STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2396

State of Minnesota,
Respondent,

vs.

Brian Andrew Phillips,
Appellant.

Filed January 6, 2009
Affirmed
Halbrooks, Judge

Carver County District Court
File No. 10-CR-05-1130

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

James W. Keeler, Jr., Carver County Attorney, Mary E. Shimshak, Assistant County Attorney, Carver County Justice Center, 604 East Fourth Street, Chaska, MN 55318 (for respondent)

Richard L. Swanson, 207 Chestnut Street, Suite 235, P.O. Box 117, Chaska, MN 55318 (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Halbrooks, Judge; and Harten, 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

HALBROOKS, Judge

In this appeal from the district court's denial of postconviction relief, appellant argues that (1) the postconviction court abused its discretion by not granting him an evidentiary hearing, (2) he should have received the same sentence as a co-offender, and (3) the sentencing court abused its discretion in declining to depart dispositionally from the sentencing guidelines. We affirm.

FACTS

On November 21, 2005, appellant Brian Andrew Phillips, Herbert Schneider, and S.L.A. were at a friend's apartment. S.L.A., who was 16 at the time, had already consumed a lot of alcohol before arriving at the apartment; she stumbled when ascending the steps to the apartment. Appellant and S.L.A. were kissing in front of the others in the apartment when they decided to seek some privacy. They eventually went into the bathroom, where appellant undressed S.L.A. and pushed her onto the floor. Appellant then engaged in forcible vaginal sex with S.L.A. After about one-half hour, Schneider entered the bathroom and forced S.L.A. to perform oral sex on him. After this, Schneider forcibly anally penetrated S.L.A., while appellant simultaneously forcibly vaginally penetrated her again. Schneider then left the bathroom, and appellant forcibly vaginally penetrated S.L.A. a third time.

Based on these events, appellant was arrested and charged with five counts of criminal sexual conduct: two first-degree counts, two second-degree counts, and one third-degree count. Appellant later pleaded guilty to a first-degree count based on the

victim's mental impairment. He moved the district court for a dispositional departure from the presumptive sentence based on his amenability to probation, evidenced in part by his voluntary participation in a sex-offender treatment program. The district court declined to depart and in January 2007, imposed the presumptive sentence of 144 months. The district court cited both the substantial likelihood of appellant reoffending and the low likelihood that treatment would work as the rationale for its decision not to depart.

Schneider had also been arrested, and his case was proceeding to jury trial, scheduled for April 2007. In mid-March, S.L.A.'s mother told a victim-witness coordinator that S.L.A.'s "anxiety level [was] pretty high." After this conversation, and about a week before Schneider's trial date, S.L.A.'s mental-health therapist telephoned the prosecutor and victim-witness coordinator to advise against having S.L.A. testify. According to the victim-witness coordinator, the therapist said that testifying would be "too traumatic" for and not in the best short- or long-term mental-health interest of S.L.A., whose mental health was "very fragile." After the phone call from S.L.A.'s therapist, the prosecutor and victim-witness coordinator met with S.L.A., who said that she would testify at Schneider's trial. But as the trial approached, S.L.A. wavered, and her willingness to testify became uncertain. The state offered Schneider the opportunity to plead guilty to a third-degree charge with a stayed sentence.

Appellant believed the sentencing disparity between Schneider and himself to be unjust and asked the prosecutor to reconsider the state's position and allow him to modify his sentence. The state declined to reconsider, appellant petitioned for postconviction

relief, and the district court held a hearing on the petition. Appellant's request for relief was premised on the failure of the state to disclose evidence that the victim was not in an appropriate state of mind to testify. The district court ordered S.L.A.'s mental-health therapist to disclose any communications that the therapist had with the state regarding S.L.A.'s mental health before appellant was sentenced. The district court subsequently found that, when appellant was sentenced, the state had no information that S.L.A.'s mental health would have prevented her from testifying against him. The district court denied appellant's petition and request for an evidentiary hearing. This appeal follows.

D E C I S I O N

I.

Appellant first takes issue with the district court's denial of an evidentiary hearing on his postconviction petition. We review the decision of a postconviction court for an abuse of discretion, although legal issues are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). The postconviction court is not required to hold an evidentiary hearing "unless facts are alleged which, if proved, would entitle a petitioner to the requested relief." *Fratzke v. State*, 450 N.W.2d 101, 102 (Minn. 1990).

Appellant alleges that the prosecutor knew or should have known that S.L.A.'s mental state may have precluded her from testifying against him and, therefore, had a duty to disclose this information. This raises a legal issue: whether a prosecutor has a duty to inquire about a witness's mental state and to disclose the mental state to the defense. The district court's order, in relying on the fact that the prosecutor had no

knowledge of the witness's mental state, implies that the district court concluded that no legal duty of inquiry exists.

The state violates a defendant's due-process rights when it withholds, in good or bad faith, evidence that is material to guilt or punishment and favorable to the defendant. *Brady v. Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196–97 (1963). Evidence that a key prosecution witness is incompetent to stand trial in the witness's own criminal matter must be disclosed. *State v. Hunt*, 615 N.W.2d 294, 298 (Minn. 2000). But there is a difference between competency to testify as a witness and competency to stand trial as a defendant. *Id.* at 300. A witness is competent to offer testimony if the witness "understands the obligation of an oath and is capable of correctly relating the facts." *Id.* In contrast, competency to stand trial focuses on the abilities to consult with counsel and participate in the defense. *Id.*

Appellant blurs the distinction between the competency standards. S.L.A. was not evaluated by a psychologist for her competency to stand trial because she was not facing trial as a defendant. Appellant does not allege that at any time before he was sentenced S.L.A. was incompetent to testify—i.e., that she did not understand the gravity of being under oath and was unable to accurately relate the facts of her assault. Even after appellant was sentenced, the mental-health therapist's advice to the prosecutor was not relevant to S.L.A.'s competence to testify; the therapist was concerned about the effect of testifying on S.L.A.'s subsequent mental health, not the effect of her mental health on her testimony. This is not the sort of exculpatory or impeaching evidence that the *Brady* rule

requires prosecutors to disclose. Because there is no duty to disclose this evidence, there can be no corresponding duty to inquire.

Further, in response to appellant's unsupported assertions, the district court conducted an in camera review of a court-ordered response from S.L.A.'s therapist. The therapist advised the district court that she had communicated with law enforcement on three occasions: when she made her mandatory report, when she notified a detective that S.L.A. would give a statement, and when she gave her own statement to the police.

The district court found that the state never had any information before appellant's sentencing that S.L.A. was incompetent to testify, and nothing in the record contradicts this finding. We therefore conclude that the district court did not abuse its discretion by denying the request for an evidentiary hearing and denying the postconviction petition.

II.

Appellant argues that he should have received the same, lesser sentence that his co-defendant Schneider received. We review the decision of a postconviction court for an abuse of discretion. *Leake*, 737 N.W.2d at 535. Although the sentencing guidelines seek to achieve equity, fairness, and uniformity in sentencing, one cannot simply compare the sentence of one defendant to his accomplices' sentences. *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983). Rather, a defendant's sentence must also be measured against the sentences of other, unrelated offenders. *Id.*

In *Vazquez*, the defendant participated in a gang rape and was sentenced to double the presumptive sentence, while his accomplice received the presumptive sentence. *Id.* at 111. The supreme court agreed that the accomplice was at least equally culpable, but

stated that it did not agree that the defendant's sentence had to be reduced. *Id.* at 112. The supreme court compared the defendant's sentence with those of other offenders and found the doubling not to be "relatively harsh[]." *Id.* The supreme court then elaborated:

> If both defendant's sentence and that of his accomplice were before us, the appropriate remedy to the inequity would not be to reduce defendant's sentence but to increase his accomplice's sentence. . . . [W]e are left with a choice between affirming defendant's sentence . . . and reducing defendant's sentence to that given his equally culpable accomplice, who received a sentence that we believe was too lenient. Reducing defendant's sentence would be to compound the error rather than to limit it.

Id. at 112–13.

Here, appellant's sentence was harsher than his co-offender's, but arguably appellant's conduct was more egregious than Schneider's. Appellant voluntarily and knowingly entered into a plea agreement with the state for a first-degree offense. Schneider entered into a plea agreement for a third-degree offense. A first-degree offense will generally result in a harsher sentence than a third-degree offense. Appellant's sentence was entirely consistent with the guidelines; he received the presumptive sentence. Therefore, the district court did not abuse its discretion when it denied appellant's postconviction request for reduced sentencing.

III.

Finally, appellant argues that the district court should have granted his motion for a dispositional departure because he is amenable to probation. "[A] departure from the sentencing guidelines . . . is an exercise of judicial discretion." Minn. Sent. Guidelines II.D. Only in a "rare" case will we reverse the district court's refusal to depart. *State v.*

Kindem, 313 N.W.2d 6, 7 (Minn. 1981). Even if a case presents grounds that would justify departure, we generally will not reverse. *State v. Abeyta*, 336 N.W.2d 264, 265 (Minn. 1983).

While appellant argues that he is amenable to probation, the district court articulated its concerns about the likelihood that appellant would reoffend and the low likelihood that treatment would be successful for him. While another district court might have weighed these possibilities differently, it cannot be said that this is the rare case warranting reversal. We decline to substitute our judgment for that of the district court, which found no substantial and compelling circumstances to justify a departure.

Affirmed.