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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT
D.C. File No. 27-CR-21-7460

State of Minnesota,
Plaintiff,
vs.
Kimberly Ann Potter,
Defendant.

DEFENDANT'S MOTION FOR DURATIONAL DEPARTURE

* *

The Defendant, Kimberly Ann Potter, through and by her lawyers, Earl Gray and Paul Engh, and in accordance with Sec. 2.D.203, Minnesota Sentencing Guidelines, moves the Court for a downward durational departure. Our grounds:

1. The key mitigating factor is that "[t]he victim was an aggressor in the incident." Sec. 2.D.203(a)(1). Under this provision, Mr. Wright merely had to have been "an aggressor" and he was.

Without Mr. Wright's violent and aggressive resistence, nothing would have happened. All Mr. Wright had to do was stop, obey lawful commands, and he'd be alive. In support of the departure, we ask the Court to make that specific finding.

And these findings as well: That Mr. Wright set his course by violating the

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law, namely by driving without a license, in a car that didn't have insurance. The fact that this Court had issued a bench warrant was his fault. Officer Luckey's decision to cuff Mr. Wright was reasonable, and pursuant to that court order. No officer who testified indicated that Mr. Wright should have been allowed to run away. He resisted, and then committed the felony of fleeing a police officer, a crime of violence. See Sykes v. United States, 564 U.S. 1 (2011).

2. The related ground for durational departure is found in 2.D.203.3(a)(5), that "other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Under this provision, Mr. Wright did not have to actually assault Officer Potter. His resistence to arrest is more than enough. His conduct escalated the "seriousness of the offense." State v. Solberg, 882 N.W.2d 618, 623 (Minn. 2016).

3. This Court has, of course, "great discretion in the imposition of sentences," including imposing a downward departure. States v. Soto, 855 N.W.2d 303, 308 (Minn. 2014) (quoting State v. Spain, 590 N.W.2d 85, 88 (Minn. 1999)). The factors considered for a durational departure are non-exclusive, and apply to a "small number of cases." Id.; Comment 2D.301. There has been no other police officer involved shooting like this one prosecuted in Minnesota.

4. What is not unique, however, is that a victim's violent conduct has been

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a downward sentencing departure ground for the last twenty-five years. The seminal decision is Koon v. United States, 518 U.S. 81 (1996). In Koon, one Rodney King was observed driving in excess of 100 mph. Mr. King ignored the "red lights and sirens activated," Id. at 86; after a chase of eight miles, he was stopped, and ordered out of the car. Mr. King was asked to lie on his stomach but refused. When the officers attempted to keep him on the ground, "King resisted and became combative," and he charged toward one of the officers. Id. Recorded on the famous videotape, one of the officers "used his baton to strike King on the side of his head. King fell to the ground." Id. When King began to rise up, he was struck again. The officers at the scene kicked King "in the upper thoracic or cervical area six times," and one of the officers later admitted, "I havent [sic] beaten anyone this bad in a long time." Officer Koon himself sent a message to his police station announcing that "u[nit] just had big time use of force. . . . Tased and beat the suspect . . . big time." Id. at 87.

The three involved officers were charged in California state court and acquitted, verdicts that "touched off widespread rioting in Los Angeles." Id. at 88. Thereafter, the officers were indicted on civil rights violations in federal court, and convicted.

The District Court departed downward from the presumptive federal

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guideline sentence for reasons that "the victim's wrongful conduct contributed significantly to provoking the offense behavior." Id. at 89 (emphasis added)(quoting U.S.S.G. Sec. 5K2.10). The language of Sec. 5K2.10 is near akin to Minnesota Guideline Sec. 2D.203. Provoking behavior is aggressive by nature. No one can say Mr. Wright acted passively in making his improvident escape.

The prosecution appealed the departure. The Ninth Circuit reversed, on the basis that "misbehavior by suspects is typical in cases involving excessive use of force by police and is thus comprehended by the applicable Guideline." Id. at 90. That ruling was reversed in turn by the United States Supreme Court, with a rationale that matches to our facts.

The Koon analysis can be broken down in steps:

-A downward departure was available for the police officers because, as noted, of Mr. King's initial "wrongful conduct contributed significantly to provoking the offense behavior." Id. at 101.

-The reason why Mr. King had contributed to his own tragedy, the Supreme Court found, was that he drove "while intoxicated," he "refus[ed] to obey the officer's commands," and he "attempt[ed] to escape from police custody." Id. at 102. This is what Mr. Wright did.

-"Indeed," the Supreme Court emphasized, "a finding that King's

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misconduct provoked lawful force but not the unlawful force that followed without interruption would be a startling interpretation and contrary to ordinary understandings of provocation. A response need not immediately follow an action in order to be provoked by it." "The excessive force followed within seconds of King's misconduct." Id. at 104. Koon thus rejects Mr. Stoughton's claim that Mr. Wright's provocation had ended or was de-minimis, or should have been ignored.

-Koon holds instead that since "[v]ictim misconduct is an encouraged ground for departure, [a] district court, without question, would have had discretion to conclude that victim misconduct would take an aggravated assault case out of the heartland. That petitioners' aggravated assaults were committed under color of law does not change the analysis." Id. at 105 (emphasis added). In light of Koon, Office Potter's status as a police officer does not remove Minnesota's Sec. 2.D.203.3(a)(1) as a ground for departure.

Applying the essential and concluding language of Koon, but for Mr. Wright's "initial conduct," Officer Potter's behavior "would not have escalated to this point, indeed it would not have occurred at all . . ." Id. at 102 (quoting the District Court's reasoning).

5. Koon was not an outlier. Minnesota case law has long recognized the victim's behavior has to be taken into account for sentencing purposes. See e.g.,

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State v. Hennum, 441 N.W.2d 793, 801 (Minn. 1989)(husband's violence toward his wife caused her violent response). The Eighth Circuit had affirmed a downward departure where, again as here, the victim brought about the assault through his own "misconduct" and his "own actions" directed toward the defendant, who did not start the fight. United States v. Yellow Earrings, 891 F.2d 650, 652 (8th Cir. 1989). If the victim's behavior "substantially contributed in provoking the offense behavior," by his initial "physical show of force," Id. at 654, a departure is available.

6. This Court gave Officer Potter's self-defense instruction, which quoted Minn. Stat. 609.066. That statute delineates a police officer's ability to defend herself when faced with an "apparent" and "substantial" risk of "death or great bodily harm." Subd. 1. By agreeing with the instruction, this Court acknowledged that there was sufficient evidence to justify shooting Mr. Wright, whose behavior was dangerous, and that Officer Potter had the right to protect herself and others by lethal force, whether or not she thought she was using her gun.

7. This avenue for departure further resonates in light of Mr. Wright's past violent behavior, namely his possession of a dangerous weapon without a permit, his pending charge of aggravated robbery (with a pistol pointed at a young

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women), and the pending civil cases filed against his estate, alleging that he fired a gun at innocents, one of whom has brain damage; the other will not walk again without pain.

Our ability to litigate this avenue of departure was constrained at trial. We note anew our objection. Mr. Wright's attendant violence and reputation was relevant then, and now for sentencing, to impeach Seth Stoughton's testimony that Mr. Wright should have been let go because, after all, he was a danger to no one and would be found later, somewhere. See Rule 703, Minn.R.Evid. The State introduced Mr. Stoughton's testimony well aware of Mr. Wright's violent past. Moreover, the State did not provide to Mr. Stoughton, according to his report, with Mr. Wright's criminal history. Failure to correct false testimony is a due process violation. Napue v. Illinois, 360 U.S. 264 (1959).

8. At trial and for sentencing, we object anew to this Court's related rulings – excluding any mention of Mr. Wright's palpable dangerousness, proven by his acts of abject violence – which ran against the "long standing rule in Minnesota" that when a defendant, as here, claims self-defense, she "may offer evidence of the decedent's bad character and reputation for violence 'to prove that the deceased was the aggressor and precipitated the confrontation.'" State v. Thurson, 216 N.W.2d 267, 269 (Minn. 1974)(quoting State v. Keaton, 104 N.W.2d 650, 656

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(Minn. 1960)).

This Court ruled that Officer Potter didn't know Mr. Wright and therefore could not have been aware of what he'd already done. But when self-defense is raised, and where there is evidence of past violence, "it is not necessary that the victim's reputation be known to the defendant." Id.

In State v. Penkaty, that rule was reiterated: "Reputation evidence is also admissible to show that the victim was the aggressor, and for this purpose the defendant need not have known of the reputation." 708 N.W.2d 185, 201 (Minn. 2006). Whether Mr. Wright's behavior was a cause of the tragedy was disputed (with Stoughton finding it was not and Steve Ijames and Sgt. Johnson testifying that it was). Evidence concerning Mr. Wright and his reputation was "highly probative" at trial, Id. at 202, and should be at sentencing.

Penkaty also held that once the State disparaged, via cross, our defense of self-defense, by challenging Sgt. Johnson and former Chief Gannon, by disputing the testimony of Steve Ijames, and by alleging Officer Potter's testimony was unconvincing, Mr. Wright's reputation for violent acts became relevant to corroborate that testimony, and should have come in. Id. at 203. It remains relevant for sentencing for this additional reason.

9. We would be remiss in finally not addressing the Amended Complaint

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plead the punishment suggested by Minn. Stat. 609.11. We anticipate the Attorney General will make an argument calling for at least a mandatory three-year term.

The Attorney General does not control the sentencing under this provision. Judge Amdahl's opinion in State v. Olson, 325 N.W.2d 13 (Minn. 1982) held that Minn. Stat. 609.11 obviated judicial discretion, and was thus null and void. After Olson, the Legislature passed Subd. 8, which allows this Court, on its own motion, to "sentence without regard to the mandatory minimum." Minnesota Guidelines E.2(2); Comment 2E.04 (citing Olson).

This minimum is not regularly imposed. See Minnesota Sentencing Guidelines Commission, "2019 Sentencing Practices: Annual Summary Statistics for Felony Cases Sentenced in 2019" (published December 1, 2020), at figure 17, noting a downward departure rate of 54% for level 9 offenses, which include Manslaughter in the First Degree.

Dated: January 31, 2022

Respectfully submitted,

/s/ Paul Engh

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