STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1369

State of Minnesota,
Respondent,

vs.

Dayquan Jayru Rain Hodge,
Appellant.

Filed July 27, 2020
Affirmed
Smith, Tracy M., Judge

Hennepin County District Court
File No. 27-CR-18-24099

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Florey, Judge.

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

SMITH, TRACY M., Judge

In this direct appeal from a final judgment of conviction for three counts of fleeing a police officer resulting in death, appellant Dayquan Jayru Rain Hodge argues that the

district court abused its discretion by imposing three consecutive prison sentences, totaling 390 months. Appellant also argues that he was denied the promised benefit of his plea bargain because his attorney did not argue for a 300-month sentence. We affirm.

FACTS

The offenses and guilty plea

Shortly after 1:00 a.m. on September 23, 2018, a state trooper spotted a vehicle that had been reported stolen driving on I-94 between St. Paul and Minneapolis. When the vehicle exited the highway and stopped at the intersection of Hiawatha Avenue and Cedar Avenue, state troopers activated their lights and sirens to signal the vehicle to pull over. Hodge was the driver, and he had four juvenile passengers in the car. When he saw the lights and sirens, he knew he was supposed to pull over. But, instead of stopping, Hodge fled south on Cedar Avenue at a high rate of speed, traveling at 80 to 105 miles per hour. He sped away for several blocks, passing multiple cars by driving in the wrong lane of traffic, as observed from a state patrol helicopter. He then ran a red light and struck a pickup in the intersection at 35th Street. All three passengers in the pickup died at the scene. All four passengers in Hodge's vehicle sustained injuries, including fractures requiring surgery, facial trauma, and injuries requiring intubation. Hodge was pinned in the vehicle and also sustained injuries requiring surgery. Hodge had smoked marijuana before driving the vehicle that day, and he knew that the vehicle was stolen.

The state charged Hodge with ten counts: three counts of fleeing a peace officer resulting in death, three counts of criminal vehicular homicide, criminal vehicular operation—great bodily harm, criminal vehicular operation—substantial bodily harm, and

two counts of criminal vehicular operation—bodily harm. Pursuant to a plea agreement, Hodge pleaded guilty to three counts of fleeing a police officer resulting in death and the state dismissed the other seven charges. The parties agreed to a sentencing range of 300 to 480 months.

Sentencing

At sentencing, the district court heard from several family members of the victims, who detailed the devastating impact of the loss of their loved ones. The district court also heard from a doctor who performed a neuropsychological examination on Hodge. The doctor explained, consistent with his written report that the district court reviewed, that Hodge had suffered a brain injury when he was four or five years old after he fell from a third-story window and sustained multiple skull fractures. Since then, he has had a history of negative, dysregulated behaviors, including impulsivity and lack of cooperation with authorities. His cognitive difficulties have been compounded by an extraordinarily tumultuous home life. He was removed from the home at a young age and had 11 different out-of-home placements. The doctor explained that Hodge has had various psychological evaluations performed on him over the years, which yielded diagnoses including mood disorders, conduct disorder, and oppositional defiant disorder.

In addition to reviewing Hodge's records and history, the doctor performed a series of thinking skills tests. He reported that Hodge's best scores were in the lower part of the "average range" but that many of his scores were "significantly lower." Hodge's "most severe intellectual deficits" were with executive skills: logic, reasoning, planning, organization, and decision-making. And, on the tests where Hodges "had to make decisions

and choices and use logic when speed was a factor, his scores were uniformly below the first percentile." The doctor explained: "[Y]ou put Mr. Hodge[in a] situation where he does not have the ability to take his time and think about things, his decision-making skills are greatly impaired." The doctor stated that this impaired decision-making capability is related to Hodge's brain injury and that when Hodge is in "situations . . . trying to make decisions quickly . . . these skills in essence entirely fail him."

The district court also reviewed an extensive and thorough mitigation report submitted by Hodge's counsel. The mitigation report details Hodge's difficult childhood and experiences with child protective services, his exposure to abuse and violence in his environment, his educational history, and his mental health history. The report provides relevant details about the science on adolescent brain development and specifically how trauma affects the adolescent brain. It also provides Minnesota Sentencing Guidelines Commission data on sentences for the same offense as Hodge's.

The presumptive durational disposition for each of Hodge's convictions is 150 months, without Hernandizing.[1] The presentence investigation report (PSI) recommended three 150-month sentences, served consecutively, for a total of 450 months. The state

[1] "Hernandize" is "the unofficial term for the process described in section 2.B.1.e [of the sentencing guidelines] of counting criminal history when multiple offenses are sentenced on the same day before the same court." Minn. Sent. Guidelines 1.B.(10) (2018). With Hernandizing, the presumptive duration for Hodge's second conviction becomes 180 months, and for the third becomes 210 months. But when felony offenses are sentenced consecutively, "the court must use a Criminal History Score of 0 . . . to determine the presumptive duration." Minn. Sent. Guidelines, 2.F.2.b. (2018). The 150-month presumptive duration for each of Hodge's offenses is based on a criminal history score of zero.

joined the recommendation of the PSI evaluator. Hodge's counsel argued for a sentence "towards the middle or bottom of the [bargained-for] range." Hodge's counsel represented that the middle of the bargained-for range, 390 months, could be accomplished without a departure from the sentencing guidelines because the bottom of the guidelines range would be 384 (128—the bottom-of-the-box sentence for each conviction—three times). The district court pronounced three consecutive sentences of 130 months each, totaling 390 months.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by imposing three consecutive sentences totaling 390 months.

We review the imposition of permissive consecutive sentences when multiple victims are involved for an abuse of discretion. *See State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009). An appellate court "will interfere with a district court's sentencing discretion only when the 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) (quotation omitted). Reviewing courts "are also guided by past sentences imposed on other offenders." *State v. McLaughlin*, 725 N.W.2d 703, 715 (Minn. 2007) (quotation omitted). A sentence within the guidelines range is presumptively appropriate. Minn. Sent. Guidelines 2.D.1 (2018); *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010) ("This court will not generally review a district court's

exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.").

The Minnesota Sentencing Guidelines provide that "when an offender is convicted of multiple current offenses . . . concurrent sentencing is presumptive." Minn. Sent. Guidelines 2.F (2018). But a district court may impose consecutive sentences "[i]f the offender is being sentenced for multiple current felony convictions for crimes on the list of offenses eligible for permissive consecutive sentences." Minn. Sent. Guidelines 2.F.2.a.(1)(ii). Fleeing a peace officer resulting in death is included on the list of offenses eligible for permissive consecutive sentencing. Minn. Sent. Guidelines 6 (2018). "In cases with multiple victims, consecutive sentences are rarely, if ever, disproportionate to the offense." *State v. Ali*, 855 N.W.2d 235, 259 (Minn. 2014).

Hodge argues that the district court abused its discretion by imposing three consecutive sentences because a cumulative 390-month sentence exaggerates his culpability based on his "extreme mental impairment." "Extreme mental impairment has been held to mitigate against an upward departure." *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992). The supreme court has emphasized that "extreme mental impairment" is impairment that deprives a person of control over his actions. *Id.*; *see McLaughlin*, 725 N.W.2d at 716 (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").

Hodge argues that the neuropsychological report presented to the district court established that he suffered an extreme mental impairment. He argues that the doctor's

testimony that, when Hodge is trying to make decisions quickly, his executive functions "in essence entirely fail him" establishes that he "had no capacity to make a rational decision" when the sirens came on and he needed to decide whether to pull over. Hodge argues that this court has found "extreme mental impairment" based on similar levels of cognitive impairment, citing *State v. Martinson*, 671 N.W.2d 887 (Minn. App. 2003), *review denied* (Minn. Jan. 20, 2004), and *State v. Barsness*, 473 N.W.2d 325 (Minn. App. 1991), *review denied* (Minn. Aug. 29, 1991).

Neither *Martinson* nor *Barsness* provides a particularly close factual analogy, though, and, importantly, in neither case did this court reverse the district court's decision whether to impose permissive consecutive sentences. In *Martinson*, the district court granted a substantial downward dispositional departure due to the defendant's mental condition. 671 N.W.2d at 890. Martinson suffered from paranoid schizophrenia, which manifested in psychotic delusions. *Id.* At the time that he killed his wife by swerving into oncoming traffic, he believed that his wife was working with the CIA, which, he irrationally believed, wanted him dead. *Id.* The state appealed, arguing that district court abused its discretion by granting the downward durational departure because the sentence was not proportional for a murder offense. *Id.* at 891. This court affirmed the district court's decision to depart as within its discretion. *Id.* at 893.

In *Barsness*, the district court similarly imposed a downward dispositional departure, and this court affirmed. 473 N.W.2d at 329. Barsness left her baby alone for a week, causing its death. *Id.* at 327. The mitigating circumstances cited by the district court included that "Barsness was: 1) borderline mentally retarded; 2) chemically dependent;

and 3) suffering from major, severe depression." *Id.* at 329. On appeal, Barsness argued that she should have received a greater downward durational departure (more than 36 months), and this court concluded that the departure adequately reflected her "lack of substantial capacity for judgment" and affirmed the district court's decision. *Id.* (quotation omitted). Ultimately, neither *Martinson* nor *Barsness* leads us to conclude that the district court erred by imposing consecutive sentences here.

Hodge also argues that his history of trauma and related mental illness compounded the cognitive deficits caused by his brain injury. He also cites case law and research about the mitigating factor of youth, as he had recently turned 18 when this offense occurred. *See, e.g.*, *Roper v. Simmons*, 543 U.S. 551, 574, 125 S. Ct. 1183, 1197 (2005) ("The qualities that distinguish juveniles from adults do not disappear when an individual turns 18.").

The state responds that the same information Hodge presents in his appellate brief was presented to the district court. It argues that the district court considered the totality of the evidence and acknowledged Hodge's mental condition but determined that Hodge was nonetheless responsible for a series of choices that made consecutive, bottom-of-the-box sentences appropriate.

The district court indeed evaluated substantial information regarding Hodge's cognitive abilities and mental condition. At sentencing, the district court told Hodge, "[There is] no question that you've experienced trauma in your short life." The district court also noted that Hodge was remorseful for his actions. But the district court nevertheless determined that sentencing on each count did not unfairly exaggerate the

criminality of Hodge's conduct because three victims died and, as the district court explained to Hodge, "[Y]ou were making choices that day: You were on probation. You were in a stolen car. You were using marijuana. You were speeding, really speeding. In addition, you drove for miles. You could have stopped at any point, but you didn't, and we are here today."

Although Hodge makes a compelling case for leniency in sentencing, and his traumatic past is indeed tragic, we cannot conclude that the district court abused its discretion by imposing consecutive sentences, at the bottom of the guidelines range, under these circumstances. *See State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998) (explaining that the district court "sits with a unique perspective . . . [and] is in the best position to evaluate the offender's conduct and weigh sentencing options"). The district court imposed a guidelines sentence, and consecutive sentences when there are multiple victims "are rarely, if ever, disproportionate." *Ali*, 855 N.W.2d at 259; *see also State v. Edwards*, 774 N.W.2d 596, 605 (Minn. 2009) ("[W]here multiple victims are involved, a defendant is equally culpable to each victim."). As the district court determined, Hodge made a series of choices—not just a single, split-second decision—the night of the offenses in question. Moreover, Hodge has not shown that his sentence is inconsistent with sentences imposed on other offenders. *See McLaughlin*, 725 N.W.2d at 715. According to the historical sentencing data in the mitigation report, the six offenders convicted of fleeing police resulting in death between 2010 and 2017 each received sentences within or above the guidelines range. For the foregoing reasons, we hold that the district court did not abuse its discretion by imposing three consecutive sentences, totaling 390 months.

II. Hodge was not denied the promised benefit of his plea bargain.

Hodge next argues that he was denied the promised benefit of his plea bargain when his attorney did not argue for a 300-month sentence. For a guilty plea to be valid, it must be voluntary, accurate, and intelligent. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). As part of the voluntariness requirement, "if a guilty plea is induced by a government promise, such a promise must be fulfilled or due process is violated." *State v. Wukawitz*, 662 N.W.2d 517, 522 (Minn. 2003). "Determining what the parties agreed to in a plea bargain is a factual inquiry," but the interpretation and enforcement of plea agreements present issues of law subject to de novo review. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004); *see also State v. Jumping Eagle*, 620 N.W.2d 42, 43 (Minn. 2000).

Hodge pleaded guilty to three counts of fleeing a peace officer resulting in death, and the state dismissed the remaining seven counts in the complaint. At the plea hearing, the prosecutor explained that the bargained-for sentencing arrangement was a sentence range of 300 to 480 months. Hodge's attorney agreed with this summary and also noted for the record that a discussion in chambers occurred about how the district court could structure the sentences to fit within that range. Hodge's attorney noted that "the defense will be arguing for 300 months."

The district court then expressed its understanding that the guidelines called for a presumptive sentence on count one of 150 months, or a range of 120[2] to 180 months.

[2] The correct lower limit is actually 128 months. *See* Minn. Sent. Guidelines 4.A. & 5.A (2018).

Accordingly, it explained, if permissive consecutive sentences were imposed, the cumulative sentence would approach the upper limit of the agreed upon range. Before accepting Hodge's plea, the district court clarified that Hodge understood that the agreement was for a sentence within a broad range:

> DISTRICT COURT: Mr. Hodge, you know that the plea agreement in this case comes with some level of uncertainty? You know that?
> HODGE: Yes.
> DISTRICT COURT: Because there's that range, 300 to 480. So if you choose to go forward with the plea today, then the — the two sides are going to argue what they think the sentence should be within that range. So there is some uncertainty there for you. You get that?
> HODGE: Yes.
> DISTRICT COURT: And you want to go forward despite that uncertainty?
> HODGE: Yes.

The PSI noted that "[t]he negotiated range of a 300-480 month commitment presumes permissive consecutive sentencing." The PSI evaluator and the state recommended that the district court impose three consecutive sentences of 150 months (the presumptive duration on one count), for a total of 450 months' imprisonment.[3]

As discussed above, in lieu of a sentencing memorandum, the defense submitted a detailed mitigation report, which ultimately requested "[a] sentence near the bottom of the range." At the sentencing hearing, defense counsel argued that "Mr. Hodge's history, his significantly traumatic childhood and his brain injury all support the sentencing towards

[3] The PSI evaluator reviewed the neuropsychological report by the doctor before making this recommendation.

the middle or bottom of the range." Defense counsel then explained that the middle of the bargained-for range, 390 months, could be accomplished without a downward departure from the guidelines by imposing three sentences of 130 months, an amount near the bottom of the guidelines range, 128 months. Defense counsel later reiterated the request for a sentence "towards the middle or bottom of the range."

Hodge argues on appeal that his attorney's sentencing argument denied him the benefit of the plea bargain because his attorney did not argue for a 300-month sentence.[4] He asserts that his attorney could have argued for consecutive sentences of 150 months on the first two counts and a concurrent sentence on the third, which would have kept the request within the agreed-upon range. The state responds that the plea bargain was not induced by an unfulfilled promise because Hodge received a sentence within the bargained-for range, and claims that the agreement had always been to sentence each count to recognize the death of each victim. A sentence of 300 months, the state contends, would have constituted a departure from the presumptive guidelines range if sentencing consecutively on all three counts.

It appears from the record that, as Hodge argues, the plea agreement would have allowed defense counsel to argue for two consecutive sentences and one concurrent sentence, consistent with the guidelines, which allow for permissive—not presumptive—consecutive sentences under these circumstances. *See* Minn. Sent. Guidelines

[4] Hodge does not bring a claim of ineffective assistance of trial counsel. He clarifies in his reply brief—after the state responded to his claim as potentially encompassing an ineffective-assistance argument—that his "claim is based primarily on due process—that he was denied the benefit of his agreement."

2.F.2.a.(1)(ii). It is not entirely clear why defense counsel did not argue for one of the sentences to run concurrently, because, at the plea hearing, defense counsel appeared to anticipate doing so and the state's sentencing memorandum anticipated that argument. It is possible that defense counsel thought that an argument for concurrent sentencing would likely fail under the general one-sentence-per-victim principle and in light of the historical sentencing data for the same offense. *See Ali*, 855 N.W.2d at 259. In any event, defense counsel prepared and submitted a wealth of mitigating information for the district court's consideration and argued for a sentence "towards the middle or bottom of the range." We accordingly hold that Hodge has not shown that his plea was induced by an unfulfilled promise.

Affirmed.