STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0057

State of Minnesota,
Respondent,

vs.

Trevor Daniel Schweitzer,
Appellant.

Filed October 28, 2019
Affirmed
Rodenberg, Judge

Olmsted County District Court
File No. 55-CR-17-7130

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Reilly, Judge.

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

RODENBERG, Judge

Appellant Trevor Schweitzer appeals from the district court's final judgment of conviction, arguing that his sentence must be reversed and remanded because the district

court abused its discretion when it denied his motion for a downward durational departure and imposed a sentence that is excessive when compared to the sentence of his co-defendants. We affirm.

FACTS

In October 2017, a team of police officers executed a search warrant at appellant's house. When officers entered the house, they found appellant and his girlfriend together in a basement bedroom. The criminal complaint states that, while searching the house, investigators found a plastic container filled with hundreds of small plastic bags, a small bag containing 32.8 grams of methamphetamine under a mattress in the basement bedroom, and a ledger that appeared to contain information concerning drug sales.

After he was informed of his *Miranda* rights, appellant admitted to an investigator that he lived in the house with his girlfriend, last went to "the cities" two weeks earlier to pick up drugs, and, if he were to take a drug test, it would come back "dirty." Investigators also found an iPhone appearing to belong to appellant that contained text messages indicating that appellant and his girlfriend were actively selling drugs together.

Appellant was charged with first-degree sale of methamphetamine under Minn. Stat. § 152.021, subd. 1(1) (2016), and second-degree possession of methamphetamine under Minn. Stat. § 152.022, subd. 2(a)(1) (2016). Appellant pleaded guilty to an amended count of second-degree sale (possession with intent to sell) under Minn. Stat. § 152.022, subd. 1(1) (2016). In exchange for appellant's guilty plea, the state dismissed the first-degree-sale charge, agreed to recommend a maximum prison sentence of 75 months, and agreed that appellant could argue for a downward durational departure at sentencing.

In his plea testimony, appellant admitted that the methamphetamine[1] found under the mattress in the basement bedroom was his and that he intended to sell the methamphetamine. Appellant also admitted to having two prior second-degree controlled-substance convictions.

Appellant moved the district court for a downward durational sentencing departure, arguing that his "culpability [was] mitigated by his co-defendants" and that his conduct was less serious than typical for the offense of conviction. Before sentencing, appellant cooperated with a presentence investigation which recommended that the district court sentence appellant to 88 months in prison, consistent with the Minnesota Sentencing Guidelines. The presumptive sentence for appellant's offense, based on his four criminal history points, was from 75 to 105 months in prison. The district court denied appellant's motion for a downward durational departure after declining to find that appellant "played a less serious, more passive role" in the offense. It sentenced appellant to 75 months in prison.

This appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying his motion for a downward durational departure because his conduct was less serious than the conduct

[1] Despite the criminal complaint listing the amount of methamphetamine found at 32.8 grams, the record reflects that appellant admitted to possessing 27.986 grams of methamphetamine. Either amount is above the threshold for both second-degree drug sale, Minn. Stat. § 152.022, subd. 1(1), (10 grams) and first-degree drug sale, Minn. Stat. § 152.021, subd. 1(1), (17 grams).

typically associated with a conviction of second-degree possession with intent to sell, and his sentence was significantly longer than the sentences imposed on his two co-defendants.

In a direct appeal from a final judgment of conviction, sentencing issues may be addressed. *See State v. Thomas*, 371 N.W.2d 533, 534-35 (Minn. 1985). "The sentences provided in the [Minnesota Sentencing Guidelines] are presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines 2.D.1 (2017). "[A] sentencing court can exercise its discretion to depart from the guidelines only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (citations and quotations omitted). "We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). "A district court abuses its discretion when its reasons for departure are legally impermissible and insufficient evidence in the record justifies the departure." *Id.* Only in a "rare" case will an appellate court reverse a sentencing court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Ordinarily, appellate courts will not disturb the district court's imposition of a presumptive guidelines sentence, even if reasons exist for a downward departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). "The general issue that faces a sentencing court in deciding whether to depart durationally is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984).

Appellant argues that his conduct was less serious than typical because, while his admissions established the "minimum factual basis for the offense," they did not establish other factors typically found in a second-degree-drug-sale case. Appellant explains four "other factors" that he claims make his offense less serious than typical. First, he argues that the statute contemplates multiple sales over multiple days, and appellant only admitted to conduct on one day. Second, he argues that there was not a sale, transaction, or controlled buy in this case, so appellant was not "engaging in illegal conduct on the street" but instead "merely had the drugs in his bedroom." Third, he argues that no weapons were involved. And fourth, appellant argues that other people were "equally associated" with the methamphetamine that appellant possessed.

The district court declined to conclude that appellant's offense was less serious than is typical. It observed that, based on the factual basis given by appellant's plea-hearing testimony, the amount of methamphetamine appellant possessed was well above the threshold for a second-degree offense and would have supported a first-degree conviction but for the plea agreement.

We see no error in the district court's reasoning. Appellant admitted to possessing approximately 27 grams of methamphetamine with the intention of selling it. This is more than double the amount required by the second-degree-drug-sale statute and would indeed have been sufficient to support a first-degree conviction. *See* Minn. Stat. §§ 152.021, subd. 1(1), .022, subd. 1(1). The district court did not clearly err or abuse its discretion in declining to depart from the guidelines on this basis.

Appellant also argues that his sentence is excessive when compared to his two co-defendants who, he claims, were equally culpable yet received shorter sentences than appellant.

Uniform treatment of offenders does not require comparing the sentences of co-defendants. *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983); *see also State v. Lonergan*, 381 N.W.2d 51, 53 (Minn. App. 1986). "The sentence chosen for a co-defendant does not mandate a more lenient sentence for appellant." *Lonergan*, 381 N.W.2d at 53. The district court was not required to detail a comparison of appellant's sentence with those of his co-defendants. The district court properly determined appellant's sentence by applying the guidelines to appellant's offense of conviction and his criminal history score.

Even if appellant's sentence were compared to the sentences of his two co-defendants, it is noteworthy that appellant had a criminal history score of four. Appellant's female co-defendant, who pleaded guilty to the same charge as appellant, had a criminal history score of zero. Her presumptive sentence under the guidelines was a stayed prison term and, like appellant, she was sentenced consistent with the guidelines. Appellant's male co-defendant, who pleaded guilty to a first-degree controlled-substance offense, also had a lower criminal history score than appellant. In short, the sentencing factors relevant to appellant's sentence were different from those of his co-defendants. The sentencing disparity of which appellant complains is a function not of any error by the district court but of the criminal-history-score component that inheres in applying the sentencing guidelines to the facts of the case.

The district court acted within its discretion in sentencing appellant, and appellant's sentence was not excessive.

Affirmed.