STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1543

State of Minnesota,
Respondent,

vs.

Robert Mathison,
Appellant.

Filed May 20, 2008
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 06052936

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

Mike Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

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

JOHNSON, Judge

Robert Mathison pleaded guilty to the issuance of a dishonored check. He was sentenced to 50 months of imprisonment, which is an upward durational departure from the presumptive guidelines sentence. Mathison appeals, arguing that his sentence is improper because the district court did not make findings of fact at the sentencing hearing to support the upward departure. We conclude that the district court stated reasons for the upward departure at the sentencing hearing and that the record justifies the stated reasons. Therefore, we affirm.

FACTS

Robert Mathison obtained two paint sprayers from a Sherwin-Williams paint-supply store by presenting a personal check in the amount of $3,621. The check was drawn on Mathison's checking account but was returned because the account had been closed four months earlier. According to the criminal complaint, one of the paint sprayers was left at a pawn shop on the date of purchase in exchange for approximately $350.

Mathison was charged with one count of issuance of a dishonored check in violation of Minn. Stat. § 609.535, subds. 2, 2a(a)(1) (2004), and one count of theft by swindle over $2,500, in violation of Minn. Stat. § 609.52, subds. 2(4) (Supp. 2005), 3(2) (2004). The complaint also indicated the state's intent to seek an upward durational departure to as much as 60 months pursuant to the career offender statute, Minn. Stat.

§ 609.1095, subd. 4 (Supp. 2005), because Mathison had more than five prior felony convictions and the charged offenses were part of a pattern of criminal conduct.

At a November 2, 2006, plea hearing, Mathison pleaded guilty to the dishonored-check charge, and the theft-by-swindle charge was dismissed. Mathison also waived his rights under *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), to have a jury determine whether he was a career offender pursuant to section 609.1095, subdivision 4. Furthermore, in a colloquy with his attorney, Mathison admitted that he was eligible for sentencing under the career offender statute:

> Q. Now, with respect to your prior background, you and I have talked about how the career offender statute is written, right?
>
> A. Right.
>
> Q. And you'd agree that this case, with the charge, would have a presumptive commit on its face, right; that is, that the normal sentence would be for you to go to prison?
>
> A. Right.
>
> Q. And that you'd agree that you also have enough felony convictions where you'd meet—satisfy that portion of the career offender statute?
>
> A. Right.
>
> Q. And, finally, you would agree that your criminal history, at least a significant portion of it, is all property-related offenses, so that a jury could find and you're agreeing that that in fact does constitute a pattern of similar behavior?
>
> A. Yes, it does.

> Q. And that based upon those three things, that you would meet the statutory definition of a career offender and should you not come back, the judge could depart from the Sentencing Guidelines and give you an aggravated sentence because of that?
>
> A. Yes.

The parties agreed that Mathison would be released without bail pending sentencing and that the presumptive guidelines sentence would be applied if Mathison appeared for sentencing as scheduled. The prosecutor stated that "part of the agreement is this: Mr. Mathison, in this three-week period, will have to be law-abiding as well, so if he picks up any new charges, that would be grounds for the Court to impose the 60-month sentence, as well as if he fails to appear."

A sentencing hearing was scheduled for November 27, 2006. Mathison did not appear on that date because he was hospitalized with heart and kidney problems. The sentencing hearing was continued to the following week, and then continued again, due to Mathison's continuing heart and kidney problems. Mathison also failed to appear for the December 29, 2006, sentencing hearing because he was undergoing an emergency root canal. Rather than set a sentencing hearing for the fourth time, the district court issued a bench warrant for Mathison's arrest. For at least a couple of months, Mathison remained in contact with his attorneys but did not turn himself in. On May 7, 2007, Mathison was arrested on the bench warrant.

At a May 23, 2007, sentencing hearing, the district court heard arguments from counsel concerning the district court's options with respect to the duration of the sentence. The state argued that a sentence of 60 months was required; Mathison's

attorney argued that the district court had discretion to impose any sentence between the presumptive guidelines sentence (which counsel referenced, inconsistently, as 22 or 23 months) and 60 months. Mathison's attorney urged the district court to impose a sentence of between 30 and 36 months to account for Mathison's failure to appear for sentencing without a bench warrant. After counsel had made their arguments, the district court concluded the hearing by stating:

> Everybody said everything? Court herewith does find you guilty and based upon your plea in this matter and does commit you to the Commissioner of Corrections for the State of Minnesota for the term of 50 months, 5-0, until events discharge you by due process of the law or competent authority. It's further ordered that you be given credit for 117 days credit on that sentence.

Mathison appeals, arguing that the district court erred by imposing a 50-month sentence without making any findings of fact to justify an upward departure from the presumptive sentence.

D E C I S I O N

When imposing an upward durational departure for a felony, "the court shall state, on the record, findings of fact as to the reasons for departure." Minn. R. Crim. P. 27.03, subd. 4(C). Essentially the same requirement is contained in the Minnesota Sentencing Guidelines, which state that a district judge must "disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D. The sentencing guidelines are intended "to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following

conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history." Minn. Sent. Guidelines I.

In *Williams v. State*, 361 N.W.2d 840 (Minn. 1985), the supreme court stated, in subparagraph 1 of its concluding paragraph, that "[i]f no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." *Id.* at 844. The *Williams* court also stated, in subparagraph 2 of its concluding paragraph, that "[i]f reasons supporting the departure are stated, [a reviewing] court will examine the record to determine if the reasons given justify the departure." *Id.* A court may not rely on a plea agreement as the sole basis for a departure if the plea agreement, "standing alone," merely refers to a particular agreed-upon sentence. *See State v. Misquadace*, 644 N.W.2d 65, 71-72 (Minn. 2002). But a court may rely on a pre-sentencing report that recites the defendant's criminal history. *See id.* at 72.

At the sentencing hearing, the district court stated that the sentence was "based upon [Mathison's] plea." This is a statement of reasons for the departure, although it is not a complete statement of reasons. The state contends, however, that "the record is replete with the bases for the upward departure sentence." The state is correct. The career offender statute was the subject of extensive discussion at the plea hearing six months before the sentencing hearing. A review of the entire district court record leaves no doubt that the district court, the prosecutor, the defense attorney, and Mathison himself understood that the career offender statute could be applied and, in fact, was applied at the sentencing hearing. Thus, the district court's statement is sufficient to constitute "reasons supporting the departure" pursuant to subparagraph 2 of *Williams*.

361 N.W.2d at 844; *see also State v. Martinson*, 671 N.W.2d 887, 894 (Minn. App. 2003). But the stated reason, by itself, is "inadequate." *Williams*, 361 N.W.2d at 844; *see also Misquadace*, 644 N.W.2d at 66-67, 72 (referring to district court record because district court "cited only the plea agreement," in which the state agreed to "recommend an aggregate sentence of 266 months"). The inadequacy of the stated reason raises the question whether "there is sufficient evidence in the record to justify departure"; if so, "the departure will be affirmed," but if not, "the departure will be reversed." *Williams*, 361 N.W.2d at 844; *see also State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008) (referring to pre-*Blakely* practice of "independently examin[ing] the record").

At the plea hearing, Mathison admitted facts that support the imposition of an upward departure pursuant to the career offender statute, which provides, in relevant part:

> Whenever a person is convicted of a felony, and the judge is imposing an executed sentence based on a Sentencing Guidelines presumptive imprisonment sentence, the judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence *if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct*.

Minn. Stat. § 609.1095, subd. 4 (Supp. 2005) (emphasis added). To reiterate, Mathison admitted that he has "enough felony convictions [to] satisfy that portion of the career offender statute," that his "criminal history" includes enough "property-related offenses, so that a jury could find . . . a pattern of similar behavior," and ultimately "that based upon those . . . things, that you would meet the statutory definition of a career offender

and . . . the judge could depart from the Sentencing Guidelines and give you an aggravated sentence because of that."

The record supports the sentence imposed by the district court because the record clearly establishes the predicate facts necessary to justify an upward departure under the career offender statute. This is true notwithstanding the fact that the factual support is derived from plea proceedings. We interpret *Misquadace* to forbid reliance on a plea agreement "standing alone" because plea agreements typically reflect an agreement between the parties on a particular length of sentence, in a conclusory manner, without regard for whether there is a factual basis for the agreed-upon sentence. *See* 644 N.W.2d at 71-72. The plea proceeding in this case, however, contains conclusive evidence of the predicate facts necessary for an upward departure pursuant to the career offender statute. Furthermore, this is not a case in which the district court merely adopted an agreed-upon sentence suggested by a plea agreement. In fact, at the sentencing hearing, the parties did *not* agree on the length of the sentence, and the sentence selected by the district court is one that neither party had urged. *Cf. Misquadace*, 644 N.W.2d at 71-72 (reversing district court for adopting sentence suggested by plea agreement); *State v. Rannow*, 703 N.W.2d 575, 579-80 (Minn. App. 2005) (same); *State v. Sanchez-Sanchez*, 654 N.W.2d 690, 694 (Minn. App. 2002) (same). Thus, it is apparent that the district court, when it departed from the guidelines, relied on the facts established during the plea hearing, not on any agreement between the parties on a specific, bargained-for sentence.

In sum, Mathison's admissions at the plea hearing constitute "sufficient evidence . . . to justify departure," and, thus, "the departure [is] affirmed." *Williams*, 361

N.W.2d at 844; *see also Martinson*, 671 N.W.2d at 893-94 (affirming because record supported district court's reference to defendant's mental condition as reason for downward dispositional departure).

Affirmed.