STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1183

State of Minnesota,
Respondent,

vs.

Geoffrey Ronald Gilbertson,
Appellant.

Filed July 21, 2009
Affirmed
Hudson, Judge

Clay County District Court
File No. 14-K5-05-001780

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

Brian Melton, Clay County Attorney, Heidi M.F. Davies, Assistant County Attorney, 807 North 11th Street, Moorhead, Minnesota 56560 (for respondent)

Daniel Mohs, Daniel Mohs & Associates, Ltd., 1735 Juliet Avenue, St. Paul, Minnesota 55105-2122 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Kalitowski, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant challenges his presumptive guidelines sentence of 48 months for criminal vehicular homicide—leaving the scene of an accident, and argues that the

district court abused its discretion when it denied his request for a downward dispositional departure. We affirm.

FACTS

At approximately midnight on August 30, 2005, appellant Geoffrey Ronald Gilbertson was driving in the northbound lane on Highway 75 in rural Clay County. He attempted to pass two vehicles, realized that another vehicle was approaching in the southbound lane, and crossed back into the northbound lane between the vehicles that he was in the process of passing. Appellant lost control of his car, and it struck the rear of the vehicle in front of him, which caused appellant's car to re-enter the southbound lane, colliding head-on with the southbound vehicle. The driver of that vehicle died as a result of the collision.

Appellant and his passenger got out of his car just before it caught fire. According to testimony at a 2006 plea hearing, appellant asked his passenger and the driver of the vehicle not involved in the accident whether each was all right. He then walked away from the scene and walked along a railroad track to his home, approximately one and a half miles from the scene. A Clay County deputy located him there at approximately 2:45 a.m. The deputy transported appellant to the sheriff's department, where he admitted that he had been drinking before the accident and that he walked away from the scene.

Appellant was charged with criminal vehicular homicide for operating a motor vehicle in a grossly negligent manner, in violation of Minn. Stat. § 609.21, subd. 1(1) (2004); and criminal vehicular homicide—leaving the scene of an accident, in violation

of Minn. Stat. § 609.21, subd. 1(7) (2004). He pleaded guilty to the latter charge, for which he was sentenced to 48 months of imprisonment. The other charge was dismissed.

On July 26, 2006, appellant moved to withdraw his guilty plea. The district court granted the motion, and appellant was released to stand trial on the original charges against him. Appellant filed notice that he intended to present a defense of mental illness or deficiency due to "immediate-onset post-traumatic shock" and included his treating physician in the list of witnesses whom he intended to call at trial. The state filed a motion in limine to prohibit appellant from asserting a mental-deficiency defense and to exclude expert testimony regarding any alleged mental deficiency on the ground that no expert qualifications or reports had been disclosed. The district court denied the state's motion. The state appealed from the denial of its pretrial motion. This court reversed and remanded the district court decision and held that "if [appellant] can make a prima facie showing that his post-traumatic shock meets the standard set forth in [the mental-illness-defense statute], he is entitled to a bifurcated trial at which he can present that defense in the second phase of the trial." *State v. Gilbertson*, No. A07-516, 2007 WL 3072100, at * 4 (Minn. App. Oct. 17, 2007).

On remand, the matter was scheduled for trial. Just prior to trial, appellant again entered a guilty plea to criminal vehicular homicide—leaving the scene of an accident. Prior to sentencing, appellant moved for a downward dispositional departure. Appellant argued that, in making its decision, the district court should focus on offender characteristics, such as "prior criminal history, ongoing or future employment, education and training, as well as support from family and friends." Appellant also referred the

district court to a sentencing guidelines commission report which documented that in 2005, 18 of 33 drivers convicted of criminal vehicular homicide were sentenced to a year or less in jail. Appellant appeared to suggest that because "several judges in rural counties granted dispositional departures in criminal vehicular homicides" from February 2005 to March 2008, a dispositional departure would be appropriate in his case as well. As for "substantial and compelling" circumstances that warranted a dispositional departure, appellant highlighted his conduct following the charged offense, that: although he left the scene of the accident, he first asked if everyone was all right; he did not try to evade detection by the police (he walked home while his passenger/roommate remained at the scene and told police where they lived); he walked home because he "freaked out" when his vehicle burst into flames; and he cooperated fully with the investigating officers. Appellant also highlighted his background and particular amenability to probation, specifically: his age (21 at time of offense, 24 at time of sentencing); his lack of criminal record; his steady employment since the time of arrest; his education; the fact that since his arrest and release from custody he had remained law-abiding and chemically free; his remorse for the pain he caused the victim's family as well as his own family; and the fact that he was compliant with the terms of his suspended license.

At the sentencing hearing the district court stated that it would not impose a sentence based on race or employment factors (such as the possible "negative effect upon the [appellant's] employment prospects now or in the future") because those factors were "irrelevant" and, in the case of employment, prohibited from consideration under the

sentencing guidelines. As for social factors, the district court stated that, "[t]here's no question that the defendant comes from a very good family and has tremendous support from his family." But the district court refused to take appellant's support network into account based on the belief that it was a prohibited factor under the sentencing guidelines. The district court determined that substantial and compelling circumstances did not exist to support a downward dispositional departure. The district court noted that because appellant pleaded guilty to the charge of felony criminal vehicular homicide—leaving the scene of the accident, he could not avail himself of testimony or proof of the "shock phenomenon" that he alleged he had sustained. Because there was no medical testimony that the court could utilize in finding any mitigating factors that would change the case "from what is an average and ordinary case for this type of sentence or offense," the district imposed the presumptive guidelines sentence of 48 months of imprisonment. This appeal follows.

D E C I S I O N

Appellant argues that the district court abused its discretion when it denied his motion for a downward dispositional departure because there were substantial mitigating factors present, primarily appellant's amenability to probation and extreme remorse. The district court must order the presumptive sentence unless "substantial and compelling circumstances" justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Whether to depart from the sentencing guidelines rests within the district court's discretion, and this court will not reverse the decision absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied*

(Minn. Aug. 22, 2001). Only in a "rare" case will this court reverse a sentencing court's refusal to depart, *Kindem*, 313 N.W.2d at 7, such as when the district court fails to exercise its discretion. *See, e.g.*, *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (remanding where the district court failed to exercise its discretion and ignored arguments for departure).

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that a district court may use as reasons for granting a departure. Minn. Sent. Guidelines II.D.2.a. Amenability to probation is not listed, but this court has held that the district court may impose probation "in lieu of an executed sentence when the defendant is particularly amenable to probation." *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). To assess a defendant's amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Here, the district court specifically stated that it would not take into account social factors (such as the fact that appellant "comes from a very good family and has tremendous support from his family") because it believed those factors were prohibited from consideration under the sentencing guidelines. But while the sentencing guidelines prohibit the district court from considering *some* social factors (such as educational attainment, living arrangements, length of residence, and marital status), the consideration of a support network is not specifically prohibited. Minn. Sent. Guidelines II.D.1.d. Nonetheless, this court recently held that a district court does not abuse its discretion when it refuses to dispositionally depart even if there is evidence in the record

that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 665 (Minn. App. 2009). There, the district court sentenced the defendant to the presumptive sentence under the Minnesota Guidelines even though a probation officer testified that the defendant was amenable to probation. *Id.* at 664. This court held that while a district court has broad discretion to grant a downward dispositional departure, it is not required to do so. *Id.* at 664–65. Accordingly, even if reasons exist for departing downward, a reviewing court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (holding that the district court did not abuse its discretion in denying a motion for a downward dispositional departure for a defendant who was 22 years old, had no prior criminal history, quickly took responsibility for his offenses, expressed remorse, and had a large support network, but had a "level of defensiveness" which would "make sex offender specific treatment very difficult, at best.").

Here, the district court "deliberately considered" many of the factors supporting departure which appellant put forward and was neither "mechanical" nor "callous" in imposing appellant's sentence. *See Curtiss*, 353 N.W.2d at 264 ("Consideration of compelling circumstances is central to the scheme of the sentencing guidelines, and the practice will avoid sentencing that is either mechanical or callous."). Specifically, the district court decided not to dispositionally depart because

> the [appellant's] conduct of leaving the scene of the accident is no different really than what we would see in an ordinary case of this type because at this point in time we have no evidence . . . which would describe the shock phenomenon that the [appellant] alleges to have sustained, [and] he did not

> avail himself of that avenue by entering this plea. He waived his right to that and there's no medical testimony here that the Court could utilize in finding any mitigating factors that would take this case from what is an average and ordinary case for this type of offense.

The district court's conclusion that there were no "substantial and compelling circumstances" to support a downward dispositional departure is supported by the record on the whole. This is not the rare case which would require a reversal of the sentencing court's refusal to depart.

Because the district court has broad discretion in deciding whether to depart, and because the court provided a rational basis for its decision, the denial of the dispositional departure was not an abuse of discretion.

Affirmed.