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Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Bart Andrew SWEDIN, Respondent.

No. A05-1153.
|
Jan. 31, 2006.

Synopsis

Background: Defendant pled guilty in the District Court, Dakota County, to felony mistreating an animal, fifth-degree domestic assault, and gross misdemeanor negligent storage of a firearm. State appealed.

Holding: The Court of Appeals, Worke, J., held that trial court adequately set forth substantial and compelling circumstances warranting downward durational departure from presumptive guidelines sentence.

Affirmed.

Dakota County District Court, File No. K8-04-3671.

Attorneys and Law Firms

Mike Hatch, Attorney General, St. Paul, MN; and James C. Backstrom, Dakota County Attorney, Scott A. Hersey, Assistant County Attorney, Hastings, MN, for appellant.

Anthony E. Ho, McDonough, Wagner & Ho, LLP, Apple Valley, MN, for respondent.

Considered and decided by WORKE, Presiding Judge; TOUSSAINT, Chief Judge; and MINGE, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

***1** On appeal from a sentence imposed for felony mistreatment of an animal, the state argues that the district court abused its discretion in departing durationally by imposing a gross-misdemeanor sentence relying on improper grounds. Because the district court adequately set forth substantial and compelling circumstances warranting a departure, we affirm.

DECISION

The decision to depart from the sentencing guidelines rests within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Given,* 544 N.W.2d 774, 776 (Minn.1996). The district court "is given such deference because it sits with a unique perspective on all stages of a case, including sentencing, and the [district court] is in the best position to evaluate the offender's conduct and weigh sentencing options." *State v. Sanders,* 598 N.W.2d 650, 656 (Minn.1999) (quotation omitted). However, the district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" warranting a departure. *State v. Kindem,* 313 N.W.2d 6, 7 (Minn.1981); *see also* Minn. Sent. Guidelines II.D. Appellate courts do not generally interfere with a district court's decision to depart. *Kindem,* 313 N.W.2d at 7. However, this court will modify a departure if it has a "strong feeling" the sentence is inappropriate in the case. *State v. Law,* 620 N.W.2d 562, 564 (Minn.App.2000), *review denied* (Minn. Dec. 20, 2000). As a general rule, the *offender*-related factor of particular unamenability to treatment in a probationary setting may be used to justify a dispositional departure in the form of execution of a presumptively-stayed sentence but may not be used to support an upward durational departure. On the other hand, *offense*-related aggravating factors may be used to support not only a dispositional departure but, alternatively an upward durational departure. *State v. Chaklos,* 528 N.W.2d 225, 228 (Minn.1995).

On November 14, 2004, Eagan police officers were dispatched to the residence of respondent Bart Andrew Swedin based on a call reporting that respondent had been drinking and had shot the family dog. Respondent's wife told the officers that she was in the upper level of the home when she heard the dog whining. She went downstairs and

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saw respondent shocking the dog with its shock collar. She told the officers that she attempted to assist the dog and in doing so was shocked herself. After she returned upstairs, respondent's wife stated that she heard approximately three shots fired in the basement bathroom of the home. Respondent had shot the dog with a .9 millimeter pistol three times. Respondent pleaded guilty to felony mistreating an animal, in violation of Minn.Stat. § 343.21, subds. 1, 9(d) (2004), one count of fifth-degree domestic assault, in violation of Minn.Stat. § 609.2242, subd. 1(1) (2004), and gross misdemeanor negligent storage of a firearm, in violation of Minn.Stat. § 609.66, subds. 1, 2 (2004).

***2** At the sentencing hearing, the district court reviewed a victim impact statement from respondent's wife, the presentence investigation report, and other documentation regarding mental health treatment and psychological testing completed on respondent. The district court stated that respondent "has taken significant steps to understand and address the factors he believes contributed to his offense behaviors." Those significant steps consisted of seeking mental-health treatment within three days of the incident, attending individual psychotherapy sessions, completing chemical-dependency treatment and scheduling outpatient treatment even though outpatient treatment was not recommended by the Rule 25 assessor, and completing domestic-abuse counseling. Further, the district court recognized that respondent was amenable to probation, had a supportive family, and was very remorseful for his actions. Finally, the district court considered the victim-impact statement from respondent's wife which requested that respondent receive a lighter sentence due to the impact a felony-level sentence would have on her daycare license. Based on all of those factors, the district court durationally departed by imposing a gross-misdemeanor sentence on the felony count of mistreating an animal and imposed misdemeanor sentences on the gross-misdemeanor count of negligent storage of a firearm and the fifth-degree domestic assault.

The state claims the district court abused its discretion because it relied on improper grounds in departing durationally. Specifically, the state objects to the district court considering how the sentence would impact respondent's wife's daycare license and respondent's amenability to probation in making its determination. The state argues that the factors considered by the district court may be used to justify a dispositional departure but not a durational departure. "Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *State v. Trog,* 323 N.W.2d 28, 31 (Minn.1982). The Minnesota Sentencing Guidelines do not attempt to enunciate all of the circumstances that the district court may determine to be "atypical, dissimilar, or different, and which may be, depending on the facts of the case, both substantial and compelling." *State v. Bendzula,* 675 N.W.2d 920, 922 (Minn.App.2004). Here, the district court considered respondent's remorsefulness, his cooperation (which began as early as three days after the incident), and the support of his family in making its determination to durationally depart from the presumptive sentence. In addition, the district court took into consideration the steps respondent took to address the factors that may have contributed to his behavior, including mental-health counseling, chemical-dependency counseling, and domestic-abuse counseling. Upon examination of the record as a whole, we conclude that the district court may improperly have considered appellant's amenability to probation in deciding to depart durationally from the sentencing guidelines. *See Chaklos,* 528 N.W.2d at 228 (unamenability to probation may only be used to support a dispositional, as opposed to a durational departure); *State v. Cermak,* 350 N.W.2d 328, 335 (Minn.1984) (future likelihood of criminal behavior may not be relied on to support a durational departure). Nonetheless, the offense-related aggravating factors found by the court, by themselves, support a durational departure. If improper reasons are given to support a departure, we will affirm the departure if the evidence in the record is sufficient to support the departure. *Chaklos,* 528 N.W.2d at 228.

***3** In addition, the state's argument that the district court erred by improperly considering the impact of the sentence on respondent's wife's daycare license fails. The victim of an offense has a right by law to submit an impact statement at the time of sentencing. Minn.Stat. § 611A.038 (2004). The district court may consider the victim impact statement as the basis for departure. *State v. Yanez,* 469 N.W.2d 452, 455 (Minn.App.1991), *review denied* (Minn. June 19, 1991). In the usual case, the victim-impact statement has supported an upward durational departure. *See id.* There is no reason to ignore the victim-impact statement when it supports a downward durational departure.

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Because the district court dealt with the departure issue both deliberatively and thoroughly, and because the court adequately identified considerations favoring its downward departure that were both atypical and substantial, we must defer to its judgment. The district court fully explained why the departure was "more appropriate than the presumptive sentence." Minn. Sent. Guidelines II.D. The district court did not abuse its discretion in granting a downward durational departure.

Affirmed.

All Citations

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