STATE OF MINNESOTA
IN COURT OF APPEALS
A11-64

State of Minnesota,
Respondent,

vs.

Theto Diee Hatley, Jr.,
Appellant.

Filed October 31, 2011
Reversed and remanded
Huspeni, Judge[*]

Dakota County District Court
File No. 19HA-CR-10-1624

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

James C. Backstrom, Dakota County Attorney, Shirley A. Leko, Assistant Dakota County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Bjorkman, Judge; and Huspeni, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUSPENI, Judge

On appeal from the district court's imposition of a 39-month executed prison sentence for conviction of second-degree assault, appellant argues that the substantial and compelling reasons he presented supporting a downward dispositional departure were not considered by the court. Because the record does not establish that the district court considered these reasons, we reverse and remand.

FACTS

Rosemount police, in responding to a report that a man had been run over by a vehicle, found an adult male (victim) unconscious. The victim had difficulty breathing and the officers observed what appeared to be tire-tread marks on the victim's stomach. Two witnesses advised police that three men attacked the victim and his two companions; one of the attackers kicked the victim in the head and left him lying against the curb and another attacker entered a vehicle and drove over the victim and away from the scene. A short time later, an Apple Valley police officer stopped a vehicle that matched a witness's description of the vehicle used to run over the victim. The officer observed damage to the front of the vehicle and blood on the bumper and lower part of the vehicle. Appellant Theto Diee Hatley, Jr. was identified as the driver of the vehicle. After appellant failed field sobriety tests and a preliminary breath test, the officer arrested him for driving while impaired (DWI).

Appellant was charged with second-degree assault, aiding and abetting second- and third-degree assault, criminal vehicular operation, and fourth-degree DWI, and

pleaded guilty to aiding and abetting second-degree assault, a violation of Minn. Stat. §§ 609.05, 609.222, subd. 1 (2008). Under a plea agreement approved by the district court, the remaining charges were dismissed and the state did not seek a sentence greater than 39 months in prison, which is the lowest end of the presumptive-guidelines range. At the sentencing hearing, the district court received a presentence investigation report that recommended imposition of a 39-month executed prison sentence, a victim-impact statement, and a statement from appellant apologizing for his offense and expressing his willingness to cooperate with authorities. Appellant moved for a dispositional departure. In imposing the 39-month executed prison sentence, the district court commented on the extent and severity of the victim's injuries, observing that appellant's offense was "outrageous" and that the district court must ensure not only that appellant is rehabilitated, but "also that society extracts some form of punishment [from him] so that it doesn't happen again." The record is silent regarding the district court's consideration of the mitigating circumstances urged by appellant. This appeal followed.

D E C I S I O N

Appellant, in arguing that the district court abused its discretion by denying a dispositional departure, contends that the district court failed to consider relevant substantial and compelling reasons presented in support of that departure. We note initially that the district court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). The district court must impose the presumptive guidelines sentence unless

there are "substantial and compelling circumstances" that warrant a downward departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008); Minn. Sent. Guidelines II.D.

The decision to depart from sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). The district court must exercise its discretion by weighing the reasons for and against departure. *State v. Curtiss*, 353 N.W.2d 262, 263–64 (Minn. App. 1984). But the district court is not obligated to grant a dispositional departure merely because a mitigating factor is present. *Oberg*, 627 N.W.2d at 724. "Only in a rare case would the [district] court's refusal to depart warrant reversal." *Id.*

A district court may choose to dispositionally depart from the presumptive guidelines sentence by imposing probation instead of an executed sentence when a defendant is amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "[W]hen justifying only a *dispositional* departure, the [district] court can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A relevant factor to consider when determining whether to dispositionally depart is the defendant's amenability to probation. *Id.* Other relevant factors include the defendant's age, criminal history, remorse, cooperation, attitude while in court, and support the defendant receives from family and friends. *Id.* (citing *Trog*, 323 N.W.2d at 31). If the district court "considers reasons for departure but elects to impose the presumptive sentence," an

explanation for denying the downward-departure motion is not necessary. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

In support of his assertion that this is a rare case that justifies departure, appellant contends that he was 23 years old at the time of the offense and has no history of violent crime, that he feels and has expressed remorse for the offense, that he has cooperated with and expressed a willingness to cooperate with police and the court, and that he receives support from his family. Appellant presented evidence to the district court supporting these arguments, including his statement apologizing for his offense and willingness to cooperate. The district court was also presented with evidence that appellant has participated in several rehabilitative programs in jail, including anger management and chemical-dependency treatment.

We recognize that the existence of mitigating factors does not compel the imposition of a departure. *Oberg*, 627 N.W.2d at 724. But our review of the caselaw convinces us that the district court should "exercise[ ] its broad discretion, comparing reasons for and against departure." *Curtiss*, 353 N.W.2d at 263; *see also Van Ruler*, 378 N.W.2d at 80-81 ("The reviewing court may not interfere with the [district] court's exercise of discretion, as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination.").

Here, the district court expressed on the record its consideration of the severity of appellant's offense, stating that it was "outrageous" and detailing the injuries suffered by the victim. While such consideration was proper, the record is silent regarding any consideration by the district court or exercise of its discretion regarding the factors urged

by appellant: his age, prior record, remorse, cooperation, the support he receives from his family, or his rehabilitation efforts. *Heywood* underscores the importance of focusing on those factors that would be informative regarding appellant's amenability to probation. Those factors are personal to appellant, and are surely included in those he articulated in his request for a dispositional departure. Recognizing again the very broad discretion vested in a district court in deciding whether or not to depart, a reviewing court needs to have before it a record that demonstrates actual exercise of that broad discretion. Such a record is not available in this case.

This case is similar to *Curtiss*, in which we remanded for resentencing because the district court denied appellant's departure motion without "deliberately consider[ing]" factors supporting departure. 353 N.W.2d at 264. In doing so, we observed that "[t]his is not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred."

It is not possible for us to conduct meaningful review on the record before us. In order to enable the district court to exercise its discretion in balancing reasons for and against departure, and thereby create a record capable of meaningful review, we remand for resentencing.

Reversed and remanded.