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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0487**

State of Minnesota,
Respondent,

vs.

Semaj Maurice Dow, Jr.,
Appellant.

**Filed October 5, 2020
Affirmed
Reilly, Judge**

Mower County District Court
File No. 50-CR-18-131

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Megan A. Burroughs, Assistant County
Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Larkin, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

REILLY, Judge

Appellant challenges his resentencing on remand from this court, arguing that the
district court abused its discretion by imposing multiple sentences for possession offenses

relating to the same firearm because the sentences exaggerated the criminality of his conduct. We affirm.

FACTS

The facts of appellant Semaj Dow Jr.’s conviction are set forth in more detail in this court’s earlier opinion. *State v. Dow*, No. A18-1856, 2019 WL 4594236, at *1 (Minn. App. Sept. 23, 2019), *review denied* (Minn. Nov. 27, 2019). Briefly, respondent State of Minnesota charged Dow with six offenses: (1) possession of a firearm by an ineligible person; (2) possession of ammunition by an ineligible person; (3) possession of a firearm with an obliterated serial number; (4) fifth-degree possession of a controlled substance (methamphetamine); (5) possession of a firearm by an unlawful user of a controlled substance; and (6) possession of drug paraphernalia. *Id.* at *2. A jury found Dow guilty of counts 1 through 5. *Id.* But the jury did not return a verdict on count 6 and the state later dismissed that count. *Id.* The district court then imposed concurrent sentences of 60, 60, 15, and 21 months of imprisonment, respectively, on counts 1 through 4, and imposed a sentence of 212 days in jail on count 5. *Id.*

Dow appealed and this court affirmed his convictions. *Id.* at *4. But this court concluded that counts 3 and 5 “arose from the same behavioral incident” and thus the court reversed Dow’s sentence and remanded for resentencing. *Id.* at *5.

On remand, Dow argued that imposing a felony sentence for count 3—possession of a firearm with an obliterated serial number—unfairly exaggerated the criminality of his conduct because he already received a felony sentence for possessing the same firearm in count 1. The district court disagreed, concluding:

I do have concerns that the Felon in Possession feels a little draconian in some cases with the sentences we, sort of, have to impose most of the time; however, when you add that a felon in possession of, basically, untraceable firearm that does make it, significantly, more concerning to public safety.

The district court then vacated the original sentence for count 5, and affirmed the presumptive 15-month sentence for count 3, to run concurrently with the other sentences previously imposed. This appeal follows.

D E C I S I O N

Dow challenges the district court's imposition of a sentence for count 3, arguing that because he already received a felony sentence for possessing a firearm in count 1, the added felony sentence for count 3, which related to the same firearm contemplated in count 1, exaggerated the criminality of his conduct. Thus, Dow argues that his sentence for count 3 should be reversed, and the case remanded with instructions that he be sentenced for the gross-misdemeanor offense charged in count 5, instead of the felony offense charged in count 3.

"We review a district court's determination of whether sentences exaggerate the criminality of the defendant's behavior for abuse of discretion." *State v. Alger*, 941 N.W.2d 396, 403 (Minn. 2020). "Only in a rare case will a reviewing court reverse imposition of a presumptive sentence." *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) (quotation omitted), *review denied* (Minn. July 20, 2010).

Generally, appellate courts determine whether a sentence exaggerates the criminality of conduct by comparing it to sentences in similar cases. *See, e.g., State v. Cruz-Ramirez*, 771 N.W.2d 497, 512 (Minn. 2009) (stating that "we have upheld similar

sentences” and then concluding that the district court did not abuse its discretion by imposing multiple sentences); *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992) (“Whether consecutive sentencing over exaggerates criminality is determined by this court, based on our observations of sentences in similar cases.”); *State v. Brom*, 463 N.W.2d 758, 765 (Minn. 1990) (affirming multiple consecutive life sentences for multiple counts of premeditated murder, based on precedent). The defendant bears the burden of showing that the sentence unfairly exaggerates the criminality of his conduct. *See State v. Hough*, 585 N.W.2d 393, 398 (Minn. 1998) (affirming sentence because defendant “has made no such showing” that sentence exaggerates criminality).

In *State v. Salyers*, this court held that the district court properly sentenced the defendant for unlawful possession of a firearm and possessing a firearm with an obliterated serial number. 842 N.W.2d 28, 37 (Minn. App. 2014), *aff’d*, 858 N.W.2d 156 (Minn. 2015).¹ Similarly, in *State v. Watson*, the defendant was convicted of ineligible person in possession of a firearm, and possession of a firearm on which the serial number had been obliterated. 829 N.W.2d 626, 629 (Minn. App. 2013), *review denied* (Minn. June 26, 2013). On appeal, the defendant challenged the district court’s imposition of sentences for both offenses. *Id.* at 631. We affirmed the defendant’s sentences, “notwithstanding that both offenses were committed as part of the same conduct.” *Id.* at 633-34.

¹ The issue of whether the defendant was properly sentenced for ineligible person in possession of a firearm, and possession of a firearm with an obliterated serial number, was not before the supreme court. *Salyers*, 858 N.W.2d at 157 n.1.

Dow argues that *Watson* “does not control here” because *Watson* “did not address, nor did it foreclose, the fairness issue that [Dow] raises here.” Indeed, the court in *Watson* did not contemplate whether the defendant’s sentence exaggerated the criminality of his conduct. But in determining whether a sentence unfairly exaggerates the criminality of a defendant’s conduct, we compare a defendant’s sentence with sentences imposed on other offenders in similar cases. *Neal v. State*, 658 N.W.2d 536, 548 (Minn. 2003). *Watson* applies because the defendant in that case was convicted of, and sentenced for, the same offenses at issue in this case. *See id.* And a comparison of *Watson* and *Salyers* to this case, shows that Dow’s sentence did not exaggerate the criminality of his conduct.

Dow also contends that the district court’s imposition of multiple sentences for counts 1 and 3 exaggerates the criminality of his conduct because “[t]hese separate sentences aim to punish [him] for the same conduct—the possession of a single firearm.” But the district court specifically rejected this argument: “when you add that a felon in possession of, basically, untraceable firearm that does make it, significantly, more concerning to public safety.” The district court’s consideration of the added seriousness of a felon possessing an untraceable firearm supports the court’s determination that felony sentences for counts 1 and 3 do not exaggerate the criminality of Dow’s conduct.

Dow also argues that the imposition of multiple felony sentences for counts 1 and 3 “not only” affects “the fairness of [his] current sentences, but also any future sentences.” But Dow cites no authority to support his argument that consideration of a potential, future sentence is warranted in analyzing whether a sentence exaggerates the criminality of the

defendant's conduct. Rather, the focus is on the defendant's conduct related to the sentence at issue.

Finally, Dow argues that when his "multiple sentences are compared with those of other firearms offenders, the disparity of his sentence becomes apparent." To support his position, Dow refers to statistics from the Minnesota Sentencing Guidelines Commission 2018 Annual Sentencing Practices, as well as the sentences imposed in Mower County for offenders convicted of firearms offenses. But as the state points out, Dow's "comparison is too narrow" because "it only looks at convictions for one crime—felon in possession of a firearm." Dow's comparison fails to address similarly situated offenders—those offenders who were convicted of possession of a firearm by an ineligible person *and* possession of a firearm with an obliterated serial number.

In sum, Dow's sentence is akin to the sentences received by similarly situated offenders in *Watson* and *Salyers*. Dow cites no comparable cases to support his position that his sentence exaggerates the criminality of his conduct. And Dow received the presumptive sentence for his offenses. "Presumptive sentences are seldom overturned." *Delk*, 781 N.W.2d at 428 (quotation omitted). As a result, Dow is unable to establish that the district court's imposition of sentences for both counts 1 and 3 exaggerates the criminality of his conduct.

Affirmed.