STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0128

State of Minnesota,
Respondent,

vs

Phillip Julius Butenhoff, Jr.,
Appellant.

Filed November 26, 2018
Affirmed
Johnson, Judge

St. Louis County District Court
File No. 69DU-CR-17-33

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

Mark S. Rubin, St. Louis County Attorney, Rebekka L. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Christopher Mishek, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

JOHNSON, Judge

Phillip Julius Butenhoff Jr. pleaded guilty to one count of first-degree burglary and two counts of threats of violence. Before sentencing, he moved for a downward departure.

The district court denied the motion and imposed concurrent, executed sentences on all three counts. We conclude that the district court did not abuse its discretion by denying Butenhoff's departure motion. We also conclude that Butenhoff's attorney did not provide ineffective assistance of counsel at sentencing. Therefore, we affirm.

FACTS

In the early morning hours of January 1, 2017, Butenhoff broke into a home in Duluth. The two women who resided there awoke to find Butenhoff, whom they did not know, setting items by the front door, presumably intending to steal them. Butenhoff held the women in their home by leading them to believe that he had a firearm in his jacket, even though he did not. The women were able to escape after approximately an hour and called the police. After the women escaped, Butenhoff walked to a friend's nearby house, where five persons were present. Four of those persons barricaded themselves inside a bedroom after Butenhoff threatened to shoot them. Butenhoff was under the influence of marijuana, speed, and alcohol while at both homes.

In January 2017, the state charged Butenhoff with one count of first-degree burglary, in violation of Minn. Stat. § 609.582, subd. 1(b) (2016); five counts of threats of violence, in violation of Minn. Stat. § 609.713, subd. 1 (2016); and one count of false imprisonment, in violation of Minn. Stat. § 609.255, subd. 2 (2016).

In April 2017, Butenhoff requested a screening by the district court's mental-health division. A staff person for the mental-health court determined that he was eligible for admission to the mental-health court, subject to the district court's approval.

In July 2017, Butenhoff and the state entered into a plea agreement. Butenhoff pleaded guilty to the burglary charge and two threats-of-violence charges. The state dismissed the remaining charges and withdrew its request for an aggravated sentence.

Before sentencing, Butenhoff moved for a downward dispositional departure and a downward durational departure. In a memorandum accompanying the motion, Butenhoff argued that he is particularly amenable to probation. At the sentencing hearing in October 2017, the district court stated that it had reviewed the motion papers, the pre-sentence investigation (PSI), a letter of support from Butenhoff's social worker, a victim-impact statement, a letter from Butenhoff, and the notice of Butenhoff's preliminary acceptance to mental-health court. The district court denied Butenhoff's request for a downward dispositional departure on the ground that he is not particularly amenable to probation and, thus, there are not substantial and compelling reasons to depart from the presumptive sentences. The district court imposed concurrent, executed sentences of 100 months of imprisonment on the burglary charge, 18 months of imprisonment on the first threats-of-violence charge, and 21 months of imprisonment on the second threats-of-violence charge. Butenhoff appeals.

D E C I S I O N

I. Motion for a Downward Dispositional Departure

Butenhoff argues that the district court erred by denying his motion for a downward dispositional departure.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2016). For any particular offense, the

presumptive sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.13 (2016). Accordingly, a district court "must pronounce a sentence . . . within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2016); *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotations omitted).

The guidelines also provide non-exclusive lists of mitigating and aggravating factors that may justify a departure. Minn. Sent. Guidelines 2.D.3 (2016). If a defendant requests a downward dispositional departure, the district court must "deliberately consider[] circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). If a district court departs from the presumptive sentence, the district court is required to state the reason or reasons for the departure. Minn. Sent. Guidelines 2.D.1.c (2016). But if the district court does *not* depart, the district court is *not* required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). "[T]he mere fact that a mitigating factor is present . . . does not obligate the court to place defendant on

probation." *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted).

This court generally applies an abuse-of-discretion standard of review to a district court's denial of a defendant's motion for a downward dispositional departure. *Id.* at 253; *see also State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only a "rare case" will warrant reversal of a district court's refusal to depart from the sentencing guidelines. *Kindem*, 313 N.W.2d at 7; *see also State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

In this case, Butenhoff's motion for a downward dispositional departure was based on the seventh mitigating factor mentioned in the sentencing guidelines: "particular amenability to probation." *See* Minn. Sent. Guidelines 2.D.3.a.7 (2016). In determining whether a defendant is particularly amenable to probation so as to justify a downward dispositional departure, a district court may consider, among other things, "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). If a district court denies a defendant's motion for a downward dispositional departure, the district court need not discuss all of the *Trog* factors. *Pegel*, 795 N.W.2d at 254.

The district court stated reasons on the record for its decision to deny Butenhoff's motion for a downward dispositional departure. The district court expressed concern about Butenhoff's "chemical use issue," and "mental health issues." The district court also stated that the author of the PSI (the same person who deemed Butenhoff eligible for mental-health court) "outlined in his PSI that Mr. Butenhoff is just, frankly, not amenable." Butenhoff did not challenge the accuracy of the PSI. We have reviewed the PSI (which is

a confidential document), and we have determined that it supports the district court's reasoning.

Butenhoff contends that the district court abused its discretion because its decision is against logic and the facts in the record. Butenhoff contends that a downward dispositional departure is appropriate for several reasons, including his preliminary acceptance into mental-health court, a letter of support from a social worker, and his respectful and remorseful attitude throughout court proceedings. Even if Butenhoff has identified reasons that might have supported a downward dispositional departure, he has not demonstrated that such a departure is the only reasonable sentence. There were ample facts in the record to support the district court's finding that Butenhoff is not particularly amenable to probation.

Butenhoff also contends that the district court erred by not considering other possible reasons for a downward dispositional departure, such as his mental-health condition. He asserts that his mental-health condition could be a basis for departing downward based on the third mitigating factor listed in the guidelines, which allows a downward departure if "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Minn. Sent. Guidelines 2.D.3.a.3 (2016). The district court likely did not refer to that mitigating factor because Butenhoff did not cite it in his motion papers, which asserted only that he is particularly amenable to probation. Butenhoff has not cited any authority for the proposition that a district court must consider mitigating factors not argued by a defendant, and we are not aware of any such authority.

Thus, the district court did not abuse its discretion by denying Butenhoff's motion for a downward dispositional departure on the ground that he is not particularly amenable to probation.

II. Assistance of Counsel

Butenhoff also argues that his attorney in district court proceedings provided him with ineffective assistance of counsel in connection with sentencing.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6. This right is the "right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S. Ct. 2052, 2063 (1984) (quotation omitted). To prevail on an ineffective-assistance-of-counsel claim, a defendant must satisfy two requirements:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Id. at 687, 104 S. Ct. at 2064. If a defendant claims that his attorney was ineffective in representing him at sentencing, the defendant must prove that there is a reasonable probability that the sentence would have been different but for counsel's deficient performance. *See id.* at 694, 104 S. Ct. at 2068; *Scruggs v. State*, 484 N.W.2d 21, 25 (Minn.

1992). If one of the *Strickland* requirements is not satisfied, a court need not consider the other requirement. *See State v. Mosley*, 895 N.W.2d 585, 591 (Minn. 2017).

Generally, an ineffective-assistance-of-counsel claim is raised in a petition for postconviction relief. *State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000); *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). But an ineffectiveness claim may be raised on direct appeal if the relevant facts are sufficiently developed in the record. *See Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). In this case, Butenhoff seeks review of his claim on direct appeal, and the record is sufficiently developed to allow for a determination of the claim.

Butenhoff contends that his attorney's performance was deficient because the attorney did not further investigate Butenhoff's mental illness, did not present additional evidence about his mental illness, and did not seek a downward dispositional departure on that particular basis. As stated above, Butenhoff was screened by the mental-health court and was conditionally deemed eligible for admission, subject to the district court's approval. Butenhoff's attorney sought a departure based solely on Butenhoff's particular amenability to probation. His attorney apparently believed that particular amenability to probation was a better argument and elected to make a focused argument based on that sole ground. Such a decision is a classic example of the type of strategic or tactical decision that an attorney may make without falling below the constitutionally minimal level of performance. *See State v. Mems*, 708 N.W.2d 526, 534 (Minn. 2006); *see also Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 2541 (2003). But Butenhoff's attorney did not ignore the issue of mental health. The memorandum he filed in support of the departure

motion referred to Butenhoff's eligibility for mental-health court and asserted that he "would be a perfect candidate for such a program." At the sentencing hearing, the attorney referred to Butenhoff's mental health and argued that mental-health court was necessary to allow Butenhoff to receive proper treatment. In addition, the district court was well aware of Butenhoff's struggles with mental illness, acknowledging that they were "clear as day." This part of the record indicates that Butenhoff's attorney would have been reasonable in deciding that it was unnecessary to further investigate Butenhoff's mental health, develop additional evidence on that topic, and make an additional argument for a departure. For these reasons, we cannot conclude that the attorney's performance was deficient. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

In addition, it does not appear that there is a reasonable probability that further investigating Butenhoff's mental health, developing additional evidence on that topic, and making an additional argument for a departure would have led to a different result. Butenhoff does not describe in sufficient detail the additional evidence that his attorney would have elicited if he had investigated further. Without such information, we cannot conclude that an additional argument for a departure would have been successful. A district court may order a downward dispositional departure based on a mental impairment only if the mental impairment is "extreme" and only if the defendant's mental condition deprived him of control over his actions. *State v. Lee*, 491 N.W.2d 895, 902 (Minn. 1992). Given the present record, we cannot conclude that the alleged deficiencies in Butenhoff's attorney's performance prejudiced Butenhoff's interests at sentencing. *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064.

Butenhoff also contends that his attorney was ineffective because he did not object to the district court's statement during the sentencing hearing that it could not order a downward dispositional departure without finding that Butenhoff is amenable to probation. Butenhoff contends that the district court's statement is a misstatement of law. It appears that the district court was not making a broad statement of generally applicable law but, rather, was making a statement about the issue presented in this particular case, in which Butenhoff's argument focused solely on his asserted particular amenability to probation. Butenhoff's attorney likely did not object because he understood the statement to have that meaning. In addition, an attorney does not have an obligation to object when a district court is pronouncing a sentence. Furthermore, it is unlikely that an objection would have led to a different result. Thus, Butenhoff has not demonstrated that his attorney engaged in constitutionally ineffective assistance by not objecting to the district court's statement.

In sum, Butenhoff is not entitled to a new sentencing hearing on the ground that he received constitutionally ineffective assistance of counsel.

Affirmed.