STATE OF MINNESOTA
IN COURT OF APPEALS
A10-460

State of Minnesota,
Respondent,

vs.

Jonathan Mark Radunz,
Appellant.

Filed March 12, 2012
Affirmed
Minge, Judge

Ramsey County District Court
File No. 62-CR-08-18100

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

John J. Choi, Ramsey County Attorney, Dawn R. Bakst, Thomas Ragatz, Assistant County Attorneys, St. Paul, Minnesota (for respondent)

Robert D. Miller, Minneapolis, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Crippen, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

MINGE, Judge

Appellant challenges the district court's denial of postconviction relief, arguing that he received ineffective assistance of counsel when his attorney failed to bring a timely motion to depart from the presumptive prison sentence for his conviction of first-degree criminal sexual conduct. Because appellant has failed to demonstrate that his trial counsel erred and, if he erred, that such error prejudiced him, we affirm.

FACTS

In July 2008, appellant Jonathan Radunz attended a party at the residence of a coworker. At the end of the party, Radunz, who was intoxicated, was allowed to sleep on a couch on the ground floor of his coworker's residence. During the night, a woman sleeping in the basement awoke to Radunz performing oral sex on her. She reported that she could not move, did not open her eyes during the incident, and felt Radunz climb on top of her, pull her dress down, and bite her. The incident caused bruising on various areas of the woman's body.

Radunz was ultimately charged with first-degree, second-degree, third-degree, and fourth-degree criminal sexual conduct. Radunz did not testify at his trial. Defense counsel argued that the sexual contact was consensual. The jury found Radunz guilty of each of the charged offenses.

As part of the presentence investigation (PSI), a corrections officer interviewed Radunz about the incident and his criminal and chemical history. Radunz maintained that the sexual contact had been consensual, that the victim had lied at trial about her lack of

consent, and that the victim had received the bruises from alternative sources. Also, Radunz admitted that alcohol had caused problems in his life, including two prior convictions for driving while intoxicated, but indicated that he was willing to participate in treatment only "because I have to, to not be incarcerated." Ultimately, the PSI recommended that Radunz receive the presumptive 144-month prison sentence. *See* Minn. Sent. Guidelines IV (2006) (establishing a presumptive sentence of 144 months for a severity-level-A offense and a criminal-history score of zero).

The sentencing hearing occurred on December 17, 2009. On December 16, Radunz's attorney filed a motion for a downward dispositional and durational sentencing departure with the district court. However, at the sentencing hearing the next day, both the prosecutor and the district court reported that they had not received the motion. The district court concluded that the motion was "not timely if [it was] filed yesterday for today" but allowed the victim, the prosecutor, Radunz's attorney, and Radunz to make statements regarding sentencing.

The victim stated that she feared being touched by others, had nightmares, and had withdrawn from her family and friends since the incident, and argued for "a sentence as severe as the crime committed." The prosecutor argued that Radunz should receive the full 144-month presumptive sentence because the offense was "incredibly opportunistic and predatory," because Radunz had not taken responsibility for his actions, and because Radunz had no empathy for the victim. Radunz's attorney stated that the offense was primarily caused by Radunz's alcohol use and that chemical-dependency treatment, followed by sex-offender treatment, would be an appropriate disposition. And Radunz

apologized to the victim, stated that he had a problem, and expressed his willingness "to move forward in getting help."

The district court concluded that the 144-month presumptive sentence was appropriate because it:

> is the one recommended by the state sentencing guidelines and means that it meets the community expectation as well as a victim expectation. It's about safety and community values and giving you an opportunity to address the issues in a way that will get you on track in a different direction.

Radunz replaced his trial counsel with a different attorney and filed an appeal with this court.

At Radunz's request, this court stayed his appeal and remanded for postconviction proceedings. Radunz filed a postconviction petition alleging ineffective assistance of counsel in failing to timely file a motion for a downward sentencing departure. An evidentiary hearing was held in February 2011, at which time Radunz submitted an extensive psychological evaluation dated September 29, 2010, supporting a downward departure. However, the district court concluded that the psychological evaluation had no probative value because it was based on Radunz's situation 10 months after the December 2009 sentencing hearing. The district court found that the record at the postconviction proceeding did not provide a factual basis for changing the sentencing determination because Radunz, in the presentence interviews and at the sentencing hearing, had "little or no remorse, refused to take responsibility for his crime[,] and refused to acknowledge alcohol abuse as a significant problem." Thus, the district court found that there was no showing of substantial and compelling reasons for a sentencing

departure at the time of the sentencing hearing. Based on these findings, the district court concluded that Radunz could not show that he was prejudiced by his trial counsel's alleged error and denied the petition for postconviction relief. This appeal follows.

D E C I S I O N

The issue on appeal is whether the district court erred by denying Radunz's petition for postconviction relief based on ineffective assistance of counsel. "The party alleging ineffective assistance must show that representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Opsahl v. State*, 677 N.W.2d 414, 420–21 (Minn. 2004) (quotations omitted). "The objective standard is defined as representation by an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances." *Leake v. State*, 767 N.W.2d 5, 10 (Minn. 2009) (quotations omitted). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). A postconviction decision regarding a claim of ineffective assistance of counsel involves mixed questions of fact and law and is reviewed de novo. *Opsahl*, 677 N.W.2d at 420.

Radunz argues that by failing to timely file a motion to depart from the presumptive sentence, his trial counsel erred and that, but for that error, there is a reasonable probability that he would have received a dispositional or durational sentencing departure. The district court declined to consider whether trial counsel had

erred, instead assuming that such an error had been made, and determined that Radunz could not show prejudice from the alleged error.[1] For purposes of this appeal, we do not further consider whether trial counsel erred. Rather, we focus our analysis on the second prong of the ineffective-assistance-of-counsel issue: whether there is a reasonable probability that but for the error, a sentencing departure would have been made.

A district court may grant a departure from the presumptive sentence only if substantial and compelling circumstances exist. Minn. Sent. Guidelines II.D. (2006); *State v. Cameron*, 370 N.W.2d 486, 487 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985). The district court has broad discretion in determining whether to depart, and the existence of mitigating circumstances does not obligate the district court to do so. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011); *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Radunz seeks both a dispositional and a durational departure, and each will be addressed in turn.

[1] We note that Radunz has not identified which rule of criminal procedure applies to filing a motion to depart, nor provided any evidence that, given the record and time lines in this case, a "reasonably competent attorney" would have filed motions to depart earlier than his trial counsel. Instead, Radunz relies on the district court's statement at the sentencing hearing that the motions were not timely. It is unclear whether the district court's conclusion was accurate. Under Minn. R. Crim. P. 27.03, subd. 1(D) (2008), a party must file a motion for a sentencing hearing no later than eight days prior to the date scheduled for sentencing. However, when the PSI is received by that party "within eight days prior to the sentencing date, [the party has] a reasonable time" to file their motion. Minn. R. Crim. P. 27.03, subd. 1(D). Here, the PSI was revised on December 15, 2009, only two days prior to the sentencing hearing and one day prior to Radunz's motions for a dispositional and durational sentencing departure. Although the record does not indicate what revisions were made or when Radunz received the revised PSI, assuming the date on the revised PSI is accurate, one day would likely constitute a reasonable time to file a motion.

A. Dispositional Departure

A significant factor in determining whether to grant a dispositional departure is a defendant's amenability to probation. *State v. Wright*, 310 N.W.2d 461, 462–63 (Minn. 1981). A defendant's amenability to probation can depend on numerous factors, including the defendant's age, prior record, cooperation, remorse, attitude while in court, and the support of family or friends. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "The presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation." *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994).

At the time of sentencing, Radunz was 26 years old and had two prior alcohol-related convictions. The PSI indicates that, despite these convictions, Radunz believed he was a social drinker who did not often become intoxicated and stated that he was willing to participate in treatment only because he had to. During an interview conducted for the PSI, Radunz stated that the sexual contact was consensual, that the victim was moaning in a sexual manner and was "fully into it," that he did not touch her hard enough to leave marks or bruises, and that the victim lied about the incident. These statements indicate that Radunz lacked remorse and refused to take responsibility for his actions.

Radunz offered a psychological report at the postconviction hearing to prove that he is amenable to probation. The report states that "Radunz admits to his chemical dependency problem," that "he feels terrible for obviously terrifying the victim and leaving a traumatic memory behind," and that he "experiences significant fearfulness and anxiety in [prison] relative to his personal safety and well being." Ultimately, relying on

Radunz's remorse and understanding of both the incident and his alcohol problem, the report concludes that Radunz is amenable to sex-offender treatment and that "[h]is best rehabilitation can occur in the community." However, this information is based on interviews conducted in September 2010 and does not reflect Radunz's attitude or remorse at the time of his December 2009 sentencing hearing. Only the information in the psychologist's report regarding Radunz's background relates back to the time of the December 2009 sentencing. That part of the report, though more detailed, is largely duplicative of the background information contained in the PSI. Radunz's personal statements of his attitude toward his crime were his own doing. His 2010 postsentencing recantation of that attitude in an interview with his post-conviction-petition consulting psychologist does not change the record at the time of the 2009 sentencing.

Regardless, Radunz's recantation is limited. The report of Radunz's post-conviction-petition psychologist does not address Radunz's effort to shift blame to the victim. Radunz's pro se brief in this appeal continues to question the victim's sincerity in asserting his conduct was an attack. This difficulty in accepting responsibility is not consistent with establishing a substantial and compelling basis for a dispositional departure. Based on these considerations, we conclude that the psychological report is of limited relevance to the determination of Radunz's amenability to probation at the time of sentencing and that the record lacks a substantial and compelling basis for a downward departure to a probationary sentence.

B. Durational Departure

When considering whether to grant a downward durational departure, the district court may consider only offense-related factors. *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). Here, Radunz was convicted of first-degree criminal sexual conduct. The incident was unanticipated by the victim, was instigated by a person previously unknown to the victim, occurred in a residence that she considered "a safe place," and caused her to become introverted, to withdraw from her family and friends, to have nightmares of the incident, and to fear being touched by others. Moreover, she was sleeping when the incident occurred and was therefore particularly vulnerable. *See State v. Skinner*, 450 N.W.2d 648, 654 (Minn. App. 1990) (stating that the victim's vulnerability was increased because she was sleeping when the sexual assault began), *review denied* (Minn. Feb. 28, 1990).

Moreover, Radunz's lack of remorse increases the seriousness of the incident. *See State v. McGee*, 347 N.W.2d 802, 806 n.1 (Minn. 1984) (stating that lack of remorse could "be considered as evidence bearing on a determination of the cruelty or seriousness of the conduct"). As previously discussed, as of the time of sentencing, Radunz refused to take responsibility for his actions and stated that the victim was lying about the incident.[2] This increases the impact on an already vulnerable victim, who must now defend herself against accusations that she fabricated the assault. As with the

[2] Again, we note that Radunz did nothing to dissuade us from this conclusion when he submitted a separate pro se brief stating that "[t]he victim's police statements testify that she was in fact aware of what was going on"; that "[s]omebody who was raped would not fall back asleep aside the attacker"; and that "if I did not handle the situation properly, I would like someone to tell me what I should have done."

dispositional departure, appellant by his own statements has undermined his claim of a substantial and compelling basis for a downward durational departure.

In sum, we conclude that Radunz has failed to demonstrate that the district court abused its discretion in determining that there is not a reasonable probability that any error by his attorney in failing to timely file a motion to depart prejudiced Radunz by precluding a finding of substantial and compelling circumstances warranting a downward departure.

Affirmed.

Dated: