STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1674

State of Minnesota,
Respondent,

vs.

Montreal Tremaine Willis,
Appellant.

Filed May 4, 2010
Affirmed
Klaphake, Judge

Washington County District Court
File No. 82-CR-08-3724

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

Kari A. Lindstrom, Assistant Washington County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Crippen, 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

KLAPHAKE, Judge

Following the stop of his vehicle on April 29, 2008, appellant Montreal Tremaine Willis was arrested and charged with two felonies: driving while impaired, Minn. Stat. §§ 169A.20, subd. 1(1), .24, subd. 1(3) (2006), and refusal to submit to testing, Minn. Stat. §§ 169A.20, subd. 2, .24, subd. 1(3) (2006). He was also charged with two misdemeanors: driving after revocation, Minn. Stat. § 171.24, subd. 2 (2006), and violation of the open-bottle law, Minn. Stat. § 169A.35, subd. 3 (2006). Appellant pleaded guilty to the felony test-refusal offense in exchange for the right to argue for a downward dispositional departure at sentencing. Because we observe no abuse of discretion in the district court's decision to deny appellant's request for a downward dispositional departure from the presumptive sentence, we affirm.

D E C I S I O N

The district court exercises its discretion in determining a criminal sentence, and this court will not reverse that 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). In evaluating whether to dispositionally depart, the district court considers offender-related factors, such as amenability to probation, as well as offense-related mitigating factors. *State v. Donnay*, 600 N.W.2d 471, 473-74 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999). For a dispositional departure when the defendant claims particular amenability to treatment as a basis for requesting a probationary sentence, the sentencing factors include "the defendant's age, his prior record, his remorse, his

cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *see State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (stating that dispositional departure permits sentencing court to "focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society"). Amenability to probation "depends on an offender's ability to comply with the conditions of probation and benefit from the opportunity for rehabilitation." *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003).

Appellant makes two arguments in support of a dispositional departure. First, he claims that the specific circumstances of his prior impaired driving offense mitigate his culpability in the current felony-level offense. The current offense was elevated to a felony based on the underlying conduct of a prior offense, in accordance with Minn. Stat. § 169A.24, subd. 1(3). According to appellant, the circumstances of his prior 2006 conviction for criminal vehicular operation that resulted in injury, Minn. Stat. § 609.21, subd. 2a(4) (2006), involved an injury to the victim that was relatively minor—a fractured leg that has since healed. He argues that because of the "minor" nature of that injury, his "situation is materially distinguishable from that of the typical felony DWI offender," and that his sentence should be reflective of that fact.

An offense-related factor may be used as a basis for a dispositional departure. *State v. Allen*, 706 N.W.2d 40, 46 (Minn. 2005); *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). The prior offense required appellant to have caused substantial bodily harm to another during operation of a motor vehicle while appellant had an alcohol concentration of .08 or more. *See* Minn. Stat. § 609.21, subd. 2a(4). "Substantial bodily

harm" is defined as bodily injury causing temporary but substantial disfigurement, loss or impairment of a body member or organ function, or "a fracture to any bodily member." Minn. Stat. § 609.02, subd. 7a (2008). The injury at issue here, a fractured leg, falls squarely within the statutory definition of substantial bodily harm, and we are not persuaded that the injury did not meet the definition of substantial harm just because it healed properly.

Appellant also contends that for a felony-level DWI offense, other provisions of the charge require a greater number of prior DWI predicate offenses, that this was only his second offense, and that his sentence was too harsh. Minn. Stat. § 169A.24, subd. 1(1) (2006) requires "three or more qualified prior impaired driving incidents," but the prior DWI offenses under subdivision 1(1) do not include prior DWI offenses that involved bodily injury to another during the commission of the DWI. In establishing the basis for a felony DWI offense based on prior conduct, the legislature apparently concluded that prior DWI offenses involving substantial bodily harm are more serious than those that do not involve substantial bodily harm. The sentencing guidelines provide for a presumptive executed sentence, rather than a presumptive stayed sentence, if the prior impaired driving conviction was for criminal vehicular operation. Minn. Sent. Guidelines II.C. The court did not abuse its discretion in rejecting this argument.

Appellant's second argument is that he should have been given a probationary sentence because he has shown that he is amenable to probation. The record does not support this argument with respect to application of the *Trog* factors. 323 N.W.2d at 31. While defendant is relatively young, his prior record includes a similar recent offense.

Further, he has also not shown particular remorse—he suggests that the prior offense was minor and that the current offense was due to a family disagreement. Nor has he cooperated during the pendency of this action, as demonstrated by his comments to the arresting officer[1] and to his probation agent.[2] Further, although appellant claims to have the support of friends and family, he suggests that he failed to attend chemical dependency treatment because of the "craziness of normal life," and that a disagreement with his girlfriend was the cause of the current offense. Finally, appellant has not shown particular amenability to probation by failing to complete chemical dependency treatment and by being charged with a gross misdemeanor assault offense while on conditional release for this offense. Under these circumstances, the district court properly exercised its discretion in sentencing appellant to an executed prison sentence.

Affirmed.

[1] After being read the implied consent advisory, appellant refused to submit to chemical testing, and when advised that refusal to test was a crime, he responded, "take that s—t to court."

[2] After appellant missed four required urinalysis tests while placed on conditional release and was informed of that fact by his probation agent, he replied, "F—k you, suck my d—k. Put out your warrant and catch me if you can."