STATE OF MINNESOTA
IN COURT OF APPEALS
A10-512

State of Minnesota,
Respondent,

vs.

Tito Fonzio Campbell,
Appellant.

Filed May 16, 2011
Affirmed in part, reversed in part, and remanded
Peterson, Judge

Ramsey County District Court
File No. 62-CR-09-7645

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Sarah Elizabeth Cory, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Mark D. Nyvold, Special Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

PETERSON, Judge

In this appeal from convictions of fleeing a police officer resulting in death, criminal vehicular homicide, criminal vehicular operation causing bodily harm, felony

DWI, child endangerment, and driving after cancellation, appellant argues that (1) he did not knowingly, voluntarily, and intelligently waive his Miranda rights, and, therefore, the district court erred in denying his motion to suppress his statements to police; and (2) his consecutive sentence must be modified to concurrent because the court did not pronounce the sentence for the fleeing offense as consecutive to the sentence for the criminal-vehicular-operation offense, or, alternatively, the court erred in not using a zero criminal-history score to determine the consecutive sentence's duration. We affirm in part, reverse in part, and remand.

FACTS

Appellant Tito Fonzio Campbell's girlfriend called police to report an assault after having an argument with appellant. When Roseville Police Officer Thomas Pitzl arrived, the girlfriend was waiting near the front door of her apartment building. While talking to Pitzl, the girlfriend saw appellant driving away in her Chrysler and pointed it out to Pitzl. Appellant's ten-year-old son was a passenger in the car.

Roseville Police Officer Dennis Kim responded to Pitzl's call for assistance. When Kim was near the girlfriend's apartment, he saw the Chrysler coming toward his squad car. Kim briefly activated the squad car's siren and lights as the Chrysler passed the squad car. Kim saw appellant look at him, but appellant did not pull over or stop. Instead, after passing the squad car, appellant turned onto eastbound Highway 36. Kim made a u-turn, again turned on the squad car's siren and lights, and pursued the Chrysler onto Highway 36. Appellant steadily increased the Chrysler's speed on the freeway

entrance ramp and continued accelerating after merging onto the freeway. A radar unit clocked the Chrysler's speed at 90 miles per hour.

As appellant approached what Kim described as "a pack of vehicles," "four or five vehicles in both lanes of traffic," appellant moved into the left lane without signaling and then swerved sharply onto the highway's shoulder. Kim slowed down because he "felt that such driving was extremely dangerous for the conditions and the amount of traffic." After Kim slowed down, appellant continued driving on the shoulder at a high rate of speed. Kim saw appellant exit from Highway 36 onto southbound Highway 35E and then lost sight of the Chrysler.

P.S., who was traveling in the left lane on southbound Highway 35E, looked in his rearview mirror and saw the Chrysler approaching at a high rate of speed. The Chrysler was straddling the left lane and the left shoulder. P.S. could not move into the right lane because there was a car next to him, but there was not enough room between the left lane and a concrete median for the Chrysler to pass on the left. P.S. moved over to the right as far as possible, and the Chrysler "flew by [him] on the left." P.S. saw the Chrysler cut across three traffic lanes and take the Larpenteur Avenue exit ramp at a high rate of speed. The Chrysler's brake lights did not come on until the car was more than halfway up the exit ramp.

The Chrysler then went through a red light and hit a Toyota Camry in the intersection. When the crash occurred, the Chrysler's speed was about 58 miles per hour, and the Toyota's speed was 22 to 25 miles per hour. The Toyota's passenger died, and the driver sustained a head injury. Appellant was arrested at the scene. Test results from

a blood sample taken about one and one-half hours after the crash showed that appellant's alcohol concentration was .151 or .152.

Roseville Police Detective Mark Ganley interviewed appellant about one and one-half hours after the crash. Ganley asked: "[S]o when you saw the squad turn on you, did you just assume she called the cops and made a false report or something? Is that what happened?" Appellant replied, "Pretty much." Ganley then asked, "[F]rom what I was told, . . . the cops saw you on like 36 or so, or, no, you went, you went 35E southbound to . . . Larpenteur?" Appellant replied affirmatively.

Appellant was charged with fleeing a police officer in a motor vehicle resulting in death in violation of Minn. Stat. § 609.487, subd. 4(a) (2008); criminal vehicular homicide with an alcohol concentration of .08 or more, as measured within two hours of the time of driving in violation of Minn. Stat. § 609.21, subd. 1(5) (2008); first-degree felony DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .24, subd. 1(1) (2008); fleeing a police officer in a motor vehicle resulting in substantial bodily harm in violation of Minn. Stat. § 609.487, subd. 4(c) (2008); criminal vehicular operation causing substantial bodily harm with an alcohol concentration of .08 or more as measured within two hours of the time of driving in violation of Minn. Stat. § 609.21, subds. 1(4), 1a(c) (2008); child endangerment in violation of Minn. Stat. § 609.378, subd. 1(b)(1) (2008); and driving after cancellation in violation of Minn. Stat. § 171.24, subd. 5 (2008). The district court denied appellant's motion to suppress his statement to Ganley, and the case was tried to a jury.

Appellant testified at trial that he saw his girlfriend talking to the officer and assumed that she was making an assault allegation, so he "floored the car" because he "wanted to get out of the area" before the officer could stop him.

The jury found appellant guilty of fleeing a police officer resulting in death, criminal vehicular homicide with an alcohol concentration of .08 or more, first-degree felony driving while impaired, child endangerment, and driving after cancellation. The jury also found appellant guilty of criminal vehicular operation causing bodily harm, a lesser-included offense of criminal vehicular operation causing substantial bodily harm, and not guilty of fleeing a police officer resulting in substantial bodily harm.

The district court announced sentences for appellant's offenses in the order in which the offenses occurred. The district court announced sentences as follows: (1) for driving after cancellation, an executed term of 12 months to be served concurrently with the sentence for fleeing a police officer resulting in death; (2) for felony DWI, a stayed term of 36 months to be served concurrently with the sentence for fleeing a police officer resulting in death; (3) for child endangerment, a 12-month sentence to be served concurrently with the sentence for criminal vehicular operation resulting in bodily harm and consecutively to fleeing a police officer resulting in death; (4) for criminal vehicular operation resulting in bodily harm, an executed term of 12 months to be served concurrently with the child-endangerment sentence but consecutively to the sentence for fleeing a police officer resulting in death; and (5) for fleeing a police officer resulting in

death, an executed term of 234 months.[1] The district court reconvened the sentencing hearing to correct errors in appellant's criminal-history score but concluded that the errors did not affect appellant's sentence.

This appeal followed.

D E C I S I O N

I.

"The state has the burden of proving that the defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights." *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 252 (Minn. 1997).

> On review, the district court's findings of fact supporting the determination that a suspect validly waived his *Miranda* rights and voluntarily gave a statement will not be disturbed unless those findings are clearly erroneous. But we independently determine whether, under the totality of the facts and circumstances, the state proved that the suspect voluntarily, knowingly, and intelligently waived his rights.

State v. Moon, 717 N.W.2d 429, 446 (Minn. App. 2006) (citation omitted), *review denied* (Minn. Sept. 19, 2006), *overruled on other grounds by State v. Reed*, 737 N.W.2d 572 (Minn. 2007). When evaluating the totality of the circumstances, a court may look to factors such as "age, maturity, intelligence, education, experience, and ability to comprehend." *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). The court may also consider the adequacy of the warning, the length and conditions of the detention, the nature of the interrogation, and the defendant's familiarity with the criminal-justice

[1] The district court also imposed $550 in fines and ordered appellant to pay $81 in court costs and $30,457.46 in restitution.

system. *Id.* An intoxicated suspect can validly waive his *Miranda* rights. *State v. Smith*, 374 N.W.2d 520, 524 (Minn. App. 1985), *review denied* (Minn. Nov. 26, 1985).

Appellant argues that his waiver of his *Miranda* rights was invalid due to his injuries, intoxication, pain, pain medication, and a hurried reading of the *Miranda* warning. In rejecting appellant's argument, the district court found that appellant "was articulate and lucid during the taped interview" and that he "displayed a good vocabulary . . . and a better than average sentence structure." The district court also found that appellant had

> received *Miranda* warnings in the past, recalled having received such warnings, and, in fact, had actually invoked his right to remain silent on another occasion when he felt it was in his interest to do so and didn't invoke his right to remain silent in another case when he didn't feel that it would be necessary to do so.

The district court rejected the argument that the officer's 17-second reading of the *Miranda* warning was hurried. The court stated, "I did read it to myself at what I thought was an extremely slow pace, and it still only took 25 seconds."

The district court's findings are supported by evidence in the record and are not clearly erroneous, and the findings support the conclusion that appellant knowingly, intelligently, and voluntarily waived his *Miranda* rights.

Even if the district court erred in admitting appellant's statement to police, appellant is not entitled to reversal of his conviction "if the jury's verdict was surely unattributable to the error." *State v. Sanders*, 775 N.W.2d 883, 887 (Minn. 2009).

Appellant argues that his statement to police "was crucial to proving the key issue in the case, whether [appellant] knew he had been signaled to stop."

The offense of fleeing a police officer is committed when a person

> flees or attempts to flee by means of a motor vehicle a peace officer who is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, and who in the course of fleeing causes the death of a human being not constituting murder or manslaughter or any bodily injury to any person other than the perpetrator.

Minn. Stat. § 609.487, subd. 4 (2008).

When used in the statute, "the term 'flee' means to increase speed, extinguish motor vehicle headlights or taillights, refuse to stop the vehicle, or use other means with intent to attempt to elude a peace officer following a signal given by any peace officer to the driver of a motor vehicle." Minn. Stat. § 609.487, subd. 1 (2008). Intent may be proved with circumstantial evidence "by drawing inferences . . . in light of the totality of the circumstances." *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

There was very strong circumstantial evidence that appellant knew that he had been signaled by a peace officer and intended to flee. Appellant admitted at trial that he saw his girlfriend talking to the officer and assumed that she was making an assault allegation, so he "floored the car" because he "wanted to get out of the area" before the officer could stop him. He then drove more than three miles from his girlfriend's apartment, weaving around traffic and driving in an extremely dangerous manner at an extremely high rate of speed. Kim testified that when he saw appellant's car approaching, he activated the squad car's lights and siren, and appellant accelerated after

looking at Kim. P.S. testified that he saw red lights behind him after appellant passed P.S.'s car. A witness who lived near the crash scene testified that she heard sirens before the crash. The only reasonable inference from these facts is that appellant intended to elude police. We, therefore, conclude that the verdict was surely unattributable to any error in admitting appellant's statement to police.

II.

This court reviews the district court's sentencing decision for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). But "[s]tatutory construction and interpretation of the sentencing guidelines are subject to de novo review." *State v. Johnson*, 770 N.W.2d 564, 565 (Minn. App. 2009).

Consecutive Sentences

"[W]hen separate sentences of imprisonment are imposed on a defendant for two or more crimes, . . . the court in the later sentences shall specify whether the sentences shall run concurrently or consecutively. If the court does not so specify, the sentences shall run concurrently." Minn. Stat. § 609.15, subd. 1(a) (2008).

Appellant argues that the sentence for fleeing a police officer should be modified to run concurrently with the sentence for criminal vehicular operation because the district court did not state that the sentences were to run consecutively when it imposed the later sentence for fleeing a police officer. But the district court did state that the sentences were to run consecutively when it imposed the sentence for criminal vehicular operation. The case relied on by appellant, *State v. Rasinski*, is distinguishable from this case because, in *Rasinski*, the district court did not state on the record that the sentences were

to be served consecutively. 527 N.W.2d 593, 594 (Minn. App. 1995). Rather, the consecutive sentence was indicated on the warrant of commitment, and, when Rasinski moved to correct his sentence, the district court cited in-chambers discussions to support the imposition of consecutive sentences. *Id.* at 595. This court stated, "The failure to pronounce a consecutive sentence on the record at sentencing makes Rasinski's sentence concurrent by statutory presumption." *Id.* Because the criminal-vehicular-operation sentence and the fleeing-a-police-officer sentence were imposed at the same hearing and the district court specified on the record that the sentences were to run consecutively, we affirm the imposition of consecutive sentences.

Duration of Consecutive Sentences

Appellant argues that the duration of any consecutive sentence should have been calculated using a criminal-history score of zero. Under the sentencing guidelines, "[f]or each offense sentenced consecutive to another offense(s), other than those that are presumptive, a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration." Minn. Sent. Guidelines II.F.2 (2008).

In *State v. Rivers*, this court concluded that the district court properly used one or two criminal-history points in imposing consecutive sentences for a felony and a gross-misdemeanor offense committed against different victims. 787 N.W.2d 206, 212-13 (Minn. App. 2010), *review denied* (Minn. Oct. 19, 2010). In *Rivers*, the only basis for imposing the consecutive sentence was the multiple-victim rationale recognized under caselaw. *Id.* at 213. This court stated:

> Because the guidelines do not apply to gross-misdemeanor sentences *and* because the authority for consecutive sentencing in this case does not derive from the sentencing guidelines, we conclude that the provisions of Minn. Sent. Guidelines II.F.2 do not apply to the sentences imposed in this case.

Id. (emphasis added). Here, in contrast to *Rivers*, the felony offense for which appellant received a consecutive sentence is an offense for which a consecutive sentence is permitted under Minn. Sent. Guidelines § II.F.2.f. (stating that consecutive sentences are permissive for "[a] current felony conviction for Fleeing a Peace Officer in a Motor Vehicle as defined in Minnesota Statutes, section 609.487").

A consecutive sentence for fleeing a police officer resulting in death is also authorized under Minn. Stat. § 609.035, subd. 5 (2008), which states that

> a prosecution or conviction for violating section 609.487 is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct. If an offender is punished for more than one crime as authorized by this subdivision and the court imposes consecutive sentences for the crimes, the consecutive sentences are not a departure from the Sentencing Guidelines.

The district court stated that appellant's "consecutive sentences are based upon the authority granted to [the district court] by Minn. Stat. § 609.035, subd. 5; Minn. Stat. § 609.15, subd. 1(b); and section II.F.2.f of the Minnesota Sentencing Guidelines." In addition, the district court found "that the multiple victim exception to the single behavioral incident rule also applies to this case" and determined that "multiple sentencing does not unfairly exaggerate the criminality of [appellant's] conduct."

In *Johnson*, a driver pleaded guilty to gross-misdemeanor driving after cancellation, in violation of Minn. Stat. § 171.24, subd. 5, and to felony first-degree driving while impaired, in violation of Minn. Stat. § 169A.20, subd. 2, 770 N.W.2d at 565. The driving-while-impaired statute, Minn. Stat. § 169A.28, subd. 3 (2002), provided that "[t]he court may order that the sentence imposed for a violation of section 169A.20 (driving while impaired) run consecutively to a previously imposed misdemeanor, gross misdemeanor, or felony sentence for a violation other than section 169A.20." *Id.* The district court sentenced the driver first for the gross misdemeanor. *Id*. The district court then ordered that the driving-while-impaired sentence run consecutively to the gross-misdemeanor sentence and used a criminal-history score of eight to calculate the duration of the sentence. *Id.* This court reversed and remanded for resentencing using a criminal-history score of zero based on its determination that "[t]he requirement of Minn. Sent. Guidelines II.F that the duration of a permissive consecutive sentence be determined using a criminal history score of zero applies to permissive consecutive sentences imposed under Minn. Stat. § 169A.28, subd. 3." *Id*. at 566. This court rejected the state's argument that the guidelines requirement for using a zero criminal-history score applies only to permissive-consecutive-sentence situations set out in guidelines section II.F. *Id*.

Because the consecutive sentence for fleeing a police officer resulting in death was authorized by guidelines section II.F.2.f and by Minn. Stat. § 609.035, subd. 5, we conclude that, as in *Johnson*, the duration of the permissive consecutive sentence must be determined using a criminal-history score of zero. We, therefore, reverse appellant's

sentence and remand for resentencing using a criminal-history score of zero. Because we have concluded that the duration of the consecutive sentence should be determined using a criminal-history score of zero, we need not address appellant's additional argument that the district court erred when calculating his criminal-history score to determine the duration of the sentence.

Affirmed in part, reversed in part, and remanded.