

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1244**

State of Minnesota,
Respondent,

vs.

Robert Anthony Winston,
Appellant.

**Filed May 22, 2023
Affirmed
Segal, Chief Judge**

St. Louis County District Court
File Nos. 69DU-CR-19-3704, 69DU-CR-19-4431,
69DU-CR-19-4570, 69DU-CR-22-844

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kimberly J. Maki, St. Louis County Attorney, Nathaniel T. Stumme, Victoria Wanta,
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Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant
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Considered and decided by Wheelock, Presiding Judge; Segal, Chief Judge; and
Ross, Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

In this direct appeal, appellant challenges the presumptive sentences imposed by the
district court for his convictions of first- and second-degree sale of controlled substances

and second-degree assault, arguing that he received ineffective assistance of counsel because counsel failed to electronically file his motions for a downward dispositional and durational departure. He also argues that the district court abused its discretion when it denied his departure motions. We affirm.

FACTS

Respondent State of Minnesota charged appellant Robert Anthony Winston in four separate district court files with various controlled-substance crimes and second-degree assault. The offenses allegedly occurred between September 2019 and March 2022. The parties reached a plea agreement in the four cases, whereby Winston agreed to plead guilty to (1) aiding and abetting first-degree controlled substance—sale of ten or more grams of heroin, (2) second-degree controlled-substance sale of three or more grams of heroin within a 90-day period, (3) second-degree assault—shooting toward an occupied vehicle, and (4) aiding and abetting first-degree controlled-substance sale of 17 grams or more of cocaine or methamphetamine within a 90-day period. In exchange for the guilty plea, the state agreed to dismiss the remaining counts in the four cases and to recommend a sentence that was no higher than the mid-point of the presumptive guidelines sentence. The state also agreed that Winston could seek downward dispositional and durational sentencing departures. The district court accepted the guilty pleas and scheduled a sentencing hearing.

At the sentencing hearing, Winston’s counsel began his oral argument for the downward departures but was interrupted by the district court because the court file did not contain written motions seeking departures. The following exchange then occurred:

THE COURT: Can you tell me what you're referring to, [Counsel]. I don't see that in that file.

COUNSEL: The [defense] investigat[or's] report [accompanying the departure motion] was e-mailed to everybody and in the file, I can approach with a copy.

THE COURT: Is there a reason why you didn't file anything?

COUNSEL: I sent [it to] the Public Defender's Office for them to file, Your Honor.

THE COURT: And nothing is filed, including your motion.

COUNSEL: What's that?

THE COURT: Including your motion.

COUNSEL: Okay, I understand that Your Honor, I have—I'm unaware of how-to e-file, I have been sending these to the Public Defender's Office every single time I have a motion to be filed and they have been filed.

THE COURT: Are you not a Minnesota attorney?

COUNSEL: I am a Minnesota attorney.

THE COURT: You don't file anything in any Court in—anywhere in the State?

COUNSEL: My—my staff does and . . . there's been technical issues with my Pub[lic] Def[ender] e-filing, so I have not been able to e-file on my Public Defender cases.

THE COURT: It is certainly disturbing to me that I haven't had a chance to look at this at all, something that you are talking about and making an argument about, in a case that frankly your client pled to a felony.

COUNSEL: Understood.

THE COURT: And now you're asking me to sentence it differently without any advanced notice to me at all. I don't have anything on that. Nothing.

COUNSEL: Okay, so what would you like to do about that, Your Honor?

THE COURT: I don't know. What do you think I should do about it? Don't you think I should be prepared for Court when I come here?

COUNSEL: Absolutely, Your Honor. I'm happy to provide you with a copy of this statement.

THE COURT: I'm going to have to take a recess and do that.

COUNSEL: Okay.

THE COURT: Do you have a paper copy?

COUNSEL: I do, Your Honor.

THE COURT: All right, I'll take it.

The district court then recessed the hearing to review the documents. The district court resumed the hearing a couple of minutes later, and Winston's counsel explained that he had emailed all of the documents to the district court and the state. The district court acknowledged receiving the email but stated that the court did not notice at the time that there were additional attachments to the email.

Winston's counsel then completed his argument in support of a dispositional departure on the grounds that Winston was sincere about achieving sobriety and was particularly amenable to probation. Winston's counsel also argued that Winston was deserving of a downward durational departure from the presumptive sentence for his second-degree assault conviction because (1) the assault victim did not want Winston punished (as set out in the defense investigator's report), and (2) the offense was significantly less serious than the typical second-degree assault.

After the state presented its argument on sentencing, the district court denied Winston's departure motion and sentenced Winston to presumptive middle-of-the-box sentences of 125 months for aiding and abetting first-degree sale of ten or more grams of heroin; 105 months for aiding and abetting first-degree sale of 17 or more grams of cocaine

or methamphetamine; 58 months for second-degree sale of three or more grams of heroin; and 36 months for second-degree assault. All sentences were to be served concurrently. The district court explained its reasons for denying a downward dispositional departure on the record and issued a written order explaining its reasons for denying a downward durational departure.

DECISION

I. The failure of Winston’s counsel to electronically file the departure motions did not constitute ineffective assistance of counsel because Winston failed to establish prejudice.

The United States and Minnesota Constitutions guarantee criminal defendants the right to effective assistance of counsel. U.S. Const. amend. VI; Minn. Const. art. 1, § 6. A defendant must satisfy a two-prong test based on the standard from *Strickland v. Washington*, 466 U.S. 668 (1984). *State v. Jones*, 977 N.W.2d 177, 193 (Minn. 2022). The defendant must “show both that (1) his trial counsel’s representation fell below an objective standard of reasonableness and (2) there is a reasonable probability that, but for the counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* (quoting *Crow v. State*, 923 N.W.2d 2, 14 (Minn. 2019)). When one prong of the *Strickland* test is determinative, an appellate court need not address the other prong. *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003). Appellate courts review “a claim of ineffective assistance of counsel de novo.” *Taylor v. State*, 887 N.W.2d 821, 823 (Minn. 2016).

In assessing whether the representation by Winston’s counsel fell below an objective standard of reasonableness under the first prong of the *Strickland* test, we look to

whether his counsel performed to the standard of “an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances.” *State v. Vang*, 847 N.W.2d 248, 266-67 (Minn. 2014) (quotation omitted). The reasonableness of counsel’s conduct should be judged by “the facts of the particular case, viewed as of the time of counsel’s conduct.” *Strickland*, 466 U.S. at 690. To determine whether an attorney’s representation was reasonable, courts look to “prevailing professional norms” in the legal community. *State v. Ellis-Strong*, 899 N.W.2d 531, 539 (Minn. App. 2017) (quotation omitted).

“[T]here is a strong presumption that counsel’s performance was reasonable.” *Andersen v. State*, 830 N.W.2d 1, 10 (Minn. 2013). “Mere improvident strategy, bad tactics, mistake, carelessness, or inexperience do not necessarily amount to ineffective assistance of counsel unless taken as a whole the trial was a mockery of justice.” *State v. Bailey*, 132 N.W.2d 720, 724 (Minn. 1965) (quotation omitted).

Winston argues that his counsel’s representation fell below an objective standard of reasonableness because the attorney failed to “comply with the rules regarding e-filing and e-service of sentencing motions” and failed “to check to make sure that his office had e-filed the motion for him.” Minnesota Rule of Professional Conduct 1.1 states: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” Winston argues that his trial counsel’s performance fell below this standard because he failed to ensure that the departure motion was timely filed with the court and admitted that he did not personally know how to e-file documents. *See* Minn. R.

Crim. P. 27.03, subd. 1(B)(6)(b) (providing that the motion must be filed eight days before the sentencing date, or if the presentence investigation report was received less than eight days before the sentencing date, the party filing the motion has “a reasonable time” to file). Winston maintains that counsel’s lack of competence was egregious because Winston’s plea bargain was predicated on seeking downward departures.

But, even if we were to conclude that the failure by Winston’s counsel to e-file the departure motions fell below the requisite standard, Winston has failed to establish the second prong of *Strickland*—“that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.” *Strickland*, 466 U.S. at 694. Here, the district court recessed the hearing and reviewed the attachments to the departure motions, which were only a few pages in length, and provided Winston’s counsel with a full opportunity to argue the motions. The district court thus had the benefit of the motion papers and oral argument by Winston’s counsel before it ruled on the motions. Given these facts, we cannot discern any reasonable probability that the district court might have ruled differently if only Winston’s counsel had timely e-filed the papers with the court. In addition, as discussed below, the district court articulated sound reasons for denying a downward departure. We therefore conclude that Winston was not denied the effective assistance of counsel.

II. The district court did not abuse its discretion by denying Winston’s motions for either a downward dispositional or durational departure.

Winston argues in the alternative that the district court abused its discretion when it denied his departure motions. “[Reviewing courts] ‘afford the [district] court great

discretion in the imposition of sentences’ and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (footnote omitted) (quoting *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999)). “[A] sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *Id.* at 308 (alteration in original) (quotations and citations omitted). Only in a “rare” case will an appellate court reverse a sentencing court’s refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Winston sought a dispositional departure in the sentence for his conviction of aiding and abetting first-degree sale of ten or more grams of heroin. The presumptive sentence for that offense—the sentence he was given—is 125 months executed in prison based on Winston’s criminal-history score. Minn. Sent’g Guidelines 4.C (2021). In his motion, Winston sought probation with the condition that he participate in chemical-dependency treatment. Winston also sought a durational sentencing departure that would have reduced the sentence for second-degree assault from a felony to a gross misdemeanor sentence.

Dispositional Departure

Winston argues that the district court abused its discretion by denying his motion for a downward dispositional departure because he was particularly amenable to probation. “[P]articular amenability to individualized treatment in a probationary setting [can] justify departure in the form of a stay of execution of a presumptively executed sentence.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court, in denying the motion for a dispositional departure, concluded that Winston had not demonstrated the “substantial and

compelling circumstances” required to justify the departure. Minn. Sent’g Guidelines 1.A.6 (2021); *see Soto*, 855 N.W.2d at 308. The district court’s basis for denial focused on the fact that, when Winston was on pretrial release from his earlier offenses beginning with the 2019 offense, he continued to commit new offenses and had numerous positive drug tests even though a condition of his pretrial release was to maintain sobriety. The district court stated:

You could have shown what you’re made of on pre-trial release, and you did show what you were made of. You committed more crimes, you continued to use, and you did not abide by pre-trial release. You had ten positive UAs on pre-trial release, . . . you told the probation officer that your only periods of sobriety are when you are incarcerated or in treatment, that you were regularly using right up until your incarceration and your use is what compels all of these charges, this is why we’re here. You’ve had plenty of opportunities, you’ve been in treatment, you’ve done well in treatment but then you get out of treatment and you’re right back at it. . . . I cannot find substantial and compelling reasons to support a departure in this case.

The district court thus had substantial reasons for determining that Winston was not amenable to probation, let alone particularly amenable. We agree with the district court that, in light of Winston’s record while he was on pretrial release, Winston’s arguments concerning his age and his sincerity in wanting to turn his life around are not substantial and compelling. We thus discern no abuse of discretion by the district court in denying Winston’s motion for a dispositional departure.

Durational Departure

Winston next argues that the district court abused its discretion by denying his motion for a downward durational departure on his sentence for second-degree assault so that it would be in the range of a gross misdemeanor instead of a felony. A durational departure focuses on offense-related factors and is appropriate where an offense is “significantly less serious than that typically involved in the commission of the offense.” *State v. Solberg*, 882 N.W.2d 618, 623-24 (Minn. 2016).

The second-degree assault conviction was based on an incident that took place in a parking lot that was captured on video. In the video, Winston is seen engaging in a “scuffle” with a male victim who was in a car. The victim was known to work as a middleman selling drugs for Winston. The victim tried to drive away, dragging Winston with his car. After Winston got free, he grabbed a gun and shot the bumper of the victim’s car as the victim drove away. Winston argued that his assault offense—shooting at the victim’s car—was significantly less serious than the typical second-degree assault because he only shot at the car after having been dragged by it, and the shot did not hit the victim, it only hit the bumper of the car. Winston also argued that it was less serious because the victim did not want Winston punished as set out in the defense investigator’s report attached to the motion papers.

The district court denied the downward durational departure on the ground that the assault was not necessarily “less egregious” than any other assault. The district court also discounted the victim’s input on punishment because Winston “and the victim were ‘work associates’ and the reason for the victim’s statement is unknown to the Court.” The district

court thus considered Winston's arguments but found them unpersuasive. We are similarly unpersuaded by Winston's arguments on appeal. Winston used a deadly weapon, a gun, and shot at the victim's vehicle after Winston was free of the victim's car. We also conclude that the district court acted within its discretion in not placing greater weight on the victim's input on punishment given the fact that the victim was a "work associate" of Winston's.

Affirmed.