STATE OF MINNESOTA
IN COURT OF APPEALS
A09-868

State of Minnesota,
Respondent,

vs.

Cody Lee Elven,
Appellant.

Filed April 6, 2010
Affirmed
Ross, Judge

Chisago County District Court
File No. 13-CR-07-1644

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janet Reiter, Chisago County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Center City, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

ROSS, Judge

In this appeal from his sentence to 84 months' imprisonment for possession of methamphetamine, Cody Lee Elven argues that the district court abused its discretion by

denying his request to stay his sentence and place him on probation. Because Elven's status as a repeat offender subjected him to a mandatory minimum sentence that could not be stayed, we conclude that the district court did not abuse its discretion by imposing an executed sentence.

FACTS

Cody Elven led police on a car chase at speeds of more than 100 miles per hour to avoid being stopped for a traffic violation. Elven's car entered oncoming traffic several times, forcing other vehicles onto the shoulder. Police saw Elven and his passenger stuffing items into the car's center console and under the front seats. The chase ended when police executed a standard vehicle-contact maneuver, unintentionally causing Elven's car to careen into a ditch and roll over. Elven then resisted arrest, attempting to kick and punch the officer. Police discovered about nine grams of methamphetamine in and near the car and on Elven's person.

The state charged Elven with possessing and selling methamphetamine, fleeing a police officer, criminal vehicular operation, and obstructing legal process. At Elven's bail hearing, the district court granted his request for a furlough to attend a 13-month residential chemical-dependency treatment program at Minnesota Teen Challenge.

On the day scheduled for trial, Elven's attorney announced that the parties had negotiated a plea agreement. Under the agreement, Elven would plead guilty to possessing methamphetamine, and the state would dismiss the other charges. The state also agreed not to seek a prison commitment of more than 84 months on the possession charge. An 84-month prison term was at the low end of the sentencing range prescribed

by the Minnesota Sentencing Guidelines for someone with Elven's criminal history score and offense severity level. Elven indicated that he would seek a downward durational or dispositional departure at sentencing.

At the sentencing hearing, the prosecutor recounted Elven's prior convictions, which included escape from custody, anhydrous ammonia possession, attempted first-degree controlled substance crime, and three fifth-degree controlled substance crimes. The prosecutor requested that Elven be sentenced to an executed 84-month prison term. Elven sought a dispositional departure (in the form of a stayed sentence), arguing that his success at Teen Challenge and several favorable character references showed that he was amenable to probation.

The district court denied Elven's departure motion, sentencing him to an 84-month prison term. The district court highlighted "real public safety concerns" and rejected Elven's argument that he was amenable to probation. It cited Elven's decision to reoffend even after being briefly incarcerated for his prior offenses. The court stated that Elven had failed to demonstrate compelling reasons for departure, and it concluded that departure would not serve the interests of the criminal justice system.

Elven appeals his sentence.

D E C I S I O N

Elven argues that the district court erred by sending him to prison rather than staying his sentence and putting him on probation. The state responds that the district court was required by statute to impose an executed sentence. The state's argument is

sound. As a repeat offender, Elven was subject to a mandatory minimum three-year sentence that could not be stayed.

Elven was convicted of possessing more than six grams of methamphetamine, a violation of Minnesota Statutes section 152.022 (2006). Section 152.022 provides a mandatory minimum sentence of three years for a conviction that is a "subsequent controlled substance conviction." Minn. Stat. § 152.022, subd. 3(b). Section 152.026 provides that "[a] defendant convicted and sentenced to a mandatory sentence under sections 152.021 to 152.025 . . . is not eligible for probation . . . until that person has served the full term of imprisonment as provided by law."

Elven's conviction is a subsequent controlled substance conviction. A subsequent controlled substance conviction is one that occurs less than ten years after the defendant is discharged from a sentence for a previous conviction of a controlled substance felony. Minn. Stat. § 152.01, subd. 16a (2006). Elven had five prior convictions for controlled substance felonies, and he was imprisoned for three of them. All of the convictions occurred in 2002 and 2003, making Elven's latest conviction a subsequent controlled substance conviction because it came within ten years of his discharge from the sentences for his prior controlled substance felony convictions. And because Elven's latest conviction is a subsequent controlled substance conviction, section 152.022, subdivision 3(b) and section 152.026 required the district court to impose a prison sentence of at least three years and prohibited probation. *Accord State v. Bluhm*, 676 N.W.2d 649, 653–54 (Minn. 2004); *State v. Turck*, 728 N.W.2d 544, 547–48 (Minn. App. 2007), *review denied* (Minn. May 30, 2007).

That the state did not rely on this ground when arguing to the district court does not prevent the state from relying on it on appeal. *See State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003) (holding that a respondent may raise an alternative theory on appeal in support of the district court's decision as long as "there are sufficient facts in the record . . . , there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted"). Whether or not the district court realized it, its hands were tied; it was bound to impose an executed sentence.

Elven contends that if the district court lacked the discretion to depart dispositionally, his guilty plea was invalid. He argues that his plea was induced by the state's promise to allow him to argue (presumably without opposition) for a downward dispositional departure, and he cites case authority for the proposition that a guilty plea pursuant to a plea agreement is not valid unless the agreement is fulfilled. He adds that the state's agreement that he could argue for a departure was meaningless if he faced a mandatory prison term. The only support in the record that Elven's right to argue for a downward departure was part of the plea agreement is that when Elven announced the plea agreement to the court, he indicated that he also planned to seek a downward departure. But the mere fact that Elven contemporaneously stated his intent to seek a departure does not make the right to obtain a dispositional departure part of the plea agreement.

We add that even if the district court had the discretion to grant a dispositional departure in this case, its rationale for denying a departure was appropriate. The district court may not depart downward from the presumptive guidelines sentence unless a

defendant presents substantial and compelling circumstances to warrant a departure. Minn. Sent. Guidelines II.D. An appellate court reviews a district court's decision not to depart from a presumptive sentence for an abuse of discretion, and it is a "rare" case in which the district court's refusal to depart will warrant reversal. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Elven argued to the district court that it should grant a dispositional departure based on his amenability to probation. A defendant's amenability to probation is a sufficient basis for a downward dispositional departure. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The district court rejected Elven's contention that he was amenable to probation. Elven now argues that the district court failed to analyze the relevant factors before concluding that he was not amenable to probation.

The supreme court has identified a nonexclusive list of factors (known as the "*Trog* factors") that are relevant to a defendant's amenability to probation: the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of his friends and family. *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003) (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). In this case, the district court explicitly discussed Elven's criminal record, one of the *Trog* factors. It found Elven's criminal history conclusive that he was not amenable to probation. It reasoned implicitly that Elven's choice to reoffend after experiencing prison demonstrated that the probationary threat of prison would be ineffective. The court was mindful of the progress Elven had made in Teen Challenge, commenting that Elven

should be "congratulated in that regard," but it nonetheless concluded that Elven's amenability argument was not compelling.

Elven accurately asserts that the district court did not discuss all the *Trog* factors. But neither *Trog* nor any case we are aware of requires an analysis of each factor or prohibits consideration of other relevant factors. The court considered at least one *Trog* factor, Elven's criminal history. And although it did not explicitly discuss the support of Elven's family and friends, it accepted statements from Elven's girlfriend and a Teen Challenge staff member, who spoke on his behalf at the sentencing hearing.

Elven cites two cases for the proposition that amenability to probation *may* be premised on a defendant's motive to reform, irrespective of criminal history. But the district court was within its discretion to conclude that Elven's motive to reform did not overcome his criminal history and that his history tipped the scales in favor of imposing an executed sentence.

Finally, Elven argues that his time in Teen Challenge and imminent completion of that program constituted compelling circumstances supporting a downward dispositional departure. Elven's assertion that he has demonstrated his motive to reform by his success in Teen Challenge is persuasive. But the presence of a mitigating factor does not oblige the district court to place a defendant on probation. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

The district court lacked discretion to impose a term of probation rather than imprisonment under section 152.022, subdivision 3(b) and section 152.026. And even assuming that the statute did not prohibit the district court from staying Elven's sentence,

the court did not abuse its discretion by denying Elven's request to depart, a request based exclusively on his post-arrest, post-charge conduct.

Affirmed.