STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0731

State of Minnesota,
Respondent,

vs.

Kevon Dante Vaughn,
Appellant.

Filed February 12, 2018
Affirmed in part, reversed in part, and remanded
Kirk, Judge

Ramsey County District Court
File No. 62-CR-15-8655

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Kirk, Presiding Judge; Halbrooks, Judge; and Schellhas, Judge.

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

KIRK, Judge

Appellant challenges his 82-month prison sentence, arguing that (1) he is entitled to withdraw his guilty plea, and if he elects not to do so, he is entitled to resentencing under

the 2016 Drug Sentencing Reform Act's (DSRA) amended sentencing guidelines and (2) the district court abused its discretion in denying his motion for a downward dispositional departure. We conclude that appellant is entitled to resentencing but that he is not entitled to withdraw his guilty plea. We also conclude that the district court did not abuse its discretion in denying appellant's departure motion. We affirm in part, reverse in part, and remand for resentencing.

FACTS

On November 3, 2015, appellant Kevon Dante Vaughn was charged with (1) first-degree controlled-substance crime, possession of ten or more grams of cocaine with intent to sell, pursuant to Minn. Stat. § 152.021, subd. 1(1) (2014); and (2) possession of a stolen firearm, pursuant to Minn. Stat. § 609.53, subd. 1 (2014), for offenses alleged to have occurred on September 19, 2015. On October 10, 2016, appellant pleaded guilty to count 1, first-degree controlled-substance crime, in exchange for dismissal of count 2 and a sentence of the "low end of the box minus 12 months."

On January 11, 2017, appellant moved to withdraw his guilty plea, arguing that because his attorney mistakenly told him at the plea hearing that he was pleading guilty to a severity level eight offense, not a severity level nine offense, he was misled regarding the expected length of his sentence. The district court granted his motion, finding that appellant's attorney misrepresented the length of the sentence that he faced, that the state would not be prejudiced by plea withdrawal, and that it was fair and just to allow appellant to withdraw his guilty plea.

On January 18, appellant again pleaded guilty to count 1, in exchange for dismissal of count 2, and an 82-month sentence of "the low end of the box less 12 months," with the ability to argue for a downward dispositional departure, which the state planned to oppose. Appellant filed his departure motion on January 31, asserting that he accepted responsibility for this offense early on in the court proceedings and that he is amenable to probation.

At the February 8 sentencing hearing, appellant's attorney argued that appellant is particularly amenable to probation and treatment and asserted that appellant took responsibility early on for this offense by pleading guilty. Appellant's attorney also emphasized that appellant comes from a difficult background and struggles with addiction. Appellant's attorney noted that, during his pretrial incarceration for this offense, appellant sought mental-health and addiction treatment. Appellant's attorney requested a stayed sentence and probation for appellant so that he could seek treatment. Appellant stated that he has "changed a lot" since being incarcerated for this offense and that he wants to seek treatment. Appellant also asserted that he is not a career criminal and that he has not been convicted of any serious violent crimes.

The state argued that there were not substantial or compelling reasons to depart from the sentencing guidelines and that appellant admitted to this serious offense. The state also noted that appellant was on felony probation when he committed this offense, that he has two prior felony convictions, and that he has a pending possession charge for which he failed to appear. The state added that, while on probation, appellant also failed to appear for two mental-health appointments and failed to enroll in domestic-abuse counseling. The

state asserted that appellant is not particularly amenable to probation or treatment and asked the court to impose the agreed-upon 82-month prison sentence.

In denying appellant's motion for a downward dispositional departure, the district court found that appellant failed to take advantage of past opportunities. The court also noted that appellant has a criminal record, including terroristic threats, and that his conduct evinces criminal thinking. The district court did acknowledge that appellant was taking advantage of treatment opportunities while incarcerated and that he appeared to be doing well, which did indicate amenability to probation. But ultimately, the court found that appellant's past behavior has not shown amenability to probation.

The district court disagreed with appellant's claim that he took responsibility early by pleading guilty because he withdrew his first guilty plea. Appellant's attorney responded that appellant was permitted to withdraw his plea based on his attorney's error and that withdrawing his plea did not have anything to do with appellant accepting responsibility. The district court replied, "Nevertheless, I don't have evidence of early resolution in this case."[1] The district court denied appellant's motion for a downward dispositional departure but granted a downward durational departure based on the parties' agreement, sentencing appellant to 82 months in prison.[2] This appeal follows.

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[1] The record reflects that appellant entered his first guilty plea just over 11 months after he was charged.

[2] Although substantial and compelling circumstances must exist to support a bargained-for sentencing departure, we need not address this record's lack of support because here we remand for resentencing. *See State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002) (holding that even a bargained-for sentencing departure may be reviewed for adequacy).

D E C I S I O N

I. Appellant is entitled to be resentenced under the 2016 Minnesota Sentencing Guidelines.

Appellant argues that because he was not sentenced under the DSRA-amended sentencing guidelines, he "never received the benefit of his plea bargain," and that his guilty plea was therefore involuntary. Appellant acknowledges that, when his sentence was imposed, neither the parties nor the district court recognized that his agreed-upon sentence was based on the incorrect sentencing guidelines. Appellant asks this court to reverse and remand to the district court for resentencing, unless he elects to withdraw his guilty plea.

The state argues that appellant is not entitled to choose whether or not he withdraws his guilty plea, and that prejudice to the state is highly likely if appellant is permitted to do so because this offense occurred in 2015 and a trial would not be held until sometime in 2018. However, the state agrees that appellant is entitled to be resentenced under the 2016 sentencing guidelines pursuant to the recent Minnesota Supreme Court decision in *State v. Kirby*, 899 N.W.2d 485 (Minn. 2017). In *Kirby*, the supreme court held that, through the amelioration doctrine, if a final judgment was not entered in a defendant's case before the DSRA-amended sentencing guidelines took effect, and if that defendant would have received a reduced sentence under the new guidelines, then that defendant is entitled to be resentenced under the new guidelines. 899 N.W.2d at 496. The state notes that, at the time of sentencing, appellant received the benefit of his plea bargain and argues that after he is

resentenced under the 2016 sentencing guidelines he will again have the benefit of his plea bargain.

Appellant's case had not reached final judgment when the DSRA went into effect on May 23, 2016. 2016 Minn. Laws ch. 160, § 18(b), at 591 (stating that the DSRA is effective the day following final enactment); *see also State v. Losh*, 721 N.W.2d 886, 893-94 (Minn. 2006) (stating that a case is pending until the availability of direct appeal is exhausted). Appellant did not even enter his first guilty plea until January 11, 2017, after the DSRA's effective date. Additionally, the DSRA's amended sentencing grid would have decreased appellant's presumptive sentencing range, and as a result, would have decreased the sentence that he bargained for during plea negotiations. When he was sentenced, appellant's presumptive sentencing range was 94 to 132 months. Minn. Sent. Guidelines 4.A (Supp. 2015). Twelve months less than the bottom of the box resulted in a bargained-for sentence of 82 months. Under the DSRA-amended sentencing guidelines, appellant's presumptive sentencing range would have been 73 to 102 months. Minn. Sent. Guidelines 4.C (2016). Twelve months less than the bottom of the box would have been a sentence of 61 months. Thus, under *Kirby*, appellant is entitled to be resentenced.

Appellant contends that, because his plea agreement was for the "low end of the box less [12] months," he should be resentenced to 61 months. But the district court remains in the best position to weigh sentencing options and is not required to adhere to the parties' agreement on remand, although failure to do so may entitle appellant to withdraw his guilty plea. *See State v. Jumping Eagle*, 620 N.W.2d 42, 45 (Minn. 2000) (holding that on remand the district court must either allow plea withdrawal, or sentence in compliance with the

original plea agreement); *Perkins v. State*, 559 N.W.2d 678, 687 (Minn. 1997) (noting that if a defendant does not receive the benefit of his plea bargain on remand, he is entitled to withdraw his guilty plea). On resentencing, a district court cannot impose a longer sentence than the one originally imposed. *See State v. Prudhomme*, 303 Minn. 376, 380, 228 N.W.2d 243, 246 (1975).

When appellant was sentenced, the supreme court had not yet issued the *Kirby* decision, and as such, the DSRA-amended sentencing grid did not apply at that time. Accordingly, appellant received the benefit of his plea bargain based on the law at that time. Post *Kirby*, appellant is now entitled to be resentenced under the DSRA-amended sentencing grid, and on remand, he may again be sentenced in compliance with the terms of his plea agreement. Thus, this record does not support plea withdrawal.

We reverse appellant's sentence and remand for resentencing in accordance with the DSRA-amended sentencing guidelines.

II. The district court did not abuse its discretion in denying appellant's motion for a downward dispositional departure.

"We afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). "A sentencing court 'must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances' that distinguish a case and overcome the presumption in favor of the guidelines sentence." *Id.* at 308 (quoting Minn. Sent. Guidelines 2.D.1 (2014)). The district court may depart from the presumptive guidelines sentence if the case involves

"substantial and compelling circumstances" to warrant the departure, but the district court is not required to do so. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) ("[T]he Guidelines state that when substantial and compelling circumstances are present, the judge 'may' depart."). Substantial and compelling circumstances are those that make a case atypical. *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003). This court will only reverse a district court's refusal to depart in a "rare case." *Kindem*, 313 N.W.2d at 7.

When considering a dispositional departure, a district court may consider both offender-related and offense-related factors. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998) (citing *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995)), *review denied* (Minn. Mar. 19, 1998). But even if mitigating factors are present to support a downward departure, the district court is not required to depart. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (citing *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)). "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 downward dispositional departure. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Appellant argues that the district court abused its discretion in denying his motion for a downward dispositional departure because he is particularly amenable to probation and he has accepted responsibility for his crime. Appellant also argues that the district court improperly relied on the withdrawal of his first guilty plea in denying his motion for a downward dispositional departure. Although the district court initially noted its concern regarding appellant's plea withdrawal, appellant's attorney argued at the sentencing hearing that it was improper for the court to rely on appellant's previous plea withdrawal

in deciding his departure motion. The district court then responded by noting that, even if appellant had not withdrawn his first guilty plea, this case would not have resolved "early." Appellant argues that this court should remand to the district court for reconsideration of his departure motion.

At sentencing, based on the evidence, arguments, and statements presented, the district court concluded that, despite some indication of amenability to probation, a downward dispositional departure was not appropriate. The district court implicitly concluded that substantial and compelling circumstances do not exist here and that this case is not the "rare" or "atypical" case meriting a dispositional departure. *Taylor*, 670 N.W.2d at 589; *Kindem*, 313 N.W.2d at 7. On this record, the district court did not abuse its discretion when it denied appellant's motion for a downward dispositional departure after considering all of the circumstances of this case. We affirm the district court's denial of appellant's motion for a downward dispositional departure.

Affirmed in part, reversed in part, and remanded.