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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0116**

State of Minnesota,
Respondent,

vs.

Victor Arden Barnard,
Appellant.

**Filed November 20, 2017
Reversed and remanded; motion denied
Larkin, Judge**

Pine County District Court
File No. 58-CR-14-283

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

Reese Frederickson, Pine County Attorney, Pine City, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant pleaded guilty to two counts of a complaint charging him with 59 counts
of criminal sexual conduct against two victims, which began when the victims were

children and continued after they were adults. The district court sentenced appellant to serve 180 months on each count, which was an upward durational departure. Appellant challenges his sentence, arguing that the district court failed to make findings to support the departure. We reverse and remand for imposition of the presumptive sentence.

FACTS

Respondent State of Minnesota charged appellant Victor Arden Barnard with 59 counts of criminal sexual conduct. Barnard pleaded guilty to counts 42 and 52, which alleged sexual assaults against two different victims, and agreed to an upward durational departure of 180 months for each offense, with his sentences to be served consecutively.

At the plea hearing, Barnard and his attorney acknowledged that the agreed-upon sentence was an upward departure from the presumptive sentence of 144 months for each offense. Barnard waived his right to a trial on the presence of aggravating sentencing factors. Barnard's attorney asked Barnard, "you are agreeing that those aggravating factors existed and you are agreeing that the state does not have to prove them beyond a reasonable doubt?" Barnard agreed. With regard to counts 42 and 52, Barnard's attorney asked, "as it relates to the aggravated factors, you agree that this act occurred multiple times over a number of years?" Barnard stated that he agreed.

At Barnard's sentencing hearing on October 28, 2016, the two victims read impact statements into the record. After which, the state's attorney said, "there is really not much I can add by way of the sentencing argument" and asked the court to impose the maximum sentence of 30 years. Barnard's attorney asked the court to honor the plea agreement by ordering a 30-year sentence. The district court stated that the maximum penalty for

Barnard's offense was 30 years' imprisonment, sentenced Barnard to 180 months for each offense, and designated the sentences as consecutive, for a total sentence of 360 months' imprisonment.

The district court did not state that its sentence constituted a departure from the presumptive sentence, and it did not provide any departure grounds on the record, either orally or in writing. The district court filed a sentencing report on the day of sentencing stating that the sentence imposed was not a departure. Barnard appealed his sentence on January 24, 2017. Months after the appeal, the district court filed a sentencing departure report for each offense, indicating that it departed from the presumptive sentence because the victims were particularly vulnerable.

Barnard appeals his sentence and moves this court to strike the departure reports and any mention of them in the state's responsive briefs.

D E C I S I O N

The statutes and sentencing provisions that govern in a case are those that were in effect when the offense was committed. *State v. Robinson*, 480 N.W.2d 644, 645 (Minn. 1992). The conduct underlying Barnard's convictions occurred in 2002. Barnard was convicted under Minn. Stat. § 609.342 (2002), which provided that "the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of violating this section. Sentencing a person in a manner other than that described in this paragraph is a departure from the sentencing guidelines." Minn. Stat. § 609.342, subd. 2(b). It is undisputed that in 2002, the sentencing guidelines directed imposition of the statutory sentence of 144 months. Minn. Sent. Guidelines IV, n.2 (2002). The district

court imposed a sentence of 180 months for each count, which constituted an upward durational departure from the presumptive sentence.¹

It is assumed that the presumptive sentence is appropriate. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (stating that it is a rare case where an appellate court will reverse a district court's imposition of the presumptive sentence). The district court may depart from a presumptive sentence only if there are "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). "When departing from the presumptive sentence, a judge must provide written reasons which specify the substantial and compelling nature of the circumstances, and which demonstrate why the sentence selected in the departure is more appropriate, reasonable, or equitable than the presumptive sentence." Minn. Sent. Guidelines II.D (2002). We review the decision to depart for an abuse of discretion. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Barnard argues that the district court failed to make sufficient findings to support a departure in this case. Barnard cites *Williams v. State* for the proposition that a departure will not be allowed unless the reasons for departure are stated on the record at the time of the hearing. 361 N.W.2d 840, 844 (Minn. 1985). *Williams* provides that:

In order to ensure future compliance, however, with the sentencing guidelines requirements, we prospectively adopt,

¹ The imposition of consecutive sentences was permissive and did not constitute a departure. *See* Minn. Sent. Guidelines II.F (2002) ("[C]onsecutive sentences are permissive (may be given without departure) only in the following cases: . . . (6) A current felony conviction for . . . Criminal Sexual Conduct in the First through Fourth Degrees with force or violence as defined in [Minn. Stat. §§ 609.342 through 609.345].")

effective the date this opinion is filed, the following general rules:

1. *If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.*
2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.
3. If the reasons given justify the departure, the departure will be allowed.
4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.
5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

Id. (emphasis added).

Barnard also relies on *State v. Misquadace*, which requires district courts to “articulate substantial and compelling circumstances other than a plea agreement when departing from the guidelines.” 644 N.W.2d 65, 72 (Minn. 2002).

The state counters that, “[A] departure is not prohibited where ‘the record clearly indicates that the trial court originally intended to depart’ even if the court did not make verbal findings,” relying on *State v. Garrett*, 479 N.W.2d 745, 749 (Minn. App. 1992). In *Garrett* this court held that “[t]here can be no sentencing departure unless the trial court makes findings to support a departure. Where the failure to make findings appears to be a mere oversight, however, the trial court may depart on remand provided it makes the requisite findings.” 479 N.W.2d at 746. We reasoned that “[u]nder *Williams*, this court must reverse the sentence because the trial court failed to make the proper findings. This does not mean, however, that the trial court is required to impose the presumptive sentence

on remand.” *Id.* at 749. We went on to say, “[R]ule one in *Williams* does not prohibit the trial court from departing upon remand where the record clearly indicates that the trial court originally intended to depart.” *Id.*

The state’s reliance on *Garrett* is misplaced because in *State v. Geller*, the Minnesota Supreme Court reaffirmed the rule it announced in *Williams*, stating, “[N]o departure from the presumptive guidelines sentence is permitted absent a statement of the reasons for a sentencing departure placed on the record by the court at the time of sentencing.” 665 N.W.2d 514, 514-15 (Minn. 2003). In doing so, the supreme court recognized two conflicting lines of cases from this court.

In one line of cases, the court of appeals has given the sentencing judge an opportunity to provide reasons for a departure on remand when the judge fails to give reasons on the record at the time of sentencing. In the other line of cases, it has not permitted departure. The state . . . contends that because this court denied review of *Garrett* we implicitly ratified the court of appeals’ holding in *Garrett*.

Id. at 517 (internal citations omitted).

In *Geller*, the state asked the supreme court to “more clearly mandate that defendants be informed of the reasons for departure at the time of sentencing” and to “warn district courts that failure to comply in the future will result in imposition of a guidelines sentence.” *Id.* The supreme court responded that:

Today we re-affirm *Williams*. The *McAdory*, *Garrett*, *Sundstrom*, *Pieri* line of cases notwithstanding, we conclude that the first rule we set out in *Williams* is clear: absent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed. As we discussed in *Williams*, this rule is consistent with the requirements of the sentencing guidelines and

necessary to ensure compliance with them. 361 N.W.2d at 843-44.

Id. Because “the [*Geller*] sentencing court did not state the reasons for departure on the record at the time of sentencing,” the supreme court remanded to the district court for imposition of the presumptive guidelines sentence. *Id.*

Later, in *State v. Rannow*, this court explained that under *Geller*, “[I]f the district court does not state reasons for [a] departure at the time of sentencing, the departure is not allowed.” 703 N.W.2d 575, 579 (Minn. App. 2005). Because the district court in *Rannow* “did not provide orally or in writing any reason for the sentencing departure” and instead merely sentenced in accordance with the terms of the parties’ plea agreement, we followed *Geller* and remanded for imposition of the presumptive sentence. *Id.* at 579-80.

The state argues that the first *Williams* rule “merely requires that the reasons for the departure appear somewhere on the record, whether through a judge, the attorneys, or other means.” The state notes that the factual bases for the guilty pleas in this case included Barnard’s acknowledgment of reasons for departure. The supreme court expressly rejected this argument in *Garrett*, stating:

On appeal, the state argues that the reasons for departure were made sufficiently clear in the prosecutor’s departure memorandum and in the ensuing argument before the court. This is not persuasive. *See State v. Garcia*, 302 N.W.2d 643, 647 (Minn. 1981) (the parties themselves have no authority to determine the appropriate sentence). The court must make its own findings.

479 N.W.2d at 749.

In sum, the caselaw on this issue is clear: when a district court fails to provide reasons for a sentencing departure on the record at the time of sentencing, no departure will be allowed. Although we have no doubt that permissible departure grounds exist in this case, because the district court did not provide any departure grounds on the record at the time of sentencing, caselaw compels us to remand for imposition of the presumptive sentence. We are obligated to follow the law.

Given our conclusion that the district court's upward durational departure must be reversed and remanded for imposition of the presumptive sentence, we do not address Barnard's alternative argument that "Barnard's waiver was additionally deficient because the conduct charged in dismissed counts cannot form the basis for an aggravated sentence." We similarly deny as moot Barnard's motion to strike all references to the June 9, 2017, post-appeal departure reports. We nonetheless note this court's previous holding that, "[N]o departure is allowed when the trial court fails to provide reasons justifying departure on the record at the time of sentencing and instead files a departure report over four months later," after the defendant has filed an appellate brief challenging the departure. *State v. Pendzimas*, 379 N.W.2d 247, 249 (Minn. App. 1986).

Reversed and remanded; motion denied.