STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1499

State of Minnesota,
Respondent,

vs.

Buddy King,
Appellant.

Filed June 24, 2013
Affirmed
Bjorkman, Judge

Polk County District Court
File No. 60-CR-11-2622

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Tania K.M. Lex, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Kirk, Judge.

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

BJORKMAN, Judge

In this sentencing appeal from controlled-substance convictions, appellant argues the district court abused its discretion by (1) using the *Hernandez* method to calculate his

criminal-history score, (2) not granting a downward departure from the presumptive sentence, and (3) imposing a sentence that unfairly exaggerates the criminality of his conduct. We affirm.

FACTS

On September 15, 2011, a confidential informant (CI) told East Grand Forks Police Lieutenant Rodney Hajicek that appellant Buddy King was selling methamphetamine. That same day, officers organized a controlled buy during which the CI purchased approximately one gram of methamphetamine from King. Additional controlled buys of methamphetamine were conducted through the CI on October 3 (3 grams), November 1 (1 gram), and November 12 (3.8 grams). On November 16, police officers executed a search warrant at King's residence, discovering 17 grams of methamphetamine, $762 in cash, two digital scales, and other drug paraphernalia. King told the officers that he intended to sell the methamphetamine and that he had been selling about one ounce per week for several months.

Respondent State of Minnesota charged King with one count of first-degree controlled-substance crime, one count of failure to affix a tax stamp, one count of second-degree controlled-substance crime, and three counts of third-degree controlled-substance crime. King pleaded guilty to the five controlled-substance offenses in exchange for the dismissal of the tax-stamp charge. During the plea hearing, he acknowledged that the presumptive sentence for first-degree controlled-substance crime with a criminal-history score of six is 135 to 189 months' imprisonment.

A probation officer conducted a presentence investigation, reporting that King began selling methamphetamine after he lost his job to support his family but continued selling to support his addiction. Despite identifying several mitigating factors, the officer recommended imposition of the presumptive sentence because King was likely part of a drug hierarchy, he was not entirely truthful with police during his initial interview, the sales occurred over an extended period of time, methamphetamine has a severe negative impact on the community, and he sold and used the substance while in the presence of his five-year-old daughter. King argued for a downward departure on the basis that he is a spree offender with no prior felonies and is amenable to probation.

At the sentencing hearing, the district court heard the parties' arguments for and against departure and a statement from King. The district court denied the departure motion and used the *Hernandez* method to increase King's criminal-history score by each count on which he was sentenced that day. King's criminal-history score was zero when he was sentenced on the first count; his criminal-history score was six when he was sentenced on the final count (first-degree controlled-substance crime).[1] The concurrent sentences culminated in 135 months' imprisonment for the first-degree controlled-substance-crime conviction. King did not object to the *Hernandez* method or challenge the state's decision to charge him with five separate controlled-substance offenses. This appeal follows.

[1] The district court increased King's criminal-history score by 1.5 points after each charge. Because partial points are not used during sentencing, King had a criminal-history score of zero for the first charge, one for the second charge, three for the third charge, four for the fourth charge, and six for the final charge. *See* Minn. Sent. Guidelines cmt. II.B.101 (2010).

D E C I S I O N

The district court has substantial discretion when imposing sentences. *State v. Munger*, 597 N.W.2d 570, 573 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). We will not disturb a sentence unless the district court abused its discretion and the sentence is not authorized by law. *State v. Noggle*, 657 N.W.2d 890, 893 (Minn. App. 2003).

I. The district court did not abuse its discretion by using the *Hernandez* method to calculate King's criminal-history score.

The *Hernandez* method permits a district court sentencing a defendant for multiple offenses on the same day to increase the defendant's criminal-history score to reflect each conviction on which he or she is sentenced. *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). A district court may use the *Hernandez* method when (1) the convictions are for separate and distinct offenses that do not involve the same victims and (2) the district court does not attempt to manipulate the sentencing guidelines to achieve a substantive result that the guidelines do not intend. *State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981). We review the district court's determination of a defendant's 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).

King's challenge focuses on the second prong of the *Hernandez* analysis. His primary argument is that the prosecution engaged in sentencing manipulation by bringing separate charges for each of the controlled buys to inflate his sentence. The argument that a prosecutor manipulated a defendant's sentence is distinct from a *Hernandez*-

method challenge. And our supreme court has not recognized sentencing manipulation as a basis for reversing a sentence in the absence of "egregious police conduct which goes beyond legitimate investigative purposes." *State v. Soto*, 562 N.W.2d 299, 305 (Minn. 1997).

We first consider the state's argument that King waived his *Hernandez*-method and sentencing-manipulation challenges by failing to assert them in the district court. Issues raised for the first time on appeal are generally waived. *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001). And a guilty plea operates to waive all non-jurisdictional defects arising before the entry of the plea. *State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986). Because King's sentencing-manipulation argument turns on the prosecutor's charging decisions, which occurred prior to his guilty plea, we conclude that he waived this challenge. But a defendant cannot waive the right to appeal an illegal sentence. *State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007). A sentence based on an incorrect criminal-history score is illegal. *Id.* at 147. Accordingly, King did not waive his *Hernandez*-method challenge.

King argues that the district court abused its discretion by using the *Hernandez* method because the court manipulated the sentencing guidelines to achieve a result not intended by the guidelines.[2] He asserts that the district court, in effect, endorsed the prosecutor's charging decisions, which increased the risk of sentencing disparity. We are not persuaded. Although the sentencing guidelines are designed to reduce sentencing

[2] King does not challenge the first prong of the *Hernandez* analysis, acknowledging that his convictions reflect separate and distinct offenses.

disparity, *see* Minn. Sent. Guidelines I (2010), the supreme court has rejected the argument that the risk of sentencing disparity precludes use of the *Hernandez* method, *see State v. Pittel*, 518 N.W.2d 606, 608 (Minn. 1994) (acknowledging that the *Hernandez* method may cause sentencing disparity but stating that it is up to the sentencing guidelines commission to address this issue).

Moreover, Minnesota courts have properly used the *Hernandez* method under circumstances that are substantially similar to this case. *See Soto*, 562 N.W.2d at 302-04; *State v. Gould*, 562 N.W.2d 518, 521 (Minn. 1997) (concluding the district court appropriately used the *Hernandez* method to determine appellant's sentence for three controlled-substance convictions arising out of separate controlled buys). In *Soto*, police purchased cocaine from the appellant during four controlled buys, and the state separately charged the appellant for each sale. 562 N.W.2d at 301-02. The supreme court concluded that the *Hernandez* method was appropriate because the controlled buys took place on separate occasions over a one-month period. *Id.* at 304. The supreme court rejected Soto's argument that use of the *Hernandez* method permitted the police and prosecutor to manipulate the number of sales and amount of drugs sold on each occasion to achieve a particular sentence. *Id.* Likewise, we conclude that the district court did not abuse its discretion by applying the *Hernandez* method to calculate King's criminal-history score.

II. The district court did not abuse its discretion by denying King's motion for a downward dispositional departure.

The district court must order the presumptive sentence unless "substantial and compelling circumstances" merit a downward departure. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We review de novo whether there are substantial and compelling circumstances that merit a departure. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). But the district court's decision to grant or deny a departure from the presumptive sentence is reviewed for abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). We will only reverse a presumptive sentence in rare cases. *Kindem*, 313 N.W.2d at 7.

When denying a request for departure, the district court need not explain its reasons for imposing the presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). But the district court must carefully consider the circumstances for and against departure. *See id.* at 80-81; *State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984).

King first contends that the district court failed to consider the evidence supporting a departure. We disagree. Although the district court did not explain its reasons for denying King's motion, the record reflects that the district court carefully considered the arguments for and against departure. The district court received the presentence investigation report and the memorandum King submitted in support of his departure motion. And the district court heard the parties' oral arguments and King's own

statement regarding the merits of a downward departure. On this record, we conclude the district court carefully considered the arguments for and against departure.

King next asserts that the district court erred by determining that there are no substantial and compelling circumstances to warrant a dispositional departure. He contends that he is amenable to probation, citing his age (38 years), lack of prior felony-level offenses, remorse, cooperation, family support, motivation to deal with his addiction, and acceptance into a substance-abuse program. We are not persuaded. Although amenability to probation may provide a basis for departure, *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983), the district court is not obligated to depart even if mitigating factors are present, *see State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). The probation officer noted King's mitigating circumstances but recommended the presumptive sentence for the first-degree controlled-substance offense because the sales occurred over a period of several months, King's offenses had a severe negative impact on the community, King was likely part of a drug hierarchy, he attempted to minimize his involvement in the sale of methamphetamine and was not entirely truthful with police, and his daughter was living in his residence while he used and sold the drug. On this record, we discern no error by the district court in finding no departure grounds.

Finally, King argues the district court abused its discretion by not granting a downward durational departure because the prosecutor manipulated King's criminal-history score and sentence. This argument essentially restates his challenge to the *Hernandez* method and sentencing manipulation, which we have rejected.

III. King's first-degree controlled-substance-crime sentence does not unfairly exaggerate the criminality of his conduct.

Appellate courts have the discretion to modify a sentence that unfairly exaggerates the criminality of a defendant's conduct. *State v. Norris*, 428 N.W.2d 61, 70-71 (Minn. 1988); *see also Carpenter v. State*, 674 N.W.2d 184, 189-90 (Minn. 2004) (distinguishing *Norris*). To determine whether a sentence should be modified on this basis, we compare the sentences received by other offenders for similar offenses. *State v. Vazquez*, 330 N.W.2d 110, 112-13 (Minn. 1983); *see also Carpenter*, 674 N.W.2d at 190.

King's argument reiterates his *Hernandez*-method and sentencing-manipulation challenges. He does not cite any evidence that he received a longer sentence than similar offenders, nor does our review of the record reveal any evidence that King received a longer sentence than similar offenders. *See Soto*, 562 N.W.2d at 302, 305 (affirming defendant's sentence of 161 months' imprisonment for four counts of first-degree controlled-substance crime). Accordingly, King has not shown that his sentence unfairly exaggerates the criminality of his conduct.

Affirmed.