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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1012

State of Minnesota,
Respondent,

vs.

Christopher Edwards,
Appellant.

Filed July 29, 2008
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. K4-06-414

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Considered and decided by Shumaker, Presiding Judge; Ross, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's upward durational departure in his sentencing for his conviction of first-degree assault. Because the conduct considered by the district court shows that the first-degree assault was committed in a particularly serious way, we conclude that the upward durational departure is justified, and we affirm.

FACTS

In the early morning hours of January 28, 2006, a group of young men and women assembled in a ShopKo parking lot to continue a confrontation begun earlier at a Kwik Trip. Shortly after the group assembled, appellant Christopher Allen Edwards fired a gun seven times out of a car window towards the group. One shot hit M.D. in the chest. Had M.D. not received medical attention, he very likely would have died. One shot hit K.R.-1 in the arm and another hit K.R.-2 in the hand.

Appellant was charged with multiple counts and the case was tried to the district court without a jury. The court found appellant guilty of one count of first-degree assault against M.D. and two counts of engaging in a drive-by shooting toward people or an occupied target, injuring K.R.-1 and K.R.-2. The court acquitted appellant of the remaining counts, including attempted first-degree murder. The court determined that an upward durational departure in appellant's sentence for his conviction of first-degree assault was justified. At appellant's sentencing hearing, the district court stated:

> [Appellant's] conduct in assaulting [M.D.] was significantly more serious than that typically involved in the commission of the crime of first degree assault, in that

> [appellant] fired seven times at or toward a group of nine people in the immediate area, exposing all of them to injury or death, and, in addition to [M.D.], seriously injuring [K.R.-1]. [Appellant's] conduct was particularly serious and represented a greater than normal danger to the safety of other people.

The district court sentenced appellant to 190 months for his conviction of first-degree assault, a 30-month upward durational departure. On each of the two drive-by shooting convictions related to K.R.-1 and K.R.-2, the court sentenced appellant concurrently to 129 months, concurrent to appellant's sentence of 190 months on his first-degree assault conviction. In its discretion, the court could have sentenced appellant consecutively on each conviction related to a different victim, but the court chose not to do so. The court explained in a memorandum that "[a] rationale could be stated for a longer sentence" but "it comes down to the court's sense of what penalty is enough for the crimes in question." Noting that the sentences would require appellant to serve at least 10.5 years in prison, the court stated "I think that is enough." This appeal of the upward durational departure in the first-degree assault sentence follows.

D E C I S I O N

Appellant argues that the facts underlying his drive-by-shooting convictions cannot be relied on to support an upward durational departure in the first-degree assault sentence. We review a sentence to determine "whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2006). Review is under the abuse-of-discretion standard. *State v. Franklin*,

604 N.W.2d 79, 82 (Minn. 2000). We begin our review by examining the record to determine if the reasons for departure stated by the district court on the record justify the departure. *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

Departures from the guidelines sentencing scheme "must be based on the offense of conviction." *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002). "[C]onduct underlying one conviction" cannot be relied on "to support departure on a sentence for a separate conviction." *State v. Williams*, 608 N.W.2d 837, 840 (2000). "Departures are warranted only when substantial and compelling circumstances are present." *State v. Jones*, 745 N.W.2d 845, 848 (Minn. 2008). "Substantial and compelling circumstances are those demonstrating that 'the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question.'" *Id.* (quoting *Misquadace*, 644 N.W.2d at 69).

In applying these rules to determine whether the district court impermissibly relied on conduct that underlies another conviction, we ask "[i]f evidence only supports defendant's guilt of some other offense but does not support the conclusion that the defendant committed the instant offense for which he is being sentenced in a particularly serious way." *State v. Ott*, 341 N.W.2d 883, 884 (Minn. 1984). If so, "then it cannot be relied upon as a ground for departure." *Id.*

The supreme court applied the above-quoted language from *Ott* in *State v. Ford*, 539 N.W.2d 214, 230 (Minn. 1995), a case that involved convictions for both murder and attempted murder. In *Ford*, the district court relied on six factors to enhance the attempted-murder sentence. *Id.* The supreme court concluded that three of the factors

clearly related only to the planning and execution of the murder. *Id.* But the other three factors supported "guilt of murder and attempted murder *equally.*" *Id.* (emphasis added). Applying *Ott*, the supreme court concluded that "these reasons are not evidence that '*only* supports [the offender's] guilt of some other offense" and were therefore allowable reasons for departure. *Id*. (quoting *Ott*, 341 N.W.2d at 884.)

Under the analysis in *Ford* and *Ott*, we ask whether the district court's reliance on firing seven shots into a group of nine people was improper because the same facts underlie the drive-by shooting convictions. We conduct our analysis by asking whether firing the shots into the group of nine "*only* supported guilt" of drive-by shooting and *did not* show that the offense being sentenced, the first-degree assault, was committed in a particularly serious way. Under this analysis, if the facts *did* show that the assault was committed in a particularly serious way, then reliance on the facts to enhance the sentence was not an abuse of discretion.

But in considering this precedent, we are mindful that the supreme court's recent decisions indicate that more scrutiny may now be appropriate for "redundant enhancements." *Jones*, 745 N.W.2d at 849. In *Jones,* the supreme court struck down an enhancement in a criminal sexual conduct conviction that was based on neglect and endangerment verdicts. *Id.* at 849-51. In doing so, the supreme court noted that "since the time of our early decisions involving the guidelines, our jurisprudence related to limitations on redundant enhancements is much more developed." *Id*. at 849. The supreme court has also recently reiterated that "[t]o maintain uniformity and

proportionality, departures from the presumptive guidelines sentence are discouraged." *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008).

But the analysis applied in *Jones* is consistent with the analysis set forth in *Ott* and applied in *Ford*. In *Jones*, the supreme court gave several reasons against relying on child endangerment and neglect convictions to enhance the criminal sexual conduct sentence. *Jones*, 745 N.W.2d at 849-51. One reason given was that "the conduct underlying the neglect and endangerment convictions could not be used to support the departure for the separate criminal sexual conduct conviction." *Id.* at 850. Another reason was that "the enhancement was not based on the offense of conviction, third-degree criminal sexual conduct" because "[t]he neglect and endangerment verdicts did not demonstrate that Jones' conduct in the sexual conduct crime was significantly more serious 'than that typically involved in the commission' of that crime." *Id*. (quoting *Misquadace*, 644 N.W.2d at 69).

The *Jones* analysis is consistent with the analysis of *Ott*, applied in *Ford*. *Jones* concluded that conduct underlying the other convictions could not be considered where the conduct failed to show the offense being sentenced was committed in a particularly serious way. This conclusion complies with the *Ott* analysis that conduct used to aggravate a sentence must show that the offense was committed in a particularly serious way rather than *only* supporting guilt of another offense. We do not read *Jones* to change the analysis from that stated in *Ott* and applied in *Ford*; therefore, we follow the analysis

in *Ott* and *Ford* in this case.[1] Applying that analysis, we look to the conduct relied on by the district court and ask if it shows *only* appellant's guilt of the drive-by shootings and does not show that the assault was committed in a particularly serious way.

A drive-by shooting toward a person or occupied target is committed when a person "while in or having just exited from a motor vehicle, recklessly discharges a firearm at or toward" a person or an occupied building or motor vehicle. Minn. Stat. § 609.66, subd. 1e (a), (b) (2004). "Assault" is an act done with intent to cause fear in another of immediate bodily harm or death or the intentional infliction or attempt to inflict bodily harm upon another. Minn. Stat. § 609.02, subd. 10 (2004). First-degree assault is committed when an assault causes great bodily harm. Minn. Stat. § 609.221, subd. 1 (2004).

We are persuaded that appellant's actions in shooting seven times into a group of nine people show not *only* that he committed drive-by shootings but also that the first-degree assault was committed in a particularly serious way. The conclusion that appellant's conduct created a greater-than-ordinary risk to others is supported by precedent. *See Ford*, 539 N.W.2d at 230 (determining that defendant's conduct of shooting in a restaurant put a number of people at risk); *State v. Anderson*, 463 N.W.2d

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[1] We note that *Jones* addressed Minn. Stat. § 609.035 (2006), which "prohibits cumulative punishment for conduct that constitutes more than one offense" and "contemplates that a defendant will be punished for the 'most serious' of the offenses arising out of a single behavioral incident." *Jones*, 745 N.W.2d at 850 (quoting Minn. Stat. § 609.035). The single-behavioral-incident rule is, however, subject to an exception for crimes that have multiple victims that applies to this case. *See State v. Skipintheday*, 717 N.W.2d 423, 426 (Minn. 2006) (stating that exception to section 609.035 allows multiple sentencing when there are multiple victims and the criminality of conduct is not unfairly exaggerated).

551, 553 (Minn. App. 1990) (determining that firing a gun 13 times in a mixed residential area was "particularly serious and represented a greater than normal danger to the safety of other people"), *review denied* (Minn. Jan. 14, 1991).

Appellant argues that the district court's actions are contrary to *State v. Spaeth*, 552 N.W.2d 187 (Minn. 1996). In *Spaeth*, the defendant was convicted of first-degree murder, first-degree burglary, and first-degree assault. 552 N.W.2d at 189. The district court used aggravating and vulnerability factors which supported defendant's murder conviction to justify an upward departure in the sentence for the burglary conviction. *Id.* at 196. The supreme court held that it was "impermissible to use as aggravating and vulnerability factors conduct that resulted in [the] murder to justify an upward departure for the burglary conviction." *Id*. Appellant argues that the court in this case is similarly not permitted to consider conduct that resulted in the drive-by shooting convictions.

But *Spaeth* does not explain its application of the rule that conduct underlying one conviction cannot be used to aggravate a sentence for another; thus, we cannot conclude that it modified the holding in *Ott*. We note that after the *Spaeth* decision, the supreme court quoted the *Ott* holding with approval in *Taylor v. State*, 670 N.W.2d 584, 588 (Minn. 2003). We conclude that *Spaeth* did not modify the holding in *Ott*.

Appellant also relies on *State v. Pittel,* 518 N.W.2d 606 (Minn. 1994). In *Pittel*, when the *Hernandez* method was used to increase a sentence by increasing the criminal history score on which it was based, the court could not rely on conduct that formed the basis for the earlier-sentenced convictions again to enhance the later-sentenced conviction. *Id.* at 608. But in this case, the *Hernandez* method was not used to increase

the criminal history score on the first-degree assault sentence for the drive-by shooting convictions. The *Pittel* rule, therefore, does not apply.

Under *Ott* and *Ford,* because the conduct considered does not *only* support guilt of the drive-by shootings but also shows that appellant committed first-degree assault in a particularly serious way, the conduct was properly considered in aggravating the first-degree assault sentence. Accordingly, we conclude that the district court did not abuse its discretion in relying on this conduct to enhance appellant's sentence on the first-degree assault conviction.

Affirmed.