IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO FILE MOTION FOR REHEARING AND DISPOSITION THEREOF IF FILED

WILLIAM T. WATSON

Appellant,

v. Case No. 5D20-1928

STATE OF FLORIDA,

Appellee.

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Opinion filed March 12, 2021

Appeal from the Circuit Court for Marion County, Lisa D. Herndon, Judge.

Matthew J. Metz, Public Defender, and Allison A. Havens, Assistant Public Defender, Daytona Beach, for Appellant.

Ashley Moody, Attorney General, Tallahassee, and Nora Hutchinson Hall, Assistant Attorney General, Daytona Beach, for Appellee.

PER CURIAM.

William Watson appeals the denial of his request for a downward departure sentence, contending that the trial court failed to consider the victim as a willing participant.

Watson was twenty-five years old when he engaged in a sexual relationship with his fifteen-year-old stepsister. Their relationship resulted in the stepsister becoming pregnant. Watson was charged with and entered a plea to child abuse by impregnation, a third-degree felony.

At sentencing, the victim testified that she voluntarily engaged in the sexual relationship and did not want Watson incarcerated. The trial court, in rejecting a downward departure sentence, focused on the fact that a fifteen-year-old could not consent to sexual activity:

> TRIAL COURT: You do agree that a victim of the age of 15 legally cannot consent, correct?
>
> COUNSEL: Your Honor,—
>
> TRIAL COURT: Correct? That's a correct statement of law?
>
> COUNSEL: It's certainly no defense, the victim consents, and I don't personally believe that. But there have been cases in which underage victims have, according to the courts, have been allowed to say they consented to things, even if I personally find that—
>
> TRIAL COURT: I'm not saying that it's—the law is set forth that way, and it recognizes that a minor cannot

> consent to sexual activity, correct? It places the responsibility on the adult?
>
> COUNSEL: I would entirely agree, Your Honor.
>
> TRIAL COURT: Okay. All right, anything else you want to tell me.
>
> COUNSEL: I would say that while, legally, she can't consent, she does identify herself as a willing participant in this.
>
> TRIAL COURT: Yeah, and I understand that, and I heard her testimony.

In imposing a sentence of 81.15 months, the trial court stated:

> I do not find the downward departure reason of the victim consenting to be adequate or appropriate, under the circumstances. Therefore, I feel bound to sentence you to the lowest permissible sentence in the guidelines. I should say I feel bound to, within the law, sentence you, pursuant to the sentencing guidelines.

Watson is correct that while a minor's consent is not a defense to crimes of a sexual nature, a trial court may impose a downward departure from the sentencing guidelines under such circumstances. Section 921.0026(2)(f), Florida Statutes (2017), allows for mitigation from the sentencing guidelines where the victim was an initiator, willing participant, aggressor, or provoker of the incident. The Florida Supreme Court has held that even in cases where the victim is a minor, "trial judges are not prohibited as a matter of law from imposing a downward departure based on a finding

that '[t]he victim was an initiator, willing participant, aggressor, or provoker of the incident.'" State v. Rife, 789 So. 2d 288, 296 (Fla. 2001) (quoting § 921.0016(4)(f), Fla. Stat. (1997)).

The two-step process required of the trial court in determining the appropriateness of a downward departure was set out in Banks v. State, 732 So. 2d 1065 (Fla. 1999). First, the trial court must determine whether there is a valid legal and factual basis for a downward departure, and second, whether the case is appropriate for a departure sentence. Banks, 732 So. 2d at 1067–68. A trial court's determination under the first prong will be sustained if it applied the correct rule of law and competent substantial evidence supports its ruling, whereas the second prong is reviewed for an abuse of discretion. Id.

For purposes of appellate review, it is helpful if trial courts make findings as to each of the two prongs. Had the trial court done so in this case, it would have avoided the ambiguity present in the above-quoted remarks. Watson's argument that the trial court did not recognize its authority to downward depart based upon the victim's acknowledged willing participation centers on the trial court's remarks as to the unavailability of consent as a legal defense under the facts of this case.

The trial court fully understood the acknowledgment of a fifteen-year-old child that she willingly participated in the sexual relationship with her twenty-five-year-old step-brother. Nonetheless, the court went on to find that Watson's taking advantage of the victim's consent was not appropriate under the circumstances of the case. Accordingly, even if the court did not recognize its authority to depart, the court's remarks make it clear that it would have not exercised its discretion to depart under the facts of this case. See Kezal v. State, 42 So. 3d 252 (Fla. 2d DCA 2010) (holding that even though trial court imposed sentence under mistaken impression that mitigator concerning capacity to appreciate the criminal nature of the conduct did not apply to driving under the influence (DUI) manslaughter and DUI with serious bodily injury to another, vacatur of sentence and remand for resentencing was not necessary, where trial court's remarks at sentencing made it clear that, in any event, it would not have exercised its discretion to depart under the facts of the case based on diminished capacity).

That decision, not to depart, is discretionary under the second prong of Banks. We find no abuse of discretion in that determination. "[I]t is indeed the rare case involving a youthful victim of a sexual crime that would support a downward departure sentence." Rife, 789 So. 2d at 296 (citing State v. Rife, 733 So. 2d 541, 544 (Fla. 5th DCA 1999)).

AFFIRMED.

EVANDER, C.J., COHEN and SASSO, JJ., concur.