STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0121

Elijah Ahmad Milsap, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed October 14, 2019
Affirmed
Cochran, Judge

Stearns County District Court
File No. 73-CR-16-3707

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Cochran, Judge; and Kirk, 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

COCHRAN, Judge

Appellant Elijah Ahmad Milsap appeals the district court's denial of his motion to correct sentence under Minn. R. Crim. P. 27.03, subd. 9, asserting that his sentence was not authorized by law. Because Milsap's sentence is authorized by statute and is within the presumptive range of sentences provided by the Minnesota Sentencing Guidelines, we affirm.

FACTS

In 2016, the state charged appellant Elijah Ahmad Milsap with four counts of second-degree sex trafficking under Minn. Stat. § 609.322, subd. 1a (2014). The complaint alleged that Milsap sex trafficked two women, Adult A and Adult B. According to the complaint, Milsap placed online advertisements for the prostitution services of Adult A from March 2016 to April 2016. Later, in mid-April 2016, Milsap took revealing photographs of both Adult A and Adult B, placed advertisements for prostitution services of both women online, and instructed Adult A and Adult B on how to attract prospective patrons. Milsap communicated with the patrons, and when the women received payment from them, Milsap took the money.

The four charges in the complaint each alleged that Milsap was guilty of second-degree sex trafficking, but each count also referenced a sentence-enhancing provision under Minn. Stat. § 609.322, subd. 1(b) (2014) that increased the maximum sentence from 15 years in prison to 25 years in prison. Counts one and two alleged that Milsap sex trafficked Adult A and Adult B, respectively, and that each offense involved a

victim who suffered bodily harm during the commission of the offense. *See* Minn. Stat. § 609.322, subd. 1(b)(2). Counts three and four also alleged that Milsap sex trafficked Adult A and Adult B, respectively. Both counts referenced Minn. Stat. § 609.322, subd. 1(b)(4), by statute number and listed the maximum sentence as 25 years in prison. The charge description for counts three and four also specifically alleged that each "offense involved more than one sex trafficking victim."

The state charged Milsap with several additional offenses (in separate district court files not appealed here) for incidents that occurred while Milsap was held in Stearns County jail in connection with this case. Milsap and the state entered into a plea agreement that resolved all the cases. One provision of the agreement was that Milsap would plead guilty to count three in this case, second-degree sex trafficking involving more than one sex-trafficking victim, and receive a 252-month prison sentence. The other three counts in this case were to be dismissed.

Milsap pleaded guilty pursuant to the agreement. He submitted a plea petition that incorporated a document summarizing his plea agreement with the state. The document reflected that the agreement called for Milsap to plead guilty to second-degree sex trafficking with multiple victims—Adult A and Adult B. In laying the factual basis for his plea, Milsap testified that in April 2016, he picked up Adult A and Adult B from Duluth and brought them to St. Cloud. He provided drugs to the women. He testified that he was "aware" of advertisements for prostitution placed online for both Adult A and Adult B. He confirmed that he harbored both women for the purpose of engaging them in prostitution, and he accepted money from a patron in exchange for oral sex from Adult B. When asked

if that was why he was guilty of "[c]ount [three], which is the intentional sex trafficking of an individual Adult A, and that the offense involved more than one sex trafficking victim," Milsap responded, "Yes." The district court found that Milsap had established a sufficient factual basis and accepted his plea. Pursuant to the plea agreement, the district court sentenced Milsap to 252 months in prison.

In 2018, Milsap filed a motion to correct sentence under Minn. R. Crim. P. 27.03, subd. 9. Citing *State v. Ivy*, 902 N.W.2d 652 (Minn. App. 2017), *review denied* (Dec. 19, 2017), Milsap argued that his sentence was not authorized by law because count three, as described in the complaint, only expressly identified Adult A as a sex-trafficking victim. Milsap also submitted a pro se filing to the district court arguing that the sentence violated his constitutional rights as described in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), and *Blakely v. Washington*, 542 U.S. 296, 305, 124 S. Ct. 2531, 2538 (2004). The district court denied Milsap's motions, concluding that the facts and procedural posture of this case were distinguishable from *Ivy* and noting that *Apprendi* and *Blakely* were not implicated by a sentence modified by Minn. Stat. § 609.322, subd. 1(b)(4).

Milsap appeals.

D E C I S I O N

In his primary brief, Milsap argues that the district court erred by denying his motion to correct sentence. He argues, based on the way the state charged him, that the multiple-victim sentence modifier under Minn. Stat. § 609.322, subd. 1(b)(4), does not apply to the offense to which he pleaded guilty. Milsap also makes several pro se claims

relating to the sentence. We first address Milsap's primary argument and then turn to his pro se claims.

I. The district court did not abuse its discretion by denying Milsap's motion to correct sentence.

An appellate court reviews a district court's denial of a motion to correct a sentence under rule 27.03, subdivision 9, for an abuse of discretion. *Evans v. State*, 880 N.W.2d 357, 359 (Minn. 2016). "A postconviction court abuses its discretion when its decision is based on an erroneous application of the law or is against logic and the facts in the record." *Nunn v. State*, 868 N.W.2d 230, 232 (Minn. 2015).

Minn. Stat. § 609.322, subd. 1a(4), provides that a person who "engages in sex trafficking of an individual" may be sentenced to a maximum of 15 years' imprisonment for second-degree sex trafficking. Minn. Stat. § 609.322, subd. 1(b)(4), provides for a sentencing enhancement of up to 25 years' imprisonment for that violation if "the offense involved more than one sex trafficking victim." This sentence modifier also increases the presumptive fixed sentence and the range of presumptive sentences provided by the Minnesota Sentencing Guidelines. *See* Minn. Sent. Guidelines 2.G.1, .9.a (2015) (describing the effect of the sentence modifier on the presumptive sentence and the presumptive range of sentences). The district court sentenced Milsap on count three in the complaint pursuant to the multiple-victim sentence modifier provided by Minn. Stat. § 609.322, subd. 1(b)(4), based on his testimony at the sentencing hearing.

Relying heavily on *Ivy*, Milsap argues that the multiple-victim sentence modifier does not apply to the second-degree sex-trafficking charge to which he pleaded guilty.

Based on how the state worded the charge in count three, Milsap contends that the maximum, and presumptive, sentence for the charge is 15 years (or 180 months) in prison. The state argues that the district court correctly concluded that the sentence modifier was properly applied.

In *Ivy*, the state charged the appellant with twelve offenses, including several counts of second-degree sex trafficking and second-degree solicitation to practice prostitution. 902 N.W.2d at 655-56. Each of the sex-trafficking and solicitation charges involved a separate victim, and although each count referenced Minn. Stat. § 609.322, subd. 1(b)(4), by statute number, the state did not include language in any of the charge descriptions indicating that the offenses involved multiple sex-trafficking victims.[1] Each count also indicated that the maximum possible sentence was the standard statutory maximum for second-degree sex trafficking *without* the multiple-victim sentence modifier.

The matter went to jury trial. *Ivy*, 902 N.W.2d at 656. The jury was not instructed that multiple victims was an element of the offense on any count. *Id.* at 666. The jury returned guilty verdicts for ten counts, seven of which were charges that referenced the multiple-victim sentencing modifier in the complaint. *Id.* at 658. When the district court sentenced the appellant, it increased the length of his sentence on each of these seven counts pursuant to Minn. Stat. § 609.322, subd. 1(b)(4), and also imposed the sentences consecutively. *Id.* at 664.

[1] The district court accepted the *Ivy* complaint as an exhibit at a motion hearing on Milsap's motion to correct sentence.

This court reversed the sentence, noting that the offenses that the state charged and that the jury was instructed on were narrow incidents, each involving only one victim. *Id.* at 667. Rather than charging one count that alleged a sex-trafficking scheme involving multiple victims, the state charged several counts that alleged that the appellant sex trafficked or solicited distinct victims. *Id.* at 666. Because each individually charged offense alleged only a single victim and because the jury instructions did not list multiple victims as an element of any of the individual offenses, this court concluded that the multiple-victim sentence modifier did not apply. *Id.* This court also expressed concern that the district court relied on the multiple-victims factor not only to increase the length of the sentences but also to impose the sentences consecutively, resulting in double punishment for the same conduct. *Id.* at 666-67.

Claiming that the state charged him in a similar manner as it charged the appellant in *Ivy*, Milsap argues that his sentence is not authorized by law because it includes a multiple-victim sentence enhancement. We are not persuaded. Milsap's argument overlooks important differences between how he was charged and how the appellant in *Ivy* was charged. His argument also overlooks his plea agreement.

As the district court correctly concluded, this case is readily distinguishable from *Ivy*. First, in this case, the state specifically alleged in count three that Milsap "intentionally engaged in the sex trafficking of an individual . . . Adult A," *and* that "the offense involved more than one sex trafficking victim." In *Ivy*, there was no language in the complaint specifically alleging that any of the offenses involved more than a single victim—a factor this court found to be very important in determining whether the multiple-victim sentence

enhancement in section 609.322 was properly applied. *Id.* at 666. Second, in this case, the complaint expressly specified that the maximum sentence for count three was 25 years in prison—the maximum sentence that applies if the modifier is charged. In *Ivy*, none of the charges indicated that the maximum sentence was 25 years. Thus, in this case, unlike in *Ivy*, the complaint was clear that the charge for second-degree sex trafficking alleged an "offense involv[ing] more than one sex trafficking victim" under Minn. Stat. § 609.322, subd. 1(b)(4).

Moreover, the procedural posture of this case is significantly different than that of *Ivy*. Milsap entered into a plea agreement with the state that called for Milsap to plead guilty to a single count of second-degree sex trafficking and receive a 252-month prison sentence—a sentence that would not be permitted if the modifier did not apply because it would exceed the statutory maximum sentence of 180 months. In laying a factual basis for his plea, Milsap testified that the offense involved more than one victim, and specifically testified about his conduct towards both Adult A and Adult B.[2] Thus, unlike *Ivy*, this is not a case where the fact-finder was never instructed on the multiple-victim element. And, there is no concern that Milsap did not understand that he was pleading guilty to a charge involving multiple victims. And because Milsap pleaded guilty to only one sex-trafficking count, there is no concern that his sentence resulted in double punishment like there was in *Ivy*.

[2] We note that Milsap does not argue that the factual basis for his plea was insufficient to establish that the offense involved multiple victims. Instead, Milsap argues only that the manner that the state charged him precluded the application of the multiple-victim sentence modifier provided by Minn. Stat. § 609.322, subd. 1(b)(4).

Because Milsap pleaded guilty to second-degree sex trafficking with more than one victim—the offense charged in the complaint—we conclude that the district court did not abuse its discretion when it sentenced Milsap, pursuant to the plea agreement, to a sentence enhanced by the multiple-victim sentence modifier under Minn. Stat. § 609.322, subd. 1(b)(4).

II. Milsap's pro se claims have no merit.

In addition to the arguments raised by Milsap's attorney regarding *Ivy*, Milsap submitted his own written arguments to the district court raising other issues. Milsap's appellate attorney incorporated those arguments into her brief by reference. Generally, Milsap argues that the district court improperly imposed an aggravated sentence above the statutory maximum without adhering to the Minnesota Rules of Criminal Procedure and the procedures required by *Apprendi*, 530 U.S. 466, 120 S. Ct. 2348, and *Blakely*, 542 U.S. 296, 124 S. Ct. 2531. But, because the district court did not impose an aggravated sentence, Milsap's claims have no merit.

First, Milsap argues that the district court violated his constitutional rights as described in *Apprendi* and *Blakely*. In *Apprendi*, the Supreme Court held that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490, 120 S. Ct. at 2362-63. In *Blakely*, the Supreme Court held that to be valid under the Sixth Amendment, sentencing departures above a statutory maximum must be based on facts found by the jury, rather than the judge. 542 U.S. at 305, 124 S. Ct. at 2538. In Minnesota,

the "statutory maximum" sentence referred to in *Apprendi* and *Blakely* is the top of the guidelines range. *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005).

In *Ivy*, this court addressed a similar argument. We noted that the multiple-victim sentence modifier increases the maximum sentence of the offense and, under the Minnesota Sentencing Guidelines, the presumptive sentence for the offense. As a result, the sentence modifier "does not increase the penalty for the offense beyond the prescribed statutory maximum because such a penalty is established by statute." *Ivy*, 902 N.W.2d at 665; *see also* Minn. Sent. Guidelines 2.G.9.a (providing the method of calculating the *presumptive* sentence when the multiple-victim sentence modifier applies). Thus, neither *Apprendi* nor *Blakely* are implicated solely based on the application of the multiple-victim sentencing modifier set forth in Minn. Stat. § 609.322, subd. 1(b)(4). *Ivy*, 902 N.W.2d at 665. Sentencing under this provision does not require the district court to adhere to the procedures established in *Apprendi* and *Blakely* unless the sentence exceeds the newly calculated range with the sentence modifier.

Next, Milsap asserts that, even factoring in the heightened range of presumptive sentences established by the multiple-victim sentence modifier, the 252-month sentence that the district court imposed is an upward departure. He contends that the top of the guidelines range for the offense is 228 months. Based on this assertion, Milsap argues that the district court was still required to follow the *Blakely* procedures for imposing an aggravated sentence beyond the prescribed range. But Milsap miscalculates the range of sentences provided by the guidelines.

The guidelines rank second-degree sex trafficking a severity level C offense on the sex-offender grid. Minn. Sent. Guidelines 5.A (2015). For a person with eight criminal-history points, such as Milsap, the guidelines provide that the presumptive fixed sentence is 180 months' imprisonment. Minn. Sent. Guidelines 4.B (2015). Ordinarily, the sentencing guidelines provide for a range of presumptive sentences that runs from 85% of the presumptive fixed sentence to 120% of the presumptive fixed sentence. Minn. Sent. Guidelines 1.B.13.c (2015). As a result, the presumptive range of sentences for a person with eight criminal-history points would run from 153 months to 216 months. But because the maximum sentence for second-degree sex trafficking is 180 months without the multiple-victim sentence modifier, the highest sentence authorized by law is 180 months and the range does not extend to 216 months. Minn. Stat. § 609.322, subd. 1a; Minn. Sent. Guidelines 4.B; Minn. Sent. Guidelines 2.C.1-2 (2015) (providing that the standard presumptive range of sentences is 15% lower and 20% higher than the presumptive fixed duration displayed in the grid, unless the sentence exceeds the statutory maximum sentence).

When the multiple-victim sentence modifier applies, such as in this case, the maximum sentence increases to 25 years (or 300 months). Minn. Stat. § 609.322, subd. 1(b)(4). To determine the presumptive sentence when the modifier applies, the guidelines instruct the sentencing court to locate "the duration in the appropriate cell on the applicable Grid defined by the offender's criminal history score and the underlying crime with the highest severity level" and add "48 months, if the underlying crime was completed." Minn. Sent. Guidelines 2.G.9.a. For a person with eight criminal-history points, the presumptive

fixed sentence prescribed by the guidelines becomes 228 months (180 months plus 48 months). The modifier also increases the discretionary range of presumptive sentences by adding 48 months to the upper and lower ends of the range. *See* Minn. Sent. Guidelines 2.G.1 ("Any change to the presumptive fixed sentence [when a sentence modifier such as Minn. Stat. § 609.322, subd. 1(b)(4) applies] must also be applied to the upper and lower ends of the range found in the appropriate cell on the applicable Grid."). Because the maximum sentence no longer limits the upper range of presumptive sentences, the range of presumptive sentences is calculated by adding 48 months to the lower end of the range for the underlying offense (153 months) and also adding 48 months to the high end of the range (which, without the maximum sentence limiting the range of the underlying offense is 216 months). The sentencing guidelines, therefore, provide that the presumptive fixed sentence for a person with eight criminal-history points is 228 months, with a presumptive range of 201 months to 264 months (216 months plus 48 months).

The sentencing guidelines also provide that an additional three months must be added to the presumptive fixed sentence and to each end of the presumptive range of sentences if the defendant's criminal-history score includes a custody-status point. Minn. Sent. Guidelines 2.B.2.c (2015). The record reflects, and no party disputes, that Milsap was assigned a custody-status point in his criminal-history score calculation. Consequently, the presumptive fixed sentence for Milsap's offense is 231 months with a presumptive range of 204 months to 267 months.

The sentence imposed by the district court, 252 months, is within the presumptive range of sentences and is therefore not a departure. *See State v. Delk*, 781 N.W.2d 426,

428-29 (Minn. App. 2010), *review denied* (Minn. July 20, 2010) (noting that any sentence within the presumptive range constitutes a presumptive sentence). And, because the district court sentenced Milsap within the presumptive range prescribed by the guidelines, *Apprendi* and *Blakely* are not implicated. *See Ivy*, 902 N.W.2d at 665. Because the district court did not impose a departure from the presumptive range of sentences provided by the guidelines, we conclude that Milsap's pro se claims concerning an improper departure do not have merit.

Affirmed.