

FIRST DISTRICT COURT OF APPEAL  
STATE OF FLORIDA

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No. 1D21-490

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STATE OF FLORIDA,

Appellant,

v.

WAYLON ANDREW KAHL,

Appellee.

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On appeal from the Circuit Court for Escambia County.  
Gary L. Bergosh, Judge.

February 16, 2022

ROWE, C.J.

The State of Florida appeals the downward departure sentence that the trial court imposed on Waylon Andrew Kahl. The trial court departed from the lowest permissible sentence under the sentencing guidelines, citing COVID-19 and the “minimal nature” of the felony petit theft Kahl committed. The State argues that the court reversibly erred because no valid, statutory or non-statutory mitigating factor supports departure. We agree.

The State charged Kahl with felony petit theft after he stole a pair of sunglasses from an eyeglass retailer. When he failed to appear for a hearing, the State amended the information to include a charge of failure to appear. After his arrest, Kahl remained in county jail for ten months. He moved for pretrial release. At a

hearing on that motion, defense counsel asked the State whether it would consider a time-served sentence. The State declined, citing Kahl's extensive criminal history and his lowest permissible sentence of fifty-five months in state prison.

Defense counsel then presented evidence to support Kahl's motion for pretrial release. After counsel concluded his presentation of evidence, the trial court asked whether the State would consider "any lesser sentence." The State stated that it would not, explaining that Kahl had extensive prior convictions, including twenty-six forgeries, thirty-three uttering forged instruments, fraud counts, seven felony petit theft counts, several burglaries, and twenty-eight misdemeanor petit thefts.

The trial court acknowledged Kahl's "big record" and asked the State to confirm the lowest permissible sentence. The State responded that Kahl scored a lowest permissible sentence of fifty-five months, or sixty-nine months including the failure to appear charge.

The trial court then proposed, "what if he pled straight up and I somewhat downward departed? I would base it on this COVID and everything else." The trial court explained that it would probably sentence Kahl to probation with drug treatment, along with a period of administrative probation. The court conducted a plea colloquy and Kahl entered a no contest plea. Then, over the State's objection, the trial court sentenced Kahl to two years of probation, followed by three years of administrative probation. The State objected, restating the process required for a departure and arguing that Kahl presented no evidence to support a departure sentence. Even so, the trial court explained:

It is a downward departure. I'm going to base the downward departure on the unique issues facing our society today with Covid, with the lack of jury trials, speedy trials being suspended -- I just think in the interest of justice, based upon the minimal nature of this crime -- not minimizing the theft, but compared to what I've got. For all of those reasons, I'm going to downward depart.

The State appeals the trial court’s imposition of a downward departure sentence. We have jurisdiction. *See* Art. V, § 4(b)(1), Fla. Const.; §§ 921.0026(1), 924.07(1)(i), Fla. Stat. (2021); Fla. R. App. P. 9.140(c)(1)(M).

### *Analysis*

We review a trial court’s decision to grant a downward departure sentence applying a mixed standard of review. *State v. Kunkemoeller*, 46 Fla. L. Wkly. D2369 (Fla. 1st DCA Nov. 3, 2021). We review the trial court’s legal conclusions de novo and its factual findings to determine whether competent, substantial evidence supports those findings. *Id.* (citation omitted).

The State argues that the trial court erred when it downwardly departed based on COVID-19 and when it found that the theft was of a *de minimis* nature. The State contends that a generalized concern about COVID-19 is not a valid, non-statutory mitigating circumstance for departure and that the trial court’s conclusion that Kahl’s theft was *de minimis* contravenes legislative sentencing policy. We agree.

A trial court cannot depart from the lowest permissible sentence provided under the Criminal Punishment Code “unless there are circumstances or factors that reasonably justify the downward departure.” § 921.0026(1), Fla. Stat. (2020). Section 921.0026(2) enumerates fourteen non-exclusive mitigating circumstances a trial court may consider for a downward departure sentence. *Kunkemoeller*, 46 Fla. L. Wkly. D2369. Even so, a trial court “can impose a downward departure sentence for reasons not delineated in section 921.0026(2), so long as the reason given is supported by competent, substantial evidence and is not otherwise prohibited.” *Id.* (quoting *State v. Robinson*, 149 So. 3d 1199, 1203 (Fla. 1st DCA 2014)).

But before a court may depart, it must first determine whether there is a valid legal ground to depart that defendant has proven by a preponderance of the evidence. *Banks v. State*, 732 So. 2d 1065, 1067 (Fla. 1999). If the defendant meets this evidentiary burden, the trial court must then make a discretionary decision

under the totality of circumstances on whether it should depart. *Id.* at 1068.

Kahl did not meet his burden of proving a valid, legal ground for departure by a preponderance of the evidence. None of the circumstances enumerated in 921.0026(2) support a departure sentence. And though the statute's list of mitigating circumstances is not exclusive, a trial court may consider other circumstances only when the reason for departure is consistent with legislative sentencing policy. *See State v. Geohagan*, 27 So. 3d 111, 115 (Fla. 1st DCA 2009).

As to the trial court's first ground for departure, a generalized concern over the COVID-19 pandemic is not one of the statutory mitigating factors, nor one that is consistent with legislative sentencing policies. *See, e.g., State v. Saunders*, 322 So. 3d 763, 766 (Fla. 2d DCA 2021) (holding that jail overcrowding because of COVID-19 was not a valid ground for a downward departure). Kahl also presented no evidence or testimony about the COVID-19 pandemic, the effects of the pandemic on his health, or the effects of the pandemic on the progress of his case. *See* § 921.0026(2)(d) Fla. Stat. (authorizing a downward departure when the defendant (1) "requires specialized treatment", (2) "for a . . . physical disability", and (3) "is amenable to treatment.") "Where a defendant presents no evidence, he fails to meet the burden of proving a departure factor by a preponderance of the evidence." *State v. Williams*, 963 So. 2d 281, 282 (Fla. 4th DCA 2007) (citation omitted). For these reasons, the trial court reversibly erred when it cited the COVID-19 pandemic as a circumstance supporting departure.

Similarly, the trial court erred when it departed based on its reasoning that felony petit theft is an offense of a "de minimis" nature. The nature of the charged offense does not provide a statutory or non-statutory circumstance supporting departure. "[A] trial court's opinions that the lowest permissible sentence is too harsh, or that the severity of the sentence is not commensurate with the seriousness of the crime, are prohibited grounds upon which to depart." *State v. Bowman*, 123 So. 3d 107, 109 (Fla. 1st DCA 2013). Further, a trial court's decision to downwardly depart must be "consistent with the legislative sentencing policy." *Id.* The

State advised the trial court on Kahl's extensive criminal history and explained that the lowest permissible sentence was fifty-five months in prison. *See State v. Perlman*, 118 So. 3d 994, 996 (Fla. 1st DCA 2013) (holding that the trial court erred when it imposed a downward departure sentence for two felony petit theft charges when the defendant's criminal record consisted of "three robberies, [twenty-one] felonies, and seven forgery related thefts"). And yet the court imposed a probationary sentence. The trial court's decision to depart from the lowest permissible sentence contradicted the legislatively crafted sentencing scheme that increases the severity of sentencing when an offender has an extensive criminal history. *See Harris v. State*, 674 So. 2d 110, 112 (Fla. 1996) (explaining that "the sentencing guidelines embody the principle that the severity of the sanction should increase with the length and nature of the offender's criminal history"). And so, the trial court erred when it downwardly departed based on its opinion of the nature of the offense and because the departure sentence was inconsistent with legislative sentencing policy.

Because Kahl thus did not meet his burden to establish a valid statutory or non-statutory ground for departure, the trial court erred when it departed from the lowest permissible sentence according to Kahl's criminal scoresheet. We therefore reverse and remand for resentencing.

REVERSED and REMANDED.

LEWIS and M.K. THOMAS, JJ., concur.

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***Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.***

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Ashley Moody, Attorney General, and Julian E. Markham, Assistant Attorney General, Tallahassee, for Appellant.

No appearance for Appellee.