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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1671**

Dana Cobbins, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 7, 2008
Affirmed
Ross, Judge**

Clay County District Court
File No. K3-04-1797

Dana Cobbins, #206773, 1101 Linden Lane, Faribault, MN 55021 (pro se appellant)

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian Melton, Clay County Attorney, Heidi Fisher Davies, Assistant County Attorney, 807 Eleventh Street North, Moorhead, MN 56560 (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

ROSS, Judge

This appeal requires us to determine whether the district court acted within its discretion when correcting a sentence on remand. Appellant Dana Cobbins contends that the district court abused its discretion by upwardly departing from the presumptive range for sentencing and that it should have credited him for time served in jail for a previous racketeering conviction. Because an aggravating factor supports the upward departure and because Cobbins's current racketeering conviction does not stem from the same acts or omissions that underlie his previous conviction, we affirm the sentence.

FACTS

A jury convicted Dana Cobbins in 2005 of various crimes, including controlled substance sales, conspiracy, and racketeering for his participation in a series of drug sales in the Fargo-Moorhead area in 2003 and 2004. *State v. Cobbins*, No. A05-1617, 2006 WL 3719462, at *2–4 (Minn. App. Dec. 19, 2006), *review denied* (Minn. Feb. 20, 2007). Cobbins appealed those convictions, and this court overturned his conspiracy conviction and remanded the case for resentencing. On remand, the district court sentenced him to 130 months' imprisonment, reflecting a 32-month upward departure from the presumptive sentence. The district court based this upward departure on two aggravating factors under the sentencing guidelines, holding that the crime qualified as major controlled substance offense and involved three or more persons who actively participated in the crime. Cobbins moved the district court to correct his sentence, arguing that the aggravating factors should not have been applied because one had already been addressed in his sentence when the

district court relied on them to determine the severity of his racketeering offense and the other is an element in the offense. He also argued that he was entitled to credit for time served in connection with a 2002 racketeering conviction, which was overturned by this court in 2002. *State v. Cobbins*, No. C0-01-1793, 2002 WL 31455238 (Minn. App. Nov. 5, 2002). The district court denied Cobbins's motion to correct his sentence. This appeal follows.

D E C I S I O N

I

Cobbins contests his sentence, specifically arguing that the upward departure from the Minnesota Sentencing Guidelines' presumptive sentence was based on two aggravating factors that the district court should not have considered. We review sentencing departures and postconviction decisions for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006); *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). Reversal of a departure is warranted if the reasons for the departure are improper or inadequate. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). Cobbins maintains that one aggravating factor should not have been applied because it was already considered by the court in the sentence when it assigned a guidelines severity level to his offense. And he argues that the other should not have been applied because it was an element of the offense. His partially valid argument does not require reversal.

Cobbins's challenge requires us to address the manner in which the district court considered his criminal conduct in relation to the Minnesota Sentencing Guidelines. The guidelines rank offenses according to severity. Some offenses, like Cobbins's racketeering

offense, are unranked. *State v. Kujak*, 639 N.W.2d 878, 883 (Minn. App. 2002), *review denied* (Minn. Mar. 25, 2002); Minn. Sent. Guidelines V. To assign a rank to an unranked offense, a district court considers the gravity of the conduct underlying the offense, the severity level assigned to any similar, ranked offenses, and the severity level assigned to other offenders for the same unranked offense or similar conduct. *State v. Kenard*, 606 N.W.2d 440, 443 (Minn. 2000).

In addition to assigning a severity level to crimes, the sentencing guidelines offer presumptive sentences. Minn. Sent. Guidelines II.D. The presumptive sentence rests in part on the offense's severity ranking. If the circumstances surrounding an offense include one or more aggravating factors, a sentencing judge may issue a sentence that departs upwardly from the guidelines' presumptive sentence. *Id.* So when sentencing a defendant for an unranked offense, like racketeering, a district court first ranks the offense, determines the presumptive sentence for that ranking, and then considers whether factors justify a departure upward from the presumptive sentence.

But the same conduct or circumstance may not be used both to assign a severity level and to support an upward departure as an aggravating factor. *See Kenard*, 606 N.W.2d at 442 n.3 (“[C]onduct [used in assigning severity] cannot be relied on to justify an upward departure.”). Because a presumptive sentence is based on a crime's severity level, if a sentencing court were to use a particular circumstance to assign a severity level and then use that same circumstance to support an upward departure from the guidelines' presumptive sentence, that sentence would improperly twice punish for the same circumstance. *See State v. Peterson*, 329 N.W.2d 58, 60 (Minn. 1983) (explaining that upward departures may not

rest on elements that determined the severity level of the crime). We will therefore consider whether the upward departure of Cobbins's sentence was based on conduct or circumstances used to assign a severity level to his racketeering offense.

Cobbins's sentencing jury found two guidelines-defined aggravating factors: Cobbins's offense was a "major controlled substance offense," and Cobbins acted with a group of three or more persons who all actively participated in the crime. Minn. Sent. Guidelines II.D.2.b.(5); *id.* II.D.2.b.(10). Cobbins argues that both factors should have been excluded in considering an upward departure in his case. He is right as to the district court's use of the "major controlled substance offense" aggravator but wrong as to the use of the three-or-more-persons aggravating factor.

An offense is considered a "major controlled substance offense" if it includes at least two circumstances listed in the Minnesota Sentencing Guidelines II.D.2.b.(5). Cobbins's sentencing jury found that he occupied a high position in the drug distribution hierarchy and that the criminal enterprise involved a high degree of sophistication or planning and occurred over a broad geographic area. These two findings support the "major controlled substance offense" aggravator. But the district court had already considered the former of these two findings when assigning a ranking to Cobbins's racketeering offense: "This racketeering scheme was extremely grave and serious [because it] involved a wide geographic area [and] the defendants were very sophisticated in the distribution and sale of crack cocaine." Because the district court considered sophistication and broad geography in ranking Cobbins's racketeering offense to assign severity, it erred by also applying sophistication and broad geography to support its upward departure. *See Kenard*, 606

N.W.2d at 443 n.3. Excluding that circumstance, there remained only one circumstance to support the finding of “major controlled substance offense.” Because the “major controlled substance offense” aggravator requires *two* underlying circumstances, the district court’s use of the “major controlled substance offense” aggravator as a reason for the departure was improper.

Cobbins also challenges the use of the involvement of three or more persons who actively participated in the crime as an aggravating factor. He argues that because a racketeering conviction requires “an enterprise,” it necessarily involves three or more persons. The argument is mistaken.

A racketeering conviction does not require three people. For instance, a sole proprietorship can be a racketeering enterprise. Minn. Stat. § 609.902, subd. 3 (2006) (“‘Enterprise’ means a *sole proprietorship*, partnership, corporation, . . . or group of persons, associated in fact although not a legal entity.” (emphasis added)); Black’s Law Dictionary 1427 (8th ed. 2004) (A sole proprietorship is a “business in which one person owns all the assets, owes all the liabilities, and operates in his or her personal capacity.”). Legislative history suggests that Minnesota’s racketeering statute requires at least two persons. *See State v. Huynh*, 519 N.W.2d 191, 195 n.4 (Minn. 1994) (“[A]n assistant attorney general speaking on behalf of the proposed legislation, [was asked] whether the definition of enterprise would include any common undertaking of two or more people. The witness, after noting that [racketeering] covered any ‘structural organization’ or association-in-fact, went on to say [that] . . . you must have a hierarchy.”).

Our supreme court has stated that “Minnesota’s racketeering statute is much like the federal [racketeering] law; consequently, in construing our statute it is helpful to consider the federal courts’ interpretation of the federal Act.” *Id.* at 194. Under federal law, a racketeering defendant and his *own* sole proprietorship can constitute an enterprise, if they are sufficiently separable. *McCullough v. Suter*, 757 F.2d 142 (7th Cir. 1985) (upholding a racketeering verdict where a sole proprietorship was the “enterprise” with which its proprietor was “associated” because the sole proprietorship had other employees and was thus possessed with “some” distinct existence from that of the proprietor); *cf. Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 161–62, 121 S. Ct. 2087, 2090 (2001) (“[A civil RICO plaintiff] must allege and prove the existence of two distinct entities: (1) a ‘person’; and (2) an ‘enterprise’ that is not simply the same ‘person’ referred to by a different name. . . . [T]he person and the tool, are different entities, not the same.” (citations omitted)). Racketeering requires only two people. The district court did not abuse its discretion when it determined that the “group of three or more persons” involved in Cobbins’s crime constituted an aggravating factor.

Because the district court’s upward departure from the presumptive sentence was based on one proper and one improper aggravating factor, the question becomes whether to remand for resentencing or whether to affirm. Caselaw directs us to affirm. “If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.” *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (quoting *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985)); *see also State v. Jones*, 745 N.W.2d 845, 848–50 (Minn. 2008) (explaining that any fact used to justify a

departure must be found by a jury, unless a defendant waives that right). A single aggravating factor may justify an upward durational departure. *See, e.g., State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985); *accord State v. Dominguez*, 663 N.W.2d 563, 567 (Minn. App. 2003) (affirming upward departure because defendant challenged only two of three aggravating factors and the remaining factor supported the departure). We therefore affirm the district court's departure based on the valid aggravating factor of the participation of three or more persons in the crime.

II

Cobbins maintains that he is entitled to jail credit for his time served in connection with a 2002 first-degree sale of a controlled substance and racketeering convictions, which were overturned by this court. *Cobbins*, 2002 WL 31455238. A defendant is entitled to credit for time served when he “has been imprisoned pursuant to a conviction which is set aside and is thereafter convicted of a crime growing out of the same act or omission.” Minn. Stat. § 609.145, subd. 1 (2006). Cobbins argues that because he served time for his 2002 racketeering conviction and because some of the 2002 enterprise was used as evidence in his 2005 racketeering conviction, the 2002 racketeering should be considered the “same act” under section 609.145.

Cobbins's 2002 racketeering conviction stemmed from his May 1999 sale of drugs in St. Cloud. *Cobbins*, 2002 WL 31455238, at *1. He argues that the prosecution's original racketeering charge in this case was predicated on the activities underlying his 2002 conviction, and he argues that this racketeering and the St. Cloud racketeering were the same enterprise. Both reasons are flawed and fail to justify jail credit.

Cobbins's assertion that the present racketeering conviction was predicated on activities for which he was convicted in 2002 is inaccurate. The activities that led to the 2002 conviction—racketeering and first-degree controlled-substance sale for the benefit of a gang—are not listed as predicate acts for his Fargo-Moorhead racketeering conviction. And his racketeering conviction in this case was based on different predicate acts than his 2002 conviction. The current racketeering conviction was based on six different controlled-substance crimes in 2003 and 2004 in the Fargo-Moorhead area, and one terroristic-threats offense in St. Cloud in 2001.

Cobbins also argues that his racketeering enterprise in St. Cloud and his racketeering enterprise in Moorhead were the same enterprise. Even if those two enterprises were the same, Cobbins is not entitled to jail credit because an enterprise regards a relationship or organization, not an act or omission. *See* Minn. Stat. § 609.902, subd. 3 (defining “enterprise” as a legal entity or associated group of persons). Cobbins would be entitled to credit for time served for a conviction stemming from the same act or omission, not the same enterprise. The district court correctly determined that he is not entitled to credit for time served.

Affirmed.