

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A19-1598**

Gary Lee Burnett, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed June 1, 2020  
Affirmed  
Ross, Judge**

Mille Lacs County District Court  
File No. 48-CR-10-2092

Gary L. Burnett, Jr., Faribault, Minnesota (pro se appellant)

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

Joe Walsh, Mille Lacs County Attorney, Pakou Moua, Assistant County Attorney, Milaca, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

**UNPUBLISHED OPINION**

**ROSS**, Judge

A jury found Gary Lee Burnett guilty of first- and second-degree criminal sexual conduct, and the district court sentenced him to 156 months in prison. Burnett unsuccessfully moved the district court to correct his allegedly illegal sentence. We affirm because Burnett failed to establish that his sentence was unauthorized by law.

## **FACTS**

A six-year-old girl said that Burnett sexually abused her between 2009 and August 2010. The state charged Burnett with four counts of criminal sexual conduct, and a jury found him guilty on one count of criminal sexual conduct in the first degree (“Count I”) and two counts in the second degree (“Count III” and “Count IV”). The verdict did not designate the crimes’ order of occurrence.

Burnett asked to be sentenced first on the least serious offense followed by the most serious and argued that the remaining offense was a lesser-included version of the most serious offense. He also moved for a downward sentencing departure. The district court held that Count III was a lesser-included offense of Count I and did not sentence Burnett on that count. It denied the departure motion but agreed to sentence him first on Count IV and then on Count I, with the resulting 36- and 156-month prison terms to run concurrently.

Burnett recently moved the district court to modify his sentence under Minnesota Rule of Criminal Procedure 27.03, subdivision 9, arguing that the trial court erred by sentencing him first on Count IV and then on Count I. The district court concluded that Burnett’s sentence was not unauthorized by law and therefore construed the motion as a postconviction challenge to his sentence and rejected it as untimely.

Burnett appeals.

## **DECISION**

Burnett challenges the district court’s denial of his sentencing challenge, maintaining that the court erroneously concluded his sentence was not unauthorized by law. We review a district court’s denial of a postconviction petition for an abuse of

discretion, reviewing legal conclusions de novo and factual findings for clear error. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012); *see also Townsend v. State*, 834 N.W.2d 736, 738 (Minn. 2013) (articulating the same standard of review for the denial of a motion to correct a sentence). Applying our discretion to affirm the district court on any basis supported by the record, *see Dukes v. State*, 718 N.W.2d 920, 921–22 (Minn. 2006), we choose not to address whether Burnett’s motion was a time-barred petition for postconviction relief because it fails on its merits when treated as a sentence-correction motion under rule 27.03.

A defendant may at any time move to correct an illegal sentence. Minn. R. Crim. P. 27.03, subd. 9. He can prevail under this rule only by establishing that his sentence violated the law. *See Williams v. State*, 910 N.W.2d 736, 740, 743 (Minn. 2018) (holding that the defendant bears the burden of proof under the rule). Burnett does not establish that his sentence violated the law.

Burnett challenges the district court’s order of sentencing, maintaining that the court should have imposed the “most favorable” sentence by sentencing Count I first, followed by Count IV. Burnett cites no statute or caselaw articulating a “most favorable” requirement. When a district court sentences a defendant who has committed multiple offenses, it must sentence each offense in the order in which they occurred. *State v. Williams*, 771 N.W.2d 514, 522 (Minn. 2009). But here the order of Burnett’s crimes was undetermined. Neither the verdict nor the sentencing proceeding established a sequence. And Burnett does not identify which of his offenses occurred before the other. Accepting Burnett’s request, the district court sentenced him first on the less serious offense followed

by the more serious. Citing no legal authority supporting the proposition that the district court's approach was unlawful, Burnett fails to meet his burden under rule 27.03.

Burnett unconvincingly relies on *State v. DeRosier*, 719 N.W.2d 900 (Minn. 2006), to urge a different outcome. In *DeRosier*, the supreme court, reasoning from *Blakely v. Washington*, 542 U.S. 296, 303, 124 S. Ct. 2531, 2537 (2004), concluded that a jury should have determined the date of DeRosier's offense after the legislature modified the sentencing guidelines to increase the presumptive prison term for first-degree criminal sexual conduct. *DeRosier*, 719 N.W.2d at 902–03. The supreme court explained that because determining which presumptive sentence applied depended on a fact issue—the date of the offense—a jury rather than a judge must decide the issue. *Id.* at 903. *DeRosier* decided only who makes the date-of-offense determination and does not support Burnett's proposition that a district court must impose sentences in the “most favorable” manner when the date of offenses is unknown.

Because Burnett has failed to show that his sentence was contrary to law, we affirm the district court's decision to deny his motion to correct the sentence.

**Affirmed.**