STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0095

State of Minnesota,
Respondent,

vs.

Thomas Kendricks, III,
Appellant.

Filed December 11, 2017
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Blue Earth County District Court
File Nos. 07-CR-14-168, 07-CR-14-169, 07-CR-14-900

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Bjorkman, Judge; and Reyes, Judge.

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

BJORKMAN, Judge

Appellant challenges the denial of his postconviction petition, arguing that the district court erred by refusing to modify his sentence or to permit him to withdraw his

guilty plea. We affirm the denial of his plea-withdrawal motion because appellant was adequately informed of the conditional-release requirement. But we reverse and remand appellant's aggravated-robbery sentences because they were based on an improper criminal-history score.

FACTS

Appellant Thomas Kendricks, III was charged with three counts of third-degree criminal sexual conduct for sexually penetrating 14-year old "M" between December 2013 and January 2014. He was also charged with first-degree aggravated robbery, second-degree assault, and two firearms violations for a January 13, 2014 incident. And he was charged with first-degree aggravated robbery, second-degree assault, two firearms violations, and motor-vehicle theft for a January 14, 2014 incident. At the time of the charged offenses, Kendricks was on supervised release for two aggravated-robbery convictions.

Pursuant to a negotiated agreement, Kendricks pleaded guilty to the most serious charge in each case—one count of criminal sexual conduct and two counts of aggravated robbery. In return, the state agreed to dismiss the other charges and recommend a total sentence of 240 months. The sentencing transcript reflects the parties' confusion about whether the offenses were subject to presumptive or permissive consecutive sentencing, and whether the presentence investigation report (PSI) and sentencing-guidelines worksheet reflect the correct criminal-history score for consecutive sentencing.

The district court sentenced Kendricks to 124 months for third-degree criminal sexual conduct, within the presumptive range based on his criminal-history score of six,

and imposed consecutive 58-month sentences for each of the aggravated-robbery convictions, using a criminal-history score of one. The court also imposed a ten-year conditional-release term for the criminal-sexual-conduct conviction.

Kendricks filed a timely postconviction petition seeking to reduce his sentence or, alternatively, to withdraw his guilty plea. Kendricks argued that he should have been sentenced concurrently on the aggravated-robbery convictions, and that he was not advised that he would be subject to conditional release with respect to the criminal-sexual-conduct offense. The district court denied the petition. Kendricks appeals.

D E C I S I O N

The decision whether to grant postconviction relief is within the district court's discretion. *State v. Nicks*, 831 N.W.2d 493, 503 (Minn. 2013). But we review a court's postconviction findings of fact for clear error and its legal determinations de novo. *Id.* This appeal requires interpretation of the Minnesota Sentencing Guidelines (2014), a legal question that we review de novo. *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006).

I. Kendricks's aggravated-robbery sentences are unlawful.

"Generally, when an offender is convicted of multiple current offenses, or when there is a prior felony sentence that has not expired or been discharged, concurrent sentencing is presumptive." Minn. Sent. Guidelines 2.F. But consecutive sentencing is presumptive if the offender was on supervised release when he committed the current offense and the current offense would be a presumptive commitment to prison. Minn. Sent. Guidelines 2.F.1.a. Even if an offender meets the criteria for presumptive consecutive

sentencing, if "the total time to serve in prison would be longer if a concurrent sentence were imposed, a concurrent sentence is presumptive." Minn. Sent. Guidelines 2.F.1.c.

Kendricks was serving the supervised release portion of a 58-month sentence when he committed the criminal-sexual-conduct offense. With a criminal-history score of six, Kendricks's presumptive sentence for this offense was 140 months executed. Minn. Sent. Guidelines 4.B (Sex Offender Grid). Because the concurrent sentence based on Kendricks's criminal-history score is longer than the presumptive consecutive sentence, the district court was required to sentence concurrently with his previous sentence. Kendricks acknowledges that his 124-month sentence for criminal sexual conduct is in the lower end of the guidelines range, and he does not challenge it.

Kendricks does contest his two aggravated-robbery sentences. The district court interpreted the guidelines to require presumptive consecutive sentences. We disagree. Where, as here, an offender is convicted of multiple current offenses, concurrent sentencing is presumptive. Minn. Sent. Guidelines 2.F. The guidelines allow *permissive* consecutive sentencing only when the disposition for the current offense is commitment and one of three other conditions exists: (1) the prior felony sentence is for a crime listed among the offenses eligible for permissive consecutive sentencing in Minn. Sent. Guidelines 6; (2) the offender is being sentenced for "multiple current felony convictions" included on the above list; or (3) the offender is convicted of a new felony after escape. Minn. Sent. Guidelines 2.F.2.a.1. These requirements are met here; both third-degree criminal sexual conduct and aggravated robbery are offenses eligible for permissive consecutive sentencing, and the disposition for the aggravated-robbery offenses is commitment. *See State v. Coleman*, 731

N.W.2d 531, 538 (Minn. App. 2007) (affirming imposition of two consecutive sentences when the offender's multiple current offenses met the criteria for permissive consecutive sentencing), *review denied* (Minn. Aug. 7, 2007). Accordingly, consecutive sentencing of the aggravated-robbery convictions is permissive.

When a district court imposes permissive consecutive sentences under Minn. Sent. Guidelines 2.F.2.a.1, it must use a criminal-history score of zero. Minn. Sent. Guidelines cmt. 2.F.202. The district court based Kendricks's 58-month aggravated-robbery sentences on a criminal-history score of one. This was error. Using the proper criminal-history score, the guidelines sentence is 48 months, within a range of 41 to 57 months. Minn. Sent. Guidelines 4.A.

The state argues Kendricks's robbery sentences are nonetheless lawful because, in the aggregate, the 240 months imposed are within the 282-month presumptive range.[1] While the guidelines direct the Commissioner of Corrections to aggregate "separate durations into a single fixed sentence," Minn. Sent. Guidelines cmt. 2.F.02, this assumes that a defendant has been sentenced to individually lawful sentences. A sentence is unauthorized when it does not meet the requirements of the applicable sentencing statute. *State v. Amundson*, 828 N.W.2d 747, 752 (Minn. App. 2013). Because Kendricks's

[1] With a criminal-history score of six, Kendricks's presumptive sentence for third-degree criminal sexual conduct is 119-168 months. Minn. Sent. Guidelines 4.B. The presumptive sentence for aggravated robbery, using a zero criminal-history score as required for permissive consecutive sentencing, is 41-57 months. Minn. Sent. Guidelines 4.A. Using the highest presumptive sentence for each conviction—168 months, 57 months, and 57 months—results in a 282-month sentence, which is still within the presumptive range.

aggravated-robbery sentences do not comply with the sentencing guidelines, we reverse and remand them to the district court for resentencing.

II. The postconviction court did not err by denying Kendricks's request to withdraw his guilty plea.

A defendant does not have an absolute right to withdraw a guilty plea. *State v. Raleigh*, 778 N.W.2d 90, 93 (Minn. 2010). After sentencing, a defendant must be allowed to withdraw a guilty plea if "withdrawal is necessary to correct a manifest injustice." *Id.* at 94 (quotation omitted). A manifest injustice occurs if a plea is not valid; a plea is invalid if it is not accurate, intelligent, or voluntary. *Id.*

Kendricks argues that his plea was not accurate[2] or intelligent because the court imposed unlawful sentences and he was not informed of the conditional-release term. We have already afforded Kendricks the appropriate remedy for an unlawful sentence—remand to the district court for resentencing on the aggravated-robbery convictions. *See Amundson*, 828 N.W.2d at 754 (remanding for resentencing when sentence imposed was unauthorized by the sentencing guidelines). Thus, we turn to his contention that his plea was not intelligent because he was unaware of the conditional-release term.

A guilty plea is intelligent if a defendant "understands the charges against him, the rights he is waiving, and the consequences of his plea." *Uselman v. State*, 831 N.W.2d 690, 693 (Minn. App. 2013) (quoting *Raleigh*, 778 N.W.2d at 96). In *Uselman*, we

[2] "The accuracy requirement protects a defendant from pleading guilty to a more serious offense than that for which he could be convicted if he insisted on his right to trial. To be accurate, a plea must be established on a proper factual basis." *Raleigh*, 778 N.W.2d at 94 (citation omitted). Kendricks has not set forth facts or argument that support an accuracy challenge. Accordingly, we do not address this issue.

concluded that the defendant's plea was not intelligent because he was not aware of and did not agree to conditional release as part of his sentence. Although his sentencing worksheet noted the conditional-release term, the portion of his plea petition that referenced the conditional-release term was marked "N/A." *Id.* at 692. At sentencing, the district court imposed the conditional-release term but did not "highlight that this term of sentence differed from Uselman's plea petition." *Id.* We concluded that Uselman's plea was not intelligent "[b]ecause the plea agreement rested on the state's unfulfillable promise that a postimprisonment conditional release period would not apply." *Id.* at 693-94.

This court again addressed the issue of guilty-plea withdrawal premised on imposition of a conditional-release term in *Kubrom v. State*, 863 N.W.2d 88 (Minn. App. 2015). Kubrom pleaded guilty to an impaired-driving offense that required five years of conditional release. 863 N.W.2d at 91. Although the complaint referenced conditional release as part of the statutory penalty, Kubrom was not otherwise informed of the conditional-release term before or during sentencing. *Id.* at 90. Indeed, the first notice occurred when the district court added the term just before Kubrom's agreed-to 46-month sentence was expiring. *Id.* at 94. We noted that a defendant's plea is intelligent if he is informed before sentencing in some manner (such as a plea petition, a PSI, or a hearing) that imposition of a conditional-release term is possible. *Id.* at 93 (citing *State v. Rhodes*, 675 N.W.2d 323, 327 (Minn. 2004)). And we observed, "[W]hen a defendant's negotiated plea is induced by dismissal of charges, the opportunity for probation, or an agreed-upon sentence range, a sentence modification that adds the conditional-release term does not violate the plea agreement, even if the defendant was not informed of the possibility of

conditional release before sentencing." *Id.* Because the record demonstrated that Kubrom was not informed of the conditional-release term before sentencing and it conflicted with his specific agreed-to sentence, we reversed. *Id.* at 94-95.

Unlike in *Kubrom*, the record amply supports the district court's determination that Kendricks was informed of the conditional-release term before sentence was imposed. Kendricks's plea petition included a statement that "for . . . most sex offenses, a mandatory period of conditional release will follow any executed prison sentence that is imposed," although the number of years was not included. The PSI references the ten-year conditional-release period. Kendricks advised the district court at sentencing that he had reviewed the PSI with counsel. During the sentencing hearing, the district court told Kendricks that "as noted, the 10 year conditional release applies to [the criminal sexual conduct offense]." Kendricks did not object to this aspect of his sentence.

Kendricks's reliance on *James v. State*, 699 N.W.2d 723, 726, 730 (Minn. 2005), *State v. Jumping Eagle*, 620 N.W.2d 42, 43 (Minn. 2000), and *State v. Garcia*, 582 N.W.2d 879, 882 (Minn. 1998), is misplaced. Those cases involved defendants who learned about the conditional-release term years after sentencing. Kendricks's conditional-release term was noted in the PSI, which he reviewed with his attorney; the plea petition included a reference to conditional release; and the district court imposed the conditional-release term as part of the sentence. On this record, we discern no abuse of discretion by the district court in denying Kendricks's motion to withdraw his guilty plea.

Affirmed in part, reversed in part, and remanded.