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MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL  
OF FLORIDA  
SECOND DISTRICT

MARQUELLE DOMINIQUE WILLIAMS, )  
 )  
 Appellant, )  
 )  
 v. )  
 )  
 STATE OF FLORIDA, )  
 )  
 Appellee. )  
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Case No. 2D18-2973

Opinion filed December 13, 2019.

Appeal from the Circuit Court for Manatee  
County; Edward Nicholas, Judge.

Howard L. Dimmig, II, Public Defender,  
and Matthew J. Salvia, Assistant Public  
Defender, Bartow, for Appellant.

Ashley Moody, Attorney General,  
Tallahassee, and Pamela Cordova  
Papasov, Assistant Attorney General,  
Tampa, for Appellee.

SILBERMAN, Judge.

Marquelle Dominique Williams appeals the sentences imposed after he entered a no contest plea to the following counts: (1) sale of a controlled substance within 1000 feet of a convenience business (carfentanil); (2) neglect of a child (without great bodily harm); (3) driving while license cancelled, suspended, or revoked; (4) sale

of a controlled substance within 1000 feet of a convenience business (heroin); (5) possession of a conveyance for sale of a controlled substance (carfentanil/heroin); (6) sale or delivery of controlled substance within 1000 feet of a public park (heroin); and (7) possession of a conveyance for sale of a controlled substance (heroin). Williams sought a downward departure sentence under section 921.0026(2)(d), Florida Statutes (2016), on the basis that he required specialized treatment for mental disorders that were not related to substance abuse and that he was amenable to treatment. He contends that the trial court erred in determining that he did not legally qualify for a downward departure under section 921.0026(2)(d). Because the trial court's conclusion appears inconsistent with some of its findings and it is unclear whether the trial court applied the proper standard, we reverse the sentences and remand for resentencing.

At the sentencing hearing, Dr. Regnier testified that he has a Ph.D. in clinical psychology and has been qualified as an expert in court. Based on a referral for an evaluation of whether Williams met any criteria for mitigation, Dr. Regnier evaluated Williams. Dr. Regnier reviewed the probable cause affidavit and discovery materials and spoke with Williams' mother. He administered two psychological tests to Williams.

Testing showed that Williams suffered from bipolar disorder, mood disorder, and post-traumatic stress disorder (PTSD). Dr. Regnier testified that Williams "clearly" had "mental health problems." The doctor opined that Williams had suffered several traumatic experiences in his life that caused him to suffer from PTSD and explained some of these events. Williams self-medicated with marijuana and alcohol, and people with these disorders do this to calm themselves down. A dual-diagnosis program would treat both mental health problems and substance abuse.

Dr. Regnier testified that in prison Williams would get medication that would "probably calm him down, but it will not deal with the post-traumatic stress in the way that it needs to be dealt with. It won't deal with the mood disorder or the trauma that he's experienced that he needs to work through with a therapist[.]" Williams needed the therapy because he was "in complete denial" and minimized the traumatic events. The doctor recognized the need for a punishment component and suggested "a county jail sentence followed by immediate admission to a dual-diagnosis program and probation." Dr. Regnier described specific programs and recommended one with therapists who treat PTSD where Williams could get the dual-diagnosis treatment that he needed. Dr. Regnier stated that "in prison, that treatment would not be available."

On cross-examination, Dr. Regnier explained that people with PTSD often suppress emotions, and "[m]any times people with serious mental disorder you can't tell, by looking at them." On redirect, Dr. Regnier testified that although Williams knew he was being evaluated for sentencing purposes, Williams denied any mental health problems. Dr. Regnier had sufficient time to meet with Williams and make a determination on his mental health, explaining that an hour or two to evaluate someone is standard in the field.

Williams' mother also testified about his background, her own mental health issues that affected how she raised her children, and that she never sought treatment for him. Williams' sister and a retired United States Army sergeant with PTSD also testified on Williams' behalf.

Williams testified that he had learned a lot during the almost two years he had been incarcerated and had enrolled in programs like life skills and parenting to

"learn[] how to become a more productive citizen." If given the opportunity, he was willing to get dual-diagnosis treatment.

The State argued that Williams did not qualify for a downward departure and that there was very little evidence of depression. There was "no ongoing previous history" and "no observations that he seemed to be exhibiting depression or a lack of motivation or a lack of ability to get up and carry on his daily life, or lack of ability to take care of himself or communicate response appropriately."

Defense counsel asserted that it was not a matter of mere depression but that a trained psychologist with thirty-five years of experience diagnosed Williams as bipolar and suffering from PTSD. Defense counsel argued that under section 921.0026(2)(d), Williams required specialized treatment for the mental disorders of bipolar and PTSD which were not related to substance abuse and that he was amenable to treatment.

The trial court ruled as follows on the request for a downward departure:

So as to sentence, with all due respect to Dr. Regnier, he's a fine doctor. He has provided this Court with immeasurable and critical information over many years, decades, indeed, that has assisted me in a wide range of areas, competency issues, mental health issues, sentencing decisions, treatment options, counseling recommendations, etcetera. He is indeed one of the best in the area and I rely on him and have done so for many years.

Having said all that, I do not believe that there is a sufficient credible, reliable and persuasive evidence that a downward departure pursuant to 921.0026[(2)](d) has been established. The Court is simply not persuaded that the Defendant requires specialized treatment for a mental disorder. Mr. Williams definitely has challenges.

Mr. Williams, you've had difficulties in your life. You've certainly experienced a good bit of tragedy. [You're] upbringing was far, far from optimal, but a departure

pursuant to section (d) is not reasonably justified as is required by statute. I just don't think the evidence is there for that. Despite counsel's compelling argument and again, Dr. Regnier's testimony, which this Court has given great weight, in which this Court always considers in ways [sic], there is no reasonable justification for a downward departure here.

Later, the trial court summarized that it found "no sufficient basis to downward depart" and that "there's no basis for a downward departure here." The trial court imposed concurrent sentences under the Criminal Punishment Code of 108.37 months in prison for the first-degree felonies, five years in prison for the third-degree felonies, and time served on the misdemeanor.<sup>1</sup> Williams now appeals and contends that the trial court erred in determining that he did not legally qualify for a downward departure sentence.

In the two-step process required to impose a departure sentence, the trial court must first determine "whether there is a legal basis to depart and whether the defendant has proven the factual support for that basis by a preponderance of the evidence." Camacho v. State, 164 So. 3d 45, 47 (Fla. 2d DCA 2015) (citing Banks v. State, 732 So. 2d 1065, 1067 (Fla. 1999)). If the first step is met, "the trial court then must make a discretionary decision under the totality of the circumstances of the case as to whether to depart." Id. (citing Banks, 732 So. 2d at 1068).

Section 921.0026 authorizes downward departures when circumstances or factors exist that reasonably justify a departure. Section 921.0026(2)(d) provides a mitigating circumstance when "[t]he defendant requires specialized treatment for a mental disorder that is unrelated to substance abuse or addiction or for a physical

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<sup>1</sup>The trial court sentenced Williams to what the court calculated as the lowest permissible sentence after it subtracted eighteen points from the scoresheet due to the court's "discomfort" with the convictions for possession of a conveyance for sale of a controlled substance. The State did not object and has not filed a cross-appeal.

disability, and the defendant is amenable to treatment." The next part of step one concerns whether there is competent, substantial evidence to support that statutory ground. See Camacho, 164 So. 3d at 47. On review, "the appellate court will assess the record evidence for its sufficiency only, not its weight." State v. Chubbuck, 141 So. 3d 1163, 1168-69 (Fla. 2014) (quoting Banks, 732 So. 2d at 1067).

When relying upon section 921.0026(2)(d), the defendant has the burden to prove by the preponderance of the evidence the following three elements: "(1) the defendant has a mental disorder (unrelated to substance abuse or addiction) or a physical disability; (2) which requires specialized treatment; and (3) the defendant is amenable to such treatment." Id. at 1171 (footnote omitted). A "defendant is not required to prove that the DOC cannot provide the required specialized treatment." Id.

The record here shows that Williams presented competent, substantial evidence that he has the mental disorders of bipolar disorder and PTSD unrelated to substance abuse or addiction through the testimony of Dr. Regnier, an experienced psychologist. Further, Dr. Regnier testified that Williams needed more than just medication and addressed specialized treatment. Dr. Regnier explained that Williams needed therapy to treat the mood disorder and PTSD and named specific facilities that could provide a dual-diagnosis program. Williams testified to his efforts to better himself while incarcerated and his willingness to participate in dual-diagnosis treatment. Although not required, Dr. Regnier also testified that the needed treatment would not be available in prison.

The trial court recognized Dr. Regnier as "one of the best in the area" and stated that he had assisted the court for decades. The court also stated that he gave

Dr. Regnier's testimony "great weight." Despite that, the trial court "d[id] not believe that there is a sufficient credible, reliable and persuasive evidence that a downward departure pursuant to 921.0026[(2)](d) has been established. The Court is simply not persuaded that the Defendant requires specialized treatment for a mental disorder." The trial court did not explain what it found that was not credible or reliable.

In Kovalsky v. State, 220 So. 3d 1192, 1193 (Fla. 4th DCA 2017), a psychologist testified that the defendant had the mental health diagnosis of "Avoidant Personality Disorder." The psychologist also testified that the defendant needed specialized treatment and that he "would be amenable to such treatment." Id. The trial court denied the downward departure on the basis that "Avoidant Personality Disorder was not a mental disorder under the statute." Id. at 1195. The Fourth District determined that the trial "court erred in disregarding the only available evidence on this matter; the State never contradicted the doctor's testimony, and thus, there was no competent, substantial evidence to support the court's denial." Id. Because step one of the departure analysis had been satisfied, the Fourth District reversed and remanded for a different trial judge to hold a new sentencing hearing and conduct the analysis for step two. Id. at 1196. Thus, on remand the court would consider the totality of the circumstances and exercise its discretion on whether to depart. See id.

In Camacho, the defendant sought a downward departure under section 921.0026(2)(c), Florida Statutes (2012), for impaired capacity. 164 So. 3d at 46. The defense presented evidence of "significant frontal lobe damage" but also evidence of self-medication. Id. at 47. The trial court denied the departure, stating "that it did not 'think, legally' that Mr. Camacho 'me[t] the criteria laid out in the statutes' and that it did

not 'think' that Mr. Camacho was 'mitigation eligible.' " Id. (alteration in original). This court determined that "[i]f the trial court accepted all of the testimony presented at the hearing, the record contains competent, substantial evidence to allow the trial court to exercise its discretion to impose a downward departure sentence under section 921.0026(2)(c)." Id. at 48.

However, this court was unable to determine

whether the trial court's ruling was based on a rejection of some of the expert's opinions or whether it made a legal error by concluding that no legal basis for a departure existed because there was evidence of substance abuse. Based on the court's limited ruling, we are inclined to believe that the trial court erroneously concluded that it did not have the authority to reach the discretionary decision in step two.

Id. Thus, this court vacated the sentences and remanded for resentencing. Id. at 49.

The trial court was to consult with counsel and then, in its discretion, either conduct a new sentencing hearing or base its decision on the record already established. Id.

Here, Williams argues that he presented sufficient evidence to meet the statutory criteria and that no evidence impeached the doctor's findings. He contends that step one of the departure analysis was met and that this court should reverse and remand with instructions for the trial court to exercise its discretion in determining whether it should depart under step two of the analysis.

The State did not present any evidence contrary to Dr. Regnier's testimony. In its cross-examination of Dr. Regnier, the State elicited testimony that Williams had never been previously diagnosed with a mental disorder and that he appeared healthy and well-groomed. He also answered questions, behaved appropriately with Dr. Regnier and in court, and is intelligent. But the fact that someone



exhibits appropriate behaviors and is intelligent but does not have a previous formal diagnosis does not mean that the individual does not suffer from a mental disorder. As Dr. Regnier testified, many times one cannot tell that a person has a serious mental disorder just by looking at the person. Someone with PTSD is often able to "suppress[] even the most heinous sort of emotions" and is "really sitting on a powder keg."

The trial court stated that it did not believe there was "sufficient credible, reliable and persuasive evidence" to establish a downward departure under section 921.0026(2)(d). But the trial court also praised Dr. Regnier. If believed, Dr. Regnier's testimony provided competent, substantial evidence to support the finding that Williams needed specialized treatment for a mental disorder. After stating that the court had given great weight to the doctor's testimony, the court then stated that "there is no reasonable justification for a downward departure here." It is unclear what the trial court rejected in that testimony to conclude that the evidence was not credible, reliable, and persuasive enough to support a finding by a preponderance of the evidence that Williams needed specialized treatment for a mental disorder. The trial court's conclusion is inconsistent with its high praise of Dr. Regnier.

In summary, we are uncertain how the trial court reached its conclusion in light of the evidence before it. On its face, the evidence provided competent, substantial evidence to support a departure. It is possible that the trial court, instead of determining that it could not depart, determined that it could depart but decided in its discretion not to depart and simply stated it unclearly. Because of this uncertainty, we are compelled to reverse the sentences. See Camacho, 164 So. 3d at 48.

Therefore, we reverse the sentences and remand for the trial court to reevaluate the evidence and apply the correct two-step analysis described above. If the trial court is rejecting evidence as not credible or reliable and finding insufficient factual support for a valid legal ground for departure when it at the same time praises the witness, additional findings indicating what evidence was rejected would assist in our appellate review. We note that because Williams has not challenged his convictions, they are not affected by this opinion.

Sentences reversed and remanded for resentencing.

MORRIS and LUCAS, JJ., Concur.