STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0671

State of Minnesota,
Respondent,

vs.

Juan Manuel Ortega-Rodriguez,
Appellant.

Filed December 16, 2019
Affirmed
Reyes, Judge

Ramsey County District Court
File No. 62-CR-16-271

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

John J. Choi, Ramsey County Attorney, Adam E. Petras, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Reyes, Judge; and Slieter, Judge.

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

REYES, Judge

Appellant argues on appeal that the district court abused its discretion by imposing a top-of-the-box 108-month sentence for a second-degree criminal-sexual-conduct

conviction on remand after imposing a bottom-of-the-box sentence for a first-degree conviction that the supreme court reversed in his prior appeal. We affirm.

FACTS

Appellant Juan Manuel Ortega-Rodriguez and the mother of 10-year-old victim G.M. were in a long-term relationship. Appellant had been living with G.M.'s mother and helping raise G.M. for more than nine years. After G.M. turned ten years old in September 2015, appellant began touching her breasts under her clothes. This occurred multiple times until early January 2016, when the touching escalated and appellant began touching G.M.'s genitals with his hands and placing his penis between her legs and on the outside of her vagina. Appellant continued this conduct until mid-January 2016, when G.M. reported it to her mother.

Respondent State of Minnesota charged appellant with one count of first-degree criminal sexual conduct for sexual penetration over an extended period of time with a person under 16 years old with a significant relationship to the actor, in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2014), and one count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2014). After a court trial, the district court found appellant guilty of and entered judgment on both counts. Based on the sentencing worksheet, the first-degree offense had a presumptive sentencing range of 144 to 201 months, whereas the second-degree offense had a presumptive sentencing range of 90 to 108 months. The presentence-investigation report recommended a 144-month sentence for the first-degree charge and a 90-month sentence for the second-degree charge. The district court sentenced appellant on only the first-degree conviction and imposed a

144-month sentence. The district court imposed no sentence on the second-degree conviction. Appellant challenged his first-degree conviction on appeal, and we affirmed. *State v. Ortega-Rodriguez*, No. A17-0450, 2017 WL 6567914, at *4 (Minn. App. Dec. 26, 2017), *rev'd*, 920 N.W.2d 642 (Minn. 2018).

The supreme court reversed this conviction on appeal, concluding that the first-degree charge required sexual penetration, which the state had neither alleged nor proved, and remanded for further proceedings. *Ortega-Rodriguez*, 920 N.W.2d at 647. On remand, the district court sentenced appellant to 108 months in prison on the remaining and previously unsentenced second-degree conviction, which is at the top end of the presumptive range for that offense. This appeal follows.

D E C I S I O N

Appellant argues that the district court imposed an unreasonable sentence on remand because it is at the top of the new presumptive range and improperly considered facts from the reversed first-degree conviction. We are not persuaded.

We review the district court's sentencing decisions for an abuse of discretion. *State v. Ford*, 539 N.W.2d 214, 229 (Minn. 1995). We do not modify sentences within the presumptive range "absent compelling circumstances." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982); *see also* Minn. Stat. § 244.11(b) (2014). A district court may not increase a defendant's sentence after a successful appeal, as doing so would discourage defendants from exercising their right to appeal. *State v. Prudhomme*, 228 N.W.2d 243, 246 (Minn. 1975); *State v. Holmes*, 161 N.W.2d 650, 653 (Minn. 1968). Nor may it impose the same sentence on remand by "mov[ing] to the high end of the presumptive range to

negate [an] appellant's successful appeal on calculating his criminal history score." *State v. Benniefield*, 668 N.W.2d 430, 437 (Minn. App. 2003), *aff'd*, 678 N.W.2d 42 (Minn. 2004).

Here, the district court imposed a 144-month sentence for the later-reversed first-degree conviction. On remand, it imposed a 108-month sentence for the previously unsentenced second-degree conviction, which is within the presumptive range for that offense. The current sentence is also 36 months lower than appellant's original sentence. As such, the district court did not violate caselaw prohibiting an increased or same sentence on remand.

Appellant raises several arguments for why his sentence is improper. He first argues that *Benniefield* controls and prevents a district court from moving from the middle[1] of a presumptive range to the top of a new range on remand, even if it reduces the sentence length in doing so. Although *Benniefield* warned against moving from the bottom of a presumptive range to the top of a new range on remand, it required only that the district court not impose the same-length sentence in making such a move. *See* 668 N.W.2d at 437. Moreover, *Benniefield* involved resentencing on the same conviction on remand, not imposing a sentence on a previously unsentenced conviction, as is the issue here. We conclude that *State v. Delk* therefore is more analogous to this case. 781 N.W.2d 426, 429 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). In *Delk*, we held that the district

[1] Appellant refers to the 144-month sentence as being the "presumptive middle-of-the-box term" for the first-degree charge. But the range for the charge is 144 to 201 months. Whether the original sentence was in the middle or bottom of the presumptive range does not change our analysis.

court did not abuse its discretion by imposing a sentence for a previously unsentenced second-degree unintentional murder charge that was 30 months more than the "middle-of-the-box" sentence for that offense when the sentence for the reversed second-degree intentional-murder charge was only 12 months more than the "middle-of-the-box" sentence for that offense. *Id.* We concluded that "[a]lthough the new sentence is further toward the upper end of the box for the offense on which appellant is now being sentenced, it remains significantly shorter than the original sentence." *Id.* We further concluded that reasonable factors led the district court to impose a higher sentence in its respective presumptive range on remand than the original sentence. *Id*. Here, the record also supports that reasonable factors, such as appellant's conduct in relation to the elements required by the second-degree offense, led the district court to impose a sentence at the top of the box on that charge.

Appellant also argues that, following *State v. Hennum*, we should modify his presumptive sentence. 441 N.W.2d 793 (Minn. 1989). But in *Hennum*, the supreme court ordered a downward departure, not a lower presumptive sentence, when the district court failed to consider substantial mitigating factors. *Id.* at 800. *Hennum* does not mandate reversal of the district court's sentence.

Next, appellant argues that his sentence is inconsistent with the "rational and consistent" policy the Sentencing Guidelines seek to promote. The Guidelines embody the principle that the "severity of the sanction should increase in direct proportion to an increase in offense severity or the convicted felon's criminal history, or both." Minn. Sent. Guidelines 1(A)(2). Here, appellant's sentence represents a 25-percent decrease in

sentence length due to the lower offense severity. The district court's sentence did not violate the Guidelines' principle of proportionality.

Finally, appellant argues that the district court improperly considered facts from the reversed first-degree conviction and allowed appellant's successful appeal to influence its sentence on remand. Appellant cites *Burks v. United States*, 437 U.S. 1, 18, 98 S. Ct. 2141, 2150 (1978), and *Hankerson v. State*, 723 N.W.2d 232, 238-39 (Minn. 2006), for his claim that the district court's consideration of the facts of the first-degree offense in sentencing on the second-degree offense "violated the principles of fairness and justice." But *Burks* and *Hankerson* stand generally for the proposition that when an appellate court finds evidence legally insufficient to support certain elements, those elements cannot be retried on remand. These cases do not state that the underlying facts cannot be considered when they are relevant to an element of another offense that was not subject to a finding of insufficient evidence.

Here, the supreme court found insufficient evidence for the element of sexual penetration in the first-degree charge. The state did not argue anything related to that element during sentencing on the second-degree conviction on remand. Rather, the state requested a top-of-the-box 108-month sentence, and appellant requested a 90-month sentence. Both the state and appellant agreed that the district court had the discretion to impose a sentence anywhere in the new presumptive range. In sentencing appellant on the second-degree conviction, the district court found that "108 months accurately reflects the one thing that hasn't changed in this case, which is the facts." The district court therefore permissibly based its sentence on the facts in the record, not on the disproved sexual

penetration element of the reversed first-degree offense. No other compelling circumstances justify altering the district court's presumptive sentence.

Affirmed.