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STATE OF MINNESOTA
IN COURT OF APPEALS
A10-477

Joshua Darly Moore, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 2, 2010
Affirmed
Stauber, Judge

Hennepin County District Court
File No. 27CR0369496

David W. Merchant, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Stauber, 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

STAUBER, Judge

In this postconviction appeal challenging his 2004 sentence based on a guilty plea to second-degree unintentional murder, appellant argues that the district court erred by

denying his motion for correction of sentence under Minn. R. Crim. P. 27.03, subd. 9, because his 250-month sentence was based on invalid departure grounds. In his pro se supplemental brief, appellant also argues that he is entitled to relief under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004). We affirm.

FACTS

On September 25, 2003, appellant Joshua Darly Moore shot Jessie Ballot while seated next to him in Ballot's car. Ballot fled the car, but collapsed and died approximately 50 feet from the car. Appellant was subsequently charged with one count of second-degree intentional murder in violation of Minn. Stat. § 609.19, subd. 1(1) (2002), and one count of second-degree unintentional murder in violation of Minn. Stat. § 609.19, subd. 2(1) (2002).

Appellant pleaded guilty to second-degree felony murder. In exchange for his guilty plea, the state agreed to dismiss the remaining count of second-degree intentional murder. Appellant also agreed to a sentence of 250 months, which was an upward durational departure from the presumptive sentence. At the plea hearing, appellant admitted that he entered the victim's car with a handgun and that he displayed the gun in a threatening manner in order to obtain drugs and money from the victim. Appellant also admitted that he and two other individuals planned the robbery scheme, and that he shot the victim during a struggle over the gun.

On March 17, 2004, the district court sentenced appellant to the agreed-on 250-month sentence. The court based the upward departure on "the high degree of planning that went into" the murder. The court also based the departure on the "fact that [the

murder] was motivated by an intention to rob here and because [the victim] was shot several times and was treated with more cruelty than the average unintentional murder." Appellant did not directly appeal his sentence.

In October 2009, appellant filed a pro se motion for reduction of sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9. Appellant claimed that his sentence was improper under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000). Treating appellant's motion as one for postconviction relief, the district court denied the motion as untimely. But the court went on to address appellant's arguments and concluded that (1) appellant's Sixth Amendment rights were not violated; (2) *Blakely* was not applicable to appellant's case; (3) appellant's upward departure was permissible under Minnesota law; and (4) the facts supported the upward departure. This appeal followed.

DECISION

I.

As a preliminary matter, appellant challenges the district court's decision to treat his rule 27.03 motion as a postconviction petition. But a motion to correct a sentence filed pursuant to Minn. R. Crim. P. 27.03, subd. 9, may be treated as a postconviction proceeding brought pursuant to chapter 590 of the Minnesota Statutes. *Powers v. State*, 731 N.W.2d 499, 501 n.2 (Minn. 2007) (stating that section Minn. Stat. § 590.01 "is broad enough to encompass a motion pursuant to [rule] 27.03"); *see also Bonga v. State*, 765 N.W.2d 639, 642-43 (Minn. 2009) (noting same). The district court did not err in treating the motion as a postconviction petition.

A person seeking postconviction relief bears the burden of establishing facts that warrant relief. Minn. Stat. § 590.04, subd. 3 (2008). This court reviews issues of law de novo, but examines the postconviction court's findings to determine if they are supported by sufficient evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The denial of postconviction relief will be reversed on appeal only if there has been an abuse of discretion. *Id.*

Appellant argues that his sentence was improper because the reasons the district court cited to support the upward departure were improper and inadequate. But the district court concluded that appellant's petition was procedurally barred under Minn. Stat. § 590.01, subd. 4(a) (2008). Under that statute, no petition for postconviction relief may be filed more than two years after the later of an appellate court's disposition of a petitioner's direct appeal or, when no direct appeal is filed, the entry of judgment of conviction or sentence. *Id.* When the applicable statute was enacted, it provided: "Any person whose conviction became final before August 1, 2005, shall have two years after [August 1, 2005] to file a petition for postconviction relief." 2005 Minn. Laws ch. 136, art. 14, § 13, at 1098.

Here, because appellant was sentenced before section 590.01, subdivision 4 became effective, he was required to file his petition for postconviction relief by August 1, 2007. *See id.* By not filing this motion until October 28, 2009, appellant failed to meet this requirement. But, a postconviction court may hear an untimely petition if "the petitioner establishes to the satisfaction of the court that the petition is not frivolous and is in the interests of justice." Minn. Stat. § 590.01, subd. 4(b)(5) (2008). Appellant has

not had appellate review of his conviction and sentence, and the argument raised on appeal has merit. Therefore, we will address appellant's claims in the interests of justice. *See* Minn. R. Crim. P. 28.02, subd. 11 (permitting appellate court to review any matter "as the interests of justice may require").

This court will not disturb a district court's decision to depart from the sentencing guidelines absent a clear abuse of discretion. *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002). When a district court departs from the sentencing guidelines, it must articulate a substantial and compelling reason to justify the departure. *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999). "[A] plea agreement-standing alone-is not a sufficient basis to depart from the sentencing guidelines." *Misquadace*, 644 N.W.2d at 72. Although, without more, the terms of a negotiated plea agreement do not constitute substantial and compelling reasons that the district court may rely on to justify a departure, proper grounds for departure may be magnified by a party's admissions in the plea agreement and at the guilty-plea hearing. *State v. Pearson*, 479 N.W.2d 401, 404-05 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992). When determining whether to depart, the district court must consider whether the defendant's conduct was significantly more or less serious than that typically involved in such crimes. *State v. Cermak*, 344 N.W.2d 833, 837 (Minn. 1984). The presence of a single aggravating factor is sufficient to uphold an upward departure. *See State v. O'Brien*, 369 N.W.2d 525, 527 (Minn. 1985). But the district court's reasons for departing from the presumptive guidelines sentence must not be an element of the offense for which the sentence is imposed. *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008).

Appellant argues that his sentence was improper because the reasons cited by the district court to support the departure cannot be used as a basis for the departure. Specifically, appellant contends that the district court erred by citing the "high degree of planning" involved in robbing the victim as a basis for the departure because robbery was a separate offense that was not charged.

A "high degree of planning" is an aggravating factor that can make a defendant's conduct more serious than that typically involved in the commission of the crime in question. *See State v. Kindem*, 338 N.W.2d 9, 17 (Minn. 1983) (holding that an upward departure was appropriate where defendant "did an immense amount of planning to determine when the victim would be most vulnerable"); *see also State v. Grampre*, 766 N.W.2d 347, 353 (Minn. App. 2009) (defendant's immense amount of planning and preparation supported upward departure for first-degree criminal sexual conduct), *review denied* (Minn. Aug. 26, 2009); *State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992). But when assessing aggravating factors "the [district] court may not consider evidence that points to the defendant's guilt of some other offense but that does not support the conclusion that the defendant committed the offense in question in a particularly serious way." *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

Here, the underlying felony in the felony murder charge was assault. Thus, because robbery was an uncharged offense, any evidence related to the robbery cannot be used as a basis to support a departure unless it also supports the conclusion that appellant committed the felony murder in a particularly serious way. A review of the record

indicates that any evidence of a "high degree of planning" would certainly be directly related to the offense for which appellant was charged and convicted, felony murder. Appellant admitted on the record that he schemed with two other individuals to rob the victim of drugs and money. Moreover, the sentence was part of a negotiated plea agreement. Although we acknowledge that there is not an overwhelming amount of evidence and testimony in the record to support the finding that appellant engaged in a "high degree of planning," appellant's admissions support the basis for the departure.[1]

II.

In his pro se supplemental brief, appellant argues that he is entitled to relief under *Blakely*. *Blakely* followed *Apprendi*, in which the United States Supreme Court held that any facts, other than the fact of a prior conviction, that increase the penalty for an offense beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490, 120 S. Ct. 2362-63. The *Blakely* decision modified *Apprendi* by concluding that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum [a judge] may impose *without* any additional findings." *Blakely*, 542 U.S. at 303-04, 124 S. Ct. at 2537. The Minnesota Supreme Court has concluded that *Blakely* applies to

[1] Because appellant's "high degree of planning" was a valid aggravating factor used to support the upward departure, we need not address appellant's claim that the facts relied upon by the district court in sentencing appellant to an upward departure did not show that the victim was treated with particular cruelty. *See O'Brien*, 369 N.W.2d at 527 (holding that the presence of a single aggravating factor is sufficient to uphold an upward departure).

sentences imposed under the Minnesota Sentencing Guidelines. *State v. Shattuck*, 704 N.W.2d 131, 141-42 (Minn. 2005).

Here, appellant was sentenced on March 17, 2004, and he did not file a direct appeal. Thus, appellant's sentence became final on June 15, 2004, 90 days after he was sentenced. *See* Minn. R. Crim. 28.02, subd. 4(3) (mandating that a criminal defendant appeal within 90 days after entry of judgment); *see also Dukes v. State*, 718 N.W.2d 920, 922 n.1 (Minn. 2006) (stating that a conviction becomes final after the time for appeal is exhausted), *abrogated on other grounds by Danforth v. State*, 761 N.W.2d 493 (Minn 2009). *Blakely* was decided on June 24, 2004, after appellant's sentence became final. The Minnesota Supreme Court has held that the *Blakely* decision is not retroactive and only applies to cases on direct appeal at the time of the decision. *State v. Houston*, 702 N.W.2d 268, 273 (Minn. 2005). Because appellant's sentence was final before the ruling in *Blakely,* and because *Blakely* does not apply retroactively, appellant is not entitled to benefit from the rule in *Blakely.*

Affirmed.