STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1934

State of Minnesota,
Appellant,

vs.

Cesar Delagarza,
Respondent.

Filed June 23, 2014
Reversed and remanded
Hooten, Judge

Washington County District Court
File No. 82-CR-12-1537

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

Pete Orput, Washington County Attorney, Peter S. Johnson, Assistant County Attorney, Stillwater, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Lau, Assistant Public Defender, St. Paul, Minnesota (for respondent)

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

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

HOOTEN, Judge

In this sentencing appeal, the state argues that the district court abused its discretion by departing from Minn. Stat. § 609.2232 (2010), which requires that when an

inmate is convicted of fourth-degree assault of a correctional employee, an executed sentence must run consecutively to any unexpired portion of the earlier sentence. Because the district court failed to follow section 609.2232's plain and unambiguous mandate for consecutive sentencing, we reverse and remand for resentencing.

FACTS

Respondent Cesar Delagarza has been imprisoned for second-degree murder since February 2002 and is anticipated to be released in September 2020. In March 2012, Delagarza struck and injured a correctional officer. Delagarza was charged with, and pleaded guilty to, fourth-degree assault of a correctional employee in violation of Minn. Stat. § 609.2231, subd. 3 (2010). Delagarza moved for a downward durational departure. The state requested imposition of the presumptive sentence of a year and a day to be served consecutively. The district court filed a departure report, indicating that mitigating factors supported a downward departure. The district court imposed a sentence of a year and a day to be served concurrently. This appeal follows.

D E C I S I O N

"Statutory construction is a question of law and is reviewed de novo." *State v. Wukawitz*, 662 N.W.2d 517, 525 (Minn. 2003). "The primary objective in the interpretation of a statute is to ascertain and effectuate the intention of the legislature." *Id.* "If the statutory language is plain and unambiguous, the court does not engage in any further construction and instead looks to the plain meaning of the statutory language." *Id.* Under Minn. Stat. § 609.2232, "If an inmate of a state correctional facility is convicted of violating [among other statutes, section 609.2231], while confined in the facility, the

sentence imposed for the assault shall be executed and run consecutively to any unexpired portion of the offender's earlier sentence."

The state argues that, in light of section 609.2232, the district court erred by imposing a concurrent sentence. We agree. Section 609.2232 is unambiguous in mandating a consecutive sentence. "The canons of statutory construction provide that 'shall' is mandatory." *State v. Humes*, 581 N.W.2d 317, 319 (Minn. 1998) (citing Minn. Stat. § 645.44, subd. 16 (1996)). Accordingly, the plain and unambiguous language of section 609.2232 required the district court to impose a consecutive sentence.

Delagarza acknowledges that section 609.2232 "gives the initial impression that a mandatory consecutive sentence is required." But he argues that a consecutive sentence is not mandatory under section 609.2232 in light of *State v. Childers*, 309 N.W.2d 37 (Minn. 1981), and *State v. Feinstein*, 338 N.W.2d 244 (Minn. 1983). In both of these cases, the statute at issue stated that a person "shall" be imprisoned for a certain offense. *Feinstein*, 338 N.W.2d at 246; *Childers*, 309 N.W.2d at 38. Despite this mandatory language, the supreme court determined that because a separate statutory provision—Minn. Stat. § 609.135—authorized staying imposition or execution of a sentence except under certain circumstances, probation is an authorized dispositional alternative unless the statute specifically excludes the consideration of probation. *Feinstein*, 338 N.W.2d at 246–47; *Childers*, 309 N.W.2d at 38.

Relying on *Childers* and *Feinstein*, Delagarza argues that "because the Legislature did not specifically exclude the possibility of a departure to concurrent sentences, the court retained the authority to do so." This reliance is misplaced. Unlike in *Childers* and

Feinstein, there is no separate statutory authority permitting the imposition of a concurrent sentence despite section 609.2232's mandate for imposition of a consecutive sentence. Without another statutory authority to rebut the mandatory nature of section 609.2232, Delagarza's argument "flies in the face of the clear legislative language." *See State v. Sheppard*, 587 N.W.2d 53, 56 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999). Indeed, the supreme court has rejected "the argument that the legislature must append language prohibiting waiver to every mandatory statute to ensure that the statute is given effect." *Humes*, 581 N.W.2d at 319.

Delagarza argues that section 609.2232's mandatory language conflicts with Minn. Sent. Guidelines 2.C (Supp. 2011), which provides that "[i]t is presumptive . . . for a felony assault committed by an inmate serving an executed term of imprisonment to be sentenced consecutively to the offense for which the inmate was confined." Delagarza's argument appears to be that, because a consecutive sentence is presumptive under the sentencing guidelines, a sentencing court must have discretion to depart and, therefore, a consecutive sentence must not be mandatory.

Assuming, without deciding, that a conflict with the Minnesota Sentencing Guidelines has enough legal force to rebut 609.2232's mandatory language, we reject Delagarza's argument. Delagarza disregards the canon of statutory construction that, when "two statutes' provisions irreconcilably conflict, the more specific provision should prevail over the more general provision unless the legislature intended the general provision to control." *State v. Richmond*, 730 N.W.2d 62, 70 (Minn. App. 2007), *review denied* (Minn. June 19, 2007). Section 2.C governs all felony assaults committed by an

inmate serving an executed term of imprisonment, regardless of the identity of the victim. Section 609.2232, on the other hand, is more specific in that it governs only assaults of correctional employees. Because Delagarza assaulted a correctional employee, we would apply the more specific section 609.2232 over section 2.C. And in light of section 609.2232's plain and unambiguous instruction, we conclude that the district court erred by imposing a concurrent sentence, and we must reverse.

The parties dispute the appropriate remedy. The state contends that "this case should be remanded with the specific instruction to modify [Delagarza's] sentence from concurrent to consecutive." Delagarza requests that this court remand to the district court to consider his original request for a consecutive 90-day sentence and "to determine whether his plea was induced by the promise of an illegal [concurrent] sentence, and whether he must be given the opportunity to withdraw his plea as a result."

Because the district court filed a departure report indicating that mitigating factors supported a downward departure, we recognize that more is involved than a change from a concurrent to a consecutive sentence. Accordingly, we remand for resentencing consistent with this opinion and allow the district court to express its intentions in light of the invalid sentence. *See State v. Montermini*, 819 N.W.2d 447, 454–55 (Minn. App. 2012) (noting "that the district court correctly recognized that our remand instructions must be construed in light of caselaw granting the district court flexibility to consider the effect of the court of appeals decision on the remainder of the plea agreement"). We express no opinion as to Delagarza's hypothetical motion to withdraw a guilty plea.

Finally, we address the arguments raised in Delagarza's pro se supplemental brief. First, he argues that "[t]he Court of Appeals and the [district court] lack jurisdiction over this case" because "any further punishment would constitute" constitutional violations. But we are remanding for resentencing, not imposing further punishment. Second, Delagarza argues that the state's appeal is frivolous. Given our decision, this argument is unpersuasive. Finally, Delagarza argues that section 609.2232 is ambiguous. But as explained, section 609.2232's plain and unambiguous language directs a district court to impose a consecutive sentence for a violation of section 609.2231, subdivision 3.

Reversed and remanded.