STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2407

Angel Dominguez Martinez, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed December 23, 2008
Affirmed
Collins, Judge*

Hennepin County District Court
File No. 27-CR-01-056087

Lawrence Hammerling, Chief Appellate Public Defender, Sharon E. Jacks, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth R. Johnston, Assistant County Attorney, C-2000 Government Center, 300 South Sixth Street, Minneapolis, MN 55487 (for respondent)

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Collins, Judge.

Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appealing from the denial of the petition for postconviction relief challenging the duration of his sentence, appellant argues that the district court erred in sentencing by finding that the following factors justified an upward departure: (1) the agreement between the parties; (2) an invasion of the victim's zone of privacy; (3) endangerment of others during the commission of the offense; and (4) the more serious nature of the offense compared with the typical second-degree unintentional murder. We affirm.

D E C I S I O N

I.

A district court has broad discretion to depart from the presumptive sentence under the sentencing guidelines. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). Departures from presumptive sentences are reviewed under an abuse-of-discretion standard, but there must be "substantial and compelling circumstances" in the record to justify a departure. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). "If the record supports findings that substantial and compelling circumstances exist, this court will not modify the departure unless it has a strong feeling that the sentence is disproportional to the offense." *State v. Anderson*, 356 N.W.2d 453, 454 (Minn. App. 1984) (quotation omitted).

A. Agreement between the parties

After being charged with second-degree intentional murder and second-degree unintentional murder, appellant waived his right to a jury trial and submitted to a

stipulated-facts trial on the charge of second-degree unintentional murder. As part of this waiver, appellant agreed to a sentence of 216 months' imprisonment if found guilty. For this offense, committed by an offender such as appellant with zero criminal-history points, the presumptive guidelines sentence is 150 months' imprisonment, within the presumptive range of 128 to 180 months.

A plea agreement—standing alone—does not provide substantial and compelling circumstances to support a departure from the presumptive guidelines sentence. *State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002). But, by implication, the agreement is a factor that may be considered by the district court in sentencing. Thus, the district court did not abuse its discretion by alluding to appellant's duration-of-sentence agreement as one sentence departure factor.

B. Invasion of the victim's zone of privacy

That the crime was committed within the victim's "zone of privacy" may be used as an aggravating factor under the sentencing guidelines. *State v. Kindem*, 338 N.W.2d 9, 17-18 (Minn. 1983). Appellant contends that the offense occurred on the stairway leading down to the apartment, not in the hallway outside the victim's apartment door as found by the district court. The district court also found that the victim had come out of his apartment "during the fight in the hallway" and that appellant "was also in the hallway." In its order denying relief, the postconviction court stated that "the record in this case reflects that after the incident the victim was [lying] just outside the door to his apartment."

Based on our review of the record, the offense occurred on the steps. However, the district court's findings are reconcilable with the record because the district court found that the stairway and hallway are "essentially the same location" in that the two are "[s]eparated by only a few feet" and "[t]he entire incident occurred within twelve feet of the victim's apartment door." The term "hallway" is defined as "[a] corridor in a building" or "[a]n entrance hall." *The American Heritage Dictionary of the English Language* 816 (3d ed. 1992). The record supports the district court's determination that the stairway, composed of a landing area and between five and nine steps leading down to two apartments, is part of an entrance hall or building corridor. Thus, the district court's finding that the offense occurred in the hallway in close proximity to the victim's apartment door is not clearly erroneous.

Appellant also argues that a victim's zone of privacy is limited to his or her home and its curtilage. The Minnesota Supreme Court has held that a victim's zone of privacy includes the home and curtilage. *State v. Thao*, 649 N.W.2d 414, 421 (Minn. 2002). This court has included the home and "surrounding area" in the zone of privacy. *State v. Titworth*, 381 N.W.2d 510, 512 (Minn. App. 1986), *review denied* (Minn. Apr. 18, 1986). The *Thao* court declined to extend the zone of privacy to the "zone of tranquility." 649 N.W.2d at 422.

Appellant contends that *Thao* contravenes the "surrounding area" language in *Titworth*. However, even after *Thao* was decided, this court has defined the "zone of privacy" in terms of the area that "surrounds the victim's home." *State v. Copeland*, 656 N.W.2d 599, 603 (Minn. App. 2003) (quotation omitted) (citing *Kindem*, 338 N.W.2d at

18), *review denied* (Minn. Apr. 29, 2003). Declining to extend the zone of privacy to include an ethereal "zone of tranquility" does not vitiate the "surrounding area" definition, and the district court's reliance on *Titworth* is not an abuse of discretion. "Violation of the victim's zone of privacy . . . encompasses the fact that the violator deliberately trespassed in a place where the victim felt particularly safe." *State v. Bock*, 490 N.W.2d 116, 121 (Minn. App. 1992), *review denied* (Minn. Aug. 27, 1992).

Appellant also argues that the stairway leading to the victim's apartment was not within the victim's zone of privacy, citing cases indicating that curtilage in multifamily residences does not include the hallway. *State v. Krech*, 403 N.W.2d 634, 637 (Minn. 1987); *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985); *United States v. Arboleda*, 633 F.2d 985, 992 (2nd Cir. 1980); *United States v. Eisler*, 567 F.2d 814, 816 (8th Cir. 1977); *Commonwealth v. Thomas*, 267 N.E.2d 489, 491 (Mass. 1971). However, although these cases generally suggest that common areas are not part of an apartment's curtilage, they are all Fourth Amendment search-and-seizure cases. We agree with the district court that these cases are not persuasive in determining the zone of privacy for sentencing purposes. Rather, we apply the two factors outlined in *Bock* to define the zone of privacy.

This distinction between the Fourth Amendment and the *Bock* factors is an important one. The purpose of identifying the curtilage for Fourth Amendment analysis is to determine the confines within which the individual has a reasonable expectation of privacy that should be protected from invasion by the state. The purpose of identifying a "zone of privacy" in sentencing, however, is to determine whether the circumstances of

the offense are such as to justify an upward departure from the sentencing guidelines. Minn. Sent. Guidelines, cmt. II.D.01. The *Bock* court determined that (1) the victim's future fear and (2) the offender's trespass into a "place where the victim felt particularly safe" are the factors to be considered when assessing the zone of privacy for sentencing. 490 N.W.2d at 121.

Here, the district court determined that appellant had "deliberately trespassed in a place where the victim felt safe near his home." The district court based this determination on findings that (1) the offense occurred in the hallway in front of the victim's apartment; (2) the apartment building had an exterior security door that was propped open; and (3) the interior hallway accessed only two apartments. The district court reasoned that "[t]he victim had every right to feel particularly safe in the small common hallway inside his apartment building that had an exterior security door to limit access to the interior of the building." The district court also recognized that "the victim would have felt particularly safe only feet from the door to his own apartment." Additionally, the district court observed that this court has found that a rape that occurred in the laundry room of the victim's apartment building was within her zone of privacy, *Titworth*, 381 N.W.2d at 512, and that the place where the instant offense occurred was closer in proximity to the victim's apartment than that of the laundry room to the victim's apartment in *Titworth*.

Appellant asserts he did not deliberately trespass because he had been invited into the building. But our focus is on the victim's expectation. An invitation into the zone of privacy by a third party does not negate the victim's expectation of security within that

zone of privacy. *Copeland*, 656 N.W.2d at 603. And here it was a third party, not the victim, who had invited appellant into the apartment building.

The district court did not abuse its discretion by determining that the offense took place within the victim's zone of privacy.

C. Endangering others during the commission of the offense

A sentencing court may depart upwardly when "the conduct underlying the offense was particularly serious and represented a greater than normal danger to the safety of other people." *State v. McClay*, 310 N.W.2d 683, 685 (Minn. 1981). An offense may be more serious than a typical crime when a large number of people are placed at risk or more people are put in fear than in the typical case. *State v. Mitjans*, 408 N.W.2d 824, 834 (Minn. 1987) (citing *State v. Profit*, 323 N.W.2d 34, 36 (Minn. 1982) (upholding upward departure where defendant intentionally committed violent crime in front of children); *McClay*, 310 N.W.2d at 685 (upholding departure in aggravated robbery case because more people were put in fear than in typical case)).

Appellant argues that the district court erred by finding that he recklessly endangered others or placed them in fear for their safety. The district court based its determination on findings that (1) there were between five and ten people in the hallway at the time of the incident; (2) witnesses described the people, including appellant and the victim, being bunched together during the incident; and (3) the victim suffered multiple stab wounds.

While recognizing that the typical stabbing offense places only the immediate victim at risk, the district court found that appellant's multiple stabbing actions "placed

every individual in the hallway in greater than normal risk to their safety due to their proximity to [appellant]."

The district court also found that appellant's conduct caused fear in many of those people. The district court observed that several witnesses "reported being scared, running from the area because they were scared, or seeing others running from the area." One witness indicated that he ran because he "got scared," though he did not directly answer when the officer asked him if he was scared because he saw what was happening. Another witness indicated that after the stabbing he saw the body of the victim and was frightened. In light of the expressions of fright and flight, the record supports the district court's finding that those persons in the hallway and in the apartments were placed in fear by appellant's conduct.

The evidence supports the district court's findings. Therefore, the district court did not abuse its broad discretion by determining that appellant endangered a number of others as he repeatedly stabbed at the victim and that a number of people were put in fear.

D. More serious than the typical second-degree unintentional murder

"Underlying the Guidelines is the notion that the purposes of the law will not be served if judges fail to follow the Guidelines in the 'general' case." *State v. Garcia*, 302 N.W.2d 643, 647 (Minn. 1981). "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).

The district court found that "[t]he presence of the aggravating factors of invading the victim's zone of privacy and endangering bystanders are substantial and compelling circumstances that make [appellant]'s offense more serious than the typical second-degree murder." The district court specifically found that this stabbing took place within a few feet of the entrance of the victim's home in a manner that placed several people in greater-than-normal danger. The record supports these findings. The district court's determination that the offense was significantly more serious and dangerous than the typical second-degree unintentional murder, therefore, is not an abuse of discretion.

In sum, the record supports the district court's findings on the specified factors amounting to substantial and compelling circumstances justifying the upward departure. And we do not see that the sentence is disproportional to appellant's offense.

Affirmed.