STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1092

State of Minnesota,
Appellant,

vs.

Brett Allyn Michling,
Respondent.

Filed December 12, 2011
Reversed and remanded
Larkin, Judge

Dakota County District Court
File No. 19HA-CR-10-3395

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

James C. Backstrom, Dakota County Attorney, Karen Wangler, Assistant County Attorney, Hastings, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, Erik Withall (certified student attorney), St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Klaphake, Judge; and Hudson, Judge.

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

LARKIN, Judge

On appeal from the district court's decision to stay execution of respondent's sentence and place him on probation, appellant argues that the district court erred by failing to impose the mandatory-minimum sentence required under Minn. Stat. § 152.023, subd. 3(b) (2010). We reverse and remand for resentencing.

D E C I S I O N

Respondent Brett Allyn Michling pleaded guilty to one count of third-degree controlled-substance crime in violation of Minn. Stat. § 152.023, subd. 2(6) (2010), for possession of methamphetamine in a school zone. Because less than ten years had elapsed since Michling's prior sentence for a felony-level controlled-substance conviction was discharged, he was subject to a mandatory-minimum sentence of 24 months. *See* Minn. Stat. §§ 152.023, subd. 3(b), .01, subd. 16a (2010).

The prosecutor asked the court to impose the presumptive guidelines sentence, a 45-month commitment to the commissioner of corrections, or, in the alternative, the minimum 24-month commitment required under section 152.023, subdivision 3(b). Michling requested a downward dispositional departure. The district court granted Michling's request and sentenced him to a 45-month stayed sentence. The district court placed Michling on probation for 15 years with various conditions, including that Michling serve 365 days in jail and complete an intensive treatment program. The district court listed three reasons for the downward dispositional departure:

(1) Michling's amenability to treatment, (2) his genuine remorse, and (3) his genuine accountability and responsibility.

Appellant State of Minnesota argues that the district court erred by refusing to impose the mandatory-minimum sentence under Minn. Stat. § 152.023, subd. 3(b). Appellate courts may review a "sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the sentencing court's findings of fact." Minn. R. Crim. P. 28.05, subd. 2. "This court recognizes the broad discretion of the [district] court in sentencing matters and is loath to interfere." *State v. Law*, 620 N.W.2d 562, 564 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Dec. 20, 2000). "The [district] court is in [the] best position to weigh the various sentencing options and therefore is granted broad discretion in sentencing." *Massey v. State*, 352 N.W.2d 487, 489 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984). But the district court's sentencing discretion may be constrained by statute, as it is in this case. *See State v. Bluhm*, 676 N.W.2d 649, 654 (Minn. 2004) (holding that Minn. Stat. § 152.025, subd. 3(b), mandates that a convicted defendant "be committed to the local correctional authority to serve, at a minimum, a six-month sentence and that probation may not be imposed in lieu of serving the six-month sentence"); *State v. Adams*, 791 N.W.2d 757, 757 (Minn. App. 2010) (holding that the district court may not stay execution of a sentence when the mandatory-minimum sentencing provision in Minn. Stat. § 152.022, subd. 3(b), applies), *review denied* (Minn. Mar. 15, 2011); *State v. Turck*,

728 N.W.2d 544, 548 (Minn. App. 2007) (holding that Minn. Stat. § 152.023, subd. 3(b), mandates a 24-month executed sentence), *review denied* (Minn. May 30, 2007).

Minn. Stat. § 152.023, subd. 3(b), clearly and unambiguously mandates that when a "sentence is for a subsequent controlled-substance offense, [the convicted defendant] must serve a term of imprisonment of not less than two years." *Turck*, 728 N.W.2d at 548. In *Turck*, this court reversed the district court's decision to stay execution of the defendant's sentence on a third-degree controlled-substance conviction, concluding that because the defendant had a previous qualifying controlled-substance conviction, Minn. Stat. § 152.023, subd. 3(b), required the defendant to "serve a term of imprisonment of not less than two years." *Id*. This court analyzed the mandatory-minimum sentencing provision in Minn. Stat. § 152.023, subd. 3(b), in light of Minn. Stat. § 152.152 (2010), which provides judicial discretion to depart from presumptive prison sentences. *Id.* This court determined that section 152.152 applies in two situations: "first-time controlled-substance offenders and repeat offenders who have served their term of imprisonment." *Id.* We held that the specific mandatory-sentence provision for repeat controlled-substance offenders in section 152.023, subdivision 3(b), prevails over the general provision allowing departures under section 152.152. *Id.* Thus, this court has already rejected Michling's argument that under section 152.152, the district court had discretion not to impose the mandatory-minimum sentence under section 152.023, subdivision 3(b).

Michling's other arguments in support of the dispositional departure are also unavailing. Michling asserts that the *Turck* holding "will undo what progress drug courts have made rehabilitating offenders in Minnesota and fill Minnesota's prisons with

nonviolent offenders who need help with drug addiction." This policy-based argument is misplaced; the legislature—not this court—determines the appropriate punishment for crimes. *See State v. Jonason*, 292 N.W.2d 730, 733 (Minn. 1980) (stating that "[j]udicial sentencing must strictly adhere to statutory authorization"); *State v. Osterloh*, 275 N.W.2d 578, 580 (Minn. 1978) (stating that "the legislature, having the power to define what acts constitute criminal conduct, necessarily retains the power to define the punishment for such acts" and that "[t]he role of the [district court] in prescribing sentence in a criminal case is that of the executor of the legislative power").

Michling also asserts that the sentence was an appropriate exercise of the district court's inherent authority. He argues that "[t]he district court did not abuse its discretion in dispositionally departing from the statutorily mandated minimum sentence because it was exercising its authority to appropriately suspend the rules to ensure the proper administration of justice." He relies on *State v. Erickson*, 589 N.W.2d 481 (Minn. 1999), for support. In *Erickson*, defendants jointly challenged a county attorney's office's use of Minn. R. Crim. P. 26.03, subd. 13(4) to remove a particular district court judge from a vast majority of criminal cases. 589 N.W.2d at 482. In an exercise of inherent power, the supreme court suspended the county attorney's office's privilege to use Minn. R. Crim. P. 26.03, subd. 13(4). *Id.* at 485. We do not equate the supreme court's suspension of a rule that it promulgated with the district court's disregard of a legislative sentencing mandate and binding precedent. *See State v. M.L.A.*, 785 N.W.2d 763, 766-67 (Minn. App. 2010) (stating that "[i]t is not for the court to lightly use judicial authority to enforce or restrain acts which lie within the executive and legislative jurisdiction of

another department of the state" and that "[t]he district court, like this court, is bound by supreme court precedent and the published opinions of the court of appeals") (quotations omitted), *review denied* (Minn. Sept. 21, 2010).

Michling also asserts that if the district court was not permitted to impose a stay of execution, the appropriate recourse is to provide Michling with an opportunity to withdraw his guilty plea rather than to remand the case for resentencing. But if Michling wishes to withdraw his plea, the request must be made in the first instance in the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that appellate courts will generally not decide issues which were not raised in the district court); *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988) ("The function of the court of appeals is limited to identifying errors and then correcting them."); *State v. Senske*, 291 Minn. 228, 232, 190 N.W.2d 658, 661 (1971) (declining to address an issue not raised in the district court, explaining that it would amount to an advisory opinion).

Finally, we address Michling's request, which was made for the first time at oral argument to this court, that we reverse our decision in *Turck*. Michling asserts that the *Turck* decision fails to recognize ambiguity in section 152.023, subdivision 3(b), and that the statute can be interpreted as granting the district court discretion not to impose the mandatory-minimum sentence. But Michling did not raise this argument in his brief to this court, and issues not briefed on appeal are waived. *State v. Butcher*, 563 N.W.2d 776, 780 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Thus, we do not consider the argument.

Because the district court was statutorily required to impose an executed prison sentence of "not less than two years," its decision to stay the execution of Michling's sentence was "inconsistent with statutory requirements" and must be reversed. *See* Minn. R. Crim. P. 28.05, subd. 2 (stating that appellate courts may review sentences, in part, to determine whether they are "inconsistent with statutory requirements").

Reversed and remanded.

Dated:

Judge Michelle A. Larkin