STATE OF MINNESOTA
IN COURT OF APPEALS
A10-65

State of Minnesota,
Respondent,

vs.

Barry Scott Michaelson,
Appellant.

Filed October 5, 2010
Affirmed
Halbrooks, Judge

Anoka County District Court
File No. 02-CR-08-12696

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

Robert M.A. Johnson, Anoka County Attorney, Kathryn M. Timm, Assistant County Attorney, Anoka, 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 Halbrooks, Presiding Judge; Stoneburner, Judge; and Stauber, Judge.

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

HALBROOKS, Judge

Appellant challenges his conviction of first-degree burglary, arguing that the district court abused its discretion by sentencing him to 150 months under the career-

offender statute and by denying his motion for a downward dispositional departure. Appellant further contends that he is entitled to withdraw his guilty plea because it was improperly induced by promises of the state. Appellant reiterated these arguments in his pro se supplemental reply brief. Because we conclude that the district court acted within its discretion in sentencing appellant and because we conclude that appellant has waived the issue of his ability to withdraw his guilty plea, we affirm.

FACTS

On June 8, 2008, appellant Barry Scott Michaelson entered the home of D.O. through an unlocked, ground-level window. Once inside, appellant took a laptop computer and some coins. That same evening appellant committed another burglary in an unoccupied home, stealing two laptop computers. D.O.'s computer was found in the unoccupied home, along with two gloves. Subsequent testing confirmed appellant's DNA on one of the gloves. Appellant was charged with first-degree burglary pursuant to Minn. Stat. § 609.582, subd. 1(a) (2006), for entering D.O.'s home while she was asleep inside.

On December 3, 2008, the state notified appellant of its intent to seek an aggravated sentence based on the career-offender statute, Minn. Stat. § 609.1095, subd. 4 (2006). On February 10, 2009, appellant signed a petition to plead guilty. In the petition, appellant acknowledged that the state was seeking the statutory maximum sentence of 240 months. Appellant agreed to waive a *Blakely* hearing with respect to the issue of whether the career-offender statute applied, but the terms of the plea agreement permitted him to argue for a downward departure. The petition also stated that in exchange for his

plea, the state agreed to dismiss a separate 2008 case and agreed to a furlough for appellant to seek treatment. On the same day as the plea hearing, appellant also signed a petition regarding the aggravated sentence, acknowledging that the maximum sentence was 240 months; and he again waived his right to a trial on the facts required to support an aggravated sentence under the career-offender statute. The prosecutor discussed the terms of the plea agreement at the plea hearing, stating that "[t]he state would agree to dismiss the remaining file[,] [appellant] will waive *Blakely*, agree career criminal, and the time will be argued at sentencing." Later in the hearing, after appellant waived his rights and offered the petition, the district court inquired as to the furlough. The exchange was as follows:

> THE COURT: I didn't hear anything about a furlough to treatment.
> ATTORNEY: That was part of the agreement, Your Honor. However, there was a DOC—
> THE COURT: Well, it's written here—
> ATTORNEY: There was a DOC hold.
> THE COURT: —but I didn't hear anything.
> ATTORNEY: Yeah.
> THE COURT: You're agreeing to that?
> PROSECUTOR: As I understand it, the defendant has a Department of Corrections hold so, furlough or not, he's not going anywhere. I understand somebody else agreed to it, and so, yes, the state agrees to a furlough.

The district court accepted appellant's guilty plea, finding that his plea was made voluntarily and intelligently.

Appellant later moved for a downward dispositional departure, seeking a stay of execution and probation. At the sentencing hearing, appellant argued that a departure was justified on the grounds that he took responsibility for his actions and because he

wanted to move to Florida to attend treatment to address his drug and mental-health issues. Appellant's counsel referred to the possible furlough, stating that "[the] court in fact did okay a furlough for him to go to treatment, but we weren't able to get him the furlough because of the DOC hold in Hennepin County. We think that's now expired." The prosecutor asked for an executed sentence of 100 months.

The district court denied appellant's motion for a downward dispositional departure, noting that (1) appellant had a criminal history of ten years, (2) after appellant's last two treatment attempts he continued to abuse alcohol and drugs, (3) appellant "continued to victimize and prey on people" and commit crimes of burglary to support his drug habit, and (4) appellant's other arguments did not support a departure. Stating that it found no reason to disregard the application of the career-offender statute, the district court sentenced appellant to 150 months. Appellant did not move to withdraw his guilty plea at any time. This appeal follows.

D E C I S I O N

I.

This court reviews a sentence to determine if it was an abuse of the sentencing judge's discretion. *State v. Thompson*, 720 N.W.2d 820, 828 (Minn. 2006). A "judge may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4. Appellant does not challenge his sentencing under the career-offender statute, but instead argues

that the 150-month sentence unfairly exaggerates the criminality of his conduct. An appellate court is authorized to review and modify a sentence that is "unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact." Minn. Stat. § 244.11, subd. 2(b) (2008).

When imposing an aggravated sentence, district courts must be mindful of the policy underlying the Minnesota Sentencing Guidelines, which is "to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender's criminal history." *Neal v. State*, 658 N.W.2d 536, 546 (Minn. 2003) (quoting Minn. Sent. Guidelines I (2002)) (examining an aggravated sentence pursuant to the dangerous-offender statute). In order to determine whether a district court's sentence under the career-offender statute is consistent with this policy, appellate courts should examine the nature of the offense and compare the sentence imposed to other aggravated sentences for similar crimes. *See id.* at 547-48; *Vickla v. State*, 778 N.W.2d 354, 359 (Minn. App. 2010) (holding that the principles of *Neal* apply with equal force to appellate review of aggravated sentences pursuant to the career-offender statute), *review granted* (Minn. Apr. 20, 2010).

The presumptive sentence for first-degree burglary for a person with appellant's criminal-history score is 60 months. But the statutory maximum sentence for first-degree burglary is 240 months. Minn. Stat. § 609.582, subd. 1(a). Appellant cites no case law demonstrating that, in comparison, his sentence of 150 months for first-degree burglary unfairly exaggerates the criminality of his conduct. Instead, appellant focuses on the

presumptive sentence of 60 months and argues that the 150-month sentence is excessive because it is more than a double departure. The supreme court in *Neal* cautioned against imposing the statutory maximum sentence in all cases falling within the dangerous-offender or career-offender statute. 658 N.W.2d at 546. Appellant's sentence, while more than double the presumptive 60 months, is considerably less than the statutory maximum sentence. The district court reasoned that 150 months was an appropriate sentence, considering appellant's ten-year history of preying on individuals and committing crimes and his unamenability to probation. Specifically, the district court found "no mitigating circumstances to deviate and to not [sentence appellant] under the career criminal [statute]." On this record, we conclude that the district court did not abuse its discretion by sentencing appellant to 150 months.

II.

Appellant also contends that the district court abused its discretion by imposing an executed prison sentence rather than a probationary sentence, which would constitute a downward dispositional departure from the presumptive commitment. We apply an abuse-of-discretion standard to review a district court's decision not to impose a downward dispositional departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Ordinarily, a district court must impose the presumptive sentence unless "substantial and compelling circumstances" warrant a different sentence. Minn. Sent. Guidelines II.D (2006). The district court was required to consider appellant as an individual in deciding whether to depart dispositionally. *See State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981). The district court must weigh such relevant factors as appellant's

amenability to probation, age, prior record, remorse, cooperation, attitude while in court, and the support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

Appellant argues that because he was seeking professional help for his drug and mental-health issues and because he admitted responsibility, the district court should have imposed a dispositional departure. But the district court stated on the record that appellant had attempted treatment in past years but had returned to drug use after each attempt. The district court noted that appellant had never addressed his drug use in a constructive fashion and had committed burglaries in order to fuel his addiction. Additionally, the district court stated that the psychiatrist who appellant claimed he had been seeing was actually a physician's assistant. Weighing the relevant factors and, despite appellant's assertions to the contrary, the district court determined that appellant was not amenable to probation. We conclude that the district court's decision to impose the presumptive commitment was not an abuse of discretion.

III.

Appellant argues that his sentencing agreement was invalid, and his guilty plea should be vacated. "A defendant does not have an absolute right to withdraw a valid guilty plea." *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). After sentencing, a defendant may only withdraw a guilty plea to correct a manifest injustice. Minn. R. Crim. P. 15.05, subd. 1. A manifest injustice occurs if the guilty plea is not voluntary, intelligent, and accurate. *Perkins v. State*, 559 N.W.2d 678, 688 (Minn. 1997). A

voluntary plea requires that the plea is not in response to improper inducements or pressures. *Alanis v. State*, 583 N.W.2d 573, 577 (Minn. 1998).

Appellant argues that his plea was involuntary because it was induced by the state's agreement to a furlough, which the state knew could not be fulfilled due to appellant's DOC hold. "'[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.'" *State v. Spaeth*, 552 N.W.2d 187, 194 (Minn. 1996) (quoting *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971)). Inducing a guilty plea by a promise that cannot be fulfilled invalidates the plea and may be remedied by altering the sentence, specific performance of the agreement, or allowing the plea to be withdrawn. *State v. Jumping Eagle*, 620 N.W.2d 42, 43 (Minn. 2000).

Appellant raises this issue for the first time on appeal. At no time after signing his plea petition, during his plea hearing, or during his sentencing hearing did appellant argue that he was entitled to withdraw his plea on the ground that it was improperly induced by the state. The record reflects that at all times appellant and his counsel were aware that appellant had a DOC hold that would prevent him from a furlough, regardless of whether the state abided by the agreement and agreed to a furlough. During the plea hearing, appellant's counsel responded to questions from the district court concerning the furlough and remarked that appellant had a DOC hold. And nearly two months later at the sentencing hearing, appellant's counsel again remarked that appellant's DOC hold in Hennepin County prevented him from obtaining a furlough. Appellant never moved

pursuant to Minn. R. Crim. P. 15.05 to withdraw his plea, despite the fact that he knew that the DOC hold prevented his furlough at all times during the proceedings in district court. Because this issue was not previously raised and because the record contains no support for appellant's assertion that he was improperly induced by the promise of a furlough to plead guilty, we conclude that appellant has waived his right to appellate review of this issue. *See State v. Coe*, 290 Minn. 537, 537-38, 188 N.W.2d 421, 422 (1971).

Affirmed.