STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1592

State of Minnesota,
Respondent,

vs.

Frederick Neal Bishop,
Appellant.

Filed June 3, 2013
Affirmed
Cleary, Judge

Stearns County District Court
File No. 73-CR-10-6595

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

Janelle P. Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Cleary, Presiding Judge; Kalitowski, Judge; and Hooten, Judge.

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

CLEARY, Judge

In this sentencing appeal, appellant Frederick Bishop argues that the district court abused its discretion when it denied his request for a minimum presumptive guidelines

sentence following his conviction of a second-degree controlled-substance offense. The court instead sentenced appellant to 120 months, which is at the high end of the presumptive sentencing range on the guidelines grid, or "the box." Because the district court did not abuse its discretion, we affirm.

FACTS

Appellant has an extensive criminal history and has spent much of his adult life in prison. He was most recently released in April 2010. Two months after his release, St. Cloud police officers met with a confidential informant who made arrangements for, and successfully completed, five controlled buys of crack cocaine from appellant over the course of approximately two weeks. Appellant was charged by complaint with a second-degree controlled-substance offense for the sale of three grams or more within a 90-day period, in violation of Minn. Stat. § 152.022, subd. 1(1) (2008). The state filed a notice of intent to seek an aggravated durational departure from the Minnesota Sentencing Guidelines based on appellant's previous convictions. Appellant filed a notice of entrapment defense, posted bond, and was released from jail.

In September 2011, the state extended a plea offer to appellant reflecting a bottom-of-the-box sentence of 92 months. That same month appellant violated an order for protection. In November 2011, appellant failed to appear for his jury trial and committed a false-name offense. In January 2012, while awaiting his trial, which was set for April 10, appellant was arrested attempting to flee police in a stolen vehicle. Appellant was charged with additional felony counts and remained in custody pending trial. The state withdrew the bottom-of-the-box plea offer after appellant was charged with these

additional crimes. Appellant also declined a subsequent plea offer from the state, this one reflecting a 108-month middle-of-the-box sentence.

On the date of appellant's trial, the parties settled on a plea agreement. Appellant entered, and the district court accepted, a guilty plea to one count of second-degree sale of a controlled substance. The state agreed not to argue for an upward departure at sentencing, and appellant agreed to waive his entrapment defense. The agreement also called for a presumptive guidelines sentence of no more than 129 months (the top of the box) to the Commissioner of Corrections and otherwise left sentencing discretion to the court and appellant free to argue for a lesser duration.

At the sentencing hearing held June 8, 2012, the state requested a top-of-the-box guidelines sentence of 129 months, while appellant requested a bottom-of-the-box guidelines sentence of 92 months. Appellant argued that, because law enforcement chose to set up multiple controlled-buy transactions with him instead of arresting him after the first sale, he was charged more severely than necessary and should therefore be sentenced at the bottom of the applicable guidelines range. Appellant testified that he was remorseful for his crime; that he was apologetic to his victims; and that he was tired of living the life of a drug addict.

The court sentenced appellant to 120 months to the Commissioner of Corrections, a sentence within the plea agreement and within the presumptive guidelines range. This appeal followed.

D E C I S I O N

Sentence ranges provided in the Minnesota Sentencing Guidelines are presumed to be appropriate. Minn. Sent. Guidelines II.D (2008). Sentences imposed within the appropriate guidelines range constitute presumptive sentences. *State v. Delk*, 781 N.W.2d 426, 428–29 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). A district court must order a presumptive guidelines sentence unless the case involves "substantial and compelling circumstances" to warrant a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court's review of a district court's exercise of its discretion to not depart from a presumptive sentence is "extremely deferential." *Dillon v. State*, 781 N.W.2d 588, 595–96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Appellant first argues that his sentence was an abuse of discretion and exaggerated the criminality of his conduct because law enforcement "racked up the bill" by conducting five controlled buys before he was charged instead of just one. Appellant argues that the state intentionally did not charge him after the first controlled buy so that it could ultimately charge him with a more severe offense that carried a greater penalty.

Appellant cites to no authority in support of his argument, but it appears that he is requesting that we adopt the doctrines of sentencing manipulation or entrapment discussed in *State v. Soto*, 562 N.W.2d 299 (Minn. 1997). In *Soto*, the supreme court explained that these doctrines have been adopted to reduce a sentence when law enforcement intentionally sought to increase a resulting sentence through conduct that was "outrageous" and which "overc[ame] the will of an individual predisposed only to dealing in small quantities." 562 N.W.2d at 305 (quotation omitted).

Appellant's argument is without merit. Not only does he fail to point to any evidence indicating that he was predisposed to selling only small quantities of crack cocaine, but he also fails to point to any evidence that law enforcement intentionally conducted the additional controlled buys to inflate his sentence. If law enforcement truly intended to "rack up" appellant's sentence, officers could have conducted additional controlled buys to increase the total amount of drugs sold to provide grounds for a first-degree charge and a greater presumptive sentence. *See* Minn. Stat. § 152.021, subd. 1 (2008) (allowing for a charge of first-degree sale of a controlled substance if, within a 90-day period, the person unlawfully sells ten or more grams of cocaine); Minn. Sent. Guidelines IV (2008) (providing a presumptive sentencing range of 135–189 months for appellant had law enforcement charged him with first-degree sale of a controlled substance).

We see no reason to conclude here that law enforcement's conduct with appellant was anything other than reasonable, let alone outrageous. Accordingly, we decline to adopt the doctrine of sentencing manipulation or entrapment to conclude that the district court abused its sentencing discretion. *See Soto*, 562 N.W.2d at 305 (declining to consider a sentencing departure based on sentencing manipulation or entrapment where the defendant failed to present any evidence showing that the multiple drug sales were conducted for the sole purpose of increasing his sentence, rather than for the reasonable purposes of establishing his guilt or tracing his supplier).

Appellant also argues that, because he admitted to being a drug addict and felt remorse for his actions, the district court abused its discretion by sentencing him to the

high end of the presumptive guidelines range. Again, appellant's argument is without merit. Caselaw makes it clear that any sentence imposed within the presumptive guidelines range is considered a presumptive sentence, and that we are to overturn imposition of such sentences only in compelling circumstances. *See State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982) (stating that an appellate court generally will not exercise its authority to modify a sentence within the presumptive range "absent compelling circumstances"); *see also Delk*, 781 N.W.2d at 428–29.

In sentencing appellant, the district court stated that it was its "sincere hope that while [appellant] is in prison [he is] able to deal and address the issues that are a result of [his] addiction." The district court gave no further reasoning for sentencing appellant for nine months less than the maximum presumptive sentence, nor did it need to. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (providing that while district courts are "required to give reasons for departure, an explanation is not required when the court . . . elects to impose the presumptive sentence.").

The presumptive guidelines sentence for appellant's offense and with appellant's criminal history score was commitment within the range of 92–129 months. Minn. Sent. Guidelines IV. Appellant's plea agreement provided that the state would not seek a durational departure, which it did not, and that the district court would have the discretion to sentence him to up to 129 months. The district court sentenced appellant to 120 months, and therefore appellant received more than the benefit of his bargain. If this is not a frivolous appeal, it is close. We are "extremely deferential" to a district court's sentencing decision in these circumstances and find no reason on this record to conclude

that the district court abused its discretion by imposing the sentence that it did. *Dillon*, 781 N.W.2d at 595–96.

Affirmed.