STATE OF MINNESOTA
IN COURT OF APPEALS
A06-0810

State of Minnesota,
Respondent,

vs.

Jennifer Ann Johnson,
Appellant

Filed January 15, 2008
Affirmed
Minge, Judge

Cass County District Court
File No. 11-K3-04-001319

Lori Swanson, Attorney General, Kathleen L. Winters, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Earl E. Maus, Cass County Attorney, Cass County Courthouse, P.O. Box 3000, 300 Minnesota Avenue, Walker, MN 56484 (for respondent)

John M. Stuart, State Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Stoneburner, Judge; and

Minge, Judge.

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

MINGE, Judge

Appellant challenges her first-degree controlled-substance crime conviction, arguing that key evidence was obtained as a result of a search warrant issued without probable cause. Appellant also challenges her sentence, arguing that the district court's denial of her motion for a downward dispositional departure was an abuse of discretion. We affirm.

FACTS

The events leading to the search of appellant Jennifer Ann Johnson's home arose out of an investigation of Steven Shake, a suspected drug dealer, by the Central Minnesota Drug Task Force (DTF). Hoping that Shake would lead the task force to his supplier, the DTF conducted a series of controlled buys of methamphetamine between Shake and an informant in early November 2004.

On November 10, the informant bought all of Shake's inventory of methamphetamine, then notified the DTF that Shake intended to obtain more methamphetamine by the end of the day. Following the informant's tip, the DTF set up constant surveillance of Shake's movements. The officers followed Shake to Johnson's rural residence. After Shake left Johnson's home, Shake and the informant arranged another transaction at Shake's bar. After the informant completed his purchase, the task force arrested Shake.

Following Shake's arrest, a DTF officer obtained a warrant to search Johnson's residence. The search of her home revealed cash with serial numbers matching the

money the informant used to purchase methamphetamine from Shake earlier that day and the day before. Johnson was charged with violating Minn. Stat. § 152.021, subd. 1(1) (2004) (first degree sale of a controlled substance). Johnson moved to suppress the evidence found in her home and dismiss the complaint, claiming that there was not probable cause to issue a search warrant. The district court denied the suppression motion. After a trial, a jury found Johnson guilty. The district court sentenced her to 86 months, executed, the presumptive guideline sentence. This appeal follows.

D E C I S I O N

I.

The first issue is whether the district court erred by denying Johnson's motion to suppress the evidence seized from her home. Johnson argues that because the original warrant application lacked probable cause and sufficient evidence linking her to a specific crime, the search warrant was not valid, and the results of the search were inadmissible.

Issuing magistrates are asked to make practical, common-sense decisions as to whether, given all the circumstances presented to them, there is a fair probability that contraband or evidence of a crime will be found in a particular place. *Illinois v. Gates*, 462 U.S. 213, 238, 103 S. Ct. 2317, 2332 (1983). We accord great deference to a district court's determination that probable cause exists to issue a search warrant. *State v. Rochefort*, 631 N.W.2d 802, 804 (Minn. 2001). We do not review that determination de novo. *Id*. On appeal, this court examines whether there was a substantial basis to conclude that probable cause existed. *State v. Harris*, 589 N.W.2d 782, 787-88 (Minn.

1999). Substantial basis in this context means a "fair probability," given the totality of the circumstances, "that contraband or evidence of a crime will be found in a particular place." *State v. Zanter*, 535 N.W.2d 624, 633 (Minn. 1995) (citations omitted). Applying the totality-of-the-circumstances standard, we review the search warrant application as a whole, not its component parts in isolation. *State v. Botelho*, 638 N.W.2d 770, 776 (Minn. App. 2002).

Here, the warrant application requested authorization to search "[t]he trailer house and appurtenant outbuildings at [a specified address], Cass County Minnesota . . . an off-white color trailer house, with the 911 address sign posted at the end of the driveway . . . ." Johnson claims that the facts recited in the warrant application read more like a statement supporting a search of Shake, his home, and his bar. Johnson asserts that the application provided insufficient evidence linking her or her residence to any crime. Johnson further contends that the information set out in the warrant application was too vague and stale to support a finding of probable cause.

Although the information provided in the warrant application may have been adequate to justify searches of other locations, it included information adequate to search Johnson's residence. The warrant application recounted the DTF investigation on November 10, 2004, including the following: After Shake said he would obtain more methamphetamine, investigators followed Shake on rural roads until he parked in front of Johnson's trailer. After Shake left the trailer, the informant called Shake to purchase more methamphetamine. Soon after this call, the informant purchased more

methamphetamine from Shake, and the officers then arrested Shake for selling methamphetamine.

The warrant application also recounts that, as a result of prior investigations, the DTF had identified an association between Shake and appellant Johnson. It states that in September 2004, the DTF had attempted to identify Shake's source by setting up drug purchases. At that time, Shake told the informant that he was out of methamphetamine and would return within an hour. Although surveillance officers followed Shake to the rural area where Johnson lived, officers were unable to "place Shake down at a specific address." When Shake returned, the informant purchased a substance that field-tested positive for methamphetamine. The DTF agent also stated in the search warrant application that, in August 2004, the Motley Police Department stopped a vehicle leaving Shake's home, and the vehicle was registered to Johnson at her home address.

Reviewing the search warrant application as a whole, we conclude that the district court did not abuse its discretion in determining that there was a fair probability that contraband or evidence of wrongdoing would be located at Johnson's residence as shown on the warrant and that this constituted probable cause. Accordingly, we conclude that there was an adequate factual basis for issuance of a warrant and affirm the district court's denial of Johnson's motion to suppress the evidence obtained from her home.

II.

The second issue is whether the district court abused its discretion in denying appellant Johnson's motion for a downward dispositional departure in her sentence based on her amenability to probation and her acceptance into a treatment program. The district

court denied the motion and committed Johnson to the custody of the Commissioner of Corrections for the presumptive 86-month-guideline sentence. Johnson contends that she was a proper candidate for probation and treatment under *State v. Trog*, 323 N.W.2d 28 (Minn. 1981).

Generally, a sentencing court should not depart from the sentencing guidelines unless aggravating or mitigating factors are present. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). A district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also* Minn. Sent. Guidelines cmt. II.D.03 (stating "that mitigating factors and the written reasons supporting the departure must be substantial and compelling to overcome the presumption in favor of the guideline sentence"). Only in a rare case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Johnson contends that, under *State v. Donnay*, 600 N.W.2d 471, 473-74 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999), a district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation or offense-related, mitigating circumstances are present. Johnson also argues that, when considering whether a defendant is suited for treatment in a probationary setting, the district court should consider a defendant's age, prior record, remorse, cooperation, attitude, and support of friends or family. *Trog*, 323 N.W.2d at 31. Johnson stated at her sentencing hearing that she had been accepted into Teen Challenge, a 13-

month faith-based treatment program; that she was well-suited for individualized treatment in a probationary setting; that other than the conviction in this proceeding, she had no prior record except for three minor traffic violations; and that she was a proper candidate for a dispositional departure. Johnson takes issue with the following statements by the district court at the sentencing hearing:

> the message has to be clear that when there is a sale of controlled substance that the consequences are severe and that there is a price to be paid.
>
> The price to be paid for not imposing this type of sentence would send the message that you can do this and not face the consequences. I'm sorry that you're in this position. I wish you weren't, but I don't think I can do anything different.

Johnson contends that sending a message is not a proper reason to deny her request for a departure and that the district court should have done something different.

Johnson is a sympathetic defendant—she is in her mid-30's, has a minor daughter, has supportive family and friends in the community, holds an accounting degree, and had no prior felony record. But it does not follow that the district court abused its discretion in denying a downward departure. Johnson cites none of the mitigating factors listed in the sentencing guidelines as a basis for a downward departure. *See* Minn. Sent. Guidelines II.D.2.a(1)-(5). And although the list of mitigating factors is not intended to be exhaustive (*id*. cmt. II.D.201), both the sentencing guidelines and our supreme court's prior decisions strongly encourage the district courts to apply the presumptive sentence unless "substantial and compelling circumstances" exist for departure. The controlled-substance-offense statutes permit certain downward dispositional departures based on

amenability to probation when the offender has been accepted into, and can respond to, a treatment program. Minn. Stat. § 152.152 (2006). But the statute does not require the district court to grant such a departure when those conditions are met. *See id.* As *Kindem* notes, only in a rare case will this court reverse the imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Although the record may have furnished the district court with an adequate basis to grant a dispositional departure, we only review for abuse of discretion. Based on the record, we conclude that the district court did not abuse its discretion in imposing the presumptive guideline sentence.

Affirmed.

Dated: