

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

STATE OF FLORIDA,)
)
 Appellant,)
)
 v.)
)
 ROBERT C. LEIGHTON,)
)
 Appellee.)
 _____)

Case No. 2D11-1372

Opinion filed April 11, 2012.

Appeal from the Circuit Court for Manatee
County; Scott M. Brownell, Judge.

Pamela Jo Bondi, Attorney General,
Tallahassee, and Ronald Napolitano,
Assistant Attorney General, Tampa, for
Appellant.

James Marion Moorman, Public Defender,
and Allyn M. Giambalvo, Assistant Public
Defender, Bartow, for Appellee.

BLACK, Judge.

The State appeals the downward departure sentence imposed upon
Robert C. Leighton. Because some of the trial court's reasons for the downward
departure are based on legally invalid grounds and because the remaining reasons are

not supported by competent, substantial evidence, we reverse and remand for further proceedings.

Leighton entered a negotiated, no contest plea to burglary of an occupied dwelling, a second-degree felony; dealing in stolen property, a second-degree felony; obtaining money from a pawnshop by fraud, less than \$300, a third-degree felony; two counts of possession of a controlled substance, a third-degree felony; possession of cannabis, not more than twenty grams, a first-degree misdemeanor; and possession of drug paraphernalia, a first-degree misdemeanor, in exchange for a sixty-month cap on his sentence. The lowest permissible sentence on Leighton's scoresheet was 31.125 months in prison; however, the trial court entered a downward departure sentence of ten years' probation for the two second-degree felony counts, to be served concurrently, and five years' probation for each of the third-degree felonies, to be served concurrently with each other and concurrently with the second-degree burglary count. The court also sentenced him to time served on the misdemeanor counts.

At the sentencing hearing, the trial court orally pronounced four reasons for the departure sentence: (1) Leighton agreed to plead guilty without a guaranteed sentence; (2) he understood and appreciated the nature and seriousness of the crimes; (3) he demonstrated remorse; and (4) he required specialized treatment for mental and emotional care that could not be provided in prison. The court also noted those reasons in writing on Leighton's scoresheet.¹

¹Although the parties do not raise this issue, we note that the trial court failed to issue a written order delineating its findings for the downward departure; however, we may still review the findings because there are handwritten reasons for departure on the scoresheet and because the trial court made oral findings on the record at the sentencing hearing. See Fla. R. Crim. P. 3.704(d)(27)(A) ("The

Under the Criminal Punishment Code, "[t]he lowest permissible sentence is the minimum sentence that may be imposed by the trial court, absent a valid reason for departure." § 921.0024(2), Fla. Stat. (2010). In other words, "[a] departure sentence is prohibited unless there are mitigating circumstances or factors present as provided in s. 921.0026 which reasonably justify departure." § 921.00265(1); see also §§ 921.002(3), .0026(1). "Section 921.0026(2) sets forth a nonexclusive list of mitigating factors under which a departure from the lowest permissible sentence is reasonably justified." Jackson v. State, 64 So. 3d 90, 92 (Fla. 2011). "The level of proof necessary to establish facts supporting the mitigation of a sentence is a preponderance of the evidence." § 921.002(3). If the trial court gives multiple reasons for a departure sentence, the sentence "shall be upheld when at least one circumstance or factor justifies the mitigation regardless of the presence of other circumstances or factors found not to justify mitigation." Id.

"A trial court's decision whether to depart from the guidelines is a two-part process." Banks v. State, 732 So. 2d 1065, 1067 (Fla. 1999). The trial court must first determine whether it can depart—whether the defendant has met the burden of establishing sufficient factual support for a valid legal ground. "This aspect of the court's decision to depart is a mixed question of law and fact and will be sustained on review if the court applied the right rule of law and if competent, substantial evidence supports its ruling. Id. at 1068. The trial court must then decide whether it should depart—"a judgment call within the sound discretion of the court." Id.

sentencing judge may also list the written reasons for departure in the space provided on the Criminal Punishment Code scoresheet."); see also State v. Hall, 981 So. 2d 511, 513 (Fla. 2d DCA 2008) (reviewing a downward departure sentence where the trial court made oral findings on the record at the sentencing hearing).

Kezal v. State, 42 So. 3d 252, 254 (Fla. 2d DCA 2010) (quoting State v. Green, 890 So. 2d 1283, 1286 (Fla. 2d DCA 2005)). If the trial court's reasons for a downward departure are invalid or not supported by competent, substantial evidence, it is not necessary to review "the trial court's discretionary determination of whether it should impose a departure sentence." State v. Hall, 47 So. 3d 361, 363-64 (Fla. 2d DCA 2010) (citing State v. Knox, 990 So. 2d 665, 668 (Fla. 5th DCA 2008)).

Here, the State challenges the trial court's decision regarding the first step—whether the court could depart. The State argues that the reasons for the departure are either invalid or not supported by competent, substantial evidence. We address the fourth reason stated by the trial court first because Leighton concedes that there is insufficient evidence to support the trial court's finding that he requires specialized treatment for mental or emotional health problems that could not be provided for in prison. Leighton correctly acknowledges that the record does not show that his mental and emotional problems are unrelated to his substance abuse. See § 921.0026(3) ("[T]he defendant's substance abuse or addiction, including intoxication at the time of the offense, is not a mitigating factor under subsection (2) and does not, under any circumstances, justify a downward departure from the permissible sentencing range."). Therefore, the trial court could not impose the downward departure sentence on this ground. We address the trial court's other three reasons in turn.

The trial court's first reason for a departure sentence was that Leighton agreed to plead without a guaranteed sentence. The State argues that this is not a valid reason for departure. We conclude that it was a legitimate reason for a departure; however, the record does not support it. Leighton did enter a negotiated plea in this

case, but in order for a plea bargain to support a downward departure, there must be an agreement between the parties to downwardly depart. See Dozier v. State, 881 So. 2d 662, 663 (Fla. 3d DCA 2004) (Cope, J., concurring) (citing State v. Hale, 682 So. 2d 613, 614 (Fla. 2d DCA 1996)). The record shows that the only agreement between Leighton and the State was regarding the cap for the maximum sentence that could be imposed. There was no agreement as to the minimum sentence or for a downward departure. In justifying the downward departure, the trial judge stated, "[P]art of it is that you agreed to plead guilty without a sentence promise, without a guarantee of a sentence." The court also stated, "[T]here was a plea bargain with a— with no proposed sentence." While the trial court was correct that a plea bargain constitutes a valid reason for a downward departure, it was incorrect in finding that all plea bargains represent a valid reason for departure. See State v. Sawyer, 753 So. 2d 737, 738 (Fla. 2d DCA 2000) ("[A]lthough an uncoerced plea bargain is a valid reason to depart from the guidelines, the downward departure . . . cannot be upheld . . . because the State did not join in the plea agreement."). In this case, the State did not join in the agreement to downwardly depart; thus, it was not a part of the plea agreement and the record does not support this basis for the departure sentence.

The second reason given by the trial court is that Leighton understood and appreciated the nature and seriousness of the crime. In its findings, the trial court stated, "[Y]ou do have a genuine appreciation for the nature of the crime and a genuine remorse." This does not constitute a valid reason for departure. The trial court misconstrues the valid, legal basis for this mitigating factor. The court's finding connotes that an appreciation of the nature and seriousness of the crime must occur

after the offense is committed. This is contrary to the plain language of the statute. The mitigating factor listed in section 921.0026(2)(c) states: "[t]he capacity of the defendant to appreciate the criminal nature of the conduct or to conform that conduct to the requirements of law was substantially impaired." (Emphasis added.) Thus, it requires that the defendant was in some way substantially impaired at the time the crime was committed. At the sentencing hearing, Leighton did state that he bought thirty Xanax on Saturday night and that, when he was arrested on Sunday morning, he had no recollection of what he did. Defense counsel also argued that Leighton "must have taken 28 Xanax, to the point where he didn't remember what he was doing." However, this is not a valid basis for departure either because "intoxication at the time of the offense, is not a mitigating factor." § 921.0026(3). Therefore, this mitigating factor did not form a legal reason for departure pursuant to section 921.0026(2)(c).

Finally, the trial court stated that Leighton demonstrated remorse. As stated above, the trial court found that Leighton had "genuine appreciation for the nature of the crime and a genuine remorse." However, the court went on to state, "Whether you've communicated that I'm not sure, but that'll be a part of the probation—but a genuine remorse for the damage that you did, as well as the damage to yourself, but the damage to your family and your friends. . . . I think that the demonstration tells me at least that there is a possibility that you can do better." At the sentencing hearing, defense counsel argued that the crimes were committed in an unsophisticated manner and that Leighton demonstrated remorse; however, the court did not address the unsophisticated nature of the crime in its oral pronouncement of the reasons for a

downward departure. It simply made a note on the scoresheet, stating "unsophisticated manner."

Section 921.0026(2)(j) requires that "[t]he offense was committed in an unsophisticated manner and was an isolated incident for which the defendant has shown remorse." In order for this to form a valid basis for departure, the trial court's reasoning must meet three prongs: "(1) the crime was committed in an unsophisticated manner; (2) the defendant has shown remorse; and (3) the crime was an isolated incident." State v. Jordan, 867 So. 2d 635, 636 (Fla. 5th DCA 2004). "[R]emorse . . . , without evidence to support the additional required elements that the offense was committed in an unsophisticated manner and that it was an isolated incident, [is] not sufficient to support the downward departure sentence." State v. Santomaso, 764 So. 2d 735, 737 (Fla. 2d DCA 2000). The judge's oral reason for the departure sentence under this mitigating factor only encompassed the remorse prong; thus, it did not form a valid basis for departure under this section.

Furthermore, the crimes charged were not "an isolated incident." Besides the fact that the information charged Leighton with multiple crimes over a two-day period, his scoresheet indicated that he had a previous record, including possession of a misdemeanor amount of marijuana; petit theft; driving while license suspended with knowledge; and possession of prescription drugs without a prescription, a third-degree felony. See State v. McGriff, 698 So. 2d 331, 332 (Fla. 2d DCA 1997); State v. Tice, 898 So. 2d 268, 269 (Fla. 5th DCA 2005). Thus, even if the court did meet the first two prongs by noting on the scoresheet that the crimes were committed in an unsophisticated manner, the evidence does not support the third prong—that the crimes

were an isolated incident. As a result, the trial court's downward departure is not supported based on this reason.

Because all four of the trial court's reasons for a downward departure were either legally invalid or not supported by competent, substantial evidence, we reverse and remand to the trial court with instructions to give Mr. Leighton the opportunity to withdraw his negotiated plea. Upon any resentencing, a guidelines sentence should be imposed. See State v. Hall, 981 So. 2d 511, 514 (Fla. 2d DCA 2008) (citing State v. Green, 890 So. 2d 1283, 1287 (Fla. 2d DCA 2005)); see also McGriff, 698 So. 2d at 332; State v. Scott, 611 So. 2d 596, 597 (Fla. 2d DCA 1993).

Reversed and remanded with instructions.

NORTHCUTT and KELLY, JJ., Concur.