STATE OF MINNESOTA
IN COURT OF APPEALS
A11-307

State of Minnesota,
Appellant,

vs.

Brian Hamilton Bloomgren,
Respondent.

Filed June 13, 2011
Reversed and remanded
Larkin, Judge

Hennepin County District Court
File No. 27-CR-10-30198

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

Michael O. Freeman, Hennepin County Attorney, David C. Brown, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, St. Paul, Minnesota; and

William Ward, Chief Public Defender, Jane M. Imholte, Assistant Public Defender, Minneapolis, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Larkin, Judge.

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

LARKIN, Judge

In this sentencing appeal, appellant-county argues that the district court erred by refusing to impose a mandatory minimum sentence under Minn. Stat. § 152.022, subd. 3(b) (2006). We agree and therefore reverse and remand for resentencing.

FACTS

Respondent Brian Hamilton Bloomgren pleaded guilty to one count of second-degree controlled-substance crime under Minn. Stat. § 152.022, subd. 2(1) (2006). Because less than ten years had elapsed since Bloomgren's prior sentence for a felony-level controlled-substance conviction was discharged, he was subject to a mandatory minimum sentence of 36 months. *See* Minn. Stat. §§ 152.022, subd. 3(b), .01, subd. 16(a) (2006).

Instead of sentencing Bloomgren to serve 36 months in prison as the county requested, the district court granted Bloomgren a downward dispositional departure over the county's objection. The district court imposed a 58-month stayed sentence and ordered Bloomgren to serve 365 days in the workhouse, submit to drug testing, and complete a chemical-health assessment. The district court stated three reasons for the departure: (1) Bloomgren was amenable to treatment, (2) he had previously cooperated with the police, and (3) he would be particularly vulnerable in prison. The district court acknowledged the statutory requirement for a 36-month mandatory minimum commitment and that the sentence would most likely be appealed. As predicted, this appeal follows, in which the county argues that the district court erred by refusing to

impose the mandatory minimum sentence required under Minn. Stat. § 152.022, subd. 3(b).

D E C I S I O N

Appellate courts may review a "sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the sentencing court's findings of fact." Minn. R. Crim. P. 28.05, subd. 2. "This court recognizes the broad discretion of the [district] court in sentencing matters and is loath to interfere." *State v. Law*, 620 N.W.2d 562, 564 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Dec. 20, 2000). But under certain circumstances, the district court's sentencing discretion is constrained by statute, as is the case here.

Bloomgren pleaded guilty to a second-degree controlled-substance crime under Minn. Stat. § 152.022, subd. 2(1). The penalty section of this statute states, "[i]f the conviction is a subsequent controlled substance conviction,[1] a person convicted under subdivision 1 or 2 shall be committed to the commissioner of corrections for not less than three years nor more than 40 years and, in addition, may be sentenced to payment of a fine of not more than $500,000." *Id.*, subd. 3(b). This language is "clear and unambiguous" and mandates "that a repeat offender serve a minimum sentence of three years and [that the offender] is not eligible for probation until that time is served." *State*

[1] "A subsequent controlled-substance conviction is a conviction for an offense committed less than ten years after the defendant is discharged from a sentence for a previous conviction of a controlled-substance felony." *State v. Adams*, 791 N.W.2d 757, 759 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011); *see also* Minn. Stat. § 152.01, subd. 16a.

v. Adams, 791 N.W.2d 757, 759 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011).

Adams controls our decision: when the mandatory minimum sentencing provision in Minn. Stat. § 152.022, subd. (3)(b) applies, the district court may not stay execution of the sentence. *See id*. at 757. The district court therefore was required to impose at least an executed 36-month sentence, and its determination that factors existed to justify a departure did not allow it to stay the mandatory minimum sentence required under statute. *See id*. at 759 (stating that "[b]ecause we are reversing and remanding for resentencing, we do not address the validity of the factors upon which the district court based its dispositional departure").

Bloomgren argues that not allowing district courts to grant dispositional departures in controlled-substance cases where statutes mandate prison sentences will "undo what progress drug courts have made rehabilitating offenders in Minnesota and fill Minnesota's prisons with nonviolent offenders who need help with drug addiction." This policy-based argument is misplaced; the legislature—not this court—determines the appropriate punishment for crimes. *See State v. Osterloh*, 275 N.W.2d 578, 580 (Minn. 1978) (stating that "the legislature, having the power to define what acts constitute criminal conduct, necessarily retains the power to define the punishment for such acts" and that "[t]he role of the trial judge in prescribing sentence in a criminal case is that of the executor of the legislative power").

Bloomgren further argues that if this court reverses his sentence, he must be permitted to withdraw his guilty plea because the district court impermissibly injected

itself into the plea negotiations. Bloomgren's request for plea withdrawal must be made in the first instance in the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts will generally not decide issues which were not raised to the district court); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."). Because we do not issue advisory opinions, Bloomgren's plea-withdrawal argument is not properly before this court, and we do not consider it. *See State v. Senske*, 291 Minn. 228, 232, 190 N.W.2d 658, 661 (1971) (declining to address an issue not raised in the district court, explaining that it would amount to an advisory opinion).

In sum, because the district court was required to impose a mandatory minimum sentence of 36 months under Minn. Stat. § 152.022, subd. 3(b), its imposition of a stayed sentence was inconsistent with statutory requirements and must be reversed. *See Adams*, 791 N.W.2d at 759; *see also* Minn. R. Crim. P. 28.05, subd. 2 (stating that appellate courts may review sentences to, in part, determine whether they are "inconsistent with statutory requirements").

Reversed and remanded.

Dated:

Judge Michelle A. Larkin