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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0206**

Ronald Mark Alstrup, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed October 6, 2009
Affirmed
Shumaker, Judge**

Hennepin County District Court
File No. 27-CR-02-049300

Marie L. Wolf, Interim Chief Appellate Public Defender, Cathryn Y. Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

Considered and decided by Lansing, Presiding Judge; Shumaker, Judge; and Hudson, Judge.

UNPUBLISHED OPINION

SHUMAKER, Judge

Appellant contends that the district court imposed an illegal consecutive sentence when it ordered that the second sentence commence upon completion of the first sentence rather than upon his release from prison, as provided by the sentencing guidelines. Because the district court identified and relied upon sufficient aggravating factors to support its sentencing departure, we affirm.

FACTS

Appellant Ronald Mark Alstrup befriended and gained the trust of H.H., a 94-year-old man, and then, over the course of several months, stole a total of \$149,369 from him.

After Alstrup got caught, he agreed to plead guilty to two counts of theft by swindle and to aggravated departures on his sentence. He admitted that he had developed and maintained a relationship with H.H. and was able as a result to swindle more than \$35,000 from him. He also acknowledged that, because of H.H.'s advanced age, H.H. was more likely susceptible to being tricked than a younger person might have been.

Adopting as aggravating factors the state's recitation that H.H. was particularly vulnerable because of his age, that the crimes constituted a violation of a relationship of trust, and that there were multiple crimes over a long period of time, the district court imposed sentence. As to the first count, the court imposed an executed term of 120 months, representing an upward durational departure from the presumptive executed sentence of 55 months. On the second count, the court originally imposed a consecutive

60-month stayed sentence but later granted Alstrup's petition for postconviction relief and amended that sentence to the presumptive 21-month stayed term. The court expressly ordered that the sentence on the second count would begin upon the completion of the 120-month sentence on count one.

Alstrup later moved to clarify his sentence, contending that the requirement that his 21-month term was to begin upon completion of 120 months rather than upon his release from prison was illegal. The district court denied the motion and Alstrup appealed.

DECISION

Alstrup contends that, under the Minnesota Sentencing Guidelines, “[t]he consecutive stayed sentence begins when the offender completes the term of imprisonment and is placed on supervised release.” Minn. Sent. Guidelines II.F (2002). He then notes that, in denying his motion for clarification, the district court stated that this was the sentence to which Alstrup agreed. But, he correctly contends, “a defendant cannot agree to an illegal sentence.” *See State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002) (stating that a plea agreement cannot in itself form the basis for a sentencing departure). Appellate courts “review a postconviction court’s decision only to determine whether sufficient evidence supports the court’s findings.” *Greer v. State*, 673 N.W.2d 151, 154 (Minn. 2004). We will reverse that decision only for error of law or abuse of discretion. *Id.*

In sentencing a felony, the district court must impose the presumptive sentence unless “substantial and compelling circumstances” warrant a different sentence. Minn.

Sent. Guidelines II.D. A departure from the presumptive sentence is justified if the court relies upon, and states, proper reasons therefor. *State v. Shattuck*, 704 N.W.2d 131, 139-40 (Minn. 2005). A sentencing departure then is generally within the district court's broad discretion. *Id.* at 140.

Under the sentencing guidelines, a consecutive sentence is to begin when the offender completes imprisonment on the prior sentence and then is released on supervised release. Minn. Sent Guidelines II.F (2002). Arguably, a requirement that the consecutive sentence is not to begin until the entire prior term has been completed is a departure from the sentencing guidelines. Unless supported by sufficient aggravating circumstances, the departure would be illegal. *Misquadace*, 644 N.W.2d at 72. A plea agreement alone is not a sufficient reason for a departure from the sentencing guidelines. *Id.*

In denying Alstrup's motion to clarify his sentence, the district court stated only that it had imposed the sentence to which Alstrup agreed. Alstrup cites that statement in support of his contention that the consecutive-term departure was based only on a plea agreement and therefore was illegal. But the question is whether sufficient aggravating circumstances existed and were identified at the time of sentencing, irrespective of whether the court's postconviction comments failed to reiterate all of those factors.

A crime victim's particular vulnerability because of age is an express departure factor. Minn. Sent Guidelines II.D.2.b(1) (2002). Multiple incidents of criminal conduct and the violation of a position of trust to facilitate an offense are also express departure factors. Minn. Sent. Guidelines II.D.2.b(4)(a)-(d) (2002). These express departure factors were those the district court identified and relied upon in imposing the durational

departure on count one and the term-commencement departure on count two. Because sufficient departure factors existed and were identified at the legally operative moment, namely, the imposition of sentencing departures, the district court did not abuse its discretion in requiring that Alstrup's sentence on count two is to begin upon his completion of his 120-month sentence on count one.

Affirmed.