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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2020**

State of Minnesota,
Respondent,

vs.

Mark Anthony Galatowitsch,
Appellant.

**Filed July 1, 2013
Remanded
Ross, Judge**

Dakota County District Court
File Nos. 19HA-CR-11-2596;
19HA-CR-11-2852

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

James C. Backstrom, Dakota County Attorney, Tricia A. Loehr, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

ROSS, Judge

Mark Galatowitsch pleaded guilty to fourth-degree criminal sexual conduct and was sentenced to 24 months' imprisonment in accordance with his plea agreement. He appeals from his sentence, arguing that it is an upward dispositional departure that the district court did not support by stating its reasons for the departure. Because the parties contest Galatowitsch's criminal history score and the record does not include findings or facts sufficient to determine it, we remand for additional findings.

FACTS

The state charged Mark Galatowitsch with fourth-degree criminal sexual conduct in violation of Minnesota Statutes section 609.345, subdivision 1(b) (2010), after he had repeated sexual contacts with a 14-year-old girl "during 2010 through August 4, 2011." Galatowitsch pleaded guilty in exchange for dismissal of other charges, and he agreed to a 24-month executed prison sentence followed by 10 years' supervised release. The district court accepting his guilty plea did not make findings specifying the date of his offense, and it ordered a sentence greater than the guidelines sentence, following the sentence contemplated in the plea agreement but without articulating the reasons for the departure from a guidelines sentence.

A criminal history report from the county probation office indicated that Galatowitsch had a criminal history score of two, based on a prior felony conviction for domestic assault that was committed while Galatowitsch was on probation for a previous offense. But an investigation report completed five months later but before the plea

agreement indicated additional convictions, including a gross misdemeanor conviction for obstructing a peace officer, and it assigned a criminal history score of three. The district court did not make a finding designating Galatowitsch's criminal history score.

Galatowitsch appeals.

D E C I S I O N

Galatowitsch challenges his sentence, arguing that the district court erred by imposing a sentence that constitutes an upward dispositional departure without stating reasons on the record. We cannot determine whether his argument is correct based on the record before us.

A district court has broad discretion to depart from the presumptive guidelines sentence. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). But a departure must be accompanied by an on-the-record statement of reasons for the departure. *State v. Williams* 361 N.W.2d 840, 844 (Minn. 1985). A plea agreement cannot alone support a sentencing departure. *State v. Misquadace*, 629 N.W.2d 487, 491 (Minn. 2001), *aff'd*, 644 N.W.2d 65 (Minn. 2002). So to determine whether the district court erred by failing to state reasons for the alleged upward departure, we must first determine whether Galatowitsch's sentence actually was an upward departure. The presumptive sentence for Galatowitsch's offense with a criminal history score of two is a 36-month stayed prison term. *See* Minn. Sent. Guidelines 4 (Supp. 2011); Minn. Sent. Guidelines IV (2010). But the presumptive sentence for Galatowitsch's offense with a criminal history score of three would be a 45-month executed prison sentence. *See* Minn. Sent. Guidelines 4 (Supp. 2011); Minn. Sent. Guidelines IV (2010); So if Galatowitsch's criminal history score is two, the 24-month

executed sentence was an upward dispositional departure. And if his criminal history score was three, his sentence was a downward durational departure. So it appears that Galatowitsch's sentence was a departure one way or the other, but whether it was an upward or downward departure depends on his criminal history score.

We cannot determine Galatowitsch's criminal history score, however, because the record lacks sufficient information for us to do so. The district court did not determine the date of his offense of conviction, and the sentencing guidelines provisions for calculating the criminal history score changed during the period of offenses as alleged in the state's complaint. "The date of the offense is important for sentencing purposes [because] [t]he sentencing guidelines provide: '[m]odifications to the Minnesota Sentencing Guidelines will be applied to offenders whose *date of offense is on or after the specified modification effective date.*'" *State v. Goldenstein*, 505 N.W.2d 332, 347 (Minn. App. 1993) (quoting Minn. Sent. Guidelines III.F.) (emphasis added), *review denied* (Minn. Oct. 19, 1993). The parties' briefs on appeal begin at different criminal history scores—Galatowitsch asserts that it was two and the state asserts three—and each correspondingly focuses mainly on whether Galatowitsch's sentence represents an unsupported upward dispositional departure. At oral argument, the parties further demonstrated that they are relying on different assumptions about the date of Galatowitsch's offense and the version of the sentencing guidelines that apply to determine his criminal history score, assumptions that were not explained or defended in the briefing.

The unsettled issues of the timing of the offense and the consequent issue of the criminal history score must be resolved before we can address the parties' departure

arguments. The 2010 sentencing guidelines, applicable before August 1, 2010, assign one unit for each misdemeanor and gross misdemeanor conviction listed on the Misdemeanor and Gross Misdemeanor Offense List. *See* Minn. Sent. Guidelines II.B.3 & IV. (2010). Four units combine to add one criminal history point. *Id.* at II.B.3. Galatowitsch's record included only two listed convictions at the time of his offense: a misdemeanor conviction for violating an order for protection and a gross misdemeanor conviction for domestic assault. So if his offense was committed before August 1, 2010, he apparently did not have enough units for another criminal history point to be added to the two points that he and the state agree he received as a result of his felony domestic-assault conviction with a custody-status point. On the other hand, the 2011 sentencing guidelines, applicable from August 1, 2010, to August 1, 2011, assign one unit for each misdemeanor conviction listed on the targeted misdemeanor list in Minnesota Statutes section 299C.10, subdivision 1(3) (2010) as well as one unit for *any* nontraffic gross misdemeanor conviction. *See* Minn. Sent. Guidelines 2.B.3 (Supp. 2011). Galatowitsch's record apparently contained four qualifying offenses under the 2011 guidelines: a misdemeanor conviction for violating an order for protection; a gross misdemeanor conviction for domestic assault; a gross misdemeanor conviction for false information to a peace officer; and a gross misdemeanor conviction for obstructing a peace officer. So if his offense was committed between August 1, 2010, and August 1, 2011, he had sufficient units for an additional criminal history point, resulting in a criminal history score of three.

Not knowing the date assigned to the offense or the resulting criminal history score, we cannot begin to address the departure issue. Where a charged offense occurs on

an uncertain date within a defined time period, the defendant has a right to have the jury determine the date of the offense. *State v. Murray*, 495 N.W.2d 412, 412–13 (Minn. 1993). Although a defendant may waive this right, *see id.*, the district court did not determine a date for Galatowitsch’s offense. And the factual basis for the determination is ambiguous, since Galatowitsch acknowledged only that “[a]t some time between 2010 and the date of August 4th, 2011 . . . at some point [he] had contact” with the 14-year-old victim. The plea petition includes the same range rather than specifying a date. Although the warrant for commitment does specify a date for the offense, it does not indicate the basis for it or whether Galatowitsch assented to it. And we do not find facts on appeal. *In re Welfare of M.D.O.*, 462 N.W.2d 370, 374–75 (Minn. 1990).

We remand for the district court, conducting further proceedings if necessary, to make findings determining Galatowitsch’s criminal history.

Remanded.