STATE OF MINNESOTA
IN COURT OF APPEALS
A07-938

State of Minnesota,
Appellant,

vs.

Jonas Gerald Grice,
Respondent.

Filed April 8, 2008
Affirmed; motion denied
Willis, Judge

Scott County District Court
File No. 70-2005-03250

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

Patrick J. Ciliberto, Scott County Attorney, Neil G. Nelson, Assistant County Attorney, Scott County Justice Center, 200 West Fourth Street, Shakopee, MN 55379 (for appellant)

Robert E. Oleisky, Oleisky & Oleisky, P.A., 250 Second Avenue South, Suite 225, Minneapolis, MN 55401-2161 (for respondent)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Crippen, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

WILLIS, Judge

The state appeals from respondent's sentence, arguing that the district-court judge impermissibly injected himself into plea negotiations and abused his discretion by imposing a sentence that was a downward dispositional and durational departure from the presumptive guidelines sentence. We affirm.

FACTS

On the evening of August 30, 2004, an adult female, H.S., reported to police that her ex-boyfriend, respondent Jonas G. Grice, had sexually assaulted her. H.S. stated that, at approximately 6:00 a.m. that morning, she and Grice had driven to a park in Shakopee where they engaged in consensual sexual intercourse. Grice then told H.S. that he wanted to have anal sex with her. H.S. refused but Grice nevertheless began to penetrate her anally. H.S. tried to get up but Grice pulled her hair and told her that he would "cut her if she did not sit still." After the act, Grice reportedly told H.S. that if they were going to be together, she "had better get used to it."

Grice was charged with one count of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subds. 1(c), 2 (2004). The state subsequently moved to amend the complaint to add a second count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subds. 1(e)(i), 2 (2004).

On the date that trial was to begin, the parties discussed the possibility of a plea agreement. As a result of off-the-record discussions, the state offered to withdraw its motion to amend the complaint in exchange for Grice's plea of guilty to the original

count of third-degree criminal sexual conduct. The state further offered to recommend that Grice serve no more than a year in the Scott County jail instead of seeking a 58-month prison sentence, the presumptive sentence for Grice's crime under the Minnesota Sentencing Guidelines. Grice rejected the offer.

Grice then entered a "straight plea" of guilty to the original count of third-degree criminal sexual conduct. Because the prosecutor was not present in the courtroom at the time of the plea hearing, the district court summarized the plea situation: "My understanding is [Grice] will plead to third degree [criminal sexual conduct] and that the State will withdraw the amended complaint and that sentencing will be left to the court after a presentence investigation."

A presentence-investigation report recommended that Grice receive the presumptive guidelines sentence of an executed term of 58 months' imprisonment. In February 2007, despite the state's request for a 58-month sentence, the district court sentenced Grice to a stayed one-year sentence and placed Grice on probation for two years. As a condition of his probation, the district court ordered Grice to serve 90 days in the Scott County jail. The state appeals.

D E C I S I O N

I. The district court did not impermissibly inject itself into plea negotiations.

We consider first the state's claim that the district court impermissibly injected itself into plea negotiations when it told Grice at the plea hearing that it would consider sentencing him as a gross misdemeanor and giving him no more than 90 days in jail.

A district court's "ultimate judicial responsibility" as it relates to the supervision of plea agreements is to make reasonably certain that a defendant has not been improperly induced to plead guilty or permitted to bargain for a plea that is excessively lenient. *State v. Johnson*, 279 Minn. 209, 215-16, 156 N.W.2d 218, 223 (1968). As a result of this responsibility, the supreme court has cautioned district courts against "impermissibly participat[ing] in plea negotiations." *State v. Nelson*, 257 N.W.2d 356, 359 n.1 (Minn. 1977); *see also State v. Moe*, 479 N.W.2d 427, 429 (Minn. App. 1992) (stating that a district court should not "improperly inject" itself into plea negotiations), *review denied* (Minn. Feb. 10, 1992). That is, a district court may neither usurp the responsibility of counsel nor participate directly in plea negotiations. *Johnson*, 279 Minn. at 216, 156 N.W.2d at 223. And it is error for a district court to promise a particular sentence at the time of the plea. *See State v. Anyanwu*, 681 N.W.2d 411, 415 (Minn. App. 2004); *State v. Vahabi*, 529 N.W.2d 359, 361 (Minn. App. 1995). When a district court impermissibly injects itself into plea negotiations the guilty plea is per se invalid. *See Moe*, 479 N.W.2d at 429-30 (concluding, without determining that the state was prejudiced, that the district court participated directly in plea negotiations and reversing a sentence).

Here, we conclude that the state's argument is unpersuasive because, although the district court stated at the plea hearing how it likely would sentence Grice, the record shows that the district court did not promise Grice a particular sentence before accepting his guilty plea. *See Anyanwu*, 681 N.W.2d at 415 (reversing a conviction after the district court promised the defendant a particular sentence in advance of the defendant's guilty

plea). At the plea hearing, the following exchange between the district court and the defendant occurred:

> THE COURT: And the record should reflect [that the state] is asking for a felony conviction. [The state] wants a year in jail. The court does not agree with either of these *but will wait for the PSI*. The court had indicated it would consider, number one, a gross misdemeanor sentence, and, number two, if there was to be time to be served and the court's -- my understanding it would be no more than 90 days. *That doesn't mean the court would give you 90 days.* Again, if the PSI comes out the way I think the PSI will come out, I think if they gave you some factors, it would be even better than that. You would have no prior record. You have no subsequent record. You've had no contact with this woman for two-and-a-half years.
>
> So, besides that has anybody else made any threats or promises to force you to do this today?
>
> THE DEFENDANT: No.

(Emphasis added.) The district court did not, therefore, promise Grice a particular sentence; the district court stated that it would wait for the results of the presentence investigation. The record does not show that the district court "directly and unequivocally promised the defendant a particular sentence in advance." *Anyanwu*, 681 N.W.2d at 415.

The state also claims that an exchange between the district court and Grice at the plea hearing shows that the district court abandoned its role as an "independent examiner" of the plea agreement. *See Johnson*, 279 Minn. at 216 n.11, 156 N.W.2d at 223 n.11 (quotation omitted). In support of this assertion, the state identifies the following colloquy:

> THE COURT: But, again, I don't think you're an awful person and I'm not going to treat you like an awful person.
>
> THE DEFENDANT: Right.
>
> THE COURT: And don't be surprised when the State comes down really hard, but I'll be here; okay. And I think if you come off [in the presentence investigation] like I think you're going to come off, you're going to be just fine with me.
>
> THE DEFENDANT: All right. Thank you.

But even during this exchange, the district court conditioned Grice's sentence on the outcome of the presentence investigation.

At sentencing, Grice's counsel stated to the district court that "it was our understanding that you would sentence [Grice] as a gross misdemeanor . . . [and] there'd be a 90 day cap on any times which you indicated." The state argues that this statement shows an expectation on Grice's part that the district court would impose a particular sentence. But based on the statements made on the record at the plea hearing, the district court did not unequivocally promise to sentence Grice in a particular way in exchange for Grice's plea.

Because the record does not show that the district court stepped into the position of one of the parties to the negotiations or promised Grice a particular sentence in advance of his plea, the district court did not impermissibly inject itself into plea negotiations.

II. The district court did not abuse its discretion by departing downwardly from Grice's presumptive sentence.

We consider next the state's contention that the district court did not provide adequate reasons on the record to support its decision to depart downwardly from the presumptive sentence under the sentencing guidelines. This court reviews a district court's departure from the guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

A district court "has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). That is, the sentence ranges in the sentencing guidelines "are presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines II.D. A district court, therefore, must impose the presumptive sentence unless the case involves "substantial and compelling circumstances" that warrant a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Here, the district court departed both dispositionally and durationally from Grice's presumptive guidelines sentence. The presumptive sentence for Grice's offense, as determined by the nature of the offense and his criminal-history score, is an executed term of 58 months' imprisonment. But the district court sentenced Grice to (1) one year in jail, stayed; (2) two years' probation; (3) 90 days in the Scott County jail as a condition of his probation; and (4) pay restitution.

To support a downward dispositional departure from the presumptive guidelines sentence, a district court may consider both offender-related and offense-related

mitigating factors. *See State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). But to support a downward durational departure, a district court may consider only offense-related mitigating factors. *Id.* (stating that unamenability to probation—an offender-related factor—may be used to support a dispositional departure but not a durational departure).

At sentencing, the district court cited the following reasons in support of its downward departures: (1) Grice's "variety of mental health issues . . . that could affect his ability to make a good decision"; (2) Grice had not reoffended in the "two and a half years after the event"; (3) there was a three-year sexual relationship between Grice and H.S.; and (4) the consensual nature of the sexual conduct that occurred moments before the assault. The fact that Grice had not reoffended is relevant to the offender-related factor of amenability to probation, but the remaining factors that the district court relied on are offense-related. For example, Grice's "mental health issues" show that Grice, "because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Minn. Sent. Guidelines II.D.2.a(3). And the long relationship between Grice and H.S. and the consensual nature of the sexual conduct that occurred just before the offense also support the district court's determination that Grice's offense was not as serious as the typical offense of third-degree criminal sexual conduct. Because the district court stated four valid reasons on the record to support its decision to depart dispositionally and because the district court stated three valid reasons on the record to support its decision to depart durationally, the district court's downward sentencing departures were not an abuse of its discretion.

III. Minn. R. Crim. P. 28.05, subd. 1(1), does not provide for attorney fees on appeal.

Grice moves this court for attorney fees, citing Minn. R. Crim. P. 28.04, subd. 2(6), which applies to pretrial prosecution appeals. But this appeal was taken under Minn. R. Crim. P. 28.05, subd. 1(1), which applies to sentencing appeals and does not provide for appellate attorney fees. Because the rules do not provide for attorney fees when the state appeals from a sentence, rather than from a pretrial order, we deny Grice's motion.

Affirmed; motion denied.