STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1555

State of Minnesota,
Respondent,

vs.

Christopher John Lichtsinn,
Appellant.

Filed May 9, 2011
Reversed and remanded
Hudson, Judge

Lincoln County District Court
File No. 41-CR-09-134

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

Glen Petersen, Lincoln County Attorney, Tyler, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Jr., Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant challenges the 108-month sentence imposed for his conviction of first-degree criminal sexual conduct. Because the district court abused its discretion by failing to evaluate the factors for and against granting a downward dispositional departure under the sentencing guidelines, we reverse and remand for resentencing.

FACTS

On January 2, 2009, appellant Christopher Lichtsinn, who was then 19, sexually assaulted his first cousin, A.B.H., who was 14. Appellant was charged with multiple counts of criminal sexual conduct, but he ultimately pleaded guilty to one count of first-degree criminal sexual conduct. *See* Minn. Stat. § 609.342, subd. 1(g) (2008) (sexual penetration where the complainant has a "significant relationship" with offender and the complainant is 16 years of age or younger). In exchange for appellant's plea, the state agreed to cap its sentencing recommendation at 108 months, which is a 36-month downward durational departure from the presumptive guidelines sentence of 144 months. *See* Minn. Sentencing Guidelines IV (establishing a presumptive sentence of 144 months for a severity-level-A offense and criminal-history score of 0).

Prior to the sentencing hearing, appellant underwent a psychosexual evaluation by Dr. Linda Marshall, during which he admitted having sexual intercourse with A.B.H. Appellant described the encounter as consensual but acknowledged that A.B.H. described it as rape. Appellant stated that "he did not feel he harmed [A.B.H.]" because he believed the encounter was consensual, but "he did see something wrong with his having sex with

a 14 year old girl whether or not it was his cousin." Appellant indicated that he was agreeable to sex-offender treatment, even though he did not consider himself a sex offender.

According to Dr. Marshall's testing, appellant had "some mood instability that could possibly be a [b]ipolar [d]isorder" and "some maladaptive personality traits that appear entrenched in his personality." Dr. Marshall stated that appellant "clearly has some cognitive distortions" about the nature of the encounter with A.B.H. and the harm that he caused her. Dr. Marshall described mixed evidence regarding appellant's likelihood of recidivism: she stated that because appellant had not been charged with or convicted of sexual-conduct offenses, his risk of reoffending was low, but because he decided to have sexual intercourse with A.B.H. and used force to do so, his risk of reoffending was increased.

Dr. Marshall did not make any specific recommendations as to whether appellant should be incarcerated or placed on probation. But Dr. Marshall opined that because appellant was amenable to treatment, "[appellant] could benefit from sex offender treatment in an appropriate outpatient treatment program that could best meet his needs." Dr. Marshall further opined that, "[i]f [appellant] is allowed to do outpatient treatment and does not comply with treatment expectations [then] an inpatient program should be considered."

At the sentencing hearing, the state recommended a sentence of 108 months and justified the downward durational departure on the grounds that appellant had no criminal history. But the prosecutor indicated that any additional departure would be

inappropriate because the assault had a traumatic effect on A.B.H. and because appellant had shown no remorse. In contrast, defense counsel requested a dispositional departure so that appellant could be placed on probation and receive sex-offender treatment. In the alternative, defense counsel requested a more significant downward durational departure with a sentence of 21 to 24 months. Defense counsel pointed out several factors that justified a more significant downward departure, including (1) lack of criminal history; (2) low risk for reoffending; (3) amenability to sex-offender treatment; (4) demonstration of remorse; (5) agreement of the parties; and (6) absence of opposition from the victim. Before the district court imposed its sentence, appellant also spoke briefly and apologized for his conduct.

The court understood defense counsel to be requesting a downward dispositional departure under Minn. Stat. § 609.342, subd. 3 (2008), which permits a stay of execution in cases involving a "significant relationship" between the offender and the complainant when the complainant is under 16 years of age if it is in the best interests of the complainant or the family unit and if a professional assessment shows that the offender has been accepted by and can respond to a treatment program. But the district court found that neither factor was established by the record. The district court therefore declined to order a downward dispositional departure and imposed a sentence that included commitment to the Minnesota Department of Corrections.

In addressing the parties' competing requests for downward durational departures, the district court declined to rely on two of the factors cited by the parties—appellant's lack of criminal history and the severity of the offense—because the presumptive

sentence already accounted for these factors. But the district court found that the 36-month durational departure proposed by the state was justified because of appellant's remorse, his willingness to accept responsibility, and the agreement of the parties. The district court therefore imposed a 108-month sentence.

On appeal, appellant challenges the district court's decision to deny his request for a downward dispositional departure under the sentencing guidelines. The state has not filed a brief, and this appeal proceeds on the merits under Minn. R. Civ. App. P. 142.03.

D E C I S I O N

Before proceeding to the merits of appellant's argument, we clarify an underlying issue that appellant has not addressed on appeal, namely, upon what grounds appellant sought a downward dispositional departure before the district court. Because appellant did not file a written motion in support of his request for a downward dispositional departure, it is unclear whether appellant was seeking a downward dispositional departure under Minn. Stat. § 609.342, subd. 3, the sentencing guidelines, or both.

The district court apparently treated appellant's request for a downward dispositional departure as a request solely under Minn. Stat. § 609.342, subd. 3, which is understandable because defense counsel requested a psychosexual evaluation pursuant to Minn. Stat. § 609.342, subd. 3. But we also note that defense counsel never explicitly stated the basis or bases for requesting a downward dispositional departure either before or during the sentencing hearing. On appeal, appellant asserts that the district court failed to consider his request in accordance with the sentencing guidelines. But at sentencing, defense counsel never attempted to correct the district court's understanding of the basis

for the request, even after it was clear that the district court was proceeding under Minn. Stat. § 609.342, subd. 3. Nonetheless, based on our review of the record, we believe that appellant was in fact seeking a downward dispositional departure under the sentencing guidelines.

We observe that, at the sentencing hearing, defense counsel made no arguments in support of the statutory factors for a downward dispositional departure under Minn. Stat. § 609.342, subd. 3, namely, that a stay would be in the best interests of the family unit and that appellant had been accepted by a treatment program. *See id.* Rather, defense counsel argued the factors relevant to granting a downward dispositional departure under the sentencing guidelines, which related instead to appellant's amenability to probation. Thus, even though defense counsel could have and should have been more explicit about the grounds for appellant's departure request, it is evident from the sentencing transcript that appellant was seeking a downward dispositional departure under the sentencing guidelines. We therefore examine the district court's denial of appellant's request for a downward dispositional departure on this basis.

A district court may depart from the presumptive guidelines sentence only when "substantial and compelling circumstances are present." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The decision to depart from the guidelines is reviewed for an abuse of discretion and will rarely be reversed. *Kindem*, 313 N.W.2d at 7.

When evaluating a request for a dispositional departure, a district court may focus on "the defendant as an individual" and determine "whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A significant consideration in determining whether to grant a dispositional departure is the defendant's amenability to probation. *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981). A defendant's amenability to probation, in turn, depends on a number of factors, which can include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

"Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). But "[i]f the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). "The fact that a mitigating factor was clearly present [does] not obligate the court to place [the] defendant on probation or impose a shorter term than the presumptive term." *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). But if the record includes evidence of factors for a dispositional departure that should have been, but were not, considered, the case must be remanded for a hearing on sentencing and consideration of departure. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984).

As appellant contends, the record contains significant evidence indicating that appellant is amenable to probation. Appellant has no criminal history other than traffic violations. He was 19 at the time of the offense and 21 at the time of sentencing. He lives with his parents and has the support of his immediate family and his fiancée. He has also expressed remorse for his conduct. And he has been found amenable to sex-offender treatment by an independent psychologist. But the district court did not address these factors in denying appellant's request for a downward dispositional departure.

In *State v. Pegel*, this court recently held that the district court's failure to address all of the factors enumerated in *Trog* does not demonstrate that the district court abused its discretion in denying a downward dispositional departure. 795 N.W.2d 251, 254 (Minn. App. 2011). But this case is distinguishable. In *Pegel*, the district court understood defendant's request as one for a downward dispositional departure under the sentencing guidelines, considered the reasons for and against departure, and decided not to grant defendant's request. *Id.* at 253. Here, however, the district court understood appellant to be requesting a stay, and therefore only discussed the factors relevant to determining whether to grant the statutory stay under Minn. Stat. § 609.342, subd. 3. The district court did not specifically address appellant's request for a downward dispositional departure under the sentencing guidelines or weigh the factors for and against granting such a departure.

For these reasons, it is not evident that the district court "carefully evaluated all the testimony and information presented before making a determination" on appellant's request for a downward dispositional departure. *Van Ruler*, 378 N.W.2d at 81. We must

therefore reverse and remand for the district court to consider the factors for and against a downward dispositional departure under the sentencing guidelines.

Reversed and remanded.