STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2268

Solomon Bryan Keith Denham, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 10, 2008
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 98013930

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, 300 South 6th Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Hudson, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.*

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

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

BJORKMAN, Judge

In this appeal from the district court's denial of his petition for postconviction relief, appellant challenges the sentencing court's adoption of the prosecutor's stated reasons for an upward durational departure and its imposition of a sentence more than double the presumptive sentence under the guidelines. He also asks us to apply *Apprendi* and *Blakely* retroactively. We affirm.

FACTS

In July 1998, appellant Solomon Bryan Keith Denham pleaded guilty to two counts of first-degree criminal sexual conduct related to the assaults of two women, L.T. and her daughter, M.T.

After meeting M.T. at a bar, appellant went home with her, where they conversed for some time. When M.T. refused to have sex with him, appellant beat and choked her until she was unconscious. During this struggle, M.T. bit her tongue nearly in half. Doctors later observed redness around M.T.'s vaginal area, suggesting appellant had intercourse with her while she was unconscious.

When L.T. arrived home, appellant was getting up from the still-unconscious M.T. Appellant followed L.T. into her bedroom wielding a steak knife. When L.T. tried to leave the room, appellant grabbed her hair, punched her in the face, and began stabbing her on her head, face, arms, and back. Appellant told L.T. that if she did not do as he wanted, he would kill her sleeping granddaughter. He choked L.T. before forcibly

penetrating her orally, vaginally, and anally. During this assault, M.T.'s three-year-old child woke up and began screaming.

Appellant agreed to plead guilty under terms that included an aggregate sentence of 390 months in prison. At the sentencing hearing, the prosecutor identified aggravating factors warranting an upward departure from the sentencing guidelines: invasion of the victims' zone of privacy, multiple penetrations, the child's presence, and the repeated stabbing of L.T., which constituted extreme cruelty. In addressing appellant, the district court further stated why an upward departure was warranted:

> It's something that I think really deserves a substantial prison sentence because I think of the horrible violence you caused to these women and the trauma they suffered and that little three-year-old girl who had to see her mother and grandmother covered with blood—and the result of being taken away and put in a shelter and being away from her family.

The district court also expressly adopted the factors identified by the prosecutor as grounds for the negotiated upward departure: "I would put down reasons for the departure. I think those were enumerated by the prosecutor." The district court sentenced appellant to the agreed-to 390 months, more than a double upward departure.

Almost nine years later, appellant filed a pro se petition for postconviction relief. The district court denied the petition. This appeal follows.

D E C I S I O N

I.

Appellant first argues the district court erred in denying postconviction relief because the sentencing court failed to cite reasons for the upward departure. We review a

postconviction court's decisions for abuse of discretion. *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We review the interpretation of procedural rules de novo. *State v. Barrett*, 694 N.W.2d 783, 785 (Minn. 2005).

Minn. R. Crim. P. 27.03, subd. 4(C), requires the district court to state, on the record, the factual basis for any sentence that departs from the sentencing guideline applicable to the case. The rule is consistent with our supreme court's direction to comply with the sentencing guidelines: "If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). The requirement enables reviewing courts to meaningfully examine departures on appeal. *State v. Peterson*, 405 N.W.2d 545, 547 (Minn. App. 1987).

Appellant argues that the district court cannot simply adopt the prosecutor's proffered reasons for departure but must itself state specific facts in support of the sentencing departure. Respondent argues that a district court may adopt the state's reasons, if they are placed on the record during the sentencing hearing. Respondent also points out that the district court did more than accept the state's departure reasons.

We agree with respondent. The district court expressly adopted the very explicit aggravating factors the state placed on the record to support the substantial upward departure. Additionally, the district court stated that a substantial sentence was warranted because of the "horrible violence" appellant caused, the "trauma" the adult victims sustained as a result, and the emotional damage appellant inflicted on the three-year-old

child. We can meaningfully examine the reasons for the departure in this case and the requirements of *Williams* and rule 27.03 are fully satisfied.

It is also significant that the upward departure was part of the plea agreement appellant voluntarily and knowingly entered into with the state. Plea agreements alone are not sufficient to support upward departures, *State v. Misquadace*, 644 N.W.2d 65, 71–72 (Minn. 2002), but they were at the time of appellant's sentence. *Misquadace* was adopted only prospectively. 644 N.W.2d at 72; *see also Hutchinson v. State*, 679 N.W.2d 160, 165 (Minn. 2004) (affirming a pre-*Misquadace* upward departure supported only by a plea agreement). Appellant did not have a direct appeal pending when *Misquadace* was announced. Therefore, even if the district court erred in failing to state departure grounds during the sentencing hearing, the plea agreement alone was sufficient to sustain the upward departure.

II.

Appellant next argues the district court erred in failing to state "severe aggravating circumstances" to support his sentence that was more than double the guidelines sentence. *See State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981) (concluding "that generally in a case in which an upward departure in sentence length is justified, the upper limit will be double the presumptive sentence length"). Appellant did not raise this issue in his postconviction petition. We generally only consider issues and theories presented to the district court, *State v. Sorenson*, 441 N.W.2d 455, 457 (Minn. 1989), and therefore decline to reach his new argument.

III.

Finally, appellant challenges the upward departure as unconstitutional under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and its predecessor, *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). He brings this challenge despite our supreme court's holding that *Blakely* does not apply retroactively. *State v. Houston*, 702 N.W.2d 268, 273 (Minn. 2005). *Houston* is the controlling law. Because appellant was sentenced in 1998, and no direct appeal was pending when *Apprendi* or *Blakely* were decided, his reliance on those cases is misplaced.

Affirmed.