery and one count of first-degree assault. In exchange, the state agreed to recommend no more than 240 months in prison.

On October 8, 2009, the district court sentenced appellant to an aggregate term of 144 months and ordered that appellant serve his state sentence consecutive to the 78-month federal sentence (making his total time in prison 222 months). At the sentencing hearing, the district court acknowledged that appellant's federal bank-robbery conviction and sentence complicated the sentencing issue and explained on the record its reasons for ordering that appellant serve his state sentence consecutive (albeit prior) to the federal sentence:

If [the federal] sentence had occurred—or if those offenses had occurred after our offenses, it's clear that, irrespective of what I would do, the federal government would have made those consecutive to this sentence. And as I indicated also earlier in the case, any sentence that I do, I think it is cleaner and more appropriate to make it consecutive to the federal time. Then we know what the

sentence is on this case and there is no possibility of confusion. If I give a particular state sentence and expecting it to be concurrent to the federal time and give a sentence that I think is appropriate served concurrently to the federal time and the federal government makes it consecutive, then a lot more time—or there is a lot larger sentence than was anticipated and also vice-versa. I don't want there to be confusion where I give a sentence and it gets to be shorter, I give a sentence expecting that it would be consecutive to the federal [sentence] and the federal government makes it concurrent, then the punishment and consequences for this offense—for the state court offenses could be substantially less. And the only way to avoid that possibility or confusion, I think it's appropriate, is to make the ultimate sentence in state court consecutive to the federal sentence so that it's clear to the federal government what the intention of the state sentencing court is.

Appellant petitioned pro se for postconviction relief, arguing that consecutive sentencing is not permissive sentencing under the sentencing guidelines and, therefore, it constitutes an improper upward departure because the district court failed to make the requisite findings. Appellant also contended that the district court improperly calculated his criminal-history score.

The postconviction court granted appellant's petition as to the calculation of his criminal-history score and denied the petition on the sentencing issue. The postconviction court imposed a new sentence (that was the same length of the former state sentence: 144 months), calculated with the correct criminal-history score. As to the consecutive nature of the sentences, the postconviction court held that it was not required to articulate a basis for an upward departure on the ground that consecutive sentences are permissive when based on a felony conviction listed in section VI of the sentencing guidelines. Because appellant's federal felony conviction is for armed bank robbery,

which is also listed in section VI, the postconviction court concluded that the consecutive sentences are permissive and do not constitute an upward departure.

The postconviction court stated that consecutive sentencing is the least confusing and most reliable way to ensure that appellant's aggregate sentence accurately reflects the criminality of his offenses. The postconviction court acknowledged that the risk that appellant's sentence might exaggerate or minimize the criminality of his conduct could not be eliminated as long as the federal authorities declined to indicate their intent concerning whether the sentences would be served concurrently or consecutively:

However, leaving the decision to the federal authorities of whether to make the state and federal sentences concurrent or consecutive could greatly affect the overall sentence in a manner that this [c]ourt sought to avoid. If the [c]ourt sentenced [appellant] to 144 months consecutive to the federal sentence and the federal authorities decided that it would be concurrent to the 78-month federal sentence, that would underestimate the criminality of the [appellant's] offenses. [Appellant] would effectively serve only 66 months (144-78) for the state offenses, which would unduly minimize the seriousness of his five separate offenses. Conversely, if this court sentenced [appellant] to 222 months concurrent with the federal sentence to assure that [appellant] served 144 months for his state offenses, there is a real danger that the federal authorities may have not honored the concurrent sentencing and instead have [appellant's] federal sentence run consecutively, resulting in [a] total sentence of 300 months (222+78). This uncertainty over what the federal authorities might do is heightened by the fact that [appellant] is serving his Minnesota sentence first even though it was imposed later. To assure that [appellant's] sentence was neither too small nor too large, this court imposed concurrent state sentences that would be consecutive to the federal sentence.

This appeal follows.

DECISION

I.

Appellant contends that the postconviction court abused its discretion by departing from the guidelines without providing a valid basis for the departure. “This issue requires interpretation of the sentencing guidelines, which is a question of law subject to de novo review.” *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005). Whether to depart from the sentencing guidelines rests within the district court’s discretion, and the district court will not be reversed absent an abuse of that discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

Generally, a state sentence that is imposed after a federal sentence is presumed to run concurrent with the federal sentence. *State v. Wakefield*, 263 N.W.2d 76, 77 (Minn. 1978). But under the Minnesota Sentencing Guidelines, consecutive sentences are permissive for felony convictions listed in section VI. Minn. Sent. Guidelines II.F. & VI (2007). Included in that list are robbery and aggravated robbery. *Id.* at VI. Here, the district court concluded that it is not a departure to impose consecutive sentences, reasoning that because section VI includes the Minnesota offense of aggravated robbery and because appellant’s prior federal felony convictions are for aggravated robbery,¹ consecutive sentencing is permissible.

This court considered a similar sentencing issue in *State v. Hahn*, 799 N.W.2d 25 (Minn. App. 2011), *review denied* (Minn. Aug. 24, 2011), where we examined section VI

¹ Appellant’s federal sentence is for armed bank robbery, which is encompassed under aggravated robbery, Minn. Stat. § 609.245, subd. 1 (2006) (“Whoever, while committing a robbery, is armed with a dangerous weapon . . . is guilty of aggravated robbery.”).

of the sentencing guidelines. We held in *Hahn* that federal offenses may not be substituted for analogous or equivalent Minnesota offenses. 799 N.W.2d at 36-37. We explained:

Construing the . . . guidelines strictly, as we must, we conclude that the guidelines do not unambiguously authorize us to read federal offenses into a list where none in fact appear. Appellant's federal offense therefore fails to meet the threshold criterion for permissive consecutive sentencing under the guidelines and concurrent sentencing was presumptive here.

Id. at 37. Because concurrent sentencing is presumptive, the imposition of consecutive sentences is a departure, and the sentencing guidelines require that the district court provide written reasons that are "identifiable, substantial, and compelling" to justify the departure. Minn. Sent. Guidelines II.D. (2007). Respondent now concedes that the district court did not provide its reasons for departing, as required by *Hahn*.

We acknowledge the district court's conscientious effort to impose the appropriate sentence, faced with the uncertainty of what appellant's federal sentence would be. Nevertheless, the sentencing guidelines do not include federal offenses in section VI that would allow for consecutive sentencing. *Hahn*, 799 N.W.2d at 36. Because imposition of consecutive sentences in this matter constitutes a departure that is unsupported by findings of substantial and compelling circumstances, we reverse and remand for resentencing consistent with *Hahn* and the sentencing guidelines. As a result, we do not need to address appellant's alternative argument that he did not validly waive his right to postconviction counsel.

II.

Appellant raises several issues in a pro se supplemental brief. First, he challenges the imposition of his state sentence consecutive to the federal sentence and the validity of his waiver of counsel in the postconviction process. Those issues have been addressed.

Second, he argues that the district court abused its discretion by imposing separate sentences for the Wal-Mart robbery, in violation of Minn. Stat. § 609.035 (Supp. 2007). Appellant pleaded guilty to aggravated robbery involving one victim and aggravated assault involving a different victim. Although under section 609.035, a defendant may only be punished once for crimes arising from a single behavioral incident, that rule does not bar multiple punishment when there are multiple victims to those crimes, as is the case here. *State v. Marquardt*, 294 N.W.2d 849, 851 (Minn. 1980).

Third, appellant contends that the postconviction court abused its discretion by resentencing him (amending the original sentence) in his absence. Although Minn. R. Crim. P. 27.03, subd. 2, provides that a “[d]efendant must be present at the sentencing hearing and sentencing,” the supreme court has interpreted subdivision 2 to apply to the original sentencing hearing but not to modifications of a sentence. *State v. Calmes*, 632 N.W.2d 641, 650 (Minn. 2001). Appellant was not entitled to be present at his resentencing.

Finally, appellant challenges the district court’s alleged violation of his plea agreement based on the Uniform Commercial Code. This argument is without merit.

Reversed and remanded.