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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1112**

State of Minnesota,
Respondent,

vs.

Brian Keith Midderigh,
Appellant.

**Filed July 22, 2008
Reversed and remanded
Wright, Judge**

Polk County District Court
File No. 60-KX-03-522

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

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Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Wright, Judge.

UNPUBLISHED OPINION

WRIGHT, Judge

On remand from a prior appeal, appellant waived his right to a sentencing jury and subsequently was sentenced by the district court under the “career offender” provision of

Minn. Stat. § 609.1095, subd. 4 (2002), to 60 months' imprisonment for third-degree burglary. The district court ordered this sentence to be served consecutively to a sentence imposed for a prior conviction. Appellant now argues that, because the district court failed to find that "severe aggravating circumstances" exist to warrant the sentence enhancement of a consecutive sentence, his sentence for third-degree burglary must be vacated and a concurrent sentence must be imposed. We reverse and remand.

FACTS

Appellant Brian Midderigh was charged with one count each of second-degree burglary, third-degree burglary, possession of burglary tools, fleeing a peace officer in a motor vehicle, and felony theft in connection with a burglary of a Crookston carwash that occurred in April 2003. Following a stipulated-facts trial conducted under the procedure set forth in *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980), he was found guilty of each offense.

At the sentencing hearing, the district court determined that Midderigh was a "career offender" as defined by Minn. Stat. § 609.1095, subd. 4 (2002). Accordingly, the district court departed upward and imposed a sentence of 60 months' imprisonment for third-degree burglary and ordered it to be served consecutively to Midderigh's sentences for three burglaries committed in 1998—an executed sentence of 60 months' imprisonment for one count and ten years' probation for each of the other two counts. The district court also imposed a concurrent sentence of 23 months' imprisonment for possession of burglary tools and a concurrent sentence of 22 months' imprisonment for

fleeing a police officer. The district court did not impose sentences for the remaining offenses of second-degree burglary and felony theft.

Midderigh appealed, arguing that (1) all but one of the convictions should be vacated because they originated from the same criminal act and behavioral incident, and (2) the career-offender sentence enhancement violated the rule established in *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). *State v. Midderigh*, No. A04-332, 2005 WL 1018424 (Minn. App. May 3, 2005), *review granted* (Minn. July 19, 2005) and *order granting review vacated* (Minn. July 19, 2006). We reversed Midderigh's conviction of second-degree burglary, affirmed the remaining convictions, reversed the career-offender sentence enhancement, and remanded for resentencing. In reversing the career-offender sentence enhancement, we held that, during the *Lothenbach* procedure, Midderigh did not waive the Sixth Amendment right to a jury determination of whether the instant offenses constitute part of a pattern of criminal conduct as required for the enhancement.

On remand, after Midderigh expressly waived the right to a jury determination on the pattern-of-criminal-conduct issue, the district court imposed the same sentences previously imposed. This appeal followed.

D E C I S I O N

We “review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b) (2006). Moreover, we also may “dismiss or

affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence” *Id.*

Midderigh does not challenge the imposition of the 60-month sentence under the career-offender provision of Minn. Stat. § 609.1095, subd. 4 (2002), which authorizes an upward durational departure based on the finding that the defendant has at least five prior felony convictions and the present felony “was committed as part of a pattern of criminal conduct.” Rather, he challenges the district court’s decision requiring the 60-month sentence to be served consecutively to the sentences imposed for his prior convictions.¹ The decision of the district court to impose consecutive sentences will not be reversed absent a clear abuse of discretion. *State v. Rannow*, 703 N.W.2d 575, 577 (Minn. App. 2005).

As a general matter, concurrent sentencing is presumptive when there is a prior felony sentence that has neither expired nor been discharged or when a defendant is convicted of several offenses. Minn. Sent. Guidelines II.F. (2002). Because the “more severe sanction” of consecutive sentences should be limited to more severe offenses, the Minnesota Sentencing Guidelines authorize consecutive sentences only under certain enumerated circumstances. *Id.* & cmt. II.F.01. For example, “[c]onsecutive sentences are presumptive when the conviction is for a crime committed by an offender serving or

¹ The state argues that Midderigh has waived consideration of this issue because he failed to raise his objection before the district court. Generally, we will not consider matters that were not argued before or considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But a defendant’s right to appeal a sentence is unconditional and cannot be waived. *Ballweber v. State*, 457 N.W.2d 215, 217-18 (Minn. App. 1990). In addition, we may address any matter that the interests of justice require. Minn. R. Crim. P. 28.02, subd. 11.

on supervised release, or on escape status from an executed prison sentence.” Minn. Sent. Guidelines II.F.

Midderigh’s conviction does not satisfy the requirements for presumptive consecutive sentencing. When he committed the instant offense, Midderigh was on supervised release as part of the 60-month executed sentence imposed for one of his three 1998 convictions for second-degree burglary; he also was on probation for the two other convictions. But the 60-month executed sentence for the 1998 burglary, which included the supervised-release term, expired in October 2003. The record demonstrates that, in December 2003 and again on remand in 2007, when the district court imposed the 60-month sentence for third-degree burglary that Midderigh challenges here, it was to be served consecutively to the only unexpired sentences that remained—the two sentences for which Midderigh was on probation at the time of the new offense. Because the sentence at issue here was not imposed consecutively to the sentence for which he was on supervised release, it does not meet the standard for presumptive consecutive sentencing. *Id.*; cf. Minn. Sent. Guidelines cmt. II.F.01 (explaining that presumption is to impose the sentence for an offense committed during an executed prison sentence “consecutive to *the sentence the offender was serving* at the time the new offense was committed” (emphasis added)).

Under the sentencing guidelines in effect when Midderigh committed the 2003 offenses, consecutive felony sentences were permissive (1) when the defendant’s current and prior offenses are both “crime[s] against a person”; (2) for multiple current offenses; (3) for felony escape convictions and offenses committed while on felony escape status;

(4) for felony convictions of fleeing a peace officer in a motor vehicle; and (5) for convictions of criminal sexual conduct involving force or violence. Minn. Sent. Guidelines II.F; *see also State v. Hunt*, 419 N.W.2d 816 (Minn. App. 1988) (holding that burglary of unoccupied commercial buildings is not crime against person). Because not one of these conditions is met, the 2003 offense also fails to satisfy the criteria for permissive consecutive sentencing under the sentencing guidelines. Thus, the district court departed from the sentencing guidelines when it ordered the 60-month sentence for Miederigh's 2003 third-degree burglary offense to be served consecutively to the probation sentences for his 1998 convictions.

When the district court imposes a sentence that departs from the presumptive guidelines sentence, it must specify "the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D; *see also* Minn. R. Crim. P. 27.03, subd. 4(C) (stating that for felony conviction, sentencing court "shall state, on the record, findings of facts as to the reasons for departure"); *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (holding that departure from sentencing guidelines is not permitted absent reasons articulated on record at sentencing). Failure to specify the rationale and aggravating factors relied on to support a departure precludes effective appellate review. *State v. Williams*, 608 N.W.2d 837, 840-41 (Minn. 2000). Moreover, without a finding that "severe aggravating circumstances" exist, an upward durational departure under the career-offender provision may not be imposed as a consecutive sentence. *State v. Rachuy*, 502 N.W.2d 51, 52

(Minn. 1993). In the absence of this finding, the district court may impose either a durational departure or a consecutive sentence, but not both. *Id.*

Although the district court provided sufficient findings to support an upward durational departure for the third-degree burglary offense under the career-offender provision of section 609.1095, subdivision 4, it did not find that “severe aggravating circumstances” exist. Thus, the sentence imposed constitutes an abuse of discretion in this respect. *See Rannow*, 703 N.W.2d at 580. The state urges us to remand to the district court to permit findings addressing the reasons for the departure. But the *Geller* court rejected this remedy under similar circumstances. 665 N.W.2d at 516-17. Rather, on remand, the presumptive guidelines sentence must be imposed. *Id.*

Accordingly, we reverse the imposition of a consecutive sentence and remand with directions to impose a sentence of 60 months’ imprisonment under the career-offender provision for the third-degree burglary offense to run concurrently with the unexpired sentences imposed for Miederigh’s 1998 offenses.

Reversed and remanded.