STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1849

State of Minnesota,
Respondent,

vs.

Anthony Lavell Frazier,
Appellant.

Filed August 31, 2010
Affirmed
Hudson, Judge

Ramsey County District Court
File No. 62-CR-09-3163

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Minge, Judge; and Muehlberg, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

HUDSON, Judge

In this sentencing appeal, appellant challenges the district court's imposition of the presumptive, mandatory minimum sentence on his conviction of aiding and abetting second-degree assault, based on his use of a firearm during the offense. Because the district court did not abuse its discretion by sentencing appellant to the presumptive sentence, we affirm.

FACTS

Appellant Anthony Frazier pleaded guilty to aiding and abetting second-degree assault in violation of Minn. Stat. § 609.222, subd. 2 (2008), and Minn. Stat. § 609.05, subd. 1 (2008). Appellant stated as the factual basis for his plea that he approached an apartment building in which people were arguing, took a handgun from his brother, and shot several times through the door of the building in the direction of people standing outside the door. He stated that he intended to use the gun to scare the people and acknowledged that one person was hit by one of the shots. The district court clarified with appellant that if the court did not order a sentencing departure, appellant would receive the mandatory minimum sentence of 36 months, based on his use of a firearm during the offense. Minn. Stat. § 609.11, subd. 5(a) (2008).

At sentencing, appellant moved for a downward dispositional or durational departure, based on a mitigating factor of lack of substantial capacity for judgment at the time of the incident. In support of his sentencing motion, appellant cited a previous medical history of learning disabilities, mental impairment, oppositional defiant disorder,

and impulsive behaviors. Appellant's counsel argued that appellant's remorse and acceptance of responsibility for the offense amounted to an additional mitigating factor.

The district court noted that appellant had been on probation four previous times and stated its belief that appellant was not amenable to probation. The district court imposed the presumptive 36-month sentence, with a minimum of 24 months in custody and 12 months on supervised release. This appeal follows.

D E C I S I O N

This court reviews the district court's decision to depart from the sentencing guidelines for abuse of discretion. *State v. Gellar*, 665 N.W.2d 514, 516 (Minn. 2003). "The sentence ranges provided in the Sentencing Guidelines Grids are presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines II.D. A downward sentencing departure requires the presence of "substantial and compelling circumstances." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). In deciding whether to depart from the guidelines sentence, a district court must weigh the reasons for and against departure and make a deliberate decision. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). But the presence of a mitigating factor does not require a sentencing departure. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Appellate courts will not generally interfere with the district court's decision not to depart, either durationally or dispositionally. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Thus, this court will reverse a district court's decision to impose a sentence in the presumptive guidelines range only in a "rare case." *Kindem*, 313 N.W.2d at 7.

Under the sentencing guidelines, the district court may depart downward based on a mitigating factor that "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Minn. Sent. Guidelines II.D.2.a.(3); *see, e.g., State v. Martinson*, 671 N.W.2d 887, 891 (Minn. App. 2003) (concluding that district court did not abuse its discretion in departing downward based on mitigating factor of offender's paranoid schizophrenia). Appellant argues that the district court abused its discretion by failing to order a downward departure from the 36-month presumptive sentence because he lacked substantial capacity for judgment at the time of the offense. He argues that consideration of his mental impairment as a mitigating factor is supported by his medical records, which show that he suffered a childhood brain injury and a later head injury, and that he has been diagnosed with attention deficit hyperactivity disorder and oppositional defiant disorder.

But appellant acknowledged at the plea hearing that he was using the gun to scare people and that he knew that a firearm was a dangerous weapon, which could cause substantial bodily harm or kill someone. He also stated that he knew that one of his shots was low enough to hit someone and that the victim had been shot in the shoulder. Based on appellant's demonstrated level of understanding of his offense at the time he committed it, the district court did not abuse its discretion by declining to order a downward departure based on lack of substantial capacity for judgment. *Cf. Martinson*, 671 N.W.2d at 892 (concluding that defendant's illness, which manifested itself in "delusional paranoia" and completely irrational behavior, was "sufficiently extreme" to

act as substantial and compelling circumstances to support downward durational departure).

Appellant also argues that the district court improperly based its sentencing decision on the victim's statement, made during investigation, that immediately before the shooting occurred, she heard appellant exclaim, "let's shoot the b---ch." Appellant points to another eyewitness's statement that it was appellant's brother who made the exclamation, and also to the victim's remark that she did not see appellant until after the shooting. But the district court properly determines the weight and credibility of evidence relating to sentencing. *State v. McCoy*, 631 N.W.2d 446, 452 (Minn. App. 2001). Based on reasonable evidence in the record, the district court did not clearly err by attributing the exclamation to appellant. *See Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003) (stating that a finding of fact is not clearly erroneous if reasonable evidence in record supports it).

Further, the district court was required to consider whether appellant's conduct was "significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Back*, 341 N.W.2d 273, 276 (Minn. 1983). Appellant was convicted of aiding and abetting the commission of second-degree assault. A person may be convicted of aiding and abetting the commission of a crime if the "person intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime." Minn. Stat. § 609.05, subd. 1 (2008). Based on appellant's acknowledgement of his conduct, the record contains no information tending to show that

this conduct was significantly less serious than that typically involved in the crime of aiding and abetting second-degree assault.

Finally, appellant argues that his showing of remorse and taking of responsibility for the offense justifies a downward sentencing departure. An offender's remorse may be considered a relevant factor in granting a downward dispositional departure. *State v. Bauerly*, 520 N.W.2d 760, 763 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994). But the district court considered the probation department's sentencing investigation, which recommended imposition of the presumptive guidelines sentence, based in part on the results of appellant's risk assessment. *See Bertsch*, 707 N.W.2d at 668 (considering district court's adherence to probation department's recommendation for executed sentence when upholding refusal to depart dispositionally). The district court also properly considered appellant's four previous attempts at probation. The district court did not abuse its discretion by imposing the presumptive guidelines sentence.

Affirmed.