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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0994**

Demiteras Al Cooper, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent

**Filed April 16, 2018
Affirmed
Worke, Judge**

Hennepin County District Court
File Nos. 27-CR-14-5026, 27-CR-14-5025

Bradford Colbert, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Grant Gunderson (certified student attorney), Minneapolis, Minnesota (for respondent)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the postconviction court abused its discretion by determining that the district court appropriately assigned a severity level nine to appellant's offense of aiding an offender. We affirm.

FACTS

On February 20, 2014, appellant Demiteras Al Cooper went to a residence to retrieve personal belongings. Cooper went into the kitchen and got into a confrontation with Q.F. Dashaunta Dmar Gomez entered the residence and shot J.H. Cooper left the residence knowing that J.H. had been shot. As Cooper pulled away, Gomez jumped into Cooper's vehicle. Cooper believed that Gomez shot J.H. and had reason to know that Gomez had the gun in his possession. Cooper drove Gomez to Gomez's residence. Cooper knew that by driving Gomez from the scene, he intentionally assisted Gomez in avoiding arrest. He also had reason to know that because Gomez had the gun, he was removing evidence from the scene and assisting Gomez in avoiding prosecution. Cooper did not report the crime to police.

Cooper was indicted on charges of first- and second-degree murder for acting alone or intentionally aiding in the death of J.H. The indictment was amended to include the unranked offense of aiding an offender after the fact, in violation of Minn. Stat. § 609.495, subd. 3 (2012).¹

¹ Gomez was charged with first- and second-degree murder and felon in possession of a firearm. *State v. Gomez*, No. A15-0128, 2016 WL 363403, at *1 (Minn. App. Feb. 1,

On December 4, 2014, Cooper pleaded guilty to aiding an offender after the fact. Cooper's plea agreement included a severity-level-nine ranking for the offense and a 134-month prison sentence. The state submitted a sentencing memorandum with justification for the level-nine ranking. Cooper did not object to the state's memorandum. The district court sentenced Cooper to 134 months in prison. The district court incorporated the state's memorandum regarding the justification for the level-nine ranking as part of its sentencing order.

In January 2017, Cooper filed a petition for postconviction relief, requesting that a "correct" severity level be assigned to the offense. The district court denied Cooper's petition, concluding that the district court appropriately exercised its discretion by adopting the state's sentencing memorandum regarding justification for the severity-level-nine ranking. This appeal followed.

DECISION

Cooper argues that he should be resentenced using a lower severity level. The district court denied Cooper's challenge to the severity-level assignment in a petition for postconviction relief. This court reviews a denial of postconviction relief for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). In doing so, this court reviews the postconviction court's legal determinations de novo and its factual findings for

2016), *review denied* (Minn. Mar. 29, 2016). A jury found Gomez guilty of second-degree murder and felon in possession of a firearm. *Id.* The district court sentenced Gomez to 60 months in prison for being a prohibited person in possession of a firearm and to 346 months in prison for second-degree murder. *Id.*

clear error. *Bonga v. State*, 797 N.W.2d 712, 718 (Minn. 2011). This court reviews a district court’s severity-level determination for an abuse of discretion. *State v. Bertsch*, 707 N.W.2d 660, 666 (Minn. 2006).

Here, Cooper pleaded guilty to aiding an offender after the fact, an unranked offense. When a district court sentences an unranked offense, the court “must assign an appropriate severity level for the offense and specify on the record why that particular level was assigned.” Minn. Sent. Guidelines 2.A.4 (2012). In doing so, the district court may consider the following factors: (1) “the gravity of the specific conduct underlying the unranked offense;” (2) “the severity level assigned to any ranked offense with elements that are similar to the elements of the unranked offense;” (3) “the conduct of and severity level assigned to other offenders for the same unranked offense;” and (4) “the severity level assigned to other offenders engaged in similar conduct.” *Id.*; *State v. Kenard*, 606 N.W.2d 440, 443 (Minn. 2000). No single factor is controlling and the list of factors is not exhaustive. *Kenard*, 606 N.W.2d at 443.

The district court adopted the state’s sentencing memorandum, which analyzed the factors considered in assigning a severity level to an unranked offense.

As to the first factor—“the gravity of the specific conduct underlying the unranked offense”—the district court found that Cooper’s conduct was “extremely serious” because Cooper was present at the time of the shooting and he drove Gomez away from the scene. The district court’s findings are supported by the record.

Gomez shot J.H. in the residence while Cooper was there. Cooper drove Gomez away from the scene, believing that Gomez shot J.H. Cooper admitted that he should have

known that Gomez left with the gun; thus, Cooper assisted in removing evidence from the scene and knew that doing so would assist Gomez in avoiding prosecution. And Cooper did not report the crime to police. These facts support the district court’s determination that Cooper’s conduct was “extremely serious.”

As to the second factor—“the severity level assigned to any ranked offense with elements that are similar to the elements of the unranked offense”—the district court, citing *Kenard*, found that the offense most similar to the offense for which Cooper was convicted was aiding an offender, in violation of Minn. Stat. § 609.495, subd. 1(a) (2012). Noting that section 609.495, subdivision 1(a), dealt with “considerably less serious underlying crimes,” the district court relied on characteristics of an offender’s conduct identified in *Kenard* that would justify a higher severity level, including the offender’s presence at, participation in, and covering up of the underlying offense. The district court found that Cooper was present during and assisted in covering up the shooting. As described above, this finding is supported by the record.

As to the third factor—“the conduct of and severity level assigned to other offenders for the same unranked offense”—the district court listed several cases cited in *Kenard* in which offenders were convicted of violating section 609.495, subdivision 3 and received severity-level rankings of seven and eight.² The district court noted that the severity levels

² Since *Kenard*, this court has released several unpublished opinions affirming severity-level assignments of eight and nine for the offense of aiding an offender, in violation of Minn. Stat. § 609.495, subd. 3, including: *State v. Wilson*, No. A15-1001, 2016 WL 1396803, at *1 (Minn. App. Apr. 11, 2016) (present in vehicle during drive-by shooting that injured two women and concealed firearm, assigned severity level eight), *review denied* (Minn. June 29, 2016); *State v. Oldenburg*, No. A09-1273, 2010 WL 2161028, at

in these comparable cases predated a modification to the sentencing guidelines that led to the increase of severity levels, making an offense previously ranked at seven now ranked at eight. See *Taylor v. State*, 670 N.W.2d 584, 587 n.3 (Minn. 2003). With the increase of the severity levels, a level seven or eight ranking would now be an eight or nine ranking.

We are also persuaded that *Kenard* supports a level-nine ranking. There are six cases cited in *Kenard*, divided into two groups based on the predicate offenses—robbery and murder. 606 N.W.2d at 444-45. The aiding-in-a-robbery offenses were assigned severity level seven. *Id.* at 445. The aiding-in-a-murder offenses were assigned severity level eight. *Id.* at 444-45. One of the murder cases is *Brayboy*. *Id.* at 444; see *State v. Patterson*, 587 N.W.2d 45, 47-48 (Minn. 1998) (discussing *Brayboy*’s conduct). *Brayboy* admitted to being present during the murders and helping the perpetrator flee the scene. *Kenard*, 606 N.W.2d at 444. *Brayboy*’s offense was assigned a severity level eight. *Id.* Similarly, *Cooper* was present at the scene and helped *Gomez* flee. *Cooper*’s offense was assigned severity level nine. Under the current sentencing scheme *Brayboy*’s offense would be assigned a severity level nine as well.

Finally, as to the fourth factor—“the severity level assigned to other offenders engaged in similar conduct”—the district court found that *Cooper*’s conduct was analogous

*1-2 (Minn. App. June 1, 2010) (aware of boyfriend’s plot to murder, assisted in disposing of body, lied to police, and concealed/destroyed evidence, assigned severity level nine); *In re Welfare of T.J.W.*, No. A07-1014, 2008 WL 224013, at *3, *11 (Minn. App. Jan. 29, 2008) (present during murder, participated in attack preceding murder, covered up murder, and misled investigators, assigned severity level eight), *review denied* (Minn. Mar. 26, 2008); *In re Welfare of C.H.*, No. C0-02-900, 2003 WL 457233, at *3 (Minn. App. Feb. 25, 2003) (chased victim with intent to cause harm, present during murder, and concealed gun, assigned severity level eight). Although not precedential, these cases are persuasive.

to the conduct of the offender in *State v. Solorzano-O'Brien*, who received a severity level ten ranking. No. A10-1514, 2011 WL 1237554, at *1 (Minn. App. Apr. 5, 2011), *review denied* (Minn. June 28, 2011). In that case, the offender, a high-ranking gang member, drove four codefendants to threaten or harm an alleged member of a rival gang. *State v. Patino*,³ No. A08-1005, 2009 WL 2225440, at *1 (Minn. App. July 28, 2009), *review denied* (Minn. Oct. 20, 2009). The victim was lured outside and one of the codefendants shot and killed him. *Id.* The appellant pleaded guilty to aiding an offender after the fact for the benefit of a gang. *Id.*

This court affirmed the severity-level ranking because the appellant was the oldest of the codefendants and exercised influence on the others, the appellant was in the car when the codefendants lured the victim outside, the appellant instructed the others to stay silent and misled the police, and the victim's family feared gang retaliation. *Solorzano-O'Brien*, 2011 WL 1237554, at *1-2. Similarly, Gomez was Cooper's stepson; thus, there was a level of influence. Gomez was a gang member. Cooper was present during the shooting. And Cooper assisted Gomez in avoiding arrest and prosecution.

In *State v. Skipintheway*, this court affirmed the district court's decision to assign a severity level eight for the crime of accomplice after the fact to first-degree murder. 704 N.W.2d 177, 183 (Minn. App. 2005), *aff'd*, 717 N.W.2d 423 (Minn. 2006). In that case, the appellant went with three individuals to a party where rival gang members would be present. *Id.* at 179. An argument arose between the individuals who arrived with the

³ The appellant used different names.

appellant and other party attendees, resulting in three individuals being shot and one being killed. *Id.* The appellant was present during the shootings but did not participate in them. *Id.* The appellant fled in a car with the shooters, advising the driver: “You didn’t see anything.” *Id.* The police stopped the vehicle and the appellant removed the ammunition from the gun and hid it and the gun in separate locations. *Id.* He also denied involvement in the shootings and misidentified an individual in the vehicle to protect him from an arrest warrant. *Id.*

Similarly, Cooper was present during the shooting and he fled in a vehicle with Gomez. Although Cooper did not personally hide the weapon, he admitted that he should have known that Gomez was in possession of the weapon when they fled; by driving Gomez from the scene, he was removing evidence and assisting Gomez in avoiding prosecution.

In sum, the district court considered the *Kenard* factors and provided sufficient reasons for its severity-level assignment. Cooper’s offense was assigned a severity level nine, a ranking that corresponds with assignments for similar conduct in comparable cases. *See State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002) (stating that the sentencing guidelines promote “uniformity, proportionality, rationality, and predictability in sentencing”). The district court did not abuse its discretion by denying Cooper’s petition for postconviction relief.

Affirmed.