STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1989

State of Minnesota,
Respondent,

vs.

Elizabeth Annette Garcia,
Appellant.

Filed September 8, 2009
Affirmed
Harten, Judge*
Concurring specially, Stauber, Judge

Stearns County District Court
File No. 73-K0-06-004765

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Janelle P. Kendall, Stearns County Attorney, Tom J. Harbinson, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Klaphake, Presiding Judge; Stauber, Judge; and Harten, 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

HARTEN, Judge

Appellant challenges her sentence for repeated third-degree controlled-substance crimes, arguing that the district court should have exercised its discretion to impose a downward dispositional departure. Because Minn. Stat. § 152.023, subd. 3(b) (2006), and Minn. Stat. § 152.026 (2006) provide that the district court has no discretion to impose a downward dispositional departure for subsequent third-degree controlled-substance crimes, we affirm.

FACTS

In September 2005, appellant Elizabeth Garcia committed two third-degree controlled-substance crimes for which she was placed on supervised probation. In August 2006, after her supervised probation had expired, a confidential informant (CI) on three occasions arranged with police officers to purchase a controlled substance from appellant. On the first occasion, the CI purchased 0.3 grams of cocaine from appellant's boyfriend (later her co-defendant); on the second and third occasions, he purchased 0.3 grams of cocaine from appellant.

Appellant was charged with one count of aiding and abetting third-degree controlled-substance crime and two counts of third-degree controlled-substance crime. She pled guilty to the count of aiding and abetting controlled-substance crime and one count of third-degree controlled-substance crime; the remaining count was dismissed.

Appellant argued for a downward dispositional departure, but she was sentenced to 24 months, executed, under Minn. Stat. § 152.023, subd. 3(b). She challenges the

sentence, arguing that the statutory sentence was unlawfully construed to be mandatory and applied as such, thereby rendering appellant's sentence unconstitutional.

D E C I S I O N

1. Statutory Construction

Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Minn. Stat. § 152.023, subd. 3(b) provides that:

> If [a person's] conviction [of a third-degree controlled-substance crime] is a subsequent controlled substance conviction, [the] person convicted . . . *shall be committed* to the commissioner of corrections for not less than two years nor more than 30 years and, in addition, may be sentenced to payment of a fine of not more than $250,000.

(Emphasis added.) "'Shall' is mandatory." Minn. Stat. § 645.44, subd. 16 (2006). The legislature further emphasized the mandatory character of sentences imposed under Minn. Stat. § 152.023, subd. 3(b), in an associated statute, Minn. Stat. § 152.026, which provides that a person sentenced under "sections 152.021 to 152.025 . . . is not eligible for probation, parole, discharge, or supervised release until that person has served the full term of imprisonment as provided by law." "Term of imprisonment" means two-thirds of the executed sentence. Minn. Stat. § 244.01, subd. 8 (2006).

Although an ambiguous criminal law must be construed narrowly in accord with the principles of lenity, appellate courts "will not invoke principles of lenity when the statute at issue is not ambiguous." *State v. Campbell*, 756 N.W.2d 263, 275 (Minn. App. 2008) (citing *State v. Loge*, 608 N.W.2d 152, 156 (Minn. 2000)), *review denied* (Minn. 23 Dec. 2008). Both this court and the supreme court have recognized the unambiguous

language and the mandatory framework of sentences imposed under sections 152.021 and 152.026. *See State v. Bluhm*, 676 N.W.2d 649, 654 (Minn. 2004) (construing Minn. Stat. § 152.025, subd. 3(b) (2002) and Minn. Stat. § 152.026 (2002) to mandate minimum six-month sentence for repeat offenders convicted of fifth-degree controlled-substance crime); *State v. Turck*, 728 N.W.2d 544, 548 (Minn. App. 2007) (holding that, under Minn. Stat. § 152.023, subd. 3(b) (2004) and Minn. Stat § 152.026 (Supp. 2005), "conviction of a controlled-substance crime carries . . . a mandatory-minimum sentence for repeat offenders"), *review denied* (Minn. 30 May 2007).

In sentencing appellant, the district court observed that *Turck* and appellant's case are similar, that district courts are "bound to follow the legislature and the Court of Appeals' interpretation of [Minn. Stat. § 152.023, subd. 3(b),]"; given the lack of ambiguity in both the statutes and the caselaw, district courts do not have discretion to exercise lenity and grant a downward dispositional departure.

The district court properly construed Minn. Stat. § 152.023, subd. 3(b), in accord with *Bluhm* and *Turck*.

2. Constitutionality

The constitutionality of a statute presents a question of law that this court reviews de novo. *State v. Wolf*, 605 N.W.2d 381, 386 (Minn. 2000).

Appellant argues that Minn. Stat. § 152.023, subd. 3(b), is unconstitutional under the separation of powers doctrine because it removes district courts' discretion to make a downward dispositional departure, but prosecutors have discretion to enable a downward dispositional departure by omitting subdivision 3(b) from the charge: thus, it gives

officials of the executive branch (prosecutors) power that should be vested in judicial branch officers (district courts).

To support this argument, appellant relies on *State v. Olson*, 325 N.W.2d 13, 19 (Minn. 1982) (legislature cannot constitutionally give to prosecutors power that it denies to courts). *Olson* involved Minn. Stat. § 609.11, subd. 8 (Supp. 1981) (permitting prosecutors to move to have a defendant sentenced and courts to sentence a defendant "without regard to the mandatory minimum terms of imprisonment established by this section"). *Id.* at 15.

> The legislature may authorize the court to exercise broad discretion in the imposition of sentences by providing for the fixing of sentences within prescribed minimum and maximum years . . . [or] restrict the exercise of judicial discretion in sentencing, such as by providing for mandatory sentences . . . . But once the legislature has prescribed the punishment for a particular offense[,] it cannot, within constitutional parameters, condition the imposition of the sentence by the court upon the prior approval of the prosecutor.
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> [T]o effectuate its major purpose[, Minn. Stat. § 609.11, subd. 8] must be interpreted to give courts and prosecutors alike the power to initiate sentencing without regard to statutory minimums.

Id. at 18-19.

First, *Olson* is distinguishable. Unlike Minn. Stat. § 609.11, subd. 8, the statutes at issue here, Minn. Stat. § 152.023, subd. 3(b) and Minn. Stat. § 152.026, do not give prosecutors discretion to move for sentencing without regard to the minimum sentences mandated by the statutes. Thus, they do not give to prosecutors what they deny to courts.

Secondly, neither the parties nor the district court challenged the questionable proposition that a prosecutor may effectively nullify the application of the mandatory minimum sentence provision under Minn. Stat. § 152.023, subd. 3(b), to any given complaint simply by omitting any reference within the complaint to that provision. That maneuver did not occur in appellant's case. Appellant raised the issue in reaction to the sentence received by her co-defendant, who was charged without reference to section 152.023, subd. 3(b), and sentenced in furtherance of a plea agreement without application of the mandatory minimum sentence provision. But the disparate treatment of appellant's co-defendant does not entitle appellant to a dispositional departure nor furnish a ground for appellant's constitutional objection. "[T]he Equal Protection Clause prohibits selective enforcement only when it is based on an unjustifiable standard such as race, religion, or another arbitrary classification. . . . [And t]he possibility that a law *may* actually fail to operate with equality is not enough to invalidate it." *State v. Richmond*, 730 N.W.2d 62, 72 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. 19 June 2007).

Finally, "[a]lthough a prosecutor 'may be influenced by the penalties available upon conviction, . . . this fact, standing alone, does not give rise to a violation of the Equal Protection or Due Process Clause.'" *Id.* (quoting *United States v. Batchelder*, 442 U.S. 114, 125, 99 S. Ct. 2198, 2205 (1979)). *Richmond* reversed a district court's decision that Minn. Stat. § 152.023, subd. 1 (third-degree controlled-substance crime), was unconstitutional as applied to a defendant because it violated equal protection by prescribing a more severe penalty for the defendant's conduct than was prescribed by

Minn. Stat. § 152.024, subd. 1 (fourth-degree controlled-substance crime), which also prohibited the same conduct. 730 N.W.2d at 65. "[T]he district court . . . relied primarily on the *potential* for unfettered prosecutorial discretion in electing whether to charge a defendant under the statute with the harsher penalty. . . . [*Batchelder*] rejected this exact analysis as factually and legally unsound." *Id.* at 72 (quotation omitted).

We conclude that Minn. Stat. § 152.023, subd. 3(b) and Minn. Stat. § 152.026 are not unconstitutional and were lawfully applied in sentencing appellant.

Affirmed.

STAUBER, Judge, concurring specially

I concur, but note the district court's concern and comments relating to the seemingly strange, unusual, and certainly questionable prosecutorial charging practices in this case. Here, the major player in the drug-sale case was benefited by the state's discretionary omission of otherwise mandatory minimum sentencing provisions in its charging authority. The co-defendant (the physically disabled girlfriend and appellant here), admittedly a smaller player, who was coerced into the scheme and whose sales were far smaller, was not given the same charging benefit and thus was sentenced to the mandatory 24-month imprisonment over the recommendations of probation. The primary defendant was given straight probation even with a much more expansive criminal history.

The district court found that appellant "played a relatively minor and passive role in being the conduit, or the contact, for the co-defendant in this case." The court further noted:

> Well, I'll make that explicit, I would have granted the downward dispositional departure as recommended by the agent. I would much rather have seen [appellant] on the kind of intensive supervision that the agent had recommended and that the agent felt would be appropriate, given her issues and given what by all accounts appears to have been a sincere effort to get out of this kind of lifestyle and start to lead a productive and healthy life. So, I would have granted that. And, however, as I reviewed *Turck*, the case that is published and that the Supreme Court denied review on . . . we would have the same case that we have here. And the legislature has chosen to go ahead and remove discretion from the district court on these sentencing matters, and I am bound to follow the legislature and the Court of Appeals' interpretation of that statute.

Unfortunately, the legislature did not consider that the government's attorneys would use their charging discretion to imprison a less-culpable and physically disabled defendant, while rewarding the major and primary co-defendant. In enacting Minn. Stat. § 152.023, subd. 3(b) (2006), the legislature has eliminated judicial discretion and taken away the ability to apply fundamental justice in those few unique cases, as here, that deserve it.