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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1708

State of Minnesota,
Respondent,

vs.

Kent D. Phelps,
Appellant.

Filed October 7, 2008
Affirmed
Johnson, Judge

Steele County District Court
File No. CR-06-2233

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Douglas L. Ruth, Steele County Attorney, Scott L. Schreiner, Assistant County Attorney, 303 South Cedar, Owatonna, MN 55060 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Harten, 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

JOHNSON, Judge

Kent D. Phelps pleaded guilty to first-degree driving while impaired (DWI). Prior to sentencing, Phelps moved for a downward departure from the presumptive guidelines sentence of 42 months of imprisonment. The district court denied the motion and imposed an executed sentence of 42 months. On appeal, Phelps argues that the district court abused its discretion by denying his motion for a downward departure. We affirm.

FACTS

On December 26, 2006, Phelps was pulled over by a Steele County deputy sheriff for speeding. The deputy observed indicia of drunken driving, such as the odor of alcohol, Phelps's bloodshot and watery eyes, and beer bottles in the back seat. Phelps failed several field-sobriety tests and was placed under arrest for DWI. The deputy searched Phelps's car and found an orange pill bottle containing a substance that appeared to be marijuana. At the county jail, Phelps consented to a breath test, which registered an alcohol concentration of .14.

The following day, the state charged Phelps with four offenses: first-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(1), .24, subd. 1(1) (2006); first-degree DWI in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .24, subd. 1(1); operating a vehicle on a restricted license in violation of Minn. Stat. § 171.09 (2006); and possession of marijuana in violation of Minn. Stat. § 152.027, subd. 4 (2006).

On February 6, 2007, Phelps pleaded guilty to count 2, first-degree DWI. In consideration of his guilty plea, the state agreed to dismiss the three other charges and to remain silent at sentencing.

Ten days before the sentencing hearing, Phelps moved for a downward dispositional departure in the form of a stay of execution or, in the alternative, a downward durational departure. At the June 8, 2007, sentencing hearing, Phelps introduced evidence of his participation in two chemical-dependency treatment programs, one sponsored by the Owatonna Family Focus agency and another called Celebrate Recovery, a faith-based treatment program sponsored by a local church. Phelps also offered the testimony of his pastor, leaders of the Celebrate Recovery program, his mentor in one of the treatment programs, his Bible-study leader, and his parents. These witnesses testified to Phelps's good character, remorse, and eagerness to reform.

At the conclusion of the sentencing hearing, the district court imposed an executed sentence of 42 months of imprisonment followed by a five-year period of conditional release. Phelps appeals.

D E C I S I O N

Phelps argues that the district court abused its discretion by refusing to grant a downward departure from the presumptive sentence. In considering a request for a downward dispositional departure, Minnesota courts weigh numerous factors, including the defendant's "age, prior record, remorse, and attitude in court." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v.*

Jackson, 749 N.W.2d 353, 360 (Minn. 2008) (citing *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002); Minn. Sent. Guidelines II.D.). A district court has broad discretion in determining an appropriate sentence, and reviewing courts will not reverse a district court's denial of a request for a downward departure unless the district court has abused its discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Even if there are reasons for departing downward, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006); *Kindem*, 313 N.W.2d at 7-8. Reversing a denial of a request for a downward departure is appropriate only in "rare" circumstances, *Kindem*, 313 N.W.2d at 7, such as when the district court incorrectly believed that it was constrained from exercising its discretion or otherwise failed to exercise its discretion, *see, e.g.*, *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

In this case, the district court exercised its discretion by considering but rejecting Phelps's arguments for a downward departure. The district court noted Phelps's statements of remorse and aspirations for recovery, the support he was receiving from friends and family, his participation in alcohol treatment programs, and his ability to remain sober during the previous five months. But the district court concluded that the presumptive sentence was appropriate given Phelps's history of chronic alcohol use, his numerous prior DWI convictions, and the danger that his repeated drunken driving posed to the public. The district court concluded by saying to Phelps that his recent period of

sobriety does not constitute "substantial and compelling circumstances to allow you [to be] at liberty and at risk to the public."

The district court had valid reasons to deny Phelps's motion for a downward departure. Phelps had four prior DWI convictions between 1997 and 2002. He repeatedly reoffended while on probation or soon after completing a period of probation. Phelps's evidence that he is remorseful and has reformed is contradicted by information in the confidential appendix to his brief. In light of the evidentiary record, the district court reasonably concluded that probation is not appropriate and reasonably concluded that the presumptive sentence of 42 months is appropriate.

In sum, the district court did not abuse its discretion in refusing to depart downward from the presumptive sentence. *See Bertsch*, 707 N.W.2d at 668; *Kindem*, 313 N.W.2d at 7-8.

Affirmed.