STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0115

State of Minnesota,
Respondent,

vs.

Albert B. Lurks,
Appellant.

Filed January 29, 2008
Affirmed
Stoneburner, Judge

Olmsted County District Court
File Nos. K9032659, K0032663, K6032666

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark Ostrem, Olmsted County Attorney, Lisa R. Swenson, Assistant County Attorney, Government Center, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

John M. Stuart, State Public Defender, James R. Peterson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant challenges imposition of the statutory-maximum sentence for his conviction of simple robbery, plus two consecutive double-durational departure sentences for two convictions of theft from a person, as unreasonable and excessive. We affirm.

FACTS

In September 2003, appellant Albert B. Lurks pleaded guilty to one count of simple robbery and two counts of theft from a person, all of which arose out of separate incidents, in exchange for dismissal of seven additional charges. At the time of the incidents, Lurks was on supervised release for a prior conviction of theft from a person. Because he had been convicted of seven prior felonies, three of which were simple robbery, which is classified as a violent crime under Minn. Stat. § 609.1095, subd. 1(d) (2002), Lurks met the criteria for sentencing as a dangerous offender and a career offender under Minn. Stat. § 609.1095, subds. 2, 3, 4 (2002).

At sentencing, the state argued that if the district court found that Lurks was either a dangerous offender or a career offender, Minnesota law required the district court to impose the statutory maximum sentence for each conviction, even though no aggravating factors existed. The district court found that subdivisions 2, 3, and 4 of section 609.1095 applied and that Lurks "is a danger to public safety" because of his "high frequency of criminal activity" and his pattern of "engaging in the same behavior over and over again." The district court imposed the statutory maximum sentence of ten years for the

simple robbery conviction[1] and consecutive double upward departures for each theft-from-a-person conviction. The district court failed to use a criminal history score of zero to calculate the presumptive sentences for each theft-from-a-person conviction. Lurks's total sentence was 120 months plus 30 months for each of his theft-from-a-person convictions, totaling 180 months (15 years).

In 2004, Lurks petitioned for postconviction relief from his sentence. The district court reversed the sentence, concluding that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), required a jury determination of whether the career-offender provision applied to Lurks's sentence. The state appealed, and this court reversed because Lurks's sentence pre-dated *Blakely*, which does not apply retroactively. *Lurks v. State*, No. A05-947 (Minn. App. Mar. 15, 2006), *review denied* (Minn. May 16, 2006). Noting the state's concession on Lurks's non-*Blakely* claims that sentencing should not have been based on subdivision 3 of section 609.1095 and that a criminal history score of zero should have been used to calculate the presumptive duration for the consecutive sentences, this court remanded to the district court for reconsideration of those claims.

At resentencing, the district court interpreted the remand not to include reconsideration of Lurks's claim that his sentence was unreasonable and excessive. The district court found that subdivision 3 of section 609.1095 did not apply and reduced Lurks's criminal history score to zero for calculating the presumptive duration of the theft-from-a-person sentences. The district court then reimposed the 10-year statutory-

[1] The presumptive sentence for simple robbery, a severity level five offense with a criminal history score of eight, was 51 months.

maximum sentence for simple robbery based on subdivisions 2 and 4 of section 609.1095. The district court also again imposed consecutive double-durational departures for each theft-from-a-person conviction using a criminal history score of zero. Lurks's new sentence is 120 months plus 24 months for each theft-from-a-person conviction, totaling 168 months (14 years). To support the departures, the district court relied on the reasons stated in the original departure report, but with references to subdivision 3 of section 609.1095 redacted. This appeal followed, challenging the sentence as unreasonable and excessive.

D E C I S I O N

This court has authority to review and modify a sentence that is unreasonable or excessive. Minn. Stat. § 244.11, subd 2(b) (2006). "In addition to this authority, we have discretion to modify a sentence in the interest of fairness and uniformity." *Neal v. State*, 658 N.W.2d 536, 546 (Minn. 2003).

Lurks does not dispute that he qualifies for an increased sentence under the dangerous-offender and career-offender provisions in section 609.1095. But he argues that under existing case law, the district court abused its discretion by imposing the statutory-maximum sentence for his conviction of simple robbery in the absence of aggravating factors.

Under the sentencing guidelines, a district court may depart from the presumptive sentence if there are substantial and compelling circumstances in the record. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996); Minn. Sent. Guidelines II.D. The supreme court has articulated a general rule that when a durational departure is justified by

compelling factors and there are no severe aggravating circumstances, the upper-departure limit is double the maximum-presumptive sentence. *Neal*, 658 N.W.2d at 544 (citing *State v. Evans*, 311 N.W.2d 481, 483 (Minn. 1981)). But the supreme court has also recognized the legislature's power to create statutory grounds for increasing sentences beyond a double-durational departure in the absence of severe aggravating circumstances. *Id.* at 545 (citing *State v. Rachuy*, 502 N.W.2d 51, 52 (Minn. 1993)). In *Rachuy*, the supreme court concluded that under the applicable career-offender statute, the district court could have increased a four-year presumptive sentence for theft by swindle to the statutory maximum of ten years, and implied that the career-offender statute authorizes such an increase even in the absence of severe aggravating circumstances. 502 N.W.2d at 51-52. In *Neal*, the supreme court explicitly held that a finding of severe aggravating factors is not required for a district court to impose a departure up to the statutory maximum under the dangerous-offender statute. 658 N.W.2d at 546. The supreme court went on to state that "to avoid disproportionate sentences, courts should use caution when imposing sentences that approach or reach the statutory maximum sentence." *Id.* The supreme court concluded that imposition of the 40-year statutory-maximum sentence for kidnapping was excessive under the circumstances of Neal's case, where a victim was briefly confined in a bathroom to facilitate aggravated robbery of a store. *Id.* at 547-48. The supreme court remanded to the district court for imposition of a sentence for kidnapping that did not exceed the 240-month statutory-maximum sentence for aggravated robbery. *Id.* at 549.

In this case, the 120-month statutory-maximum sentence for simple robbery is 18 months longer than double the 51-month presumptive sentence. Notwithstanding the caution expressed in *Neal*, we conclude that imposition of the statutory maximum in this case does not result in a disproportionate, unreasonable, or excessive sentence for the crime of simple robbery by a dangerous, career offender.

Lurks next argues that the imposition of two consecutive double-durational departure sentences "dramatically increases the unreasonableness" of his sentence. We disagree. When felony convictions arise from crimes against separate victims and the presumptive disposition is commitment to the Commissioner of Corrections, the sentencing guidelines permit the district court to impose consecutive sentences. Minn. Sent. Guidelines II.F. "We will not reverse a district court's decision to impose a consecutive sentence unless there has been a clear abuse of discretion." *Neal*, 658 N.W.2d at 548 (citing *State v. Smith*, 541 N.W.2d 584, 590 (Minn. 1996)). Lurks was sentenced for three separate crimes against three separate victims. Under the circumstances of this case, we cannot say that the district court abused its discretion by imposing consecutive sentences or that the resulting total sentence was unreasonable or excessive.

In a pro se supplemental brief, Lurks argues that the district court improperly considered a St. Paul Pioneer Press article describing Lurks's involvement in another criminal incident unrelated to the offenses for which he was being sentenced. We find no support in the record for this assertion.

Affirmed.