STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2028

State of Minnesota,
Respondent,

vs.

Dung Anh Nguyen,
Appellant.

Filed September 28, 2010
Reversed and remanded
Peterson, Judge

Dakota County District Court
File No. 19-K3-07-002037

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

James C. Backstrom, Dakota County Attorney, Phillip D. Prokopowicz, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jessica B. Merz Godes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Harten, 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

PETERSON, Judge

This appeal from a conviction of and sentence for attempted first-degree controlled-substance offense has been remanded by the supreme court for reconsideration of the upward durational departure in light of *State v. Thompson*, 720 N.W.2d 820 (Minn. 2006). We reverse the sentence and remand.

FACTS

Following a jury trial, appellant Dung Anh Nguyen was convicted of attempted first-degree controlled-substance offense for growing large quantities of marijuana. The district court sentenced appellant to 86 months, a double durational departure, because the offense was a major controlled-substance offense under Minn. Sent. Guidelines II.D.2.b.(5) (2006). The departure was based on the jury's affirmative answers to two questions submitted to it by a special-verdict form: (1) "Did the offense of Attempted Controlled Substance Crime in the First Degree involve an attempted sale or manufacture of marijuana in quantities substantially larger than 50 kilograms?" and (2) "Did the offense of Attempted Controlled Substance Crime in the First Degree involve a high degree of sophistication or planning?"

At trial, defense counsel objected to submitting these questions to the jury, arguing that because at least 50 kilograms of marijuana is an element of the attempted first-degree offense, the amount of controlled substance is not a proper ground for a sentencing departure. Noting that appellant could have harvested as much as ten times the statutory minimum from his grow operation, the district court overruled the objection, and the

questions were submitted to the jury. Both parties waived closing argument as to the sentencing factors, and the jury answered both questions affirmatively.

This court's first opinion rejected appellant's argument that the two aggravating circumstances found by the jury duplicated elements of the offense and, therefore, were improper. *State v. Nguyen*, No. A08-2028, 2009 WL 5088746, at *7 (Minn. App. Dec. 29, 2009), *review granted and remanded* (Minn. Mar. 30, 2010). The opinion acknowledged the caselaw warning against "'using quantity to support a departure under the major controlled substance offense departure criteria when to do so duplicates an element of the offense.'" *Id.* at *6 (quoting *State v. McIntosh*, 641 N.W.2d 3, 12 (Minn. 2002)). But the opinion concluded that a finding that the quantity involved was "substantially larger" than the statutory minimum of 50 kilograms did not duplicate the "quantity" element of the offense. *Id.* at *7. The opinion also rejected appellant's argument that a "high degree of sophistication or planning" duplicates the quantity element of the offense. *Id.* But that aspect of the opinion is not within the scope of the remand.

D E C I S I O N

Departures from the guidelines presumptive sentence are reviewed for an abuse of discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006). In *Thompson*, the defendant pleaded guilty to nine counts of theft by swindle. *Id.* at 823. Each of the counts aggregated various transactions to reach, and then exceed, the statutory minimum of $35,000 for that particular statutory violation. *Id.* Thompson entered a straight plea that did not include an agreement as to the sentence to be imposed. *Id.* The district court

departed on five of the nine counts, based on the "major economic offense" aggravating factor. *Id.* at 828-29. That factor requires findings that at least two of the aggravating circumstances listed in the guidelines are present. Minn. Sent. Guidelines II.D.2.b.(4) (2006).

The district court in *Thompson* found that four aggravating circumstances were present: (1) there were multiple incidents (all involving the same victim--Thompson's employer); (2) the amount taken in the five counts was substantially greater than the $35,000 statutory minimum; (3) the offense involved a high degree of sophistication or planning; and (4) Thompson violated a position of trust. 720 N.W.2d at 828-29.

The supreme court held that the first two circumstances should not have been used to support the departure. *Id.* at 830. The primary reason for rejecting the amount-of-the-theft factor in *Thompson*, and the most relevant here, is that it duplicated an element of the offense, i.e., the element requiring that the amount taken exceed $35,000. *Id.* The supreme court stated:

> Thompson pleaded guilty to nine counts of "theft by swindle aggregated over $35,000" as alleged in the complaint. Because of the detailed nature of each count within the complaint and because the district court found Thompson guilty beyond a reasonable doubt on each count alleged in the complaint, use of this factor amounted to using a factor necessarily used in convicting Thompson on each count to support the finding that Thompson engaged in a major economic offense. That sort of double-counting is impermissible.

Id.

Similarly, the supreme court noted in *State v. McIntosh*, 641 N.W.2d 3, 11-12 (Minn. 2002), that using the quantity of drugs to help support a departure "is arguably

duplicative of the quantity element," i.e., the statutory minimum amount. In earlier years, the presence of a very large quantity of drugs could be used to help support an upward departure for a drug offense. *See State v. Vogel*, 385 N.W.2d 35, 36-37 (Minn. App. 1986) (noting that defendant who attempted to sell nine pounds of marijuana did not challenge consideration of fact that the amount was "substantially larger than for personal use"). But more recently, when determining whether a departure factor improperly duplicates an element of an offense, the supreme court in *Thompson*'s discussion of a departure based on the amount involved in a theft offense, and in *McIntosh*, looked not to the literal terms of the statutory elements but to what was "considered by the legislature" when it defined the offense. *Thompson*, 720 N.W.2d at 830; *McIntosh*, 641 N.W.2d at 11-12 (quotation omitted).

It is apparent that when enacting Minn. Stat. § 152.021, subd. 1(4) (2006), which explicitly requires "a total weight of 50 kilograms *or more*," the legislature considered the amount of marijuana required to constitute a first-degree controlled-substance offense. (Emphasis added.) The legislature could have determined that an amount greater than 50 kilograms constituted a more serious offense, but it instead concluded that the first-degree offense involved any amount of "50 kilograms or more." The large grow operation involved in this case, which could potentially produce as much as 500 kilograms according to the district court, fits within this broad statutory category. Therefore, it was improper for the district court to frame, as one of the major-controlled-substance-offense factors to be found by the jury, whether the amount of marijuana involved was substantially larger than 50 kilograms. Because, without that factor, there

were not the two factors required for a major-controlled-substance-offense departure under Minn. Sent. Guidelines II.D.2.b.(5), the upward departure was an abuse of discretion. Therefore, the sentence must be reversed and remanded for imposition of a sentence within the presumptive range.

Reversed and remanded.