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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0961**

Roilan Garriga, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 21, 2020
Affirmed in part, reversed in part, and remanded
Connolly, Judge**

Hennepin County District Court
File No. 27-CR-16-29742

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

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

Michael O. Freeman, Hennepin County Attorney, Brittany D. Lawonn, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Worke, Judge; and Connolly,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the postconviction court's denial of his petition for relief, arguing that the postconviction court abused its discretion by affirming the denial of his motion for a downward dispositional departure in his sentence and that the district court erred by entering formal adjudications for two offenses committed as part of a single behavioral incident as another offense for which he was convicted. We affirm in part, reverse in part, and remand.

FACTS

On November 16, 2016, respondent State of Minnesota charged appellant Roilan Garriga with five counts relating to identity theft: count 1—aiding and abetting identity theft under Minn. Stat. § 609.527, subd. 2 (2016); count 2—attempted aiding and abetting identity theft under Minn. Stat. § 609.527, subd. 2; counts 3 and 4—possession of a scanning device or reencoder under Minn. Stat. § 609.527, subd. 5b(b) (2016); and count 5—possession of burglary or theft tools under Minn. Stat. § 609.59 (2016). The charges arose after appellant and two other men were arrested on November 12 while attempting to install credit card skimming devices on gas pumps at a gas station. The skimming devices were designed to copy information from credit cards used at the pump. Inside the men's van, the police found numerous debit cards and prepaid credit cards. An investigation revealed that those cards were encoded with the stolen identities of various residents of Hennepin County, and that the three men had used the cards illegally at various stores and restaurants over the previous several days.

Appellant pleaded guilty to all counts in November 2017 pursuant to a straight plea. He also admitted to several aggravating factors. At the sentencing hearing in January 2018, the state moved for an upward durational departure based on the seriousness of the crime, and appellant moved for a downward dispositional departure based on his particular amenability to probation. The district court denied both motions. In denying the state's motion, the court noted that the presumptive sentence already reflected the seriousness of the crime. In denying appellant's motion, it stated that placing appellant on probation would "significantly diminish the seriousness of this offense," and that appellant did not "play a minimal role" in the crime, even if he was not the "mastermind." The district court sentenced appellant to the presumptive 48-month prison term.

During sentencing, the district court determined that counts 2, 3, 4, and 5 were part of a single behavioral incident. In the warrant of commitment, the district court entered a formal adjudication for all five counts and imposed concurrent sentences on counts 1 and 2. It did not sentence appellant on the remaining counts, but instead indicated that those counts "merge[] with count 2 for sentencing."

In March 2019, appellant filed a petition for postconviction relief, arguing that the district court abused its discretion by denying his motion for a downward dispositional departure. The postconviction court denied the petition. The postconviction court determined that the district court did not abuse its discretion because it "thoughtfully examined the factors before it," including appellant's apparent attempt to minimize his role in the offense. The district court's denial of the state's motion for an upward durational departure further highlighted its consideration of all factors. This appeal follows.

DECISION

I.

Appellant argues that the postconviction court abused its discretion by affirming the denial of his motion for a downward dispositional departure because he is particularly amenable to probation. We review the denial of a petition for postconviction relief for an abuse of discretion. *Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction court abuses its discretion when it is arbitrary and capricious, bases its ruling on an erroneous view of law, or makes clearly erroneous factual findings. *Id.* We review legal issues de novo and factual findings for clear error. *Id.*

Under the sentencing guidelines, the district court must impose a sentence within the presumptive range “unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2016). “[D]epartures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The district court has broad discretion in imposing sentences, and appellate courts review sentencing decisions for an abuse of that discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). We generally do not interfere with a presumptive sentence, even if there are grounds that would justify a departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a “rare” case will a reviewing court reverse the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

When evaluating a motion for a dispositional departure, the district court can focus on “the defendant as an individual and on whether the presumptive sentence would be best

for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Particular amenability to probation is a factor that can support a sentencing departure. Minn. Sent. Guidelines 2.D.3.a.(7) (2016). The requirement of *particular* amenability “ensure[s] that the defendant’s amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Soto*, 855 N.W.2d at 309 (quotation omitted). Relevant factors for determining whether the defendant is particularly amenable to probation include the defendant’s age, prior criminal record, remorse, cooperation, attitude in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

In arguing that he is particularly amenable to probation, appellant points to his lack of criminal history, youth, remorse for the crime, cooperation with police, good attitude in court, support network of family and friends, diminished role in the crime, and mental health issues. The presentence investigation (PSI) observed that many of those factors existed—appellant had no known criminal history, was 19 years old at the time of the offense, expressed regret for the crime and empathy for the victims, was cooperative during the PSI process, appeared to have a supportive family, and played a lesser role in the crime than the other men. But again, even when facts that would justify a departure are present, we generally will not interfere with the imposition of a presumptive sentence. *Bertsch*, 707 N.W.2d at 668.

The district court considered those factors at the sentencing hearing. It explained its rationale for denying both appellant’s motion for a downward dispositional departure and the state’s motion for an upward durational departure:

This is a very serious offense. I recognize . . . that you don't have a prior criminal history, and you may be amenable to probation; however, placing you on probation will significantly diminish the seriousness of this offense. I am not going to . . . grant the defendant's motion for a downward dispositional departure. However, I'm not going to grant the State's motion for an upward durational departure. . . . I don't believe that those facts merit substantial and compelling circumstances for an upward durational departure as I believe the seriousness is taken into the fact that this crime is a higher severity offense than almost all other property crimes, and is a presumptive 48-month prison sentence without any criminal history.

. . . I know you weren't the mastermind here, that's very clear. However, you didn't play a minimal role either. You maybe didn't plan this but you were very involved and you went along for the ride and it wasn't just one night.

In affirming the denial of appellant's motion for a downward dispositional departure, the postconviction court noted that the district court appropriately considered the various mitigating and aggravating factors, including appellant's lack of criminal history and the seriousness of the offense. The district court's consideration of all factors was evident from its denial of the state's motion for an upward durational departure despite the existence of aggravating factors. In essence, the postconviction court concluded that the district court reached the presumptive sentence by balancing the mitigating and aggravating factors. Such a determination was not an abuse of discretion.

Appellant contends, however, that the postconviction court clearly erred in finding that he minimized his role in the offense throughout the proceedings and that the district court relied on this minimization to deny his motion for a downward dispositional departure. These findings are not clearly erroneous. The PSI supports the finding that

appellant minimized his role in the crimes. It notes several inconsistencies in appellant's statements during the interview and the probation officer's confusion with such inconsistencies. For example, appellant stated that the crime was just a "one time thing" and that he had no knowledge of the specific details of the crime or the tools used. And yet, he also acknowledged that the other men indicated that he was receiving "on the job training" and would "get a bigger share later," and he admitted to meeting with the other men beforehand to plan the crime. The PSI contemplated that appellant may have planned ahead to keep himself "out of the loop" if he were caught. Based on this record, it was not clear error for the postconviction court to find that appellant minimized his role in the offense.

The record also supports the postconviction court's finding that the district court relied on appellant's minimization when denying his motion for a downward dispositional departure. Appellant insists that the district court denied the motion entirely based on the seriousness of the offense. It is true that the seriousness of the offense was an important factor for the district court. But the district court also noted that appellant did not play a minimal role in the offense, as he "went along for the ride and it wasn't just one night." These comments indicate that the district court considered the inconsistencies with appellant's attempts to minimize his involvement in the crime. The postconviction court's findings were not clearly erroneous.

Thus, the postconviction court did not abuse its discretion by affirming the district court's denial of appellant's motion for a downward dispositional departure.

II.

Appellant argues that this court should vacate his convictions for counts 3 and 4—possession of a scanning device or reencoder—because the district court erred by entering formal adjudications for those counts when it had already entered a formal adjudication for count 2—attempted aiding and abetting identity theft. The state agrees with appellant that those convictions should be vacated.

“Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both.” Minn. Stat. § 609.04, subd. 1 (2018). The Minnesota Supreme Court has interpreted section 609.04 to bar “multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). When the defendant is convicted on more than one charge for the same act, the district court should formally adjudicate and impose a sentence on one count only. *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984). The district court should not formally adjudicate the remaining convictions. *Id.*

Here, the district court determined that counts 2, 3, 4, and 5 occurred as part of a single behavioral incident. Counts 2, 3, and 4 were charged under different subsections of the same identity-theft statute—Minn. Stat. § 609.527, subs. 2, 5b(b). But in the warrant of commitment, the district court entered a conviction for all five counts. Since the district court entered a formal adjudication for count 2, it violated section 609.04 by entering formal adjudications for counts 3 and 4 as well. It could enter a conviction only for counts

1, 2, and 5. We therefore reverse and remand to the district court with instructions to vacate the formal adjudications for counts 3 and 4.¹

Affirmed in part, reversed in part, and remanded.

¹ This ruling does not vacate the underlying finding of guilt. *State v. Walker*, 913 N.W.2d 463, 467-68 (Minn. App. 2018). Nor does it impact appellant’s sentence because the district court did not sentence him on either count. Nevertheless, we note that the district court’s statements that counts 3, 4, and 5 “merge[] with count 2 for sentencing” were legally incorrect, as the law does not recognize the concept of counts merging. *Id.* at 467.