STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1755

State of Minnesota,
Appellant,

vs.

Anthony Carlos Cruz,
Respondent.

Filed April 22, 2013
Reversed and remanded
Toussaint, Judge[*]
Concurring specially
Rodenberg, Judge

Dakota County District Court
File No. 19HA-CR-12-786

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

James C. Backstrom, Dakota County Attorney, Vance B. Grannis, III, Assistant County Attorney, Hastings, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Chief Judge; Rodenberg, Judge; and Toussaint, 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

TOUSSAINT, Judge

The state appeals the district court's failure to impose the mandatory-minimum sentence required by Minn. Stat. § 152.022, subd. 3(b) (2010), for respondent Anthony Carlos Cruz's conviction of second-degree controlled substance crime where Cruz has a prior conviction for a felony controlled substance crime. We reverse and remand for resentencing consistent with the requirement of the mandatory sentencing statute.

FACTS

In the afternoon of February 29, 2012, West St. Paul police officers responded to a report of shoplifting. When the police officers arrived, loss prevention officers were chasing Cruz. The officers saw Cruz toss something in the snow, which turned out to be a clear plastic bag containing a white powder. The white powder was determined to be methamphetamine. After a jury trial, Cruz was found guilty of second-degree controlled substance crime, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2010), and misdemeanor theft by shoplifting, in violation of Minn. Stat. § 609.52, subd. 2(1) (2010).

Cruz has a prior conviction for fifth-degree controlled substance crime, a felony, from March 28, 2006. The presumptive guidelines sentence for second-degree controlled substance crime, a severity-level-eight offense, is 58 months in prison based on Cruz's criminal history score of one point. Minn. Sent. Guidelines IV (2010) (grid). Because this is Cruz's second conviction for a felony controlled substance crime, the legislature prescribes a mandatory minimum sentence of at least two years in prison. *See* Minn. Stat. § 152.022, subd. 3(b).

Cruz filed a motion for a downward durational or dispositional departure. Dakota County community corrections recommended a dispositional departure based on Cruz's amenability to treatment and his acceptance of responsibility. The district court imposed, but stayed, a 58-month sentence and placed Cruz on probation for ten years with the conditions that he enter and complete the Salvation Army ARC treatment program, serve 365 days in jail, and pay restitution. The district court found the following substantial and compelling reasons supported the dispositional departure: Cruz "is amenable to probationary supervision, he is amenable to chemical dependency treatment, and he shows remorse and accepts responsibility for his conduct." The state appeals the dispositional departure.

D E C I S I O N

The question of whether Minn. Stat. § 152.022, subd. 3(b) requires a mandatory minimum term of incarceration is a question of statutory construction subject to de novo review. *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004). "[W]hen the legislature's intent is clear from plain and unambiguous statutory language, this court 'does not engage in any further construction and instead looks to the plain meaning of the statutory language.'" *Id.* (quoting *State v. Wukawitz*, 662 N.W.2d 517, 525 (Minn. 2003)).

The statute at issue here provides the following penalty for a conviction of second-degree controlled substance crime:

> If the conviction is a subsequent controlled substance conviction, a person convicted under subdivision 1 or 2 shall be committed to the commissioner of corrections for not less than three years nor more than 40 years and, in addition, may be sentenced to payment of a fine of not more than $500,000.

Minn. Stat. § 152.022, subd. 3(b). "A defendant convicted and sentenced to a mandatory sentence under sections 152.021 to 152.025 and 152.0262 is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law . . . ." Minn. Stat. § 152.026 (2010). "'Term of imprisonment' means two-thirds of the executed sentence." *State v. Turck*, 728 N.W.2d 544, 547 (Minn. App. 2007), *review denied* (Minn. May 30, 2007).

According to these provisions, the district court did not have discretion to stay the 58-month sentence, regardless of the presence of mitigating factors. This court specifically addressed the question of whether Minn. Stat. § 152.022, subd. 3(b) requires a mandatory minimum term of incarceration when a defendant is sentenced for second-degree controlled substance crime and has a prior conviction for a controlled substance crime in *State v. Adams*, 791 N.W.2d 757, 758-59 (Minn. App. 2010), *review denied* (Minn. Mar. 15, 2011). This court held that the language of the statute is clear and unambiguous: a defendant who has a prior felony controlled substance conviction must serve a minimum three-year sentence and is not eligible for probation until that time is served. *Id.* at 759. Under the plain language of section 152.022, subdivision 3(b), the only sentence the district court in this case had the discretion to impose, other than the presumptive guidelines' sentence of 58 months executed, was the mandatory minimum sentence of not less than 36 months executed.

Because *Adams* is controlling, we reverse and remand for sentencing pursuant to the mandate of Minn. Stat. § 152.022, subd. 3(b).

Reversed and remanded.

RODENBERG, Judge (concurring specially)

I concur in the majority's opinion. Minnesota law requires reversal. I write separately to observe the unique circumstances present here, which include imprisonment of appellant despite a well-supported judicial determination that he is amenable to probation. On this record, committing appellant to prison seems unlikely to produce beneficial results to anyone, and will result in considerable expense to the public.

Instead of imposing and executing a 58-month prison sentence, the district court found appellant to be amenable to probation and imposed a ten-year supervised probation to ensure long-term compliance with probationary conditions.[1] In making this determination, the district court noted a number of factors supporting a dispositional departure.[2] The experienced district court judge observed that appellant had been in jail for 125 days prior to sentencing, resulting in "an enforced period of sobriety." Appellant had completed chemical-dependency treatment, a domestic-abuse-prevention program, and a life-skills program, while in jail. At the time of sentencing, he was "attending anger management programming, parenting skills, cognitive thinking skills, narcotics

[1] An executed 58-month prison sentence would control appellant's behavior for 38 2/3 months while he is in prison and for another 19 1/3 months on supervised release. *See* Minn. Stat. § 244.01, subd. 8 (2010) (defining "term of imprisonment"); *see also* § 244.101, subd. 1 (2010) (explaining that a sentence consists of a specified minimum term of two-thirds the executed sentence and a specified minimum supervised release term that is equal to one-third of the executed sentence). But a probationary sentence controls appellant's behavior for ten years.

[2] In cases such as this, where a mandatory minimum commitment to prison is required by statute, the Minnesota Sentencing Guidelines provide that the presumptive sentence for a controlled substance conviction is "the fixed duration indicated in the appropriate cell on the Grid, or the mandatory minimum, whichever is longer." *See* Minn. Sent. Guidelines II.C. (2010).

anonymous, Bible study, and church services. He has attended special events at the jail, including a jail resource fair, and he is a trustee in the jail." The district court also noted that, in the presentence investigation report (PSI), the probation department recommended a departure from the Sentencing Guidelines and a probationary sentence. The district court added that the PSI was prepared by "a seasoned veteran probation officer" and was approved by "a supervisor [who has been] in the probation department for as long as I've been around." Finally, in imposing a 365-day local jail sentence (with credit for time previously served) as a condition of the stay of execution, the district court noted that appellant has minor children in his custody and the PSI indicates that the mother of those children is no longer parenting them and sees them only infrequently.

Appellant's counsel anticipated the likelihood of the present appeal and observed, in requesting a dispositional departure, that

> [w]e understand that is a brave thing to do, because the legislature has mandated and taken away the power from the Court to sentence as the Court sees fit; and I am almost positive that if the Court is brave and does that, the county attorney's office will appeal it.

The district court departed. As counsel anticipated, the state appealed. The state wins under current Minnesota law.

In a case such as this, where there are factors supporting a dispositional departure, Minn. Stat. § 152.022, subd. 3(b), deprives the district court of sentencing discretion and effectively assigns that discretion to the prosecutor, who is statutorily empowered to determine which cases merit a sentence other than the mandatory minimum. *See generally* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L.

Rev. 505, 583-600 (2001) (discussing mandatory minimum sentencing provisions that effectively give prosecutors the power to control the sentence). Had the state not appealed the current sentence, appellant would not be imprisoned. The so-called mandatory-minimum sentence is mandatory only because the state insists that it is.[3]

My oath of office mandates that I concur in the result. My conscience dictates that I acknowledge that the prison sentence here results not from any judicial determination that a prison sentence is the appropriate disposition. Those best situated to know and account for an individual defendant's amenability to probation are the probation department, which extensively considers the individual factors weighing both for and against a probationary sentence, and the sentencing judge, who considers the PSI and the arguments of both the prosecution and defense regarding an appropriate sentence. Section 152.022, subdivision 3(b), requires the court to ignore these individual factors.

[3] Although unpublished opinions are of persuasive value "[a]t best" and not precedential, *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993), I note that prosecutorial discretion in deciding whether to assert the mandatory sentence may lead to unequal treatment of some offenders. *See State v. Garcia*, No. A08-1989, 2009 WL 2852561 at *3 (Minn. App. Sept. 8, 2009) (citing *State v. Richmond*, 730 N.W.2d 62, 72 (Minn. App. 2007)) (noting that prosecutorial discretion in raising the issue of a mandatory-minimum sentence does not give rise to an Equal Protection challenge despite unequal treatment), *review denied* (Minn. Nov. 17, 2009). The record here does not suggest any bad faith on the part of the prosecutor. Nor by this concurrence do I suggest anything of the sort. In taking this appeal, the prosecutor is only doing what the statute allows him to do.

The power to effectuate an appropriate sentence in a case like this has been taken away from the judicial branch.[4]

I therefore concur in the result, but I do so reluctantly.

[4] For an interesting discussion of the modern trend to overcriminalize behavior and increase prosecutorial discretion in charging, which goes well beyond the confines and issues present in this case, see Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 Mich. L. Rev. 971 (2010).