STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0068

State of Minnesota,
Appellant,

vs.

Justin Taylor Dentz,
Respondent

Filed August 27, 2018
Reversed and remanded
Worke, Judge

Hennepin County District Court
File No. 27-CR-17-10172

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for appellant)

Michael J. Brandt, Brandt Criminal Defense, Anoka, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and Johnson, Judge.

S Y L L A B U S

If a person is convicted of engaging in or soliciting a minor to engage in prostitution, in violation of Minn. Stat. § 609.324, subd. 1 (2016), the fact that the person did not initially intend to solicit a minor is not a proper reason for a downward durational sentencing departure.

O P I N I O N

WORKE, Judge

The state argues that the district court abused its discretion in granting respondent a downward durational departure and sentencing him on a felony offense of hiring a minor to engage in prostitution as a gross misdemeanor. We agree and reverse and remand for resentencing.

FACTS

In March 2017, law-enforcement officers conducting an undercover prostitution sting posted an advertisement on Backpage.com posing as a young female. Backpage.com is commonly used to advertise and solicit prostitution. The advertisement stated: "Hi guys [I'm] Brittni. [I'm] super excited to meet some nice guys who love to party. [V]ery discrite [sic] just be a gentelman [sic]. [V]ery hot with a bangin [sic] body. [N]o games or drama. [I'm] here to fulfill your fantesy [sic] today only." The advertisement included: "Poster's age: 18."

Respondent Justin Taylor Dentz responded to the advertisement. Dentz asked how much it would cost to have anal sex and if he could video record the sexual encounter. The undercover officer responded that it would cost $120 per hour. The undercover officer then stated: "[I'm] not quite 18. . . . [I'm] 15 and almost 16."

When Dentz arrived at the provided address he was carrying $120. He was arrested and admitted that he responded to an advertisement on Backpage.com for a girl "who eventually identified herself as being fifteen years old." Dentz was charged with a felony count of hiring an individual whom he believed to be between 13 and 16 years old to engage

in prostitution (sexual penetration or sexual contact), in violation of Minn. Stat. § 609.324, subd. 1(b)(3).

On October 26, 2017, Dentz entered a straight guilty plea. Dentz admitted that he responded to the advertisement and discussed engaging in sexual penetration or sexual contact. Dentz admitted that "at some point in that communication with the undercover officer, they identified themselves as being 15 years old." Dentz admitted that he agreed to pay $120 to engage in sexual penetration with someone who "held themselves out to be under the age of 16."

With a severity-level-five offense and zero criminal-history points, Dentz's presumptive sentence was 18 months in prison stayed. Dentz moved for a downward durational departure, requesting that the district court sentence as a gross misdemeanor rather than a felony. Dentz argued that the facts of his case were less serious than the typical case. He attached an exhibit to his memorandum in support of his motion, which included probable-cause statements from similarly charged district court cases, allegedly distinguishing the facts from his case. Dentz asserted that the main distinction between his case and the eight similarly charged cases was the fact that the other offenders knew at the outset that the decoy was a minor, whereas Dentz did not seek out a minor and the advertisement identified the person who posted the advertisement as being 18 years old. Dentz conceded, however, that he did not back out of the transaction after learning that the decoy was underage. Dentz also claimed that he accepted responsibility and expressed remorse, which should be considered as mitigating factors. Finally, Dentz asserted that he is a military veteran and seeking help for his underlying mental-health issues.

The state countered that a downward durational departure was not justified because Dentz's offense was not less serious than the typical offense. The prosecutor stated that the case "is just like the other thousands of guardian angel cases[1] that happen across the [s]tate." The prosecutor stated that the advertisements "*all* initially start as adult ads. Eventually, the conversation, as it did in this case, works toward a child and ultimately, like *every other case*, this defendant agreed to have sex with a child." (Emphasis added.)

On December 18, 2017, the district court sentenced Dentz to 365 days in the workhouse, stayed 305 days for two years, and ordered Dentz to serve 60 days in the workhouse, but allowed him to complete 15 days of sentence to service instead. The district court stated:

> This is a downward durational departure. I do think this crime is less serious than other cases . . . basically [Dentz] solicited for what [he] thought was going to be consensual sex with an adult woman, which would be a misdemeanor offense, and the person on the other end then interjected . . . by the way, I'm 15 or whatever, and [Dentz] still [went] forward with it. That's not the same thing for me as [Dentz] actively soliciting an underage female.
>
> So, the information about the age of this woman, a girl, came from, in this case, the undercover cop, not from [Dentz]. That makes this case less serious than a typical case in general.

The district court also commented on Dentz's supportive family and friends, military service, and lack of criminal history, but stated that, while "important things to note," it was not going to use those considerations as departure grounds. The departure report indicated that Dentz received a downward durational departure and a non-felony

[1] Operation Guardian Angel is a law-enforcement effort to combat human trafficking focusing on individuals willing to engage in commercial sex with a minor.

sentence because: "[Dentz] solicited adult female for sex. Undercover officers interjected the information about the girl being underaged. Less serious." The state's appeal followed.

ISSUE

Did the district court rely on an improper reason in granting respondent's request for a downward durational departure and sentencing respondent's felony offense as a gross misdemeanor?

ANALYSIS

The district court must impose the presumptive sentence provided under the Minnesota Sentencing Guidelines unless there are "substantial and compelling" circumstances justifying a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); Minn. Sent. Guidelines 2.D.1.c (2016) (stating that a departure must be supported by "substantial and compelling" reasons showing that the departure is more appropriate than the presumptive sentence). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003) (quotation omitted).

If the district court's reasons for the departure are improper or inadequate, this court will reverse the departure as an abuse of the district court's discretion. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002); *see State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) ("A district court abuses its discretion when its reasons for departure are improper or inadequate."). Thus, our review of the district court's decision to depart requires two steps. First, we must determine whether the reason given for the departure is proper or adequate. *See Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010) ("Despite our overall review of departures for an abuse of discretion, the question of whether the district court's reason

for the departure is 'proper' is treated as a legal issue."), *review denied* (Minn. July 20, 2010). After we have concluded "as a matter of law" that the district court's reason for departure is proper or improper, we then review its decision whether to depart for an abuse of discretion. *Id.* (citing *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001)).

The imposition of a gross-misdemeanor sentence for a felony conviction is a downward durational departure. *See State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994); *see* Minn. Stat. § 609.13, subd. 1(1) (2016) ("Notwithstanding a conviction is for a felony . . . the conviction is deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02 . . . .").

A downward durational departure must be supported by offense-related reasons. *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). "Caselaw is settled that offender-related factors do not support durational departures." *Id.* Offense-related reasons supporting a downward durational departure must show that "the defendant's conduct in the offense of conviction was *significantly* . . . less serious than that typically involved in the commission of the crime in question." *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quotation omitted).

In *Rund*, the supreme court determined that the reasons given by the district court for a downward durational departure were improper because the defendant's conduct was not significantly less serious than the typical case. 896 N.W.2d at 534. In that case, the defendant posted threatening tweets directed at law enforcement. *Id.* at 530. Rund pleaded guilty to terroristic threats and requested a downward durational sentencing departure. *Id.*

at 530-31. As part of his submission in support of his request for a departure, Rund attached an apology letter reiterating that he did not intend to hurt anyone. *Id.* at 531 n.8. The district court granted Rund's request for a downward durational departure, stating that the "only reason" the crime was less serious was because of Rund's age and mental state. *Id.* at 531. The district court stated that it did not believe that Rund had the "intent" to carry out the threats, and stated that it was departing because Rund was "[b]asically, young and dumb. [A] [p]retty good kid who did a bad thing." *Id.* at 531-32, 533 n.10. The supreme court determined that the reasons given for the departure, including the defendant's "mental state," were improper because his conduct fit squarely within the statute's prohibition. *Id.* at 534.

Here, the district court similarly relied on Dentz's mental state, commenting on Dentz's intent to solicit an adult rather than a minor to engage in prostitution. The district court stated: "[B]asically you solicited for what you thought was going to be consensual sex with an adult woman . . . and the person on the other end then interjected . . . by the way, I'm 15 . . . . That's not the same thing for me as you actively soliciting an underage female." Just as the district court found that Rund did not intend to follow through with his threats, the district court here found that Dentz did not initially intend to solicit a minor. But the crime is not what he intended to do, it is what he actually did. Also, similar to *Rund*, the district court here commented that this was a "dumb one-time thing," and that Dentz did not "need to be labeled a felon the rest of [his] life." But these are not offense-related reasons that must exist to support a downward durational departure. *See Peter*, 825 N.W.2d at 130.

It is a crime to engage in, hire, or agree to hire a minor to engage in prostitution. Minn. Stat. § 609.324, subd. 1. Dentz pleaded guilty to intentionally "hir[ing] an individual who [he] reasonably believe[d] to be under the age of 16 years but at least 13 years to engage in sexual penetration or sexual contact." *Id.*, subd. 1(b)(3). Dentz admitted that he responded to an advertisement and agreed to pay $120 to engage in sexual penetration. Dentz also admitted that during "communication with the undercover officer, they identified themselves as being 15 years old." That he did not initially intend to solicit a 13-16 year old does not change the fact that he ultimately solicited a minor to engage in prostitution. The crime is what Dentz did, not what he initially intended to do. We therefore conclude that this fact did not make his conduct significantly less serious as a matter of law.

Further support for our conclusion that Dentz's conduct is typical is found in the district court cases that he submitted to support his request for a downward durational departure. Dentz relied on eight district court cases. He claimed that his case is distinguishable and less serious than these cases because he "did not seek out a minor."

Dentz asserted that five of the cases are different because the advertisements were for "16 year old females." His assertion is incorrect. We reviewed those five cases. The probable-cause statement in the first case simply states that the undercover officer acted in the "capacity as [a] 16 year old female," and that throughout text messages and phone calls, the undercover officer discussed with the defendant that she was 16 years old. Similarly, in the second case, the probable-cause statement indicates that the defendant began communicating with the undercover officer, and during these communications, he asked

how old she was and she "told him 16." Neither case indicates the age, if any, included in the advertisement. But both cases indicate that the defendants learned the age of the decoy during communications with the undercover officer.

The other three cases show that the advertisements were for 18-year-old females and that it was through communications with the undercover officers that the defendants learned that the police decoys were 16 years old. In one such case, the undercover officer stated that she tried to post on the advertisement that she was 16, but the "sites would not let her," because "[the site] said [she] had to be 18." Our review of these five cases shows that they are similar to Dentz's case in that the offenders learned that the decoys were underage through communications with the undercover officers.

In the three remaining cases, the advertisements stated: "Two 4 One – w4m – 32 – SWF seeking respectful man 4 my 'cherry' daughter and myself."[2] During conversations with the "mother," the "mother" indicated that the sex acts would include her 14-year-old deaf daughter. Dentz claims that his case is less serious than these cases because the "mother" advertised offering her daughter's "cherry." However, the record does not establish that the "typical" minor-solicitation case involves an offer by a mother for her daughter's cherry.

Moreover, relative to Dentz's assertion that his conduct is less serious than these cases because he did not initially intend to solicit a minor, the advertisements for these mother/daughter cases post for a 32-year-old female and the minor is revealed later during

[2] Two of the cases had identical advertisements. The advertisement in the third case was the same but with slightly different wording.

communications with the undercover officer. While these cases involve an advertisement for a sexual encounter with a mother and her daughter, the advertisement does not indicate that the daughter is a minor. Like Dentz, the offenders learned through communications with the undercover officer that the decoy's age was within the prohibited range.

In sum, if these eight cases represent a typical case, then Dentz's case is typical as well. First, there is no indication that any of the advertisements claimed that the decoy was between the ages of 13-16 (or under the age of 18). Second, the offenders all seemingly learned that the decoys were in the prohibited age range during communications with the undercover officers. Finally, none of the offenders withdrew after learning that the decoy was a minor. These factors are all true in Dentz's case: the advertisement was for an 18 year old, Dentz learned during communications with the undercover officer that the decoy was 15, and Dentz did not withdraw after learning the decoy's age.

Based on our review of this collection of district court cases, we conclude that Dentz's case is not less serious than the typical case. Although the district court reasoned that Dentz's case was less serious because "the information about the age of this woman, a girl, came from . . . the undercover cop, not from [Dentz]" and "[t]hat's not the same thing . . . as . . . actively soliciting an underage female," the record establishes that these circumstances are not atypical. Like all of the other offenders in the cases cited, Dentz did not withdraw after learning that the decoy was a minor. Instead, he agreed to pay a 15-year-old child $120 for anal intercourse. There is not a substantial and compelling reason justifying a departure in this case.

D E C I S I O N

The fact that Dentz did not initially intend to engage a minor in prostitution was not a proper reason for a durational sentencing departure because he did in fact engage a minor for that purpose and such circumstances are not atypical. Therefore, the district court relied on an improper reason for granting a downward durational departure and abused its discretion in sentencing this felony offense as a gross misdemeanor. We therefore reverse and remand for resentencing that is consistent with this opinion.

Reversed and remanded.