STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1166

State of Minnesota,
Respondent,

vs.

Jon Paul Weidenbach,
Appellant.

Filed May 1, 2017
Reversed and remanded
Bjorkman, Judge

Morrison County District Court
File No. 49-CR-15-503

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Brian J. Middendorf, Morrison County Attorney, Little Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Schellhas, Judge; and Bjorkman, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges his sentence for aiding and abetting arson, arguing that he was deprived of his constitutional right to an impartial fact-finder. Because the district court

impermissibly based its sentencing decision on information obtained during its independent investigation of facts outside the record, we reverse and remand.

FACTS

On April 4, 2015, appellant Jon Paul Weidenbach and Jeffery Wilson burned down the home they were renting in Little Falls. Weidenbach purchased gasoline to accomplish the crime, and watched Wilson remove their belongings, pour gasoline around the home, and start the fire.

Respondent State of Minnesota charged Weidenbach with first-degree arson and aiding and abetting first-degree arson under Minn. Stat. § 609.561, subd. 1 (2014). Weidenbach pleaded guilty to the aiding and abetting charge in exchange for the state's dismissal of the arson charge and agreement to cap his sentence at 78 months. He moved the district court for a downward durational departure to 60 months' imprisonment, the sentence Wilson received. Weidenbach argued that departure was warranted because he played a passive role in the offense and fairness principles support imposing the same sentence on Weidenbach and Wilson. The district court denied the motion and imposed a presumptive 72-month sentence.

During the sentencing hearing, it became evident that the district court obtained and relied on information outside of the record in making its sentencing decision. In explaining why it rejected Weidenbach's assertion that he played only a passive role in the offense, the district court cited the report of Wilson's presentence investigation (PSI), which reveals Wilson suffers from a myriad of mental-health issues, including borderline intellectual functioning, mild mental retardation, poor reasoning, and impulsivity. Defense counsel

asked whether the district court conducted an independent investigation. The court responded:

> [T]he argument that was made by Mr. Weidenbach . . . was that he should have the same sentence as the co-defendant, and so the Court then looked at Mr. Wilson's file to see what the pre-sentence investigation was in that file. And that's where it came across attached to the PSI was this Functional Behavioral Assessment Summary, which was done by the Minnesota Department of Human Services which chronicled the mental issues that Mr. Wilson had. And so no, . . . a copy was not provided to you or to the State . . . by the Court, but it addressed the issue that what was Mr. Weidenbach a lesser actor in this, based upon what . . . was in the factual file . . . and the fact of the . . . underlying mental issues that Mr. Wilson had, the Court concludes that Mr. Weidenbach would have been the . . . primary impetus in the arson and not Mr. Wilson.

After Weidenbach's counsel expressed concern that the district court relied on evidence that was not presented by or made available to either party, the district court stated:

> [T]he argument that you made in the sentencing departure was that Mr. Weidenbach . . . played a lesser role in this, and . . . so the Court wanted to see what the pre-sentence investigation said with regard to Mr. Wilson, as far as admissions that he made and/or other relevant facts. So it did look at the . . . pre-sentence investigation in his file and then pulled up this information that it felt was relevant to the very issue that Mr. Weidenbach raised was, you know, was Mr. Wilson the primary actor in this and the brains behind the operation, or indeed was it Mr. Weidenbach. And the Court has . . . found that Mr. Weidenbach was the principal actor and Mr. Wilson did not.

Weidenbach appeals.[1]

[1] Although the state did not file a respondent's brief, we decide the case on the merits. Minn. R. Civ. App. P. 142.03.

D E C I S I O N

We are asked to reverse a presumptive sentence, a task we almost never undertake. A district court has broad sentencing discretion and its decisions within the presumptive sentencing range are generally not reviewed. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010). Presumptive sentences are only reversed in rare cases. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). But a district court's broad sentencing discretion "is not a limitless grant of power," *State v. Warren*, 592 N.W.2d 440, 451 (Minn. 1999), and appellate courts may reverse a presumptive sentence if warranted by "compelling circumstances." *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982). We conclude that such circumstances are present here.

Minn. R. Crim. P. 26.03, subd. 14(3), provides that "[a] judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct." The Code of Judicial Conduct requires a judge to "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." Minn. Code Jud. Conduct Rule 2.11(A). This standard is met when a "reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *State v. Cleary*, 882 N.W.2d 899, 904 (Minn. App. 2016) (quoting *State v. Finch*, 865 N.W.2d 696, 703 (Minn. 2015)). A judge's impartiality might reasonably be questioned when he independently investigates facts outside the record. Minn. Code Jud. Conduct Rule 2.9(C) ("A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.").

Weidenbach argues that the district court's independent investigation of facts relevant to his sentencing requires reversal. We agree. As the Minnesota Supreme Court stated in *State v. Schlienz*, a judge must "maintain the integrity of the adversary system at *all* stages of the proceedings." 774 N.W.2d 361, 367 (Minn. 2009) (emphasis added). Schlienz challenged the judge's failure to recuse from hearing his plea-withdrawal motion following ex parte communications between the judge and the prosecutor. Citing *State v. Dorsey*, 701 N.W.2d 238 (Minn. 2005), where the judge, sitting as fact-finder, independently investigated facts relevant to the defendant's guilt, Schlienz contended that the judge lost his impartiality by suggesting to the prosecutor specific arguments to make in response to Schlienz's motion. *Id.* Our supreme court agreed and reversed, noting it was unclear whether the judge maintained an open mind with respect to Schlienz's motion, but that his statements to the prosecutor provided a beneficial roadmap to the state and effectively "denied Schlienz the right to a fair hearing before an impartial decision maker." *Id.* at 369.

As in *Schlienz,* the district court's conduct in investigating and relying on sentencing information outside of the record deprived Weidenbach of his right to a fair hearing before an impartial judge. We are confident that the district court was motivated by its desire to fully consider Weidenbach's departure motion and to impose a fair sentence. But the perceived relevance of Wilson's confidential sentencing information—to which neither the state nor defense counsel had access—does not authorize the district court to independently

investigate facts or develop information favorable to the state. Because the district court's impartiality may reasonably be questioned, we reverse and remand for resentencing.

Reversed and remanded.