STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0118

State of Minnesota,
Respondent,

vs.

Roosevelt Mikell,
Appellant.

Filed December 16, 2013
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Hennepin County District Court
File No. 27-CR-12-481

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Kirk, Judge; and Smith, Judge.

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

KIRK, Judge

Appellant Roosevelt Mikell claims that the factual basis for his guilty plea to felony violation of an order for protection (OFP) is inadequate, and that the district court

incorrectly imposed a consecutive sentence of 32 months. We affirm in part, reverse in part, and remand.

FACTS

On September 21, 2010, the district court granted J.L. an OFP forbidding appellant from having any personal contact with her. At the time, appellant and J.L. were involved in a romantic relationship. An ex-girlfriend of appellant also obtained an OFP against him in 2010, and he was convicted of felony violation of the OFP when he attempted to enter her residence on October 26, 2010. Appellant accepted a plea agreement where he would receive a stayed guideline sentence. A condition of this sentence was no contact with J.L.

While appellant was on supervised probation for the October 2010 felony OFP violation, he was charged with felony violation of the September 21, 2010 OFP involving J.L. after the police found them together in a vehicle during a traffic stop on September 24, 2011. When police spoke with appellant, he provided a false name.

On January 3, 2012, the state filed notice under Minn. R. Crim. P. 7.03 that did not indicate it was seeking an aggravated sentence for appellant's September 2011 conduct. On August 6, appellant entered a straight plea to the September 2011 offense. The questioning of appellant went as follows:

> [COURT]: Mr. Mikell, how do you plead then to Violation of Order For Protection as a felony from September 24, 2011, in Minneapolis, Hennepin County, guilty or not guilty?
> [APPELLANT]: Okay. Guilty.
> [COURT]: All right. And do you want to go over his rights with him?
> . . . .

> [APPELLANT'S COUNSEL]: Okay, Mr. Mikell, on or about September 24, [2011,] within the city of Bloomington, Hennepin County, state of Minnesota, were you in a car with [J.L.]?
> [APPELLANT]: Yes, sir.
> [APPELLANT'S COUNSEL]: And she was pulled over for some minor traffic violations?
> [APPELLANT]: Yes, sir.
> [APPELLANT'S COUNSEL]: Officers approached the car and found out that [J.L.] was the driver and you, in fact, were the passenger and there was an Order For Protection in order at that time?
> [APPELLANT]: Yes, sir.
> [APPELLANT'S COUNSEL]: It was in effect?
> [APPELLANT]: Yeah.
> [APPELLANT'S COUNSEL]: So you shouldn't have been in the car?
> [APPELLANT]: I shouldn't have been in the car.
> [APPELLANT'S COUNSEL]: And you, in fact, were in contact with her?
> [APPELLANT]: Yeah.
> [APPELLANT'S COUNSEL]: And you realize that violated the Order For Protection?
> [APPELLANT]: Yeah.

Appellant also signed and filed a petition to enter a guilty plea. Six days later, on August 11, appellant was charged with felony domestic assault after a motorcyclist observed him repeatedly punch J.L. in the face while they were parked in a vehicle at a gas station.

On October 23, the district court held a combination probation violation and conditions of release violation hearing. The district court revoked appellant's probation for his October 2010 offense and sentenced him to 21 months. Appellant was then sentenced for the September 2011 offense to a consecutive term of 32 months. This appeal follows.

D E C I S I O N

I. A sufficient factual basis supports appellant's guilty plea.

The validity of a guilty plea is a question of law, which we review de novo. *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). A defendant bears the burden of showing that his or her plea was invalid. *Id.* A valid guilty plea must be accurate, voluntary, and intelligent. *State v. Trott*, 338 N.W.2d 248, 251 (Minn. 1983). An accurate plea protects the defendant from pleading guilty to a charge more serious than he or she could be convicted of were the defendant to go to trial. *Id.*

Minn. Stat. § 518B.01, subd. 14(b) (2010) states, in pertinent part, that "whenever an order for protection is granted by a judge . . . and the respondent or person to be restrained knows of the existence of the order, violation of the order for protection is a misdemeanor." For a felony-level violation of an OFP, the statute requires that the offender "knowingly violates this subdivision within ten years of the first of two or more previous qualified domestic violence-related offense convictions." Minn. Stat. § 518B.01, subd. 14(d)(1) (2010).

Appellant argues that the record contains insufficient facts to establish that he "knowingly" violated the provisions of the statute. A recent case from the Minnesota Supreme Court, *State v. Watkins*, ___ N.W.2d ___, 2013 WL 6252424 (Minn. Dec. 4, 2013), is instructive in understanding how courts construe the "knowingly violates" element of restraining orders. The "knowingly violates" language used to describe a felony-level violation of the OFP and DANCO statutes is substantially similar. *Compare* Minn. Stat. § 518B.01, subd. 14(d)(1), *with* Minn. Stat. § 629.75, subd. 2(d)(1) (2012).

The supreme court applied the following definition: "The word 'knowingly' derives from the word 'know,' which means 'to perceive directly; grasp in mind with clarity or certainty.'" *Watkins*, 2013 WL 6252424, at *6. Applying this definition to the OFP statute, appellant must "perceive directly" that the contact violated the OFP statute. *Id.* Appellant's reasonable belief that the contact did not violate the OFP "could negate the mental state of the charged offense." *Id.*

We conclude that there is sufficient evidence in the record to prove appellant knowingly violated the provisions of the OFP statute. At the hearing, appellant admitted that he should not have been in the vehicle with J.L., and he "realized" that the contact violated the OFP. When the police questioned appellant about his identity, he gave a false name, which is further evidence that he reasonably believed his conduct violated the OFP. We also note that appellant does not offer any evidence that his presence in J.L.'s vehicle was accidental or unintentional. Instead, appellant remained in the vehicle for a sufficient period of time for the police to pull the vehicle over for a traffic violation.

II. The district court erred when it ordered a 32-month executed consecutive sentence.

Appellant contends that the district court should have reduced appellant's criminal-history score to zero when it imposed the consecutive sentence, and the district court had no authority to depart from the guidelines when it sentenced appellant. We agree.

Appellant's sentencing issues have become more complex since he filed this appeal. A separate panel of this court reversed his sentence for the probation violation

and remanded that case back to the district court for additional findings. *State v. Mikell*, No. A13-0119 (Minn. App. Oct. 15, 2013) (order op.). On remand, it is unclear whether the district court will also address the deficiencies in appellant's sentences for his October 2010 and September 2011 conduct at the same time, or if the October 2010 offense that led to the probation violation sentence will even result in an executed sentence on remand. We leave it to the district court to determine the appropriate sentences and procedure while taking into account our disposition and analysis of this case.

In this case the district court had the option of imposing either a concurrent sentence or a permissive consecutive sentence. Minnesota sentencing guidelines rank felony violation of an OFP as a severity level four offense. Minn. Sent. Guidelines 5 (Supp. 2011). The appellant could have been sentenced to a concurrent term of 23 to 32 months based on his criminal-history score of five. Minn. Sent. Guidelines 4 (Supp. 2011). The 32-month sentence was the top of the range.

While appellant's September 2011 offense was eligible for permissive consecutive sentencing, a criminal-history score of zero must be used to determine the duration of a consecutive sentence. Minn. Sent. Guidelines 2.F.2 (Supp. 2011). Based on a criminal-history score of zero, appellant should have received a year and a day consecutive sentence. Minn. Sent. Guidelines 4. We conclude appellant's 32-month consecutive sentence constituted either an upward-durational departure from the sentencing guidelines or an incorrect application of the law relating to consecutive sentencing.

"If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). The state argues aggravating circumstances were present supporting a non-presumptive sentence. Guideline sentences are presumed appropriate unless the district court identifies substantial and compelling circumstances to depart from the presumed disposition. Minn. Sent. Guidelines 2.D. & cmt. 2.D.01 (Supp. 2011); *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

Here, the record reflects that the district court did not follow the constitutional or statutory procedures for departure, and the state did not indicate that it was seeking an aggravated sentence. *See* Minn. Stat. § 244.10, subd. 4 (2012). We conclude there is no basis to consider appellant's 32-month sentence as an upward-durational departure as the state argues.

On remand, the district court has the discretion to impose a sentence of 23 to 32 months if this case is sentenced concurrently with the October 2010 offense, or an executed sentence is not imposed for the October 2010 offense. If the sentence is consecutive to an executed sentence for the October 2010 offense, a criminal-history score of zero must be used to determine the sentence.

Finally, we have reviewed the claims in appellant's pro se supplemental brief and conclude they are without merit.

A**ffirmed in part, reversed in part, and remanded.**