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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1483**

Barbara Ann Currin, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed May 7, 2018
Affirmed
Larkin, Judge**

Ramsey County District Court
File No. 62-CR-15-10139

Cathryn Middlebrook, Chief Appellate Public Defender, Chang Y. Lau, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, Nicholas B. Wanka, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Hooten, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges her 122-month sentence for racketeering, arguing that the district and postconviction courts erred by ranking the offense at severity-level nine for

sentencing. She argues that the offense should have been ranked at severity-level seven. We affirm.

FACTS

On December 29, 2015, the state charged appellant Barbara Ann Currin with one count of racketeering and seven counts of theft by swindle for operating a criminal enterprise that fraudulently obtained Medicaid payments for private-duty nursing providers. The scheme resulted in Medicaid payments of \$2,648,539.53. Currin was on probation for medical-assistance fraud when she was charged with racketeering and theft by swindle. The state provided notice of its intent to seek an aggravated sentence.

On June 8, 2016, Currin petitioned to enter a guilty plea. According to her petition, Currin agreed to “Plead guilty to count 1 [the racketeering charge], Dismiss remaining charges. Severity level 9. Middle of the Box 134 months. No additional charges regarding this incident. (2012-2015). Concurrent.” At the plea hearing, the state described the agreement as follows:

Ms. Currin will plead guilty to count one racketeering the remaining counts will be dismissed. The court would sentence count one racketeering as a level nine offense with Ms. Currin’s four criminal history points. This would place the presumptive sentence—this would be a middle of the box sentence at 134 months.

Currin agreed to the plea agreement and pleaded guilty to the racketeering charge. The district court accepted her guilty plea.

The probation department completed a presentence investigation and sentencing worksheet indicating that Currin actually had a criminal-history score of three and that a

sentence on a severity-level nine offense with three criminal-history points would result in a presumptive sentencing range of 104-146 months and a midpoint of 122 months. At the sentencing hearing, the state acknowledged the mistake regarding Currin's criminal-history score, but still asked the district court to impose a 134-month sentence because it was the number contemplated under the plea agreement. Currin requested a midpoint sentence instead of 134 months.

The district court stated that it was "just unconscionable" that the state taxpayers had paid for Currin to live "a pretty damn good life for three years." The court then stated, "Based on [the] plea, it is the sentence of the court that [Currin] be sentenced according to the Minnesota Sentencing Guidelines for a period of 122 months."¹ The district court did not state other factors or findings to support its severity-level ranking.

On October 27, 2016, Currin wrote to the district court seeking "a sentence reduction to the 'bottom of the box,'" arguing that her "felony points had been awarded in error and that an adjustment to [her] severity level was over-looked." The district court treated the letter as a postconviction motion.

¹ The conduct underlying the racketeering offense occurred between July 31, 2012 and October 6, 2015. The sentencing guidelines did not change substantively between 2011 and 2015 regarding the unranked status of a racketeering offense, the requirements for ranking unranked offenses, and the presumptive sentencing range for a level-nine offense with three criminal-history points. See Minn. Sent. Guidelines 2.A & cmt. 2.A.04, 4, 5 (Supp. 2011); Minn. Sent. Guidelines 2.A.4, 4.A, 5.A (Supp. 2015). Because the racketeering offense was a continuing offense spanning several years, and because the guidelines regarding Currin's offense did not substantively change during these years, we apply the 2015 guidelines that were effective at the conclusion of the crime.

The Office of the Minnesota Appellate Public Defender thereafter filed a supplemental memorandum in support of Currin’s pro se petition for postconviction relief. The attorney for Currin argued that the district court erred by ranking the racketeering charge as a severity-level nine offense without making supportive findings, as required by the sentencing guidelines. The attorney also argued that the racketeering charge should have been ranked as a severity-level seven offense because it is slightly more serious than a theft-by-swindle crime, and not similar to the violent crimes ranked at severity-level nine. The state argued that Currin forfeited her challenge to the district court’s severity-level ranking by agreeing to it as part of the plea agreement and by failing to object at sentencing. The state also argued that any error in the district court’s failure to place its analysis on the record was harmless in light of the facts in the record.

The postconviction court denied the petition for relief. The postconviction court concluded that Currin “forfeited her right to challenge the sentence to which she agreed in the plea agreement.” Nonetheless, the postconviction court addressed the merits of the challenge and concluded that “the facts support . . . sentencing the unranked offense as a Level IX offense.”

Currin appeals.

D E C I S I O N

This court reviews a denial of postconviction relief for an abuse of discretion. *State v. Hokanson*, 821 N.W.2d 340, 357 (Minn. 2012). We review the postconviction court’s legal determinations de novo and its factual findings for clear error. *Staunton v. State*, 842 N.W.2d 3, 6 (Minn. 2014). “A postconviction court does not abuse its discretion unless it

has exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Henderson v. State*, 906 N.W.2d 501, 505 (Minn. 2018) (quotation omitted).

As a preliminary matter, the parties disagree regarding whether the postconviction court erred by concluding that Currin forfeited her challenge to the district court’s severity-level ranking. Because the postconviction court ultimately considered the merits of the challenge, we review its decision on the merits, without considering the forfeiture issue.

Before a district court sentences a defendant for a felony-level offense, the presumptive sentence must be calculated based on the severity level of the offense and the offender’s criminal history. *State v. Bertsch*, 707 N.W.2d 660, 666 (Minn. 2006). While most offenses have an assigned severity level, certain offenses have not been assigned a severity level because “(1) the offense is rarely prosecuted; (2) the offense covers a wide range of underlying conduct; or (3) the offense is new and the severity of a typical offense cannot yet be determined.” Minn. Sent. Guidelines cmt. 2.A.04 (Supp. 2015); *Bertsch*, 707 N.W.2d at 666. The offense of racketeering has not been assigned a severity level; therefore a district 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, 5.A.

When choosing a severity level, the district court may consider

- a. the gravity of the specific conduct underlying the unranked offense;
- b. the severity level assigned to any ranked offense with elements that are similar to the elements of the unranked offense;

- c. the conduct of and severity level assigned to other offenders for the same unranked offense; and
- d. the severity level assigned to other offenders engaged in similar conduct.

Minn. Sent. Guidelines 2.A.4; *see State v. Kenard*, 606 N.W.2d 440, 443 (Minn. 2000) (recommending the district court consider these four factors when assigning a severity level to an unranked offense). “[I]nformation from the Sentencing Guidelines Commission on other offenders sentenced on the same or similar offenses can help guide the exercise of [the district court’s] discretion” in assigning a severity level to an unranked offense. *Kenard*, 606 N.W.2d at 443.

On appeal, we review a district court’s severity-level determination for an abuse of discretion. *Bertsch*, 707 N.W.2d at 666. “The failure of the district court to state the factors and considerations supporting its decision on the record can be a reason to find the district court abused its discretion.” *Id.* at 666-67.

Although the district court likely abused its discretion by failing to make a record of the factors and considerations supporting its ranking, the postconviction court remedied that failure by considering the parties’ postconviction submissions and the facts within the record to determine whether Currin’s offense was properly sentenced at severity-level nine. In doing so, the postconviction court considered the factors set forth by the supreme court in *Kenard* and explained its analysis. We turn to Currin’s challenges to the postconviction court’s analysis of those factors.

Gravity of the Specific Conduct Underlying the Unranked Offense

Currin argues that, because the conduct underlying the crime is essentially a three-year form of theft by swindle, the offense should have been ranked similarly to that offense. Theft by swindle is a level-six offense. Minn. Sent. Guidelines 5.A.

The postconviction court focused on the specific conduct underlying the offense, reasoning that

[t]he gravity of [Currin's] crime supports a severity level IX ranking. [Currin] committed a multi-million dollar Medicaid fraud crime over the course of 3 years. The amount of the loss, being significantly higher than the threshold amounts of the predicate offense, supports a severity level IX ranking. The Court agrees with the State's argument that [Currin's] theft is particularly serious because she stole money not from just any taxpayer source, but from the Medicaid program, funds dedicated to Minnesota's most vulnerable people. [Currin's] scheme was extremely sophisticated. She drew a large number of people into her scheme. Her scheme spanned three years. It reflected total disregard for those harmed by her actions. The gravity of [Currin's] conduct supports a level IX ranking.

The postconviction court thoroughly addressed the first *Kenard* factor, and we do not discern an abuse of discretion in its reasoning.

Severity Level Assigned to Ranked Offenses with Similar Elements

Currin argues that the district court should have assigned a severity-level seven because her racketeering offense was essentially the culmination of seven theft-by-swindle offenses. She also argues that, because her racketeering offense did not involve violence, like other level-nine offenses, the offense should have been ranked at a lower severity level. *See id.* (ranking serious drug crimes, first-degree assault, kidnapping, and manslaughter in the first-degree as severity-level nine offenses).

The postconviction court rejected this argument, reasoning

[Currin] argues that ranked level IX offenses all involve the infliction, or the threat of inflicting, considerable physical harm on victims. While this is true, the appellate courts have at times affirmed racketeering sentences ranked as level IX, thus recognizing that looking at physical versus economic harm as wholly dissimilar is too narrow a view. The ranked level IX offenses all involve the infliction of great harm; the Court finds [Currin's] pattern of criminal conduct depriving the State's program for the aid of vulnerable people of over [two] million dollars to be a similar infliction of great harm.

This court has stated that “the Minnesota Legislature has declared by its criminal penalty provisions, that, short of murder, racketeering and higher-degree drug crimes are the most serious offenses.” *State v. Kujak*, 639 N.W.2d 878, 885 (Minn. App. 2002), *review denied* (Minn. Mar. 19, 2002). In *State v. Huynh*, the supreme court concluded that the district court did not abuse its discretion by assigning severity-level eight to a racketeering offense. 519 N.W.2d 191, 198 (Minn. 1994). The supreme court noted that “the penalties for racketeering are similar to the penalties for offenses ranked by the [sentencing guidelines] as severity level VIII offenses, such as first degree assault,” citing the 20-year statutory maximum prison sentences for the two offenses. *Id.* The supreme court reasoned that “[t]he legislature clearly intended to punish severely those persons who engage in racketeering.” *Id.*

The postconviction court's equation of physical harm and significant financial harm is consistent with the legislature's enactment of similar statutory penalties for violent crimes—like first-degree assault—and racketeering, which need not result in physical harm.

Conduct of and Severity Level Assigned to Other Offenders for the Same Unranked Offense

In its postconviction submissions, the state filed documents showing that 29 racketeering defendants had their offenses ranked at severity-level nine between 1981 and 2015. Appellate caselaw similarly indicates that racketeering offenses are frequently ranked at levels eight, nine, and ten, and involve a variety of financial crimes. *See, e.g., State v. Longo*, ___ N.W.2d ___, ___, 2018 WL 1463376, at *7-8 (Minn. App. Mar. 26, 2018) (affirming assignment of severity-level nine to racketeering offense involving drug crimes); *State v. Ober*, Nos. A12-2163, A13-1439, 2014 WL 502812, at *1, *4 (Minn. App. Feb. 10, 2014) (affirming assignment of severity-level nine to racketeering offense involving 36 fraudulent mortgage loans), *review denied* (Minn. Apr. 29, 2014); *State v. Ober*, No. A12-2219, 2014 WL 211230, at *1, *4 (Minn. App. Jan. 21, 2014) (affirming assignment of severity-level nine to racketeering offense involving 37 fraudulent mortgage loans), *review denied* (Minn. Mar. 26, 2014); *State v. Gustafson*, No. A12-1293, 2013 WL 4404241, at *5-6 (Minn. App. Aug. 19, 2013) (affirming assignment of severity-level ten to racketeering offense involving kidnapping, terroristic threats, drug and weapons crimes, and mortgage-fraud schemes), *review denied* (Minn. Oct. 23, 2013); *State v. Maxwell*, No. A09-2018, 2011 WL 1544505, at *1, *7-8 (Minn. App. Apr. 26, 2011) (affirming assignment of severity-level ten to racketeering offense involving a mortgage-fraud scheme), *review denied* (Minn. July 19, 2011); *State v. Skaar*, A09-1843, 2010 WL 3958431, at *2-3, *5 (Minn. App. Oct. 12, 2010) (affirming assignment of severity-level eight to racketeering offense involving a mortgage-loan scheme), *review denied* (Minn.

Dec. 22, 2010); *State v. Perry*, No. C1-03-0298, 2004 WL 292092, at *10-11 (Minn. App. Feb. 17, 2004) (affirming assignment of severity-level eight to racketeering offense involving drug crimes).

The postconviction court reasoned that “[o]ther racketeering offenders have been assigned a level IX severity level for similar conduct.” Given the record before the postconviction court and the caselaw, we cannot say that the district court abused its discretion in analyzing this factor.²

Severity Level Assigned to Offenders who Engaged in Similar Conduct

The postconviction court reasoned that “[t]he severity level assigned to other offenders who engaged in similar conduct supports ranking [Currin’s] offense as a level IX offense.” The postconviction court cited *State v. Rosenlund*, No. A09-0358, 2010 WL 771773, at *1 (Minn. App. Mar. 9, 2010), *review denied* (Minn. May 26, 2010), as an example. Currin argues that the reliance on *Rosenlund* is misplaced because the defendant in that case took significantly more money.

The defendant in *Rosenlund* was estimated to have obtained between \$6 million and \$15 million through fraud, misrepresentation, recruitment of straw buyers, and the manipulation of money. 2010 WL 771773, at *5. The facts in *Rosenlund* are similar to the facts here. Other cases are also factually similar, including both *Ober* decisions and *Maxwell*, which all involved complex schemes to defraud businesses or people of large

² Unpublished cases are not precedent but may be persuasive. Minn. Stat. § 480A.08, subd. 3 (2016); *State v. Ellis-Strong*, 899 N.W.2d 531, 537 (Minn. App. 2017). They are useful when considering the third and fourth *Kenard* factors because they provide relevant examples.

sums of money. The husband-wife duo in the two *Ober* cases caused more than \$5 million in damages, and each of their offenses was ranked at severity-level nine. 2014 WL 502812, at *1, *3; 2014 WL 211230, at *1, *4. The *Maxwell* case involved a mortgage-fraud scheme that caused more than \$2 million in damages, and the underlying offense was ranked at severity-level ten. 2011 WL 1544505, at *1, *7. In sum, caselaw supports the postconviction court's reasoning.

In conclusion, the postconviction court thoroughly considered the *Kenard* factors and determined that Currin's offense warranted a severity-level nine ranking. The postconviction court did not base its conclusion on clearly erroneous facts or an error of law, or otherwise abuse its discretion in determining that nine is an appropriate severity-level for the offense. We therefore affirm the postconviction court's conclusion that the record supports a severity-level ranking of nine, and we affirm its denial of postconviction relief.

Affirmed.