STATE OF MINNESOTA
IN COURT OF APPEALS
A10-900

State of Minnesota,
Respondent,

vs.

Valerie Jayne Shingobe,
Appellant.

Filed February 1, 2011
Affirmed
Peterson, Judge
Concurring specially, Minge, Judge

Aitkin County District Court
File No. 01-CR-09-23

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

James P. Ratz, Aitkin County Attorney, Ben M. Smith, Lisa R. Rakotz, Assistant County Attorneys, Aitkin, Minnesota (for respondent)

Timothy L. Aldrich, Johnson & Aldrich Law Office, Bemidji, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Peterson, Judge; and Minge, Judge.

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

PETERSON, Judge

In this appeal from a 72-month presumptive sentence for first-degree driving while impaired, appellant argues that the district court abused its discretion in denying her motion for a dispositional departure. We affirm.

FACTS

Appellant Valerie Jayne Shingobe is enrolled in the Mille Lacs Band of Ojibwe, a band of the Minnesota Chippewa Tribe. On January 9, 2009, appellant was arrested after she rolled the vehicle that she was driving in Aitkin County. Appellant was charged with first-degree driving while impaired (DWI) in violation of Minn. Stat. § 169A.20, subds. 1(1), 3, .24 (2008); first-degree refusal to submit to chemical testing in violation of Minn. Stat. § 169A.20, subds. 2-3, .24 (2008) and driving after cancellation inimical to public safety in violation of Minn. Stat. § 171.24, subds. 3, 5 (2008). Appellant pleaded guilty to one count of first-degree DWI, and the remaining charges were dismissed.

The district court ordered a presentence investigation (PSI), which was conducted by Senior Corrections Agent Richard McKanna. As part of the PSI, McKanna completed a risk assessment, which placed appellant within the "High Risk" of reoffending continuum. McKanna's report notes appellant's history of significant mental-health and chemical-dependency issues, participation in numerous interventions, and the relatively limited periods of stability in the community that she has maintained. McKanna further stated that he believes appellant "presents a significant risk to public safety, considering the relatively short period of time she was actually in the community since being released

from MCF-Shakopee on February 5, 2007 and the amount of services which were provided in that same period of time." McKanna recommended that the presumptive sentence of 72 months be imposed.

At sentencing, appellant moved for a dispositional departure from the presumptive guidelines sentence, citing her mental illness, historical trauma, and the opportunity to participate in culturally based chemical-dependency and mental-health treatment if a probationary sentence were imposed. Appellant emphasized her childhood in foster care and her ongoing mental-health and chemical-dependency issues. The district court denied the motion and sentenced appellant to the presumptive 72-month sentence. This appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion by refusing to grant a dispositional departure from the presumptive sentence. The decision whether to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent an abuse of that discretion. *State v. Olson*, 765 N.W.2d 662, 664 (Minn. App. 2009). The district court must impose the presumptive guidelines sentence unless "substantial and compelling circumstances" warrant a departure. *State v. Morris*, 609 N.W.2d 242, 245 (Minn. App. 2000); (quoting Minn. Sent. Guidelines II.D) (quotation marks omitted), *review denied* (Minn. May 23, 2000). Only in a "rare case" will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Even when mitigating circumstances exist that might justify a departure, a reviewing court ordinarily will not interfere with the

imposition of a presumptive sentence. *State v. Back*, 341 N.W.2d 273, 275 (Minn. 1983); *see State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) (noting that district court retained discretion to deny downward departure despite existence of mitigating factor); *Kindem*, 313 N.W.2d at 7-8 (affirming district court's refusal to depart downward although mitigating factor existed). As long as the record demonstrates that the district court carefully evaluated all the testimony and information presented before making its sentencing decision, this court will not interfere with the district court's exercise of discretion. *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985).

When considering a dispositional departure, the district court may focus "on the defendant as an individual and on whether the presumptive sentence would be best for [her] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The district court may impose a dispositional departure and place a defendant on probation if the defendant is particularly amenable to probation or if mitigating circumstances are present. *State v. Donnay*, 600 N.W.2d 471, 473-74 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999). The risk to public safety incurred in placing an offender on probation is significant when determining whether to depart dispositionally from the sentencing guidelines. *State v. Sejnoha*, 512 N.W.2d 597, 601 (Minn. App. 1994), *review denied* (Minn. Apr. 22, 1994).

Appellant argues that the district court abused its discretion in denying her motion for departure because Minn. Stat. § 609.1055 (2008) authorizes an alternative placement for offenders with serious and persistent mental illness. *See also* Minn. Sent. Guidelines

II.D.2.a(6) (stating that district court may depart from presumptive sentence when alternative placement exists for "offender with serious and persistent mental illness").

That statute states:

> When a court intends to commit an offender with a serious and persistent mental illness . . . to the custody of the commissioner of corrections for imprisonment at a state correctional facility . . ., the court, *when consistent with public safety*, may instead place the offender on probation . . . and require as a condition of the probation that the offender successfully complete an appropriate supervised alternative living program having a mental health treatment component.

Minn. Stat. § 609.1055 (emphasis added).

The district court found that appellant has a serious and persistent mental illness but noted that "[t]he question before the Court is not one of probation and treatment versus prison. The question really is whether the proposed treatment and probation can be considered 'consistent with public safety.'" The district court concluded that "although [appellant] is in fact a 'person with serious and persistent mental illness' for purposes of Minn. Stat. § 609.1055, public safety considerations do not allow this Court to consider the options now requested by [appellant]." The district court observed that appellant will "have [an] opportunity to undergo dual diagnosis treatment either in prison or as a condition of supervised release."

It is apparent that when deciding whether to depart from the presumptive sentence, the district court weighed appellant's interest in receiving treatment within a probationary setting against public-safety concerns. The district court acknowledged that appellant has a "serious and persistent mental illness" but also noted that appellant has nine prior DWI

offenses and that she committed the current offense while she was on supervised release for a prior felony DWI conviction. The record demonstrates that the district court carefully considered the relevant factors for and against departure and that the district court's denial of appellant's motion for a downward dispositional departure was not an abuse of its discretion.

Appellant also argues that the district court abused its discretion by failing to consider as a basis for departure the fact "that she is a Native American suffering from Historic Trauma, in a system that only creates more trauma for her." Appellant contends that the fact "that Native Americans make up only 1% of Minnesota's population, yet, Minnesota leads the nation regarding the incarceration of Native Americans," "is what truly makes this case 'substantial and compelling.'" But under the Minnesota Sentencing Guidelines, race and social factors should not be used as reasons for departure. Minn. Sent. Guidelines II.D.1.(a), (d) (2008); *see also State v. Brusven*, 327 N.W.2d 591, 594 (Minn. 1982) (stating that fact that defendant was sexually abused as a child was social factor that could not be relied on to support departure). Therefore, the district court did not abuse its discretion in denying appellant's motion to depart based on these circumstances.

In her appellate brief, appellant questioned the district court's subject-matter jurisdiction. But, at oral argument, appellant's counsel clarified that appellant is not raising a jurisdiction issue. Therefore, we will not address the district court's subject-matter jurisdiction.

Affirmed.

MINGE, Judge (concurring specially)

I concur in the opinion of this panel and write separately to address the strenuous assertions by appellant that she is a victim of Minnesota's mistreatment of Native Americans and her challenge to this court to consider that history in reviewing the district court's refusal to grant a dispositional departure to her sentence.

The historic trauma suffered by Native Americans has been well documented. *See, e.g.*, Grant Forman, *Indian Removal* (2d ed. 1972). The impact of that trauma continues to reverberate in their communities and our society continues to grapple with how to best address it. Rates of poverty, unemployment, suicide, domestic violence, and substance abuse are all significantly higher among Native Americans. Craig Lambert, *Trails of Tears, and Hope*, Harv. Mag., Mar.–Apr. 2008, at 39, 42-43. In Minnesota, Native Americans are disproportionately represented in our prison population. They are just over 1% of the overall population, but are 8% of our prison inmates. U.S. Census Bureau, Minnesota Quickfacts (last updated Aug. 16, 2010), http://quickfacts.census.gov/qfd/states/27000.html (estimating the Native American population in 2009 at 1.3%); Minn. Dep't of Corr., *Adult Inmate Profile* 2 (July 1, 2010), www.doc.state.mn.us/aboutdoc/stats/documents/07-10AdultProfile.pdf (listing Native American inmates as 8.1% of the prison population).

Emphasizing factors unique to the Native American community, appellant urges that we recognize that incarceration is not the best option for a Native American with a long history of mental disorder and substance abuse. And while the sentencing guidelines do not allow considerations of race and social factors as reasons for departure,

Minn. Sent. Guidelines II.D.1 a., d. (2010), some of those factors may be considered indirectly to determine whether a defendant is "particularly amenable to treatment in a probationary setting." *State v. Solomon*, 359 N.W.2d 19, 22 (Minn. 1984).

The record indicates that in addition to numerous convictions for driving while intoxicated and thus being a risk to public safety, appellant has an extensive history of mental conditions and substance abuse. I recognize that appellant may have greater prospects for overcoming her alcohol dependency by participating in a culturally appropriate program in long-term treatment facility instead of prison. But, given appellant's record, an important consideration in the sentencing decision is that the proposed treatment be "consistent with public safety." *See* Minn. Stat. § 609.1055 (2010) (providing that a court may sentence an offender with a serious and persistent mental illness to probation, as opposed to incarceration, when "consistent with public safety"). To properly address the safety risk, appellant should be in a secure (locked) treatment facility. Unfortunately, an appropriate secured treatment facility, whether Native American or otherwise, does not exist. Without such a facility, the judicial system has no other option besides incarceration.[1]

This court's review is based on the record in the proceeding before us. We cannot direct the programming or the operations of the corrections system. Although the district court has significant discretion to determine the proper sentence, it too is limited to the

[1] It has also been acknowledged that "[t]ribal systems are often no better equipped than the state courts to deal with justice issues stemming from substance abuse." Judge Korey Wahwassuck, *The New Face of Justice: Joint Tribal-State Jurisdiction*, 47 WASHBURN L.J. 733, 746 (2008).

record of the defendant and the resources reasonably available. Furthermore, despite appellant's heritage, there is no particularized showing that she has been denied equal protection of the law. Based on the record in this proceeding, I concur with the conclusion that the district court did not abuse its discretion.