STATE OF MINNESOTA
IN COURT OF APPEALS
A10-504
A10-505

State of Minnesota,
Respondent,

vs.

Robert James Voss, Jr.,
Appellant.

Filed February 15, 2011
Affirmed
Lansing, Judge

Hennepin County District Court
File Nos. 27-CR-09-6024, 27-CR-09-3907

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

Michael O. Freeman, Hennepin County Attorney, Linda K. Jenny, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Minge, Presiding Judge; Lansing, Judge; and Kalitowski, Judge.

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

LANSING, Judge

In an appeal from conviction of possession of child pornography and first-degree, criminal sexual conduct, Robert Voss challenges the validity of his stipulated-facts trial and the district court's denial of his motion for a downward sentencing departure. Because Voss's convictions were based on the district court's determination of guilt in a valid stipulated-facts trial and the district court acted within its discretion by imposing the presumptive sentence, we affirm. Voss's additional claim in his pro se, supplemental brief that he received ineffective assistance of counsel, lacks a legal or factual basis for relief.

F A C T S

Following a 2008 undercover investigation of online pornography, Minneapolis police obtained and executed a search warrant for Robert Voss's residence. The search confirmed that a computer used by Voss contained a large number of files depicting child pornography as defined by Minn. Stat. § 617.247 (2006). The state charged Voss with possession and dissemination of child pornography.

When Voss's former long-term girlfriend and mother of his children learned of Voss's child-pornography charges, she communicated the information to her sister, DZ. Voss had regularly cared for DZ's daughter, AN, between May 2007 and May 2008, at the same time that he was caring for his young son. And during the summer of 2008, when AN was six years old, she was exclusively cared for by Voss on a regular basis.

In light of the charges and the significant amount of time that AN had been in Voss's care, DZ asked AN whether Voss had ever taken inappropriate pictures of her. When AN told DZ that he had made a movie of her dancing in the bathtub, DZ asked AN if Voss had ever touched her "where he wasn't supposed to" touch her. AN answered "No," but added that "Robert had sex with me." When asked to clarify, AN said that Voss "took my clothes off and he stuck his pee pee inside me." In subsequent interviews with a CornerHouse forensic interviewer, a physician who specialized in child abuse, and representatives of the state, AN described in detail multiple incidents of Voss's sexual contact with her, including putting his "pee pee" inside her butt more than once. Based on this information, the state charged Voss with first-degree, criminal sexual conduct that is prohibited by Minn. Stat. § 609.342, subd 1(a) (2006).

At a pretrial hearing approximately seven months after the criminal-sexual-conduct charge, Voss and the state informed the district court that they intended to submit the case for trial to the court on stipulated facts. The following day Voss waived his right to a jury trial, and Voss and the state submitted the pornography charges and the criminal sexual conduct charge for judicial determination on stipulated facts as provided in Minn. R. Crim. P. 26.01, subd. 3. For purposes of the stipulated-facts trial, the charges were consolidated, and Voss and the state provided the district court with a stipulated record and specific written stipulations of fact. After considering the evidence, the district court found Voss guilty of first-degree, criminal sexual conduct and possession of child pornography, but not guilty of dissemination of child pornography.

Relying on an argument of amenability to probation, Voss moved for a downward dispositional departure in his sentence for first-degree, criminal sexual conduct. The state opposed a downward departure. After hearing arguments and Voss's personal statement, the district court questioned Voss at length on the record. Following the inquiry, the district court denied Voss's motion and imposed the presumptive sentence for first-degree, criminal sexual conduct of 144 months in prison with ten years of conditional release. For possession of child pornography, the court imposed a concurrent sentence of thirty months in prison and five years of conditional release.

Voss appeals from his conviction on each of the two charges and his sentence on the first-degree, criminal-sexual-conduct charge. He challenges the validity of his stipulated-facts trial and the district court's denial of his motion for a downward dispositional departure on the criminal-sexual-conduct conviction. In a pro se, supplemental brief Voss seeks relief based on his claim that he was denied effective assistance of counsel.

D E C I S I O N

I

The rules of criminal procedure explicitly provide for a stipulated-facts trial. Minn. R. Crim. P. 26.01, subd. 3. Under rule 26.01, subdivision 3, the defendant and the prosecutor are authorized to "agree that a determination of defendant's guilt . . . may be submitted to and tried by the court based on stipulated facts." Voss challenges the validity of his stipulated-facts trial, essentially alleging that it was not an "adversarial stipulated-facts trial" but a "slightly modified guilty plea" and a proceeding unauthorized

by the Minnesota Rules of Criminal Procedure. The construction of a rule of criminal procedure is an issue of law that we review de novo. *State v. Nerz*, 587 N.W.2d 23, 24-25 (Minn. 1998).

If a defendant chooses to proceed with a stipulated-facts trial, he must waive his right to testify, to have prosecution witnesses testify in his presence and question those witnesses, and to present testimony of favorable witnesses. Minn. R. Crim. P. 26.01, subd. 3(a). Voss validly waived his rights as required by the rule, both in writing and orally on the record, and his statements reflect that he understood the nature of the proceeding. Voss does not dispute the validity of his waiver of his right to a jury trial, but instead argues that his stipulated-facts trial was outside the scope of Minn. R. Crim. P. 26.01, and therefore invalid. We disagree that Voss's trial was outside the scope of the rule.

The criminal procedure rules recognize that one purpose for a stipulated-facts trial is to obtain appellate review of a pretrial ruling. Minn. R. Crim. P. 26.01, subd. 4. This type of trial is referred to as a "stipulation to [the] prosecution's case," and is appropriate when "the court's ruling on a specified pretrial issue is dispositive of the case, or . . . the ruling makes a contested trial unnecessary." *Id*., subd. 4(a). Under these circumstances, both the prosecutor and the defendant "must acknowledge that the pretrial issue is dispositive, or that a trial will be unnecessary if the defendant prevails on appeal." *Id.*, subd. 4(c). This is essentially a codification of a judicially recognized procedure to obtain appellate review of a pretrial ruling. *See State v. Lothenbach*, 296 N.W.2d 854, 857 (Minn. 1980) (recognizing procedure for obtaining review of pretrial ruling); Minn.

R. Crim. P. 26.01, subd. 4 (providing procedure to preserve review of pretrial ruling only). In a *Lothenbach* proceeding, the defendant concedes that the state's facts are accurate, which essentially concedes factual guilt but preserves the right to obtain review of the dispositive pretrial ruling. Minn. R. Crim. P. 26.01, subd. 4(f); *State v. Riley*, 667 N.W.2d 153, 157 (Minn. App. 2003), *review denied* (Minn. Oct. 21, 2003).

Unlike the *Lothenbach* stipulation to the prosecution's case, the defendant in a generic stipulated-facts trial does not concede guilt. *See Riley*, 667 N.W.2d at 157-58. (comparing stipulated-facts trial under rule 26.01, subdivision 3, with one under *Lothenbach*). The defendant stipulates that the documents, as submitted, contain the testimony and evidence that the district court would consider had the defendant and the state not agreed to the stipulated-facts trial. *See State v. Eller*, 780 N.W.2d 375, 379-82 (Minn. App. 2010) (reviewing evidence district court considered in defendant's stipulated-facts trial because defendant preserved ability to challenge sufficiency of evidence under rule 26.01, subdivision 3), *review denied* (Minn. June 15, 2010). In addition, the defendant and the prosecutor may stipulate to specific facts or the quantity of proof on a particular element, and a defendant who is found guilty may "raise issues on appeal as from any trial to the court." *State v. Mahr*, 701 N.W.2d 286, 291 (Minn. App. 2005).

We agree with Voss's assessment that the stipulated-facts trial in this case was not a *Lothenbach* proceeding, but a generic stipulated-facts trial. But we discern nothing in the proceeding that makes it invalid. We reject Voss's claim that his trial was the same type of "prima facie trial" that was struck down in *Brookhart v. Janis*, 86 S. Ct. 1245,

1248, 384 U.S. 1, 6-7 (1966). Unlike the "prima facie" showing of guilt that was employed in *Brookhart*, the state in Voss's stipulated-facts trial was required to prove Voss's guilt beyond a reasonable doubt. *See* Minn. R. Crim. P. 26.01, subds. 2, 3 (providing that after submission of stipulated facts, district court shall make finding of guilty or not guilty). In addition, unlike the circumstances in *Brookhart*, Voss does not claim that he made an inadequate waiver of his trial rights. *See Brookhart*, 86 S. Ct. at 1246, 384 U.S. at 7 (challenging waiver of trial rights).

Finally, the district court's finding of Voss's guilt was not predetermined. Part of the stipulated evidence submitted to the court was an expert's opinion that investigators made methodological errors, that AN's statements reflected that she had been subjected to improper influence, and that there were alternative theories to explain the described events. Voss's attorney argued that there was a reasonable doubt whether Voss had committed the offenses and that AN "had her memory tainted." The district court took the case under advisement, considered all of the submitted material, and found that the evidence satisfied the elements of two of the three offenses beyond a reasonable doubt. On the third offense, distribution of child pornography, the district court found Voss not guilty.

Voss validly waived a jury trial and, in agreement with the state, submitted the charges to the district court for judicial determination under Minn. R. Crim. P. 26.01, subd. 3. Voss received a valid stipulated-facts trial under the rule.

II

A district court may depart from the presumptive sentence only if "identifiable, substantial, and compelling circumstances" support the departure. Minn. Sent. Guidelines II.D (2008). We review departure decisions for an abuse of discretion. *Rairdon v. State*, 557 N.W.2d 318, 326 (Minn. 1996). Even if the defendant has presented factors that would justify departure, the district court's presumptive sentence will stand unless it is an abuse of discretion. *State v. Back*, 341 N.W.2d 273, 275 (Minn. 1983). It is a "rare case" that warrants our reversal of a district court's decision not to depart from a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Voss challenges the district court's denial of his motion for a downward dispositional departure on his first-degree, criminal-sexual-conduct conviction. At his sentencing hearing, Voss asserted that his amenability to probation was a substantial and compelling factor justifying a downward dispositional departure. In support of his amenability, Voss's attorneys pointed to Voss's youth, his lack of any prior criminal record, his willingness to talk about the offenses and admit that his behavior was wrong, his acknowledgment that he wants help, his acceptance into a treatment program, and his overall cooperation with the court. Voss also presented a personal statement, and the district court engaged Voss in an extensive question-and-answer session.

After considering Voss's arguments and the state's objections, the district court concluded that Voss had not shown a compelling reason to depart from the presumptive sentence. The district court acknowledged that Voss's attorneys made persuasive arguments for probation, but the district court was unable to "find a compelling, equitable

reason to depart from the guidelines." The district court recognized Voss's lack of a criminal record and his potential to be a contributing member of society, but also observed that these attributes are not atypical for a pedophile. On the other side of the scale, the district court noted that Voss had violated a position of trust as uncle, caregiver, and babysitter for AN, that he did not appear to be accepting responsibility for the full range and number of sexual contacts with AN, and that his conduct with AN during the time that his young son was also under his care potentially exposed a second child to the sexual misconduct.

Relying on its stated reasons, the district court denied Voss's motion and imposed the presumptive sentence for first-degree, criminal sexual conduct. The record establishes that the district court did not abuse its discretion by denying Voss's motion for a downward dispositional departure.

III

To demonstrate ineffective assistance of counsel, a defendant must show that "counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). An attorney's actions are "within the objective standard of reasonableness when the attorney provides the client with the representation of an attorney exercising the customary skills and diligence that a reasonably competent attorney would perform under the circumstances." *Voorhees v. State*, 627 N.W.2d 642, 649 (Minn. 2001) (quotations

omitted). The law recognizes "a strong presumption that counsel's performance falls within the wide range of reasonable professional assistance." *Pierson v. State*, 637 N.W.2d 571, 579 (Minn. 2002) (quotation omitted). "An appellant claiming to have received the ineffective assistance of counsel bears the burden of proof on his or her claim." *State v. Lahue*, 585 N.W.2d 785, 789 (Minn. 1998).

In his pro se, supplemental brief, Voss asserts that his trial counsel was ineffective because he did not provide Voss with usable evidence for his defense or argue for Voss's innocence. Voss does not point to any specific facts that would support an argument that evidence was available that was unused, and his claim that his attorney did not present arguments against Voss's guilt is contradicted by the record. In addition, Voss's counsel submitted, as part of the stipulated record, the expert affidavit of R. Christopher Barden for the purpose of showing reasonable doubt on the first-degree, criminal-sexual-conduct charge. The district court commented on the high quality of representation of Voss's attorney, and the record provides no basis for a claim of ineffective assistance of counsel.

Affirmed.