DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
January Term 2011

STATE OF FLORIDA,
Appellant,

v.

CHARLES HUNTER,
Appellee.

No. 4D09-2533

[July 6, 2011]

PER CURIAM.

The state appeals a downward departure sentence granted by the trial court because of the defendant's medical condition. It claims that competent substantial evidence did not support the trial court's decision to depart, because the defendant proved neither amenability to treatment nor that treatment was unavailable in the prison system. We disagree and affirm.

A trial court's decision to grant a downward departure is a two-step process. *State v. Alonso*, 31 So. 3d 265, 266 (Fla. 4th DCA 2010). "First, the court must determine whether it *can* depart, i.e., whether there is a valid legal ground and adequate factual support for that ground in the case pending before it (step 1)." *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999) (emphasis in original). Second, where the requirements of the first step are met, the trial court "must determine whether it *should* depart, i.e., whether departure is indeed the best sentencing option for the defendant in the pending case." *Id.* at 1068 (emphasis in original). While the second step is a judgment call, within the sound discretion of the sentencing court, which will be sustained on review absent an abuse of discretion, the first step is "a mixed question of law and fact and will be sustained on review if the court applied the right rule of law and if competent substantial evidence supports its ruling." *Id.* at 1067-68. The defendant has the burden of proof to establish the facts that support a downward departure by a preponderance of the evidence. *State v. Petringelo*, 762 So. 2d 965, 965 (Fla. 2d DCA 2000).

Section 921.0026 establishes that a trial court is prohibited from giving a downward departure from the lowest permissible sentence under the Criminal Punishment Code "unless there are circumstances or factors that reasonably justify the downward departure." § 921.0026(1), Fla. Stat. (2008). The statute sets out mitigating factors, although the list is not exclusive. One statutory ground justifying a downward departure is when a defendant "requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." § 921.0026(2)(d), Fla. Stat. (2008). The requirement that the defendant be amenable to treatment is met by a showing that there is a "reasonable possibility" that such treatment will be successful. *State v. Hillhouse*, 708 So. 2d 326, 327 (Fla. 2d DCA 1998).

Although in this case the issue is factually close, the trial court had competent evidence to support its conclusion of amenability to treatment when considering the totality of the defendant's and the expert's testimony. The expert testified that the defendant had a serious mental condition, pre-dating his additional substance abuse, which required intensive treatment which she described. While she noted that he had past failures in treatment, he had recently successfully completed a treatment plan. Moreover, the defendant himself told the court of some of his past difficulties which had made treatment difficult, including the fact that in jail he has been put in protective custody and could not get into the type of treatment programs which might have helped. While the defendant's word alone that he is amenable to treatment is not enough, *see State v. Bostick*, 715 So. 2d 298 (Fla. 4th DCA 1998), we think that the court could evaluate the testimony of the expert together with the testimony of the defendant and conclude that he was amenable to treatment.

In addition, the expert testified that the specialized treatment the defendant needed was not available in the prison system, a requirement for downward departure under section 921.0026(2)(d). *See State v. Gatto*, 979 So. 2d 1232, 1233 (Fla. 4th DCA 2008). The state did not rebut the evidence presented.

Because the defendant offered competent substantial evidence of the elements of a statutory mitigating factor, the trial court did not err in concluding that it could depart. The remaining inquiry as to whether it should depart is a matter within the judge's sound discretion.

Affirmed.

POLEN and STEVENSON, JJ., concur.
WARNER, J., concurs specially with opinion.

WARNER, J., concurring specially.

I agree that this case should be affirmed, but I write separately to question whether the statutory factor of need of specialized treatment requires *the defendant* to prove that the treatment he needs is not available in the prison system. Because the statute does not make this a requirement, I would conclude that it is not part of the defendant's burden to prove this element in order for the trial court to determine that it *can* depart from the lowest permissible sentence under the Criminal Punishment Code.

Section 921.0026 provides mitigating circumstances "under which a departure from the lowest permissible sentence is reasonably justified . . . ." These include: "(d) The defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical disability, and the defendant is amenable to treatment." Although not stated in the statute, there is a significant body of case law holding that to receive a sentence pursuant to section 921.0026(2)(d), there must be evidence that the Department of Corrections (DOC) cannot provide the specialized treatment required. *See State v. Gatto*, 979 So. 2d 1232, 1233 (Fla. 4th DCA 2008); *State v. Green*, 971 So. 2d 146, 148 (Fla. 4th DCA 2007); *State v. Scherber*, 918 So. 2d 423, 424-25 (Fla. 2d DCA 2006); *State v. Wheeler*, 891 So. 2d 614, 616 (Fla. 2d DCA 2005); *State v. Green*, 890 So. 2d 1283, 1286 (Fla. 2d DCA 2005); *State v. Mann*, 866 So. 2d 179, 182 (Fla. 5th DCA 2004); *State v. Tyrrell*, 807 So. 2d 122, 128 (Fla. 5th DCA 2002); *State v. Thompson*, 754 So. 2d 126, 127 (Fla. 5th DCA 2000); *State v. Abrams*, 706 So. 2d 903, 904 (Fla. 2d DCA 1998).

This requirement appears to have had its origins in *Abrams*, the first time we find it mentioned in case law. *Abrams* involved a downward departure sentence from a guidelines sentence, because the crime for which he was being sentenced occurred in 1997, prior to the enactment of the Criminal Punishment Code. However, the statute at the time included the same mitigating factor but no reference to the unavailability of treatment in prison. *See* § 921.0026(2)(d), Fla. Stat. (1997). In *Abrams*, the court said, without citation to any authority: "There is no evidence in the record, however, that Mr. Abrams requires specialized treatment for HIV that cannot be provided through the Department of Corrections." 706 So. 2d at 904. On the other hand, in *State v. Spioch*,

706 So. 2d 32 (Fla. 5th DCA 1998), Judge Griffin accurately noted in discussing the same statute involved in *Abrams,* that

> [A] lack of available treatment in prison is not required under the statute. Although illness is not a "get out of jail free card," a treatable physical disability is one of the circumstances where the legislature has chosen to re-invest trial judges with discretion to vary from sentencing guidelines.

Id. at 36. Despite this conflict of opinion between the districts, the courts appear to have turned the one sentence in *Abrams* into an additional element for the defendant to prove in order to obtain a downward departure sentence under section 921.0026(2)(d), Florida Statutes.[1] Our court likewise adopted this element as part of the defendant's burden of proof, without any authority other than the citation of cases, which lead back to *Abrams. See*, *e.g.*, *Gatto*, 979 So. 2d at 1233; *Green*, 971 So. 2d at 148.

Sentencing statutes must be strictly construed according to their letter. *See Perkins v. State*, 576 So. 2d 1310, 1312 (Fla. 1991); *Atterbury v. State*, 991 So. 2d 980, 981 (Fla. 4th DCA 2008). In sentencing, the trial judge should strictly follow the dictates of statutes. *See Troutman v. State*, 630 So. 2d 528, 533 n.6 (Fla. 1993), *superseded by statute on other grounds as stated in Ritchie v. State*, 670 So. 2d 924 (Fla. 1996). In addition, the rule of lenity requires that when language of a statute is susceptible of differing constructions, it must be construed most favorably to the accused. *See* § 775.021(1), Fla. Stat. (2008).

By requiring the defendant seeking downward departure from a criminal punishment code sentence to prove that services to treat his or her medical condition are unavailable in prison, the courts have placed an additional burden on the defendant which is not required by the Legislature. In fact, nothing in the legislative history even hints that in order to justify a downward departure on this ground, services must be unavailable in prison to treat the condition. While that might be what the Legislature intended, I think it should state its intentions clearly so that no one has to guess as to the requirements in punishment statutes.

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[1] Furthermore, the Fifth District's own case law is internally inconsistent. The Fifth District never receded from *Spioch*, but subsequent Fifth District opinions have required the defendant to prove that the Department cannot provide the specialized treatment required. *See Mann*, 866 So. 2d at 182; *Tyrrell*, 807 So. 2d at 128; *Thompson*, 754 So. 2d at 127.

The burden of proving a negative, i.e. that no treatment options exist in the prison system, is problematic for the defendant and defense attorneys. For instance, in this case the expert testified that she had been unable to reach Department of Corrections officials to have them explain their treatment procedures in the prison system. Instead she relied on other information, including her work with former inmates and the general protocols for treating mental illness, as well as other information which might be considered hearsay.

The prison system is a very large institution with very large medical facilities. To track down all of the available treatment in the system may be a daunting and very expensive task, adding to an already overburdened public defender system. On the other hand, the information on availability of treatment is readily available to the state. I think the state is in the better position to offer such proof in opposition to a downward departure.

Nevertheless, without any legislative guidance as to what is meant by "specialized treatment," I would hold that the defendant met the first step in seeking the downward departure by proving amenability to treatment and that the treatment he needed was indeed "specialized," requiring various special therapies. Section 921.0026(2)(d) does not require the defendant to offer proof that the prison system does not provide the specialized treatment that the defendant requires. Since the state offered no proof on either of these aspects, the trial court did not err in finding that it could depart.

* * *

Appeal from the Circuit Court for the Seventeenth Judicial Circuit, Broward County; William W. Haury, Jr., Judge; L.T. Case Nos. 05-12006 CF10A, 07-18431 CF10A and 08-18852CF10A.

Pamela Jo Bondi, Attorney General, Tallahassee, and Daniel P. Hyndman, Assistant Attorney General, West Palm Beach, for appellant.

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Not final until disposition of timely filed motion for rehearing.