

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1731**

Michael James Rye, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed August 22, 2022
Affirmed in part, reversed in part, and remanded
Johnson, Judge**

Hennepin County District Court
File No. 27-CR-18-24095

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Gina D. Schulz,
Assistant Public Defenders, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Nicole Cornale, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Ross, Judge; and Slieter,
Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Michael James Rye pleaded guilty to three counts of disseminating child pornography. He later filed a post-conviction petition to challenge his sentences. We conclude that the post-conviction court erred by determining that Rye is required to register

as a predatory offender. We also conclude that the post-conviction court did not err by rejecting Rye's other arguments. Therefore, we affirm in part, reverse in part, and remand for correction of the error concerning registration.

FACTS

Between 2017 and 2018, law-enforcement officers investigating the dissemination of child pornography on peer-to-peer file-sharing websites traced numerous digital images to Rye's personal computer. In August 2018, officers seized Rye's computer pursuant to a search warrant and found 337 digital files containing child pornography. Rye admitted that he possessed the files found by the officers and that they contain child pornography. He also admitted that he made certain files containing child pornography available to others on peer-to-peer file-sharing websites.

In September 2018, the state charged Rye with eight counts of dissemination of pornographic work involving a minor, in violation of Minn. Stat. § 617.247, subd. 3(a) (2016), and three counts of possession of pornographic work involving a minor, in violation of Minn. Stat. § 617.247, subd. 4(a) (2018). Each of counts 1 through 8 of the complaint alleged that Rye disseminated a particular digital file containing child pornography on a particular date, with the dates ranging from November 9, 2017, to July 30, 2018. Each of counts 9 through 11 alleged that Rye possessed a digital file containing child pornography on August 16, 2018.

In January 2019, Rye pleaded guilty to counts 1, 2, and 3, which alleged dissemination of child pornography. He admitted that he made certain digital files containing child-pornography available for others to download on November 9, 12, and 13,

2017. He did not make any admissions concerning any of the other charges. The state agreed to dismiss the remaining charges. The parties agreed that the district court would impose concurrent sentences and that the longest sentence would be an executed sentence of 54 months of imprisonment.

Consistent with the plea agreement, the district court imposed three concurrent presumptive sentences: a stayed sentence of 24 months, a stayed sentence of 36 months, and an executed sentence of 54 months. Rye requested execution of the two stayed sentences, and the district court executed them. With respect to each conviction, the district court imposed a requirement that Rye register as a predatory offender. Rye did not pursue a direct appeal of his convictions or sentences.

In December 2020, Rye filed a three-page *pro se* petition for post-conviction relief and a 64-page handwritten memorandum of law in which he asserted multiple challenges to his sentence. The post-conviction court forwarded his petition to the office of the state appellate public defender. *See* Minn. Stat. § 590.02, subd. 1(4) (2020); *Paone v. State*, 658 N.W.2d 896, 899-900 (Minn. App. 2003). An assistant state public defender entered an appearance on Rye's behalf and filed a supplemental memorandum, which focused on Rye's predatory-offender registration requirement. In October 2021, the post-conviction court issued an order in which it denied Rye's petition. Rye appeals.

DECISION

I. Registration Requirement

With the assistance of an assistant state public defender, Rye argues that the post-conviction court erred by ruling that he is required to register as a predatory offender.

A person must register as a predatory offender if “the person was charged with . . . a felony violation of . . . any of the following [offenses], and convicted of . . . that offense or another offense arising out of the same set of circumstances.” Minn. Stat. § 243.166, subd. 1b(a)(1) (2020). The offense of possession of child pornography—for which charges were filed but dismissed—is one of the enumerated offenses requiring registration. *Id.*, subd. 1b(a)(2)(vii). The parties agree that the offense of dissemination of child pornography—to which Rye pleaded guilty—is *not* one of the enumerated offenses requiring registration.¹ The question on which the parties disagree is whether the possession charges that were dismissed arose out of “the same set of circumstances” as the dissemination charges to which Rye pleaded guilty.

That question must be analyzed according to two recent supreme court opinions. In *State v. Lopez*, 778 N.W.2d 700 (Minn. 2010), the supreme court explained the meaning of section 243.166, subdivision 1b(a)(1), as follows:

The “same set of circumstances” provision in the statute requires registration where the same general group of facts gives rise to both the conviction offense and the charged

¹We question whether the parties’ agreement is an accurate reflection of the applicable law. Section 243.166 describes one of the enumerated offenses as “possessing pornographic work involving a minor in violation of section 617.247.” Minn. Stat. § 243.166, subd. 1b(a)(2)(vii). Section 617.247 is entitled “Possession of Pornographic Work Involving Minors.” Subdivision 4 of that section criminalizes possession of child pornography. Subdivision 3 of the same section criminalizes dissemination of child pornography. In *In re Welfare of J.C.L.*, No. A21-1018, 2022 WL 1210405 (Minn. App. Apr. 25, 2022), *rev. denied* (Minn. July 19, 2022), this court stated that dissemination of child pornography in violation of section 617.247 “is an offense enumerated for predatory registration” in section 243.166, subdivision 1b(a)(2)(vii). *Id.* at *5. Nonetheless, for the limited purposes of this non-precedential opinion, we will accept the parties’ agreement that dissemination of child pornography is not an enumerated offense, and we will resolve the issue that the parties have briefed.

predatory offense. In other words, the circumstances underlying both must overlap with regard to time, location, persons involved, and basic facts. Although the conviction offense need not be based on identical facts to the charged predatory offense, the facts underlying the two must be sufficiently linked in time, location, people, and events to be considered the “same set of circumstances.”

Id. at 706. In that case, two brothers were convicted of aiding and abetting a first-degree controlled substance crime based on evidence that they sold methamphetamine to a confidential informant. *Id.* at 701-02. The brothers also were charged with aiding and abetting kidnapping based on an allegation that they held the confidential informant and another person hostage at a later date, but those charges were dismissed. *Id.* The supreme court held that the brothers’ drug convictions did not “arise out of the same set of circumstances” as the kidnapping charges because the sale of drugs occurred ten days before the alleged kidnapping, the stipulated facts underlying the drug conviction did not mention the alleged kidnapping, the alleged kidnapping occurred at a different location, and the persons involved in the alleged kidnapping were somewhat different from the persons involved in the drug sale. *Id.* at 706.

In *State v. Berry*, 959 N.W.2d 184 (Minn. 2021), the supreme court emphasized that the factors identified in *Lopez*—“time, location, persons involved, and basic facts”—should be “read narrowly” and “cannot be applied so broadly as to include merely ‘related’ circumstances.” *Id.* at 188. The supreme court clarified that “[t]he circumstances need not be identical in all respects, but there must be sufficient overlap with regard to time, location, persons involved, *and* basic facts.” *Id.* (quotation omitted). In that case, a woman’s husband forced employees of a business into a breakroom at gunpoint. *Id.* at 185. One

minute later, the woman entered the business and told her husband that it was “time to leave.” *Id.* at 186. The couple drove away and were apprehended in Ohio the next day. *Id.* The woman pleaded guilty to the offense of aiding an offender to avoid arrest, which is not an enumerated offense. *Id.* The state dismissed charges of aiding and abetting kidnapping and false imprisonment, which are enumerated offenses. *Id.* at 186-87. The supreme court held that the facts underlying the woman’s conviction of an unenumerated offenses did not sufficiently overlap with the facts underlying the enumerated offenses of aiding and abetting kidnapping and false imprisonment. *Id.* at 188-91.

In this case, the post-conviction court reasoned that “the charged offense of possession of child pornography and convicted offense of dissemination of child pornography are so closely linked” because “without possession, dissemination is impossible.” The post-conviction court also reasoned that “the basic facts and location of the two offenses align.” Accordingly, the post-conviction court concluded that Rye’s dissemination convictions and his possession charges arose out of the same set of circumstances. Rye contends on appeal that the post-conviction court erred because, given the undisputed facts, the *Lopez-Berry* factors are not satisfied. We apply a *de novo* standard of review. *Lopez*, 778 N.W.2d at 705.

We begin our analysis with the first *Lopez-Berry* factor: time. Rye pleaded guilty to three dissemination counts by admitting that he made certain child-pornography files available for others to download on November 9, 12, and 13, 2017. In the three possession charges that were dismissed, the state alleged that Rye possessed certain child-pornography files on August 16, 2018, which was the date on which law-enforcement officers seized his

computer. The interval between Rye's dissemination and alleged possession is approximately nine months, which is much longer than the intervals of ten days in *Lopez* and one minute in *Berry*. See *id.* at 706; *Berry*, 959 N.W.2d at 186. Accordingly, there is no overlap in the timing of the dissemination convictions and the possession charges.

We continue by analyzing the third *Lopez-Berry* factor: persons involved. Rye contends that there is no "indication that the same people were involved in the two sets of offenses." Rye is correct that the factual record is lacking details about the other person or persons involved in the dissemination convictions. The record is silent as to whether any of the three files relating to the dissemination convictions are the same as any of the files relating to the possession charges. In addition, the dissemination convictions necessarily involved one or more persons other than Rye and the children depicted in the downloaded digital files, while the possession charges did not involve any other adult person. In *Lopez*, in which one person was involved in the charged offense but not involved in the offense of conviction, the supreme court noted that there was "a slightly different group of people" involved in the two categories of offenses, which supported the conclusion that they did not arise from the same set of circumstances. 778 N.W.2d at 702, 706. Similarly, in this case, the record does not reveal sufficient overlap in the persons involved in the dissemination convictions and the possession charges.

We interpret *Berry* to require sufficient overlap with respect to *all* of the *Lopez-Berry* factors. See 959 N.W.2d at 188. That requirement is not satisfied here because there is no overlap with respect to the time factor and insufficient overlap with respect to the persons-involved factor. Consequently, the possession charges that were dismissed did not

arise out of “the same set of circumstances” as the dissemination charges to which Rye pleaded guilty. Thus, the post-conviction court erred by denying that part of Rye’s post-conviction petition. Therefore, we remand the matter to the post-conviction court with instructions to modify Rye’s sentence so that he is not required to register as a predatory offender.

II. *Pro Se* Arguments

In a *pro se* supplemental brief, Rye makes four general arguments for reversal of the post-conviction court’s order, with multiple parts to each argument. Rye’s brief is somewhat broader in scope than the post-conviction court’s order. Rye does not argue that the post-conviction court erred by not considering any argument that he may have presented in his petition. Accordingly, we will consider only those arguments and issues that were resolved by the post-conviction court.

First, Rye argues that the post-conviction court erred by rejecting his argument that the district court incorrectly calculated his criminal-history score. The post-conviction court explained that the so-called *Hernandez* method determined Rye’s criminal-history score for each of his three convictions. *See State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981). Specifically, the post-conviction court stated that Rye had a criminal-history score of 0 for the first sentence, a criminal-history score of 1.5 (rounded down to 1) for the second sentence, and a criminal-history score of 3 for the third sentence. Rye contends that *Hernandez* should not apply on the ground that he had no prior convictions before the convictions in this case, unlike the defendant in *Hernandez*, who had prior convictions unrelated to the convictions for which he was being sentenced. Rye does not cite any

caselaw in support of his argument. As far as we are aware, the supreme court has not limited *Hernandez* in the manner urged by Rye. Rather, the *Hernandez* method applies whenever “a defendant is sentenced for multiple offenses on the same day.” *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). Thus, the post-conviction court properly ruled that the district court did not err by applying the *Hernandez* method.

Second, Rye argues that the post-conviction court erred by rejecting his argument that the district court erred by ordering him to complete a sex-offender assessment and sex-offender treatment. The post-conviction court reasoned that, given the offenses of conviction, an assessment was required before sentencing. *See* Minn. Stat. § 609.3457, subd. 1 (2016). The post-conviction court also noted that the district court would have been required to order any recommended sex-offender treatment if it had not sentenced Rye to prison. *See id.*, subd. 3. But the district court did sentence Rye to prison and did not order sex-offender treatment. Rye has not identified any error in the post-conviction court’s analysis. Thus, the post-conviction court properly ruled that the district court did not err by requiring Rye to undergo a sex-offender assessment before sentencing.

Third, Rye argues that the post-conviction court erred by rejecting his argument that the district court erred by imposing a five-year term of conditional release. The post-conviction court reasoned that a five-year term of conditional release is required by statute. The applicable statute provides that “when a court commits a person to the custody of the commissioner of corrections for violating this section, the court shall provide that after the person has been released from prison, *the commissioner shall place the person on conditional release for five years.*” Minn. Stat. § 617.247, subd. 9 (emphasis added). Rye

contends that this statute does not apply because its last sentence refers to section 609.3455, subdivision 8, which does not refer back to section 617.247. But a cross-reference is unnecessary. Section 617.247 adopts the provisions of section 609.3455, subdivision 8, with respect to the “terms of conditional release,” which encompasses issues such as conditions of release, the costs of treatment, notification of victims, and revocation of release. *See* Minn. Stat. § 609.3455, subd. 8 (2016). In any event, nothing in section 609.3455, subdivision 8, states that conditional release may not be imposed on a defendant being sentenced for disseminating child pornography. Thus, the post-conviction court properly ruled that Rye’s sentence includes a five-year term of conditional release.

Fourth, Rye argues that the post-conviction court erred by rejecting his argument that he received ineffective assistance of counsel. The post-conviction court considered Rye’s claim that his trial attorney did not explain to him the difference between concurrent and consecutive sentences. The post-conviction court reasoned that Rye failed to establish both requirements of his claim: first, that his attorney’s representation fell below an objective standard of reasonableness and, second, ““there is a reasonable probability that, but for counsel’s unprofessional errors, the results of the proceeding would have been different.”” *See Nissalke v. State*, 861 N.W.2d 88, 94 (Minn. 2015) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)). We agree with the post-conviction court that Rye cannot establish the second requirement because he received concurrent sentences, which results in less imprisonment than if he had received consecutive sentences. Thus, the post-conviction court properly ruled that Rye did not receive ineffective assistance of counsel.

Affirmed in part, reversed in part, and remanded.