**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A10-613**

Martell Grimes, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 18, 2011**
**Affirmed**
**Johnson, Chief Judge**

Stearns County District Court
File No. 73-K5-06-000159

Bradford W. Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, St. Cloud, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Johnson, Chief Judge; and Bjorkman, Judge.

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

**JOHNSON**, Chief Judge

In 2007, Martell Grimes pleaded guilty to three counts of first-degree criminal sexual conduct involving three young children. At sentencing, the district court departed upward from the presumptive guidelines sentences on two counts on the ground that Grimes engaged in multiple forms of penetration of two of the children. In 2009, Grimes petitioned for postconviction relief, arguing that the existence of multiple forms of penetration is not a valid basis for an upward departure in this case because multiple forms of penetration is typical in cases involving child sexual abuse. We conclude that the upward departure is consistent with the applicable caselaw and, therefore, affirm.

## FACTS

In the spring of 2003, Martell Grimes sexually abused three children in St. Cloud. In September 2003, a five-year-old boy told a St. Cloud police investigator that Grimes had engaged in certain sexual acts with him and with two girls who were five years old and six years old, respectively. The boy said that Grimes threatened to hurt the children if they reported the sexual abuse.

In January 2006, the state charged Grimes with three counts of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2002). In February 2006, the state gave notice of its intent to seek an upward sentencing departure based on the alleged existence of five aggravating factors.

In April 2007, Grimes pleaded guilty to all three counts. At the plea hearing, he admitted that he engaged in sexual penetration of all three children. Specifically, he

admitted that he inserted his penis into each girl's mouth and each girl's vagina. He further admitted that he put the boy's penis inside his mouth, but he denied other forms of penetration with respect to the boy.

At the time of his guilty plea, Grimes waived his right to a trial by jury on the issue whether aggravating factors exist. The state and Grimes submitted the issue of aggravating factors to the district court on stipulated facts. In August 2007, the district court found that Grimes engaged in multiple forms of penetration of the two girls and concluded that the state had proved that aggravating factor with respect to counts two and three, which related to the two girls. The district court determined that the state did not prove the other four aggravating factors that it had alleged.

In October 2007, the district court imposed concurrent prison sentences of 144 months on count one, 216 months on count two, and 216 months on count three. The longer sentences on the second and third counts were upward departures based on the aggravating factor of multiple forms of penetration. Grimes did not pursue a direct appeal from his convictions and sentences.

In October 2009, Grimes petitioned for postconviction relief on the ground that the district court erred by departing upward from the presumptive guidelines sentences on counts two and three. The postconviction court denied the petition without an evidentiary hearing. Grimes appeals.

## D E C I S I O N

Grimes argues that the postconviction court erred by denying his postconviction petition. More specifically, he argues that the existence of multiple forms of penetration

is not a valid aggravating factor in this case because multiple forms of penetration is typical in cases of sexual abuse of children.

A person may file a postconviction petition to challenge his or her criminal conviction. Minn. Stat. § 590.01, subd. 1 (2008). A postconviction petition "shall contain . . . a statement of the facts and the grounds upon which the petition is based and the relief desired," and "[a]ll grounds for relief must be stated in the petition or any amendment thereof unless they could not reasonably have been set forth therein." Minn. Stat. § 590.02, subd. 1(1) (2008). "[T]he burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence." Minn. Stat. § 590.04, subd. 3 (2008). A postconviction court, in its discretion, "may receive evidence in the form of affidavit, deposition, or oral testimony." *Id.* The postconviction court must hold an evidentiary hearing on a postconviction petition "[u]nless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief." *Id.*, subd. 1 (2008); *see also Gustafson v. State*, 754 N.W.2d 343, 348 (Minn. 2008).

Grimes's appeal implicates the law concerning sentencing departures. A district court must impose the presumptive sentence specified in the sentencing guidelines unless there are "identifiable, substantial, and compelling circumstances" to warrant an upward departure from the presumptive sentence. Minn. Sent. Guidelines II.D. (2007). "Substantial and compelling circumstances are those showing that the defendant's conduct was significantly more or less serious than that typically involved in the commission of the offense in question." *State v. Edwards*, 774 N.W.2d 596, 601 (Minn.

2009) (quotation omitted). The sentencing guidelines provide a nonexclusive list of aggravating factors that may justify a departure. Minn. Sent. Guidelines II.D.2.b.

Grimes does not challenge the postconviction court's decision not to hold an evidentiary hearing. Rather, Grimes challenges the legal basis of the district court's upward sentencing departure. The denial of a postconviction petition generally is subject to an abuse-of-discretion standard of review, but we apply a *de novo* standard of review to a postconviction court's determinations of questions of law. *Francis v. State*, 781 N.W.2d 892, 896 (Minn. 2010). Whether a valid basis for an upward sentencing departure exists is a question of law. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010); *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *review denied* (Minn. Aug. 26, 2009).

The existence of multiple forms of penetration is not included in the sentencing guidelines' nonexclusive list of aggravating factors. *See* Minn. Sent. Guidelines II.D.2.b. But the existence of multiple forms of penetration is recognized by the caselaw as an aggravating factor that may justify an upward sentencing departure. *See Rairdon v. State*, 557 N.W.2d 318, 327 (Minn. 1996); *State v. Kilcoyne*, 344 N.W.2d 394, 397 (Minn. 1984) ("multiple types"); *State v. Dietz*, 344 N.W.2d 386, 389 (Minn. 1984) ("multiple types"); *State v. Van Gorden*, 326 N.W.2d 633, 635 (Minn. 1982) ("different forms"); *State v. Yaritz*, 791 N.W.2d 138, 145-46 (Minn. App. 2010); *State v. Abrahamson*, 758 N.W.2d 332, 338-39 (Minn. App. 2008) ("variety of sexual acts"); *State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008); *State v. Morales-Mulato*, 744 N.W.2d 679, 692

(Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008); *State v. Sebasky*, 547 N.W.2d 93, 101 (Minn. App. 1996), *review denied* (Minn. June 19, 1996).

The postconviction court referred to this body of caselaw to support its conclusion that "Minnesota courts have consistently stated that multiple forms of penetration are a potential aggravating factor that can justify an upward departure." Grimes contends that "the post-conviction court's analysis suffers from the same infirmity as do the cases from the Court of Appeals; the sentencing court simply assumes that multiple form[s] of penetration are atypical in sexual abuse cases." Grimes further contends, "The problem with this analysis is that multiple forms of penetration are, sadly, typical" in cases involving sexual abuse of children.

Grimes's argument depends on an empirical assessment of the means typically used by persons who commit first-degree criminal sexual conduct. The district court record in this case does not include any data from which a person could conclude that, in cases of first-degree criminal sexual conduct, the frequency of multiple forms of penetration is greater than the frequency of a single form of penetration. But the absence of such data from the district court record is inconsequential in light of the applicable caselaw.

In *Adell*, this court rejected an argument that is more or less the same as Grimes's argument. Adell had argued that "multiple forms of penetration is not a valid aggravating factor because it is typical of the offense with which he was convicted." 755 N.W.2d at 774. We dispatched with that argument by stating, "The fact that a defendant has subjected a victim to multiple forms of penetration is a valid aggravating factor in first-

degree criminal sexual conduct cases." *Id.* In making that statement, we relied on supreme court caselaw applying the aggravating factor of multiple forms of penetration without conducting any empirical inquiry into the relative prevalence of multiple forms, as opposed to a single form, of penetration. *Id.* at 774-75 (citing *Rairdon*, 557 N.W.2d at 327; *Dietz*, 344 N.W.2d at 389; and *Van Gorden*, 326 N.W.2d at 635).

As in *Adell*, we interpret the supreme court caselaw to say that multiple forms of penetration in a first-degree criminal sexual conduct case is atypical as a matter of law. In essence, the supreme court has implicitly concluded that a single form of penetration is typical in cases of first-degree criminal sexual conduct. In light of the applicable caselaw, a district court may apply the aggravating factor of multiple forms of penetration without making a finding that, more often than not, persons who commit first-degree criminal sexual conduct do not engage in multiple forms of penetration. This is so even in cases involving criminal sexual conduct committed against children. *See Rairdon*, 557 N.W.2d at 320 (stating that appellant abused daughter from age 6 to age 13); *Dietz*, 344 N.W.2d at 389 (stating that appellant abused 9-year-old stepdaughter); *Adell*, 755 N.W.2d at 770 (stating that appellant abused 14-year-old stepdaughter); *Morales-Mulato*, 744 N.W.2d at 682 (stating that appellant abused 11-year-old girl); *Sebasky*, 547 N.W.2d at 96 (stating that appellant abused 10-year-old and 14-year-old boys).

In this case, the district court found that the state proved beyond a reasonable doubt that Grimes engaged in multiple forms of penetration of the two girls. The district court relied on that finding when departing upward from the presumptive guidelines sentences on counts two and three. In doing so, the district court did not err by not

conducting a fresh inquiry into whether multiple forms of penetration is atypical. The applicable caselaw provides that proof of multiple forms of penetration, by itself, is a valid aggravating factor. Thus, the postconviction court did not err by denying Grimes's petition for postconviction relief.

**Affirmed.**