STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0665

State of Minnesota,
Appellant,

vs.

Nathan Clinton Keller,
Respondent.

Filed March 31, 2009
Affirmed
Klaphake, Judge
Concurring specially, Crippen, Judge*
Dissenting, Bjorkman, Judge

Sibley County District Court
File No. 72-CR-07-228

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

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Lawrence Hammerling, Chief Appellate Public Defender, Ngoc Lan Nguyen, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104; and

Anthony F. Nerud, Nerud Law Office, 325 W. Main Street, Arlington, MN 55307 (for appellant)

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

Considered and decided by Klaphake, Presiding Judge; Bjorkman, Judge; and Crippen, Judge.

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

KLAPHAKE , Judge

Appellant State of Minnesota challenges the district court's decision to impose a downward dispositional departure in sentencing respondent Nathan Clinton Keller for his conviction of first-degree criminal sexual conduct. The state argues that the court abused its discretion by sentencing respondent to probation instead of the presumptively executed 144-month sentence.

Because the district court provided substantial and compelling reasons for its departure, which were supported by record evidence, we conclude that the court did not abuse its discretion and we therefore affirm the sentence.

D E C I S I O N

We review the district court's decision to depart from the sentencing guidelines presumptive sentence for an abuse of discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). In order to depart from the guidelines, the court must find aggravating or mitigating factors and state them for the record. *Id.*; *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). When making a dispositional departure, the court considers offender-related factors, such as amenability to probation, or offense-related mitigating factors. *State v. Donnay*, 600 N.W.2d 471, 473-74 (Minn. App. 1999), *reviewed denied* (Minn. Nov. 17, 1999).

There are no offense-related mitigating factors here; respondent's conduct was well within the bounds of first-degree criminal sexual conduct. But the district court offered sufficient reasons for its downward dispositional departure: respondent's amenability to probation and sex-offender treatment, his remorse and acceptance of responsibility, and the guarantee of a longer period of supervision. *See id.* at 474 (concluding that amenability to probation is sufficient reason for departure, in conjunction with offender's remorseful and cooperative attitude and support of family and victim's family).

The court's decision is supported by the psychological and psychosexual evaluation performed by Dr. Peter Marston, who concluded that respondent had a low risk of recidivism, was amenable to treatment, and had no major mental illness or personality disorder that would impair treatment. This provides a basis for the court's decision, which is therefore not an abuse of discretion.

Despite our decision here, we are troubled by the state's failure to provide the court with information about the impact of this serious crime on the victim. Although the state attempted and failed to contact the victim, other sources of information were available, including a CHIPS petition filed shortly after this abuse came to light. Without a victim-impact statement, we are unable to conclude that the district court abused its discretion.

Affirmed.

CRIPPEN, Judge (concurring specially)

I join in the opinion to affirm, singularly because of the absence of precedent for reversing the district court decision without unanimity of the panel. *See State v. Law*, 620 N.W.2d 562, 563 (2000) (reversal founded on "collegial conclusion," or [court syllabus] a "strongly held collective resolve"). And although common experience suggests that this sentence is not compatible with the present and future interests of the victim, or the state's burden to protect these interests, nothing in this record—a circumstance attributable to appellant, the prosecution—establishes this as a fact of the case.

BJORKMAN, Judge (dissenting)

I respectfully dissent. Although this court is "loath to interfere" with a district court's sentencing decision, *State v. Case,* 350 N.W.2d 473, 476 (Minn. App. 1984), the discretion afforded to the district court "is not a limitless grant of power." *State v. Warren,* 592 N.W.2d 440, 451 (Minn. 1999). We will reverse a downward sentencing departure when it "understates the degree of the defendant's culpability." *State v. Law,* 620 N.W.2d 562, 565 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000). I conclude that the district court's downward dispositional departure is disproportionate to the severity of the offense and thus is not supported by compelling circumstances.

Criminal sexual conduct in the first degree is a crime of violence. And the facts of this case are egregious, exceeding the elements necessary to sustain a conviction. Respondent sexually abused his preteen daughter on multiple occasions over a two-year period of time. The abuse started with fondling, moved on to digital penetration, and progressed to at least six instances of sexual intercourse. Respondent acknowledged involving the family dog on one occasion. The abuse ended when the victim told her mother about it in 2002. The victim reported the abuse to authorities for the first time in 2007.

The district court relied heavily on respondent's amenability to probation and treatment. As we observed in *Law,* rehabilitation is an important goal of the criminal justice system but it is not the only goal. *Id.* at 565-66. We must be mindful of other objectives including "retribution, rehabilitation, public protection, restitution, deterrence, and public condemnation of criminal conduct." Minn. Sent. Guidelines III.A.2. The

district court's departure from the presumptive 144-month sentence does not appropriately reflect these other penal objectives. As the majority observes, the absence of information concerning the victim's present and future interests is concerning. It serves to minimize the impact of this very serious offense both as to the victim and the community. The language of Minn. Stat. § 609.342 further indicates that the sentencing court should consider the interests of the victim and family members in cases involving abuse within a family. *See* Minn. Stat. § 609.342, subd. 3(a) (Supp. 2007) (permitting district court to stay execution of a sentence under subdivision 1(g) only if it finds that "a stay is in the best interest of the complainant or the family unit"). Based on the severity and impact of respondent's offense, I conclude that there are no compelling circumstances that support a downward departure.