STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1895

Scott Ronald Perleberg, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 8, 2013
Affirmed
Smith, Judge

Mower County District Court
File No. 50-K1-05-000008

Scott R. Perleberg, Bayport, Minnesota (pro se appellant)

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

Kristen Nelsen, Mower County Attorney, Christa Daily Van Gundy, Assistant County Attorney, Austin, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Chutich, Judge; and Smith, Judge.

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

SMITH, Judge

Appellant challenges the district court's order denying his motion to correct or reduce his sentence under Minn. R. Crim. P. 27.03, subd. 9, arguing that his sentence is not authorized by law. Because appellant's sentence is authorized by law, we affirm.

FACTS

In January 2005, based on allegations of engaging in criminal sexual conduct with his daughter over the course of several years, appellant Scott Ronald Perleberg was charged with six counts of first-degree criminal sexual conduct. Following a bench trial, the district court found Perleberg guilty as charged. Subsequently, the district court sentenced Perleberg to six 144-month terms of imprisonment. The district court imposed a combination of concurrent and consecutive sentences, resulting in an aggregate length of imprisonment of 432 months.[1]

Perleberg appealed to this court, challenging "the district court's imposition of three consecutive sentences of 144 months' imprisonment . . . , arguing that the aggregate length of incarceration unduly exaggerates the criminality of his conduct." *State v. Perleberg*, 736 N.W.2d 703, 704 (Minn. App. 2007), *review denied* (Minn. Oct. 16, 2007). This court affirmed the district court in a published opinion. *Id.* Perleberg petitioned the Minnesota Supreme Court for further review. The supreme court denied the petition.

[1] The district court imposed three concurrent sentences for Perleberg's three convictions of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2000 & 2002) (engaging in sexual penetration or sexual contact with a person less than 13 years of age by a person who is more than 36 months older); two concurrent sentences, consecutive to the first three concurrent sentences, for Perleberg's two convictions of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2002 & 2004) (engaging in multiple acts of sexual abuse over an extended period of time with a person under 16 years of age by a person who has a significant relationship); and a third consecutive sentence for Perleberg's conviction of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(b) (2004) (engaging in sexual penetration with a person who is at least 13 years of age but less than 16 years of age by a person who is more than 48 months older and is in a position of authority).

In August 2009, Perleberg petitioned the district court for postconviction relief based on ineffective assistance of counsel. The district court denied the petition, and Perleberg did not appeal.

In September 2012, Perleberg moved the district court for correction or reduction of his sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9, arguing that his sentence impermissibly (1) imposes multiple punishments for the same conduct and (2) constitutes an upward durational departure. The district court denied the motion. This appeal followed.

D E C I S I O N

Perleberg contends that his sentence is not authorized by law and, therefore, he is entitled to a correction or reduction of his sentence. Under Minnesota's procedural rules, a district court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. We will not reverse the denial of a Minn. R. Crim. P. 27.03, subd. 9 motion unless the district court abused its discretion or the original sentence was not authorized by law. *Anderson v. State*, 794 N.W.2d 137, 139 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011).

A.

Perleberg first argues that his original sentence impermissibly punishes him for more than one offense. Perleberg accurately asserts that under Minnesota law, "if a person's conduct constitutes more than one offense under the laws of this state," generally "the person may be punished for only one of the offenses." Minn. Stat.

§ 609.035, subd. 1 (2000, 2002, & 2004).[2] But this statute refers to offenses that are part of "a single behavioral incident." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). And "[m]ultiple acts against the same victim do not constitute a single behavioral incident when the individual acts are separated by time and place." *Id.* Here, the district court's implicit finding that Perleberg's offenses— which occurred in multiple locations over the course of several years— do not constitute a single behavioral incident is not clearly erroneous, and Perleberg is not entitled to relief on this ground. *See id.* (concluding that the district court did not clearly err by finding that appellant's sexual abuse did not constitute a single behavioral incident when "days passed between the incidents, and sometimes up to a week," and the abuse "happened in many different rooms and at different times.").

B.

Perleberg next argues that the district court imposed an enhanced sentence, thereby violating the constitutional right to a trial by jury. *See* U.S. Const. amend. VI; *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004); *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). The parties dispute whether Perleberg's sentence constitutes an upward departure. This issue presents a question of law, which we review de novo. *See State v. Rushton*, 820 N.W.2d 287, 289-90 (Minn. App. 2012).

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[2] Perleberg also cites Minn. Stat. § 609.04 to support his argument. Pursuant to this statute, an "actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2000, 2002, & 2004). But this conviction-related statute is not relevant to our analysis, as Minn. R. Crim. P. 27.03, subd. 9, "does not allow a defendant to challenge his conviction." *Johnson v. State*, 801 N.W.2d 173, 176 (Minn. 2011). Moreover, Perleberg was convicted of the crimes charged, not lesser included offenses.

Perleberg asserts that his original sentence exceeds "the prescribed statutory maximum for his offense by 6 years." Generally, the maximum term of imprisonment for a conviction of first-degree criminal sexual conduct is 30 years. Minn. Stat. § 609.342, subd. 2(a) (2000, 2002, & 2004). And "[f]irst-degree criminal sexual conduct has a legislatively mandated presumptive minimum sentence of 144 months' imprisonment." *Perleberg*, 736 N.W.2d at 705; *see also* Minn. Stat. § 609.342, subd. 2(b) (2000, 2002, & 2004).[3] Although Perleberg's *aggregate* term of imprisonment is 432 months (36 years), the district court imposed the mandatory minimum term of imprisonment—not an upward departure—for each of Perleberg's convictions. And this court has already addressed the consecutive nature of Perleberg's sentences, concluding that it does not constitute an upward departure. *Perleberg*, 736 N.W.2d at 705-06 ("Consecutive sentences are permissive for multiple offenses, even when the offenses involve a single victim. Under these circumstances, consecutive sentencing is not a departure from the sentencing guidelines." (citations omitted)). Because Perleberg's sentence is not an upward departure, Perleberg is not entitled to relief on this ground.

C.

Finally, Perleberg argues that the district court erroneously treated his Minn. R. Crim. P. 27.03, subd. 9 motion as a petition for postconviction relief under Minn. Stat.

[3] Perleberg contends that, contrary to the statute, the applicable sentencing guidelines establish a presumptive sentence of 48 months' imprisonment for each violation of Minn. Stat. § 609.342, subd. 1(a) (2000 & 2002), and 86 months' imprisonment for each of the remaining violations. But the applicable sentencing guidelines recognize that the presumptive sentence for first-degree criminal sexual conduct is a minimum of 144 months' imprisonment. Minn. Sent. Guidelines IV n.2 (2000, 2001, 2002, 2003, & 2004).

§ 590.01 (2012). Consequently, Perleberg asserts, the district court erroneously concluded that Perleberg's argument is time barred by the two-year statute of limitations found in Minn. Stat. § 590.01, subd. 4.

The two-year time limit of Minn. Stat. § 590.01, subd. 4, "does not apply to motions properly filed under [Minn. R. Crim. P. 27.03, subd. 9]." *Vazquez v. State*, 822 N.W.2d 313, 318 (Minn. App. 2012). Thus, Perleberg's motion is not time barred. But a careful review of the record establishes that the district court did not merely treat Perleberg's Minn. R. Crim. P. 27.03, subd. 9 motion as a postconviction petition, subject to the two-year time limit. Rather, the district court analyzed Perleberg's procedural argument and concluded that Perleberg's "sentence is authorized by the Minnesota Sentencing Guidelines. He is therefore not entitled to have it corrected or modified at 'any time' under Minnesota Rule of Criminal Procedure 27.03." Sua sponte, the district court continued, "[b]ecause the rule does not apply, to be entitled to any relief, [Perleberg] would have to show that postconviction relief is available under the requirements of Minnesota Statute § 590 et seq." Under this statute, postconviction relief would be time barred. *See* Minn. Stat. § 590.01, subd. 4.

Although Perleberg's motion is not time barred, because the district court considered the merits of Perleberg's procedural argument, it did not erroneously treat his Minn. R. Crim. P. 27.03, subd. 9 motion as a postconviction petition. Therefore, Perleberg is not entitled to relief on this ground.

Affirmed.