STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1222

State of Minnesota,
Respondent,

vs.

Cory Lynn Mangan,
Appellant.

Filed July 21, 2009
Affirmed
Stauber, Judge

Stevens County District Court
File No. 75CR06281

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

Charles C. Glasrud, Stevens County Attorney, 601½ California Avenue, Box 593, Morris, MN 56267 (for respondent)

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

Considered and decided by Stauber, Presiding Judge; Stoneburner, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

On appeal from his conviction of first-degree criminal sexual conduct based on a guilty plea and plea agreement, appellant argues that (1) his conviction must be vacated

and he must be allowed to withdraw his guilty plea because it lacked an adequate factual basis; (2) the district court erred by not giving him the opportunity to withdraw his plea when he pleaded guilty with the idea that he would receive a stay of imposition and no jail time; and (3) the district court abused its discretion by not granting appellant's request for a downward dispositional departure. We affirm.

FACTS

On July 3, 2006, appellant Cory Mangan was charged with one count of criminal sexual conduct in the first degree and two counts of criminal sexual conduct in the third degree. The complaint alleged that on July 1, 2006, appellant engaged in criminal sexual conduct with an eight-year-old boy on the roof-top of an old elementary school building. According to the complaint, appellant admitted to sexually touching the penis and buttocks of the eight-year-old boy. The complaint also alleged that during a formal interview with the victim, the victim stated that a 14-year-old boy was also on the roof of the building, and that he observed appellant penetrate the anus of the 14-year-old boy also.

Appellant agreed to plead guilty to first-degree criminal sexual conduct in return for a dismissal of the remaining charges. The plea agreement called for a stay of imposition and no jail time. At the plea hearing, appellant admitted to having sexual contact with the eight-year-old boy. The district court subsequently found that there was a factual basis for appellant's plea, dismissed the remaining charges in the complaint, and ordered that a pre-sentence investigation be completed.

At the sentencing hearing, the district court noted that the pre-sentence investigation report recommended that the court reject the plea agreement and impose an executed sentence. After the court heard witness testimony and arguments from counsel on the subject, the court voiced concerns about the level of supervision available at the facility advanced by appellant as an appropriate alternative to prison. The court stated that it was inclined to follow the plea agreement if the facility could provide one-on-one supervision of appellant. But the court indicated that if that was not feasible, the court would be inclined not to follow the plea agreement. The court further noted that if it did not follow the plea agreement, appellant, "may want to withdraw his plea." The court then continued the hearing "for either [a] sentencing hearing or [a] request from [appellant] to withdraw his plea."

At the second sentencing hearing, counsel for the defense stated that after discussing the issue with appellant and his father, they decided not to withdraw the guilty plea "due to what they view as an unacceptable risk of possible worse consequences should they go to trial and be found guilty since there [was] more than one child involved in this case." The district court informed appellant that should the court not follow the plea agreement, he was entitled to withdraw his guilty plea. The court then asked appellant if he wanted to withdraw his guilty plea, and appellant answered "no." The district court subsequently sentenced appellant to 144 months in prison and a ten-year conditional-release term. This appeal followed.

D E C I S I O N

I.

Once a guilty plea has been entered, a defendant does not have an absolute right to withdraw it. *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). After conviction and sentencing, a defendant may withdraw a guilty plea if two conditions are met: withdrawal is "necessary to correct a manifest injustice," and the defendant makes a timely motion for withdrawal. Minn. R. Crim. P. 15.05, subd. 1; *Theis*, 742 N.W.2d at 646. Manifest injustice exists when a guilty plea is invalid. *Theis*, 742 N.W.2d at 646. "For a guilty plea to be valid, it must be accurate, voluntary, and intelligent (i.e., knowingly and understandingly made)." *Sykes v. State*, 578 N.W.2d 807, 812 (Minn. App. 1998) (quotation omitted), *review denied* (Minn. July 16, 1998).

Here, appellant did not move the district court to withdraw his guilty plea. But "[a] defendant is free to simply appeal directly from a judgment of conviction and contend that the record made at the time the plea was entered is inadequate." *Brown v. State*, 449 N.W.2d 180, 182 (Minn. 1989); *see also State v. Newcombe*, 412 N.W.2d 427, 430 (Minn. App. 1987) (allowing direct appellate review of factual basis for a plea because the grounds for the challenge did not "go outside the record on appeal"), *review denied* (Minn. Nov. 13, 1987). Challenges to the validity of a plea present questions of law entitled to de novo review. *State v. Rhodes*, 675 N.W.2d 323, 326 (Minn. 2004).

Appellant argues that his plea was invalid because it lacked an adequate factual basis. Thus, appellant argues that he should be allowed to withdraw his guilty plea.

A district court may not accept a guilty plea that is not supported by an adequate factual basis. *Kelsey v. State*, 298 Minn. 531, 532, 214 N.W.2d 236, 237 (1974). The purpose of requiring an adequate factual basis for accepting a guilty plea is to ensure that a defendant does not plead guilty to a crime more serious than he could be convicted of at trial. *State v. Ecker*, 524 N.W.2d 712, 716 (Minn. 1994).

Here, appellant pleaded guilty to first-degree criminal sexual conduct based on sexual contact with a person under the age of 13 in violation of Minn. Stat. § 609.342, subd. 1(a) (2004). "Sexual contact with a person under 13" is defined as the intentional touching of the child's bare genitals or anal opening by the actor's bare genitals with sexual or aggressive intent. Minn. Stat. § 609.341, subd. 11(c) (2004).

At the plea hearing, appellant admitted that he touched the penis and butt of the victim. Appellant also admitted that the victim touched him. Appellant further admitted that the victim "was . . . sitting on . . . [his] penis," and that he let the victim do that "on purpose." This testimony is sufficient to establish a factual basis that appellant had sexual contact with the victim in violation of Minn. Stat. § 609.342, subd. 1(a).

Appellant argues that although he admitted touching the penis and butt of the eight-year-old victim, and having the victim touch appellant, there is no evidence of appellant's intent. We disagree. There need only be sufficient facts from which the defendant's guilt can be "reasonably inferred" to establish an adequate factual basis for a guilty plea. *State v. Neumann*, 262 N.W.2d 426, 430 (Minn. 1978), *overruled on other grounds by State v. Moore*, 481 N.W.2d 355 (Minn. 1992). As noted above, appellant admitted the sexual contact with the victim, and admitted that the victim sat on his penis.

From this testimony, the district court could reasonably infer an aggressive or sexual intent because there could be no other reason for appellant to commit these acts. *See State v. Ness*, 707 N.W.2d 676, 687 (Minn. 2006) (observing that "sexual or aggressive intent can readily be inferred by the contacts themselves"). Accordingly, appellant's guilty plea to first-degree criminal sexual conduct was not invalid due to a lack of an adequate factual basis.

II.

In a criminal case,when a plea agreement has been reached that contemplates entry of a guilty plea, a district court may accept or reject the terms of the plea agreement or postpone acceptance or rejection of the terms of the agreement until a presentence-investigation report has been completed. Minn. R. Crim. P. 15.04, subd. 3(1). If the court rejects the plea agreement, it must advise the parties in open court and ask the defendant to affirm or withdraw the plea. *Id.*

Appellant argues that the district court failed to comply with rule 15.04, subdivision three, because appellant was never given the opportunity to withdraw his guilty plea after the court rejected the plea agreement and imposed an executed guidelines sentence. Thus appellant argues that the matter should be remanded to the district court to allow appellant the opportunity to withdraw his plea.

We disagree. At the first sentencing hearing, the district court informed the parties that he did not like his choices with respect to his sentencing options. The court stated that:

> my inclination at this point in time is that I would sentence in accordance with the plea agreement with the additional understanding that [appellant] would have one-to-one supervision until it was changed and I'd be more specific about that at the time of sentencing and that he have his own room; and if that cannot be accomplished, then I would not go along with the plea agreement.

The court then continued the matter so that the state could determine if the court's conditions could be met, and to give appellant the opportunity to consider withdrawing his plea.

At the second sentencing hearing, appellant's attorney made the following statement at the beginning of the hearing:

> And then, Your Honor, we have a plea agreement that calls for a durational and/or dispositional departure. It's my understanding from conferences in chambers that *the court is not inclined to go along with that*. I've discussed the possibility with my client and his father and they have decided that they, while they may appeal the sentence, they . . . are not going to choose to withdraw their plea of guilty in this matter due to what they view as an unacceptable risk of possible worse consequences should they go to trial and be found guilty since there [was] more than one child involved in this case. So they . . . are not going to withdraw the plea.

(Emphasis added.) After appellant's attorney argued for a downward departure, the district court made sure that appellant understood that the court was not bound by the plea agreement, and that if the court did not follow the agreement, appellant would have the right to withdraw his guilty plea. The district court then asked again if appellant wanted to withdraw his plea. Appellant declined, and the court sentenced appellant to the guidelines sentence. The court gave appellant numerous opportunities to withdraw his

plea, and the record reflects that appellant was aware of the court's "inclination" not to accept the plea agreement. Moreover, appellant failed to move to withdraw his plea after sentencing. Therefore, we conclude that appellant was given ample opportunity to withdraw his plea.

III.

A district court may depart from the sentencing guidelines if substantial and compelling circumstances are present. Minn. Sent. Guidelines II.D. A district court's departure decision will not be reversed absent a clear abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). A district court's discretion is broad, and only a rare case warrants reversal of the refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

A district court considering a dispositional departure may focus "on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Factors relevant to dispositional departures under supreme court precedent include amenability to probation. *Id.* They also include the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends and/or family. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Appellant argues that the following factors support a downward dispositional departure: (1) his mental impairment; (2) his age (18) at the time of the offense; (3) his vulnerability in prison; (4) his remorse; (5) the recommendation from appellant's therapist and program director; and (6) his amenability to treatment. Appellant argues

that because the district court failed to properly consider these factors, the case should be remanded to the district court for reconsideration of the departure decision.[1]

We disagree. There is nothing in the record to support the assertion that the district court failed to consider the mitigating factors. Rather, the record reflects that based on the factors listed by appellant, the district court strongly considered accepting the plea agreement, which would have been a downward departure. Although these factors may support a downward departure, the court ultimately decided that the potential risk to the public's safety outweighed appellant's own interests. Accordingly, on this record, the district court did not abuse its discretion in denying appellant's motion for a downward dispositional departure.

Affirmed.

[1] The state argues that because appellant's departure motion was premised on Minn. Stat. § 609.342, subd. 3 (Supp. 2005), a departure from the presumptive sentence cannot be justified since appellant cannot satisfy the statutory conditions warranting the departure. But, there is nothing in the record demonstrating that appellant moved for a departure under that statute. Moreover, Minn. Stat. § 609.342, subd. 3, is applicable only to individuals convicted under Minn. Stat. § 609.342, subd. 1(g) (2004). Because appellant was convicted under Minn. Stat. § 609.342, subd 1(a), subd. 3 is not applicable.