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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1480

State of Minnesota,
Respondent,

vs.

David Johnson,
Appellant.

Filed August 5, 2008
Affirmed; motion denied
Willis, Judge

Hennepin County District Court
File No. 04002659

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

Mike Freeman, Hennepin County Attorney, Donna J. Wolfson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Willis, Judge; and Johnson, Judge.

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

WILLIS, Judge

Following remand from this court and resentencing by the district court, appellant challenges his sentence, arguing that the district court exceeded the scope of our mandate on remand and that his sentence exaggerates the criminality of his conduct and violates the principles of proportionality, equity, and consistency in sentencing. The state has moved to strike documents from appellant's appendix. We affirm appellant's sentence and deny the state's motion as moot.

FACTS

In 2005, appellant David Johnson received two consecutive sentences of 240 months each for his convictions of aiding and abetting kidnapping and aiding and abetting attempted first-degree murder. Johnson appealed his conviction and sentence, and this court affirmed the conviction but reversed the sentence, based on the district court's erroneous reliance on Johnson's unproved Illinois criminal record. *See State v. Johnson*, No. A05-1028, 2006 WL 2347795, at *19 (Minn. App. Aug. 8, 2006), *review denied* (Minn. Dec. 13, 2006). On remand for resentencing, the district court resentenced Johnson to the same term as the original sentence. This appeal follows.

D E C I S I O N

I. The district court did not exceed this court's mandate on remand.

A district court "may not vary the mandate of an appellate court or decide issues beyond those remanded." *Harry N. Ray, Ltd. v. First Nat'l Bank of Pine City*, 410 N.W.2d 850, 856 (Minn. App. 1987); *see also State v. Roman Nose*, 667 N.W.2d 386, 394 (Minn.

2003) ("On remand, it is the duty of the district court to execute the mandate of this court strictly according to its terms."). In Johnson's first appeal, we reversed his sentence and remanded the case "for the district court to resentence Johnson without consideration of his unproved Illinois conviction and Illinois probation status." *Johnson*, 2006 WL 2347795, at *19. Johnson argues that this mandate implied that a lesser sentence was required and that the district court exceeded the mandate by resentencing him to the same term as the original sentence. But nothing in the instruction "to resentence Johnson without consideration of his unproved Illinois conviction and Illinois probation status" necessarily directed the district court to impose a lesser sentence. And if the purpose was, as Johnson argues, to correct a mathematical error in the calculation of his criminal-history score and reduce his sentence by a commensurate amount, this court could have modified the sentence accordingly; there would have been no need for a remand. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (stating that appellate courts may "modify a sentence on many grounds, including that the sentence is unreasonable or inappropriate").

We are satisfied that the district court followed our mandate. At the resentencing hearing, the state attempted to introduce certified documents proving Johnson's Illinois conviction and Illinois probation status to provide the district court with a basis for considering these matters in resentencing Johnson. The district court refused, stating, "I'm going to . . . follow the command of the Minnesota Court of Appeals that I sentence without regard to the Illinois conviction and probation status . . . . I'm not going to ignore the mandate of the Minnesota Court of Appeals." The district court was clearly mindful of its duty on remand and refused the state's invitation to exceed our mandate.

Finally, the sentences imposed by the district court on remand do not conflict with our mandate to resentence Johnson "without consideration of his unproved Illinois conviction and Illinois probation status." *Johnson*, 2006 WL 2347795, at *19. Johnson's sentences are upward departures from the presumptive sentences under the Minnesota Sentencing Guidelines. Ordinarily, the sentences set forth in the guidelines are presumed to be appropriate. Minn. Sent. Guidelines II.D; *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). A district court has no discretion to depart upwardly from the prescribed sentence absent a finding of aggravating factors. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). But if aggravating factors are present, an upward departure is within the district court's discretion. *Id.* And if the aggravating factors are severe, the district court may impose a "greater-than-double departure from the presumptive sentence; in such cases the only absolute limit on duration is the maximum provided in the statute defining the offense." *Id.*

This court has already affirmed the district court's finding of three aggravating factors for each of Johnson's convictions. *Johnson*, 2006 WL 2347795, at *15-*17. And we concluded that the aggravating factors "rise to the level of severe aggravating factors that justify the imposition of a term of more than twice the presumptive sentence for the conviction of aiding and abetting kidnapping and justify consecutive sentencing." *Id.* at *17. The presence of three severe aggravating factors for each conviction places upward departures within the district court's discretion, with the absolute limit being the statutory maximum for each offense. *See Shattuck*, 704 N.W.2d at 140.

At the resentencing hearing, the district court noted for the record that

> in 17 years of being a district court judge, this is the most heinous and hideous crime the Court has ever seen.
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> . . . .
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> [T]his was a hideous, heinous, cruel, and torturous crime, the wors[t] that this Court has ever seen in 17 years, preceded by the Court's own experience [of] six years as a Hennepin County public defender, also receiving murder cases and criminal sexual conduct cases for defense.

The district court then imposed a sentence of 240 months for each conviction, which does not exceed the statutory maximum for each offense, and ordered that the sentences be served consecutively. *See* Minn. Stat. §§ 609.185, .05, subd. 1, .17, subd. 4 (2006) (providing a maximum sentence of 20 years for aiding and abetting attempted first-degree murder); Minn. Stat. §§ 609.25, subd. 2(2), .05, subd. 1 (2006) (providing a maximum sentence of 40 years for aiding and abetting kidnapping if the victim suffers great bodily harm).

We will not reverse a district court's sentencing decision absent a clear abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). The district court sentenced Johnson without considering Johnson's unproved Illinois conviction and probation status, as required by our mandate. The sentences imposed by the district court are lawful and within the district court's discretion.

II. Johnson's sentences do not exaggerate the criminality of his conduct or violate the principles of proportionality, equity, and consistency in sentencing.

Johnson argues that his sentences unfairly exaggerate the criminality of his conduct based on comparisons to other cases of murder and kidnapping in which the defendants

received sentences less severe than Johnson's. *See State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992) (stating that unfair exaggeration of criminality is determined by comparison to similar cases). But none of the cases cited by Johnson for comparison involved crimes in which *three severe aggravating factors* were found. *See State v. Valentine*, 630 N.W.2d 429, 437 (Minn. App. 2001) (no aggravating factors), *review denied* (Minn. Aug. 22, 2001); *State v. Rodriguez*, 505 N.W.2d 373, 375 (Minn. App. 1993) (two aggravating factors), *review denied* (Minn. Oct. 19, 1993); *State v. Volk*, 421 N.W.2d 360, 366 (Minn. App. 1988) (one aggravating factor), *review denied* (Minn. May 18, 1988); *State v. Hodges*, 384 N.W.2d 175, 183-84 (Minn. App. 1986) (three aggravating factors), *aff'd as modified*, 386 N.W.2d 709 (Minn. 1986). Because the three severe aggravating factors present here make the crime more serious than the cases cited by Johnson for comparison, it is not unfair that Johnson's sentence is more severe.

Johnson also argues that his sentences violate the principles of proportionality, equity, and consistency in sentencing because other participants in the events that gave rise to the charges against Johnson received lesser sentences. In support of this argument, Johnson offers records from the Hennepin County District Court indicating the dispositions of the criminal cases against the other participants. The state has moved to strike these documents, arguing that they were not submitted to the district court and are not part of the record on appeal. *See* Minn. R. App. P. 110.01 (providing that the record on appeal consists of the "papers filed in the trial court, the exhibits, and the transcripts of the proceedings").

Regardless of whether we consider the challenged documents, a defendant "is not entitled to a reduction in his sentence merely because a co-defendant or accomplice has been

convicted of a lesser offense or received a lesser sentence." *State v. Starnes*, 396 N.W.2d 676, 681 (Minn. App. 1986). Accordingly, we conclude that Johnson's argument regarding the principles of proportionality, equity, and consistency in sentencing is without merit. And even if we were to consider the challenged documents, they appear to indicate that the other participants pleaded guilty to lesser offenses, presumably as part of plea bargains that resulted in lesser sentences. Johnson chose to plead not guilty and proceed to trial, which resulted in his conviction of a more serious offense than the other participants. The supreme court has held that it is "not 'unjustifiably disparate'" for a defendant who is convicted following trial to receive a more severe sentence than codefendants who pleaded guilty in exchange for reduced sentences. *State v. Cermak*, 365 N.W.2d 243, 248 (Minn. 1985); *see also State v. Vazquez*, 330 N.W.2d 110, 112-13 (Minn. 1983) (holding that the principle of equity in sentencing does not require that a defendant receive the same sentence as an accomplice who pleaded guilty to a lesser charge).

Because our holding does not rely on the challenged documents, we deny the state's motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when court "d[id] not rely on" challenged documents).

Affirmed; motion denied.