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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0095
A07-0132**

State of Minnesota,
Respondent,

vs.

Steven Douglas Stanke,
Appellant.

**Filed January 15, 2008
Affirmed
Worke, Judge**

Anoka County District Court
File No. K3-05-9116

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

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John M. Stuart, State Public Defender, Marie Wolf, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Worke, Presiding Judge; Klaphake, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

WORKE, Judge

On appeal from a sentence imposed for fleeing a peace officer resulting in death, appellant argues that the district court erred in imposing a greater-than-double departure on the ground that the officer who died was particularly vulnerable when performing official duties. Because the record supports the sentence based on the atypical egregiousness of the crime, we affirm.

DECISION

We review a district court's departure from the guidelines' presumptive sentence for an abuse of discretion. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). Reversal is warranted only if the reasons for the departure are improper or inadequate and there is insufficient evidence to justify an aggravated sentence for the offense of which the defendant was convicted. *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003).

Appellant Steven Douglas Stanke argues that the district court abused its discretion in imposing a greater-than-double departure from the presumptive sentence. Upward sentencing departures must be based on evidence that the defendant committed the offense in a particularly serious way. *Id.* The offense must involve "[s]ubstantial and compelling circumstances" that "make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Generally, when an upward departure is justified, "the upper limit will be double the presumptive sentence length." *State v. Williams*, 608 N.W.2d 837, 840 (Minn. 2000) (quotation omitted).

“Only in cases of *severe* aggravating circumstances may the district court impose a greater-than-double departure from the presumptive sentence” *Shattuck*, 704 N.W.2d at 140 (emphasis added) (quotation omitted).

Here, appellant led police officers on a high-speed car chase, traveling at speeds up to 110 miles per hour, on a busy interstate highway during rush hour, in a stolen vehicle. Appellant had been using methamphetamine for up to two weeks prior to the car chase and had little to no sleep during that time. As appellant drove, he talked on a cell phone and steered with his knees while he injected himself with methamphetamine. Officer Shawn Silvera attempted to place stop sticks on the highway in order to deflate appellant’s vehicle’s tires. Appellant struck Silvera while traveling between 90 and 100 miles per hour. Appellant made no attempt to brake or to steer away from the officer. Silvera was killed and another motorist was severely injured.

Appellant pleaded guilty to fleeing a peace officer in a motor vehicle resulting in death and fleeing a peace officer in a motor vehicle resulting in great bodily harm. Appellant agreed that aggravating factors existed and that he would receive at least a double-durational departure from the upper end of the range (432 months) for fleeing a peace officer resulting in the death of Officer Silvera. Appellant also agreed to a 21-month consecutive sentence for fleeing a peace officer resulting in great bodily harm, which was not a departure.

Following a sentencing hearing, the district court found that facts had been established that showed substantial and compelling reasons to justify a double departure for fleeing a peace officer in a motor vehicle resulting in death. The district court found

that appellant: (1) fled police in a stolen vehicle (committing a felony), knowing that he had a felony warrant for his arrest; (2) drove at speeds up to 110 miles per hour; (3) fled on a busy interstate during rush hour, drove in an extremely aggressive manner, and created a traveling zone of danger; (4) had been using methamphetamine for up to two weeks and had little to no sleep; (5) injected himself with methamphetamine, which can cause increased self-confidence, paranoia, violent erratic behavior, unreasonable risks, and sleep-deprived psychosis while driving; (6) steered with his knees and talked on a cell phone while he injected himself with methamphetamine; and (7) did not attempt to brake or steer away from Officer Silvera. The court also found that a “severe aggravating circumstance” existed to justify more than a double departure. The court found that “Officer Silvera, as a victim, was particularly vulnerable. He was performing official duties when [appellant] struck him.” The district court sentenced appellant to 480 months in prison for fleeing a peace officer resulting in death and a consecutive sentence of 21 months for fleeing a peace officer resulting in great bodily harm.

Appellant does not challenge the double-durational departure but rather, argues that the court impermissibly relied on the particular vulnerability of Silvera as a severe aggravating factor in imposing a greater-than-double departure. Appellant contends that the district court could not rely on the particular vulnerability of Silvera who was performing official duties, because the offense, fleeing a peace officer resulting in death, necessarily involves an officer who is performing official duties.

A defendant may not be sentenced for a crime other than the crime of conviction; therefore, a district court may rely only on the egregious conduct underlying that offense.

Taylor, 670 N.W.2d at 588. And the reasons for departing must not be elements of the underlying crime. *State v. Thao*, 649 N.W.2d 414, 424 (Minn. 2002). An individual is guilty of fleeing a peace officer in a motor vehicle resulting in death when a peace officer “is acting in the lawful discharge of an official duty, and the perpetrator knows or should reasonably know the same to be a peace officer, and who in the course of fleeing causes the death of a human being.” Minn. Stat. § 609.487, subd. 4 (2004). Appellant argues that because Silvera was performing an official duty by placing the stop sticks on the road, this was either an element or so close to an element of the offense that it cannot fairly be used to increase his sentence. Appellant’s argument is flawed. Any victim who appellant may have struck instead of the officer could have been considered to be particularly vulnerable. Therefore, just because appellant struck a police officer instead of a civilian does not mean that the officer could not have been particularly vulnerable.

But generally, a victim is considered “particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, which was known or should have been known to the offender.” Minn. Sent. Guidelines II.D.2.b.(1). The victim’s vulnerability is not a factor unless it was a “substantial factor” in the defendant’s accomplishment of the crime. *State v. Gardner*, 328 N.W.2d 159, 162 (Minn. 1983). Placing the stop sticks on the highway did not render Silvera particularly vulnerable just because he was performing an official duty and the district court’s finding is not supported by the record.

However, a sentencing departure should be affirmed if alternative grounds exist in the record that would justify the departure even if the reasons given for the departure are improper. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985). This crime clearly

represented remarkable egregiousness and greater than normal danger to the safety of other people. *See, e.g., State v. Gartland*, 330 N.W.2d 881, 882-83 (Minn. 1983) (holding that the departure was justified because the defendant's conduct was "aggravated in the extreme" when the defendant, under the influence of alcohol and without any sleep, fell asleep at the wheel and hit a pole; fled the accident at a high rate of speed in a residential area in order to avoid police detection; hit a vehicle while driving at 57-67 miles per hour; and killed the occupants of the other vehicle that was moving at 8 miles per hour); *State v. Anderson*, 356 N.W.2d 453, 454-55 (Minn. App. 1984) (holding that the departure was justified based on the egregiousness of the crime when the defendant had been driving under the influence of six or seven rum cokes and approximately five beers; intentionally drove his car at 70-80 miles per hour in a blocked-off construction area; hit a construction worker with such force that his body was thrown 119 feet and his shoes and socks were torn off; and continued to drive after he knew he hit something). The ultimate question is whether appellant's actions were so significantly different from those of other persons similarly situated that an upward departure is justified. *State v. Esler*, 553 N.W.2d 61, 64 (Minn. App. 1996), *review denied* (Minn. Oct. 15, 1996). Here, aggravating circumstances in the record justify the departure. Appellant was driving at speeds in excess of 110 miles per hour while talking on a cell phone, injecting himself with methamphetamine, and steering with his knees. Additionally, appellant made no attempt to avoid striking the officer. Thus, even though the district court relied on several factors which justified a departure, the atypical egregiousness of the crime supports a greater-than-double departure.

Affirmed.