STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0515

State of Minnesota,
Respondent,

vs.

Oscar Armando Vargas,
Appellant.

Filed December 16, 2019
Affirmed in part, reversed in part, and remanded
Worke, Judge

Mower County District Court
File No. 50-CR-17-2162

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

Kristen Nelson, Mower County Attorney, Scott K. Springer, Assistant County Attorney, Austin, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Connolly, Judge; and Stauber, 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

WORKE, Judge

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure and imposing consecutive sentences, and erred by imposing a lifetime-conditional-release period. We affirm appellant's sentences, but reverse and remand the imposition of the lifetime conditional release.

FACTS

In September 2017, a 15-year-old girl reported that appellant Oscar Armando Vargas, her stepbrother, had been sexually abusing her for the past nine years. She reported that Vargas began having sexual intercourse with her when she was 10 or 11 years old. Vargas was charged with five counts of first-degree criminal sexual conduct. On February 20, 2018, Vargas pleaded guilty to two counts of first-degree criminal sexual conduct, and the remaining charges were dismissed. The state sought consecutive sentences, and Vargas sought a downward dispositional departure. The district court ordered a presentence investigation (PSI) and a psychosexual evaluation and set sentencing for June 14, 2018.

Vargas failed to appear for his scheduled PSI and psychosexual evaluation. Vargas did appear for his sentencing on June 14, but because he did not comply with the PSI process, the district court could not proceed with sentencing. The district court noted that Vargas planned to move for a dispositional departure and stated "the more that you don't cooperate in getting the things done . . . the less likely [that motion] is going to be granted." Vargas was held in custody until his sentencing.

On January 2, 2019, the district court held Vargas's sentencing hearing. The victim read a victim-impact statement describing the sexual assaults and how the abuse throughout her childhood affects her. Vargas argued for a downward dispositional departure, stating:

> I understand what I did to my stepsister. I want to apologize to the victim . . . and the family . . . for affecting the way [the victim] is being impacted with them and their lives. I understand what I have done is very serious. . . . I understand that, you know, what I did, sexually abuse. I know I did that to her, and I feel sorry. I am really, really sorry. I know I impacted her life by a lot. Like she said in her statement, that she couldn't tell anybody. She had everything held inside. . . . [I]t just looks like . . . it hurts her. It hurts me, as well. It hurts the family.
>
> Your Honor, I feel like I . . . should get a departure. The reason why is because . . . . I have no criminal record behind me. I have graduated college, one year. I graduated high school. Your Honor, I don't do drugs. I don't drink. Your Honor, I am 23 years old. I understand what I have done, and I would like to have a second chance. I believe in second chances for the reason of everybody makes mistakes. Everybody makes mistakes. I made a very, very, very big mistake, Your Honor. I see it, and I know I feel it. I know I can do better. I have future plans of going back to school. . . . I have always been working. I went to school. I graduated. I wasn't a guy that stayed at home all day, anything like that. I was active. I was in sports. I played soccer.

The district court denied Vargas's departure motion, finding that nothing about Vargas made him "particularly amenable," and stating that it would be "a complete injustice" to grant Vargas's motion. The district court sentenced Vargas to two consecutive 144-month sentences. The district court stated that it imposed consecutive sentences because Vargas could have been convicted of the five counts in the complaint and received a longer sentence, the victim suffered for years and will continue to deal with it, Vargas appeared to have carried on a normal life while he was sexually assaulting the victim, and

the public needed to be protected. The district court also imposed a lifetime conditional release after imposing the second sentence. This appeal followed.

D E C I S I O N

Departure

A district court may depart from a presumptive guidelines sentence when "identifiable, substantial, and compelling circumstances" exist that make the case atypical. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). While a district court focuses more on the defendant and his particular amenability to "individualized treatment in a probationary setting," in considering a dispositional-departure request, *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983); *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982), it may also consider offense-related factors in deciding whether a departure is appropriate. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). A district court has broad discretion in deciding whether to depart, *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981), and this court will reverse only if there is "a clear abuse of discretion." *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

Here, the district court imposed the presumptive guidelines sentence. A district court is not required to depart from a presumptive prison sentence even if evidence in the record shows that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009); *see also State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (stating that the existence of a mitigating factor does not obligate the district court to depart). And a district court is not required to explain its reasoning for

imposing a presumptive sentence "as long as the record shows [that it] carefully evaluated all the . . . information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985); *see State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (stating we will generally affirm presumptive sentence when the record shows that district court evaluated the circumstances), *review denied* (Minn. Sept. 17, 2013).

Vargas argues that his age (23 at the time of sentencing), his criminal-history score of zero, and the psychosexual evaluator's opinion that he is amenable weigh in favor of finding that he is particularly amenable to probation. *See Trog*, 323 N.W.2d at 31 (stating that in assessing whether a defendant is particularly amenable to probation, a district court may consider age, record, remorse, cooperation, attitude in court, and support of friends/family).

But despite these facts, Vargas admitted that he began sexually abusing the victim when he was as young as 11 years old (making the victim 4 years old). He admitted that his abuse escalated to sexual intercourse when the victim was only 10 years old and he was 17 years old. He admitted that he sexually assaulted the victim at least monthly. And Vargas did not stop sexually assaulting the victim until she reported it when she was 15 years old. Thus, while Vargas is young and had no criminal-history score, he committed a sexual assault nearly every month for at least nine years.

The district court found that there was nothing about Vargas that made him "particularly amenable compared to people . . . convicted of the same thing." In other words, the district court found that there were no substantial and compelling circumstances making the case atypical and justifying a departure. The district court further found that

"it would be a complete injustice" if it granted Vargas's request. When it imposed consecutive sentences, the district court stated:

> [The victim] suffered for years . . . and is going to continue to deal with that. [Vargas] talked about it being a big mistake and talked about [his] future plans, and all the things that [he did], and being active and in soccer and all this. It sounds to me like [Vargas] just carried on a regular normal life, while [the victim] has not by any means. So . . . I still don't think [he is] looking at this the way [he] should.

These comments justify the denial of Vargas's departure motion as they relate to Vargas's lack of remorse, and the victim's suffering, which the district court may appropriately consider in deciding whether to grant a dispositional departure. *See Walker*, 913 N.W.2d at 468. The district court also addressed Vargas's lack of cooperation at his original sentencing. The district court stated that Vargas failed to follow the district court's directive and schedule a psychosexual evaluation and PSI, and had him taken into custody.

Based on this record, the district court carefully considered Vargas's departure request and did not abuse its discretion in denying it. *See Van Ruler*, 378 N.W.2d at 80-81 (stating that a district court does not have to explain its reasoning for imposing a presumptive sentence when the record shows it carefully evaluated all the information presented).

Consecutive sentences

Vargas claims that the district court failed to "carefully consider" whether the purposes of the guidelines would be best served by consecutive sentences, and, instead, imposed consecutive sentences "based on outrage over Vargas's conduct" and the district court's perception that Vargas lacked insight. This court reviews a district court's

imposition of consecutive sentences for an abuse of discretion and will reverse only when a sentence "is disproportionate to the offense or unfairly exaggerates the criminality of the defendant's conduct." *State v. Ali*, 895 N.W.2d 237, 247 (Minn. 2017).

Despite Vargas's claims, the record shows that the district court carefully considered whether consecutive sentences were more appropriate than concurrent sentences. The district court stated that it imposed consecutive sentences for several reasons. First, Vargas could have been convicted of five counts of criminal sexual conduct and sentenced to a longer sentence. Second, the victim suffered for years and her suffering will continue. Third, Vargas seemingly carried on a normal life while he was sexually assaulting the victim. Finally, the public needed to be protected for a longer period of time because Vargas lacked real insight into what he did. The district court stated: "I still don't think you are looking at this the way you should. Hopefully, at some point you will . . . . [t]hen maybe you will have some real insight into exactly what you have inflicted because I don't think you do now."

Vargas claims that "lack of insight" should not be used as a basis for imposing consecutive sentences. But the district court connected Vargas's apparent lack of insight to the need to protect the public—if Vargas lacks insight into what he did, he could do it again; thus, the public needs to be protected.

Vargas also claims that the district court failed to consider that it is his "low cognitive functioning" that resulted in his inability to express "real insight." But the district court commented that Vargas "carried on a normal life." *See State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007) (stating that in order to be considered a mitigating factor in

sentencing, a mental impairment must be "extreme to the point that it deprives the defendant of control over his actions."). Therefore, the district court carefully considered the appropriateness of imposing permissive consecutive sentences, and did not abuse its discretion in doing so.

Lifetime conditional release

Finally, Vargas argues that his lifetime-conditional-release term should be vacated. The district court imposed the lifetime conditional release pursuant to Minn. Stat. § 609.3455 (2012). "Interpreting a sentencing statute is a question of law, which we review de novo." *State v. Noggle*, 881 N.W.2d 545, 547 (Minn. 2016). Under Minn. Stat. § 609.3455, subd. 7(b),

> when the court commits an offender to the custody of the commissioner of corrections for a violation of section 609.342 [first-degree criminal sexual conduct] . . . and the offender has a previous or prior sex offense conviction, the court shall provide that, after the offender has been released from prison, the commissioner shall place the offender on conditional release for the remainder of the offender's life.

Here, after the district court announced Vargas's sentence for his second conviction, it stated: "because it is a subsequent offense, [this count] carries a lifetime conditional release period." Vargas argues that he cannot receive a lifetime conditional release because the district court accepted his two guilty pleas simultaneously and, thus, he did not have a "previous or prior sex offense conviction."

The supreme court has addressed Vargas's claim. In *State v. Nodes*, the defendant pleaded guilty to two sex offenses at the same hearing. 863 N.W.2d 77, 78 (Minn. 2015). At the sentencing hearing, the district court stated: "I will now formally accept the pleas,

and on count one adjudicate him guilty of criminal sexual conduct in the first degree . . . and also on count three, criminal sexual conduct in the second degree . . . ." *Id.* at 79. The district court then imposed ten-year conditional-release periods for each count, determining that the defendant was not subject to the lifetime conditional release just because he was sentenced for both offenses on the same day. *Id.*

The supreme court disagreed and concluded that "[a]s long as one conviction is entered before the second, it is a 'prior conviction' under the plain language of [Minn. Stat. § 609.3455]." *Id.* at 82. The supreme court stated that nothing in the statute required "a particular temporal gap between the convictions." *Id.* The supreme court explained that

> whether an offense is still in progress before the court depends on whether a conviction has been entered on that offense. When the court announced on the record that [the defendant] was adjudicated "guilty of criminal sexual conduct in the first degree," in that instant [he] was convicted of that offense, and in the next instant it was no longer a present offense, but was now a past conviction. [The defendant]'s first conviction, which occurred a moment "before" the second, was at that point a "prior sex offense conviction."

Id. The court stated that a "conviction" occurs when the district court accepts a guilty plea and the acceptance is on the record. *Id.* at 81. Vargas asserts that applying *Nodes* shows that he did not have a prior or previous conviction because his first conviction did not occur even a moment before his second as the district court accepted the guilty pleas simultaneously.

Vargas claims that his case is like *State v. Klanderud*, in which the district court stated: "Pleas [to Count 1 and Count 4] are accepted. Judgment of guilt will be entered." No. A15-1897, 2016 WL 6395252, at *5 (Minn. App. Oct. 31, 2016), *review denied* (Minn.

Jan. 17, 2017). This court concluded that, unlike *Nodes*, the record showed that the "pleas and adjudications were accepted simultaneously"; thus, the defendant "had no previous or prior convictions at the time he was sentenced." *Id.*

Vargas also claims that his case is like *State v. Rekdal*, in which the district court stated: "I'm going to accept your pleas of guilty [to Counts I and II]." No. A14-1364, 2015 WL 7199866, at *3 (Minn. App. Nov. 16, 2015). This court determined that because the acceptance of the guilty pleas occurred simultaneously, the defendant was not convicted of one count before the other, and therefore had no previous or prior conviction at the time he was sentenced. *Id.*

Here, the district court stated: "I will accept your plea of guilty to both of those counts." Unlike *Klanderud*, the district court did not state that "[j]udgment of guilt will be entered." *See* 2016 WL 6395252, at *5. But this situation is similar to *Rekdal*, in which the district court stated: "I'm going to accept your pleas of guilty [to Counts I and II]." *See* 2015 WL 7199866, at *3.

Also similar is *State v. Broehl*, in which the district court accepted the guilty pleas by stating: "I am going to . . . adopt the recommendations here [in the plea agreement]." No. A16-0966, 2017 WL 2535681, at *1 (Minn. App. June 12, 2017). The district court then sentenced the defendant, including the imposition of a lifetime-conditional-release term. *Id.* This court determined that because the district court accepted the guilty pleas simultaneously, the defendant was not convicted of any sex offense before he was convicted of another. *Id.* at *3.

The state contends that because the district court did not adjudicate guilt, Vargas was not convicted until he was sentenced and, because he was sentenced sequentially, he had a prior conviction. But in *Broehl*, this court stated that it was "inconsequential that [the defendant] was sentenced sequentially. [Because] [t]he focus is on when the convictions were accepted and entered and whether [the defendant] had a prior conviction at the time the second conviction was entered." *Id.* And the supreme court in *Nodes* stated that a "conviction" occurs when the district court accepts a guilty plea and the acceptance is on the record. 863 N.W.2d at 81. Therefore, sequential sentencing is inconsequential. Additionally, it would seem an unusual course for a district court to sentence separate counts simultaneously.

Because Vargas's convictions occurred when the district court accepted his guilty pleas on the record, and the district court accepted the guilty pleas simultaneously, the district court erred by imposing a lifetime conditional release because Vargas did not have a prior sex-offense conviction. Accordingly, we reverse and remand to the district court for imposition of a ten-year conditional-release period on each offense.

Affirmed in part, reversed in part, and remanded.