STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0194

State of Minnesota,
Respondent,

vs.

David Wayne Habshi,
Appellant.

Filed December 23, 2008
Reversed and remanded
Halbrooks, Judge

Washington County District Court
File No. K2-01-7381

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

Doug Johnson, Washington County Attorney, John W. Fristik, Assistant County Attorney, 14949 62nd Street North, P.O. Box 6, Stillwater, MN 55082 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Mark F. Anderson, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

Appellant challenges the denial of his postconviction motion to correct his sentence, arguing that the district court erred in finding that *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), has no retroactive application to his sentence. We conclude that the district court correctly found that *Blakely* has no retroactive application. But because the sentencing court did not provide any findings to support the upward departure, we reverse and remand to the district court for imposition of the presumptive sentence.

FACTS

Appellant David Wayne Habshi pleaded guilty to second-degree assault pursuant to a plea agreement on June 24, 2002. The guilty plea stemmed from appellant's assault of a corrections officer at the Minnesota Correctional Facility-Stillwater while he was serving a 210-month sentence for attempted first-degree murder. The plea agreement for the assault called for appellant to serve 51 months to run consecutively to the 210-month sentence he was then serving. The 51-month sentence was an upward departure from the presumptive sentence of 27 consecutive months. At sentencing, the district court provided no basis for the upward departure. Appellant did not file a direct appeal.

Approximately five years later, on May 30, 2007, appellant, pro se, moved the district court to correct his sentence, arguing that *Blakely* should apply. The state public defender submitted a supplemental letter brief in support of appellant's motion, arguing that appellant should be resentenced under *State v. Misquadace*, 644 N.W.2d 65 (Minn.

2002), and given a resentencing jury under *Blakely*, 542 U.S. at 303–04, 124 S. Ct. at 2537–38. The state was granted time to respond to the supplemental brief, and the state public defender submitted a reply brief. The district court denied appellant's motion to correct his sentence on the grounds that *Blakely* does not apply because appellant's conviction and sentence were final when *Blakely*, which does not have retroactive effect, was decided and that the record supported the upward departure. The district court stated that under Minn. Sent. Guidelines II.D.2.b.(3), the aggravating factor was that the assault caused an injury to the victim when appellant had a prior felony conviction that also involved injury to a victim. This appeal follows.

D E C I S I O N

I.

Appellant argues that *Blakely* should apply retroactively to his case because his sentence was improper under *Misquadace*. As the district court noted, *Blakely* applies retroactively to cases that were not final when it was decided. *State v. Houston*, 702 N.W.2d 268, 273 (Minn. 2005). A case is final for purposes of retroactivity when a "judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari [has] elapsed or a petition for certiorari [has been filed and] finally denied." *O'Meara v. State*, 679 N.W.2d 334, 339–40 (Minn. 2004) (alteration in original) (quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n.6, 107 S. Ct. 708, 712 n.6 (1987)) (concluding that the defendant's conviction was final on the date that his direct-appeal period expired). After a judgment of conviction, a defendant has 90 days to appeal the conviction. Minn. R. Crim. P. 28.02, subd. 4(3).

Here, the district court entered the judgment of conviction on June 25, 2002. Appellant's time for direct appeal expired on September 3, 2002. *Blakely* was decided on June 24, 2004, well after appellant's period for direct appeal expired. *See* 542 U.S. at 296, 124 S. Ct. at 2531. Therefore, appellant is not entitled to retroactive application of *Blakely*.

II.

We next turn to the district court's finding in its postconviction order that an aggravating factor that justifies the upward departure in sentencing exists in this case. "We look to the sentencing court's rationale to determine whether the court abused its discretion." *State v. Richardson*, 670 N.W.2d 267, 285 (Minn. 2003).

The supreme court in *Williams v. State* provided a series of rules to ensure compliance with the sentencing guidelines and Minn. R. Crim. P. 27.03, subd. 4(C). 361 N.W.2d 840, 843-44 (Minn. 1985). These rules are:

> 1. If no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed.
>
> 2. If reasons supporting the departure are stated, this court will examine the record to determine if the reasons given justify the departure.
>
> 3. If the reasons given justify the departure, the departure will be allowed.
>
> 4. If the reasons given are improper or inadequate, but there is sufficient evidence in the record to justify departure, the departure will be affirmed.
>
> 5. If the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.

Id. at 844.

The state relies on *State v. Sanchez-Sanchez*, 654 N.W.2d 690 (Minn. App. 2002), in support of its argument that the case should be remanded to the district court for resentencing if the district court determines that grounds for a departure exist. But *Sanchez-Sanchez* is distinguishable from this case because in *Sanchez-Sanchez*, we conclude that the district court articulated aggravating circumstances but not severe aggravating circumstances to justify the extraordinary upward departure when it sentenced the defendant, resulting in a remand for resentencing pursuant to *Misquadace*. *See Sanchez-Sanchez*, 654 N.W.2d at 694.

In *Sanchez-Sanchez*, the defendant was originally charged with first-degree assault for dropping and then shaking a child she was caring for, resulting in substantial permanent brain damage to the child. 654 N.W.2d at 691–92. The defendant tried to plead guilty to the assault charge, but the district court did not accept the plea, finding that the defendant's actions did not fit the charge. *Id.* The state amended the complaint to include a charge of child endangerment, and the defendant pleaded guilty to the amended charge pursuant to a plea agreement, which the district court accepted. *Id.* at 692. The plea agreement called for a 60-month sentence, the statutory maximum, but acknowledged that the district court could exercise its discretion to impose a sentence of less than 60 months. *Id.* The presumptive sentence for the offense was a stayed sentence of one year and one day. *Id.*

The district court cited the severe injuries to the child, the negotiated plea, and the reduced charge when it sentenced the defendant to 54 months—an upward departure of four-and-one-half times the presumptive sentence. *Id.* at 692–93. On appeal from the judgment of conviction, this court quoted the first and fourth rules from *Williams* and held that the district court's recitation of the severe injuries the child sustained was not a sufficient basis to justify the upward departure of four-and-one-half times the presumptive sentence. *Id.* at 694. Consequently, we reversed and remanded to the district court stating that "[a]lthough such a sentence is not necessarily unreasonable, the district court must articulate not only aggravating circumstances, but severe aggravating circumstances to justify such an extraordinary departure." *Id.*

Following *Sanchez-Sanchez*, the supreme court reaffirmed *Williams* in *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). In *Geller*, the defendant pleaded guilty pursuant to a plea agreement that did not call for an upward departure. 665 N.W.2d at 515–16. The district court decided to consider an upward departure and, after briefing by the parties, sentenced the defendant to an upward departure without providing any reasons on the record. *Id.* at 516. In discussing the upward departure, the supreme court stated that "the first rule we set out in *Williams* is clear: absent a statement of the reasons for the sentencing departure placed on the record at the time of sentencing, no departure will be allowed." *Id.* at 517. The supreme court then held that because the district court had not stated reasons on the record when it sentenced the defendant, it could not do so later. *Id.* The supreme court remanded the case to the district court with instructions to impose the presumptive sentence. *Id.*

In *State v. Rannow*, this court applied the *Geller* court's reasoning to circumstances that involved the district court's imposition of an upward departure based on the defendant's plea agreement but without providing any reasons for the departure on the record. 703 N.W.2d 575, 579 (Minn. App. 2005). Relying on *Geller*, we concluded that the proper disposition was to remand to the district court for imposition of the presumptive sentence. *Id.* at 579–80.

Here, the sentencing court gave no reasons for the upward departure. The district court stated at the sentencing hearing that "having accepted your plea of guilty to the charge of Assault in the Second Degree and granting the state's motion to dismiss the remaining charges, I hereby commit you to the Commissioner of Corrections for 51 months." Because the sentencing court did not provide any reasons for the upward departure, under the first rule in *Williams*, no departure is allowed in this case. Accordingly, based on *Geller*, we reverse and remand to the district court to impose the presumptive sentence.

Reversed and remanded.