STATE OF MINNESOTA
IN COURT OF APPEALS
A09-353

State of Minnesota,
Respondent,

vs.

Jonathan Gary Phipps,
Appellant.

Filed February 2, 2010
Affirmed in part, reversed in part, and remanded; motion granted in part and denied in part
Lansing, Judge

St. Louis County District Court
File No. 68-DU-CR-07-5179

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

Melanie S. Ford, St. Louis County Attorney, Mark S. Rubin, Assistant County Attorney, Duluth, Minnesota (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Sean M. McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Lansing, Judge; and Johnson, Judge.

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

LANSING, Judge

In this appeal from sentencing for burglary and kidnapping, Jonathan Phipps argues, first, that the district court failed to consider grounds for a dispositional departure and, second, that the restitution order lacks evidentiary support. Phipps also moves to strike sections of the state's brief, and we grant the part of the motion that relates to an unfiled letter. Because the record confirms that the district court considered Phipps's departure motion, we affirm the imposition of the guidelines-range sentence. But we remand for further consideration of the restitution order.

F A C T S

Jonathan Phipps and a codefendant were charged with burglary and kidnapping for breaking into a Duluth home on the morning of August 30, 2007, tying the hands of the homeowner and her son, and threatening to shoot the son. Phipps's codefendant had obtained information that large amounts of money were kept in a safe in the home and also obtained information on the physical layout of the house.

KH and her nine-year-old son, BH, were asleep when Phipps and his codefendant entered by forcing open a basement door. Both men carried firearms and wore hooded sweatshirts and bandanas. The men bound KH's and BH's hands, pointed guns at both of them, and asked for the money. One of the men threatened to shoot BH if KH did not answer their questions. When they were unable to find any money, the men left through the same basement door that they had entered and fled through a ravine to the west of the house.

Following an investigation, the state charged Phipps with one count of burglary and two counts of kidnapping. Phipps entered into a plea agreement in which the state agreed not to ask for an upward departure, to sentence the burglary and the kidnapping of KH as one incident, and to "cap any sentence at the same sentence as the codefendant." Phipps's presentence investigation (PSI) computed his presumptive sentence for both the burglary and kidnapping offenses as a forty-eight-month commitment to the commissioner of corrections. The guidelines range was forty-one to fifty-seven months, with permissive consecutive sentencing. The PSI indicated that Phipps had problems with substance abuse. It also indicated that KH was seeking restitution of $22,124.06 and appended her impact statement and documentation for the requested restitution. Phipps moved for a dispositional departure based on factors showing his amenability to probation. He provided letters of support and a confirmation from Teen Challenge that he had been accepted in a thirteen-month, faith-based, drug-and-alcohol treatment program.

At the sentencing hearing, the district court discussed the motions that had been submitted and the materials that it had reviewed. Phipps and the state agreed that the PSI was accurate. Phipps asked the court to consider the positive contributions that he could make, with the support of his family and his faith, if placed on probation. His sister and his mother testified, and the court sua sponte allowed Phipps's father to address the court. The state presented witnesses to support its opposition to the dispositional departure.

The district court explained that Phipps's motion for a dispositional departure presented an extremely difficult decision. It stated that the young ages of both BH and

Phipps made it difficult to balance "retribution, rehabilitation, [and] restoration." Addressing Phipps's faith, the court stated that its exercise would always be Phipps's choice, even if prison life made his circumstances more difficult. The district court said "you reap as you have sown," and told Phipps that the guidelines sentence was appropriate. It imposed a forty-eight-month prison sentence for the burglary count and a consecutive fifty-seven-month prison sentence for the kidnapping count involving BH. It ordered restitution of $22,124.06, jointly and severally with the codefendant, to be paid from Phipps's prison wages.

Phipps appealed his sentence. The fact section of the state's response brief did not include citations, although it appended several police reports and a plea-offer letter in support of its factual recitation. Phipps moved to strike the state's fact section and the documents in the appendix. A special term panel deferred the motion to strike for decision with the merits of the appeal.

D E C I S I O N

I

We first address Phipps's three-part motion to strike sections of the state's response brief. The parts of the brief at issue are police reports in the appendix; a plea-offer letter, also in the appendix; and the fact section.

The record on appeal consists of "the papers filed in the [district] court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. Appellate rules provide that "[e]ach statement of a material fact shall be accompanied by a reference to the record." Minn. R. Civ. App. P. 128.02, subd. 1(c); *see also* Minn. R.

Crim. P. 28.01, subd. 2 (stating that Rules of Civil Appellate Procedure govern criminal appeals "to the extent applicable"). Reference to the record "shall be made to the specific pages of the appendix or the supplemental record" or to the "particular part of the record, suitably designated, and to the specific pages of it." Minn. R. Civ. App. P. 128.03.

The police reports are part of the district court file; the state provided them as discovery and included copies for the district court. Although they were not introduced as exhibits in any hearing, they are indisputably among "the papers filed in the [district] court." Minn. R. Crim. P. 28.02, subd. 8. Although these reports do not appear to be relevant to the issues appealed, we deny Phipps's motion to strike the reports because they are part of the record on appeal.

The plea-offer letter is not in the district court file. We, therefore, grant the motion to strike the letter from the appendix. Accordingly, we do not consider the letter in deciding the merits of this appeal.

The last part of Phipps's motion to strike is directed at the fact section of the state's response brief. Phipps moved to strike this section because it fails to cite to the record. Phipps's motion is appropriate. A statement of facts that fails to cite to the record violates Minn. R. Civ. App. P. 128.03. Flagrant violations of appellate rules may lead to dismissal of an appeal or nonconsideration of an issue. *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999). A motion to strike portions of a brief may be granted if a complete lack of citation "demonstrate[s] either ignorance of, or willful disregard for, the appellate rules." *Cole v. Star Tribune*, 581 N.W.2d 364, 372 (Minn. App. 1998). Aside from consideration of penalties, the

failure to comply with the appellate rules "can diminish a brief's persuasiveness." *Brett*, 601 N.W.2d at 202. Striking a part of the brief may not be necessary if the uncited facts are nonetheless supported by the record. *Hecker v. Hecker*, 543 N.W.2d 678, 681-82 n. 2 (Minn. App. 1996), *aff'd* 568 N.W.2d 705 (Minn. 1997).

In its fact section the state provided no citations to the record and relied instead on a single reference to the contents of the appendix. The state did not respond to Phipps's motion and has provided no explanation for its failure to comply with the rule. The state's failure to provide the required citation is not justified by the assertion, in its brief, that Phipps misrepresented the record in his brief's recitation of the facts. To the contrary, the assertion confirms the necessity and importance of the rule that the state violated.

After careful consideration we have determined that we will not, in this instance, grant the motion to strike the fact section. Although the state's failure to provide a revised fact section with the required citations or to respond to the motion weighs in favor of imposing a penalty, we are not aware of previous violations by the same office or the same attorneys. We, therefore, consider it an isolated violation that may well reduce the persuasive value of the state's brief but does not require a penalty. A repeated violation of this rule by the same attorneys or the same office would be handled differently. We now turn to the merits of Phipps's appeal.

II

A district court has broad discretion in imposing a sentence. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). The discretion is bounded by the guidelines requirement

that a departure must be supported by the presence of aggravating or mitigating factors. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). A downward departure requires the presence of "substantial and compelling circumstances." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). But the presence of a mitigating factor does not require departure from the guidelines sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). For these reasons, only in rare cases will we reverse a district court's imposition of a sentence in the presumptive guidelines range. *Kindem*, 313 N.W.2d at 7.

In exercising its discretion, the district court must consider reasons for and against departure. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002); *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). We have previously recognized that the district court's withholding the exercise of its discretion or relying on an improper factor may present the rare circumstance that warrants remand. *See Mendoza*, 638 N.W.2d at 484 (remanding when exercise of discretion by district court "may not have occurred").

Phipps argues on appeal that remand is required because the district court failed to exercise its discretion by not considering Phipps's evidence that he was amenable to a probationary sentence. A defendant's amenability to treatment in a probationary setting can be a reason for departure. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court considered Phipps's amenability to probation when it discussed the contents of the presentence investigation and, although the district court did not specifically

analyze each of the *Trog* factors, the record demonstrates that the district court did not fail to exercise its discretion.

At the beginning of the sentencing hearing, the district court stated "[E]verybody in the room knows by now that this is heavy stuff and serious stuff. We'll process it through, talk it through, [and] hear from everybody. I appreciate everybody being here and the care that everybody has taken." The district court then listed what it had reviewed up to that point, which included the PSI and attachments, Phipps's motion for departure, and "a number of letters submitted by family and friends and some photographs on behalf of Mr. Phipps." It also stated that it had read the state's motion and a statement by KH, and reiterated that it had "read all of the attachments provided" by the parties and by the officer who prepared the PSI. The parties agreed that the court had seen everything necessary for its decision.

As the hearing progressed, the district court ensured that everyone who wanted to speak was permitted time to speak. The judge agreed with Phipps's attorney that it was "one of the toughest sentencing hearings [he has] ever had." After all the testimony, the judge stated that "[t]his hasn't been easy for me." He said that he could see, in his own son, "both young [BH] and young Mr. Phipps," and added that he had been "trying to weigh out retribution, rehabilitation, [and] restoration." The judge referred to testimony about faith by Phipps's family and noted his own familiarity with Teen Challenge, but also noted that he was struck with the seriousness of the crime. The judge added that "I think the guidelines are right." He addressed Phipps directly and stated that even with

"the hard and terrible circumstances [I am] going to put you in," Phipps's pursuit of his faith would still be Phipps's choice to make.

The record shows that the district court reviewed and considered Phipps's case for departure, and that it did in fact exercise its discretion in arriving at a decision. The district court did not abuse its discretion by declining to grant a dispositional departure and imposing a sentence within the sentencing guidelines range.

III

Finally, we address Phipps's challenge to the district court's order for restitution, arguing it lacked evidentiary support. The PSI appended a number of documents submitted by KH to account for her expenditures. Those documents address the amounts and types of requested restitution. Phipps did not request an evidentiary hearing on restitution. *See* Minn. Stat. § 611A.045, subd. 3(b) (2008) (describing defendant's obligation to request hearing). We do not address whether the documentation in the record is sufficient to support the district court's order. But for two reasons we conclude that it is appropriate to reverse the district court's restitution order and remand for reconsideration. *See* Minn. R. Crim. P. 28.02, subd. 11 (addressing review in interests of justice).

First, in Phipps's plea agreement the state agreed to "cap [Phipps's] sentence at the same sentence as codefendant." Phipps's codefendant, in a separate appeal, challenged the amount of court-ordered restitution, and that case has been remanded for a hearing. *State v. Schiller*, No. A08-1709, 2009 WL 4909024 at *5 (Minn. App. 2009). In *Schiller*

the state conceded that reconsideration of the appellant's restitution would be in the interests of justice, even though it contended that the order was proper. *Id.* at *5 n.3.

Second, the joint and several nature of the restitution obligation becomes less coherent and more difficult to apply fairly when separate proceedings on that issue have disparate results.

The restitution statute directs a procedure in which the district court would docket Phipps's and the codefendant's restitution orders as a civil judgment in favor of KH. Minn. Stat. § 611A.04, subd. 3 (2008). We recognize that, if either party to a joint liability fails to appeal, he remains bound by the judgment. *Loram Maint. of Way, Inc. v. Consol. Rail Corp.*, 354 N.W.2d 111, 113 (Minn. App. 1984). But both codefendants did appeal the restitution, and thus, the district court could reasonably join them in a single proceeding to address restitution on remand. *See* Minn. Stat. § 548.20 (2008) (stating that district court may "upon its own motion or application of any interested party" require jointly liable parties to be joined in action). We leave to the district court the determination of how best to proceed on remand with the consolidation of this case and the codefendant's case.

Affirmed in part, reversed in part, and remanded; motion granted in part and denied in part.