STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1010

State of Minnesota,
Respondent,

vs.

Brian John Holsapple,
Appellant.

Filed April 20, 2010
Affirmed
Hudson, Judge

McLeod County District Court
File No. 43-CR-08-1244

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

Michael Junge, McLeod County Attorney, Amy E. Olson, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Richard L. Swanson, Chaska, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Johnson, Judge.

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

HUDSON, Judge

Following a guilty plea, appellant Brian John Holsapple was convicted of first-degree criminal sexual conduct, possession of child pornography, fifth-degree criminal sexual conduct, and felony domestic assault. On appeal, he challenges the district court's

denial of his request for a continuance of the sentencing hearing in order to give him additional time to establish a basis for a stayed sentence under Minn. Stat. § 609.342, subd. 3 (2002). Because the district court did not abuse its discretion in denying appellant's request for a continuance, we affirm.

FACTS

In April 2008, the McLeod County Sheriff's Department received a mandated report alleging that appellant had been sexually abusing his 14-year-old daughter, JAH, since she was 9 years old. Following an investigation, which included an interview of JAH and execution of a warrant to search appellant's residence and computer, appellant was charged with multiple counts. The complaint included allegations that appellant had engaged in repeated acts of sexual penetration and oral sex with JAH over a period of years, that images of apparent child pornography were found on appellant's computer hard drives, and that appellant had exposed himself to JAH and his younger daughter while playing strip poker in the summer of 2007.

At a hearing on December 9, 2008, appellant agreed to plead guilty to one count of first-degree criminal sexual conduct, one count of possession of child pornography, two counts of gross-misdemeanor indecent exposure, and one count of felony-level domestic assault for conduct that included throwing a chair at his daughters. The state agreed to dismiss the remaining counts and to withdraw its *Blakely* motion for an upward durational departure from the sentencing guidelines. The district court ordered a presentence investigation report (PSI) and a psychosexual evaluation, and set sentencing for February 25, 2009.

On January 6, 2009, appellant consented to a voluntary termination of his parental rights to both JAH and his other daughter, who was 12 years old.

On February 4, 2009, appellant underwent an assessment at CORE Professional Services, which included a clinical interview and psychological testing. In a report dated February 10, 2009, the licensed psychologists from CORE stated that appellant showed little remorse or empathy for JAH, and that he claimed he never really cared for her or trusted her. The psychologists concluded that appellant should have no contact with his victims, and that based on his offenses, his risk assessment scores, and lack of empathy for JAH, "it would be reasonable for [him] to be incarcerated in prison and be expected to complete sex offender treatment [there]."

Appellant also chose to be evaluated by licensed psychologist Dr. James Alsdurf, who saw appellant on January 9, January 16, and February 9, 2009. In a report dated March 17, 2009, Dr. Alsdurf concluded that appellant "would benefit from sex offender treatment in order to address his behavior around the current offense." The report includes statements by appellant that suggest he had little empathy for JAH and that he felt little remorse for his actions. Appellant described JAH to Dr. Alsdurf as a "headache since she was four years old" and a "spoiled brat" who gets "whatever she wants."

The presentence investigation report (PSI) was prepared on February 19, 2009. The agent reported that appellant admitted that "he truly does not care about his daughter [JAH] and still harbors a lot of anger towards her." The agent recommended imposition of the presumptive sentence of 144 months in prison.

Sentencing was initially scheduled for February 25, 2009, but was continued to March 26, 2009, because the psychological assessments had not yet been received. At the sentencing hearing on March 26, 2009, appellant's attorney challenged the validity of the PSI because it had been prepared without the benefit of the psychosexual evaluations from CORE and Dr. Alsdurf.

Appellant's counsel also pointed out that it was his understanding, based on prior discussions that the parties had in chambers, that "the defense was going to request the court to employ the stay" provision of Minn. Stat. § 609.342, subd. 3. Counsel further stated that he did not receive the CORE assessment until "last week" and that the report from Dr. Alsdurf was received on March 20, 2009. Counsel complained that "because of the timing of both these psychosexual evaluations, I cannot present to you today that [appellant] has been accepted in a treatment program." Counsel also claimed that he had just learned that JAH would not be at the sentencing hearing and that her testimony was essential to his request for a stay.

The district court construed counsel's statements as a request for a continuance of the sentencing hearing and, after some additional arguments by counsel, denied appellant's request. Following detailed arguments from the prosecutor and defense counsel regarding sentencing, the district court imposed the presumptive 144-month sentence. The district court refused to stay imposition or execution of appellant's sentence under Minn. Stat. § 609.342, subd. 3. The district court also refused to consider any other dispositional departure, suggesting in its comments that appellant felt no remorse for his daughter, that appellant had insisted up until the day he pleaded guilty

that she was lying, that appellant had turned his entire family against her, and that appellant generally continued to minimize the severity of his conduct and accepted little responsibility for it.

D E C I S I O N

The decision whether to grant a continuance is vested in the district court's sound discretion and will not be reversed absent an abuse of that discretion. *State v. Sanders*, 598 N.W.2d 650, 654 (Minn. 1999). The court's decision should be based on the facts and circumstances surrounding the request. *See State v. Vance*, 254 N.W.2d 353, 358–59 (Minn. 1977). A reviewing court should look to whether there was material prejudice to the defendant in preparing or presenting his case, and a defendant must show prejudice to justify reversal. *In re Welfare of T.D.F.*, 258 N.W.2d 774, 775 (Minn. 1977).

In this case, appellant's counsel anticipated that he would seek a stay of sentence under Minn. Stat. § 609.342, subd. 3, as early as the plea hearing on December 9, 2008.[1] While sentencing was originally set for February 25, 2009, that hearing was continued because the parties and court had not yet received the psychological assessments prepared by CORE and by Dr. Alsdurf. At the sentencing hearing one month later, appellant's counsel raised concerns about the fact he had just received the assessments one week earlier. Counsel argued that appellant should be given an opportunity to obtain acceptance into a treatment program. Counsel further asserted that he had just learned

[1] Minn. Stat. § 609.342, subd. 3 (2002), provides, in relevant part, that if a person is convicted under Minn. Stat. § 609.342, subd. 1(g), "the court may stay imposition or execution of the sentence if it finds that: (a) a stay is in the best interest of the complainant or the family unit; and (b) a professional assessment indicates that the offender has been accepted by and can respond to a treatment program."

that JAH would not be at the sentencing hearing and that her testimony was essential to establish that a stay would be in her or the family unit's best interests.[2]

Professional courtesy would suggest that, prior to the sentencing hearing, the prosecutor could have told appellant's counsel that JAH had chosen not to attend. But, likewise, appellant's counsel could have easily contacted the prosecutor and made such an inquiry, particularly when counsel claims that he considered JAH's attendance essential to his request for a stay of sentence.

We conclude that, under the circumstances of this case, the district court did not abuse its discretion in denying appellant's request for a continuance of the sentencing hearing. Appellant had more than three months to seek admission to a treatment program or obtain other evidence regarding such programs, but failed to do so. In addition, appellant could have produced witnesses, such as his wife or other family members, to support his claim that a stayed sentence would be in JAH's or the family unit's best interests. Finally, even defense counsel acknowledged that resolution and closure were

[2] The state argues that appellant's request for a continuance is moot because his parental rights have been terminated, and the statutory-stay provision no longer applies to him. By its plain language, however, the statute permits a stay if it is in the best interest of "the complainant *or* the family unit." Minn. Stat. § 609.342, subd. 3 (emphasis added). This court has concluded that these terms are not mutually exclusive. *See State v. Hamacher*, 511 N.W.2d 458, 461 (Minn. App. 1994). Thus, even though appellant's parental rights to JAH have been terminated, he is still a member of some "family unit" that arguably could benefit from a stay of his sentence. And he was convicted of first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(g) (2002) (requiring "significant relationship" between defendant and complainant); *see* Minn. Stat. § 609.341, subd. 15(1) (2002) (defining "significant relationship" as including complainant's parent). Appellant was JAH's parent at the time he sexually abused her, even though he is no longer her legal parent and may no longer have a significant relationship with her. We therefore conclude that appellant is not necessarily excluded from requesting a stay of his sentence under Minn. Stat. § 609.342, subd. 3.

desirable in this case to allow the healing process to begin, a fact that weighed against granting a continuance. Thus, the district court appropriately considered the facts and circumstances surrounding appellant's request for a continuance when denying that request.

Further, even if the sentencing hearing had been continued, the grant of a stayed sentence is not automatic and is within the district court's discretion. *See* Minn. Stat. § 609.342, subd. 3 (providing that "the court *may* stay imposition or execution of the sentence"). The prosecutor was willing to stipulate that appellant could be accepted into a treatment program, and both psychological assessments appeared to also assume that that was the case; this would satisfy one of the statutory requirements for a stay. With respect to the other requirement, that a stay is in the best interests of the complainant or the family unit, appellant asserts that he could have produced evidence on the economics of his position as the primary breadwinner, which he claims would have supported a stay because it is in the best interests of his family unit. But appellant proffered little proof regarding what additional evidence or arguments he might have on this issue.

Moreover, the district court made it abundantly clear that it was most concerned with appellant's lack of remorse and inability to accept responsibility for his conduct, facts that indicate appellant is not amenable to probation and that weighed heavily against granting a dispositional departure. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (setting out factors to consider when determining amenability to probation, including defendant's age, prior record, remorse, cooperation, attitude while in court, and support of family or friends). The district court's decision is amply supported by the record,

which includes the statements made by appellant that were repeated in the psychological reports and in the PSI, in which he admitted that he "truly does not care about [JAH] and still harbors a lot of anger towards her"; that he does not "really give a sh-t about [her and] never really cared about her [or] trusted her"; that he "can't stand the little b--ch"; and that she has been a "headache since she was four years old," has "always been a f---ing spoiled brat, whatever she wants she gets," and has "made accusations against other people since she was six years old."

These statements indicate appellant's attitude, demonstrate that he has little empathy for JAH, and show he has no remorse for his actions. Thus, appellant cannot show that he was materially prejudiced by the denial of his request for a continuance. *See State v. McLaughlin*, 725 N.W.2d 703, 713–14 (Minn. 2007) (holding that district court did not abuse its discretion in denying continuance to procure testimony of expert witness, when that testimony would not have materially affected the outcome of trial).

Affirmed.