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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,

v.

George Edward BENNETT, Appellant.

No. C9-96-2506.
|
Aug. 26, 1997.
|
Review Denied October 14, 1997.

Ramsey County District Court File No. K6-96-417

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Considered and decided by LANSING, Presiding Judge, RANDALL, Judge, and HARTEN, Judge.

UNPUBLISHED OPINION

LANSING, Judge.

***1** This appeal from conviction and sentence for intentional second degree murder challenges the district court's denial of a motion to suppress evidence obtained from DNA testing and the imposition of an upward sentencing departure. We conclude that the DNA evidence resulted from a lawful arrest and that the district court did not abuse its discretion by imposing the maximum statutory sentence.

FACTS

A jury convicted George Bennett of shooting cab driver James Wildenauer. Wildenauer died from two gunshots in the back of his head and was found a short time later in his burning cab. The fire apparently started when the cab skidded out of control and the cooling line ruptured.

An investigating St. Paul police officer, Catherine Janssen, obtained the address for Wildenauer's last dispatch and the destination given by the caller. At the address where the call originated, Janssen learned that it had been made by Bennett and Terrance Price between 1:30 and 2:00 a.m. that morning. The destination address was determined to be fictitious, but Janssen ascertained that Bennett lived in a house located approximately three blocks from where the burning cab had been found. Janssen, accompanied by Sergeants Tim McNeely and Keith Mortenson, went to that address to find Bennett. Bennett's mother told them that Bennett had come home at approximately 2:45 a.m., but left to return a red Grand Prix automobile to a friend named Jesse Jackson. Bennett's mother gave the officers a description of Bennett.

When the officers arrived at Jackson's apartment complex, they observed a red Grand Prix parked outside the complex. Mortenson saw the name "Jackson" on the mailbox. McNeely and Mortenson went to the back door of Jackson's apartment, while Janssen remained by the front door. McNeely and Mortenson knocked on Jackson's back door for approximately five minutes. Mortenson heard movement within the apartment and saw someone inside approach the door, but then turn back. Jackson ultimately opened the door and admitted the officers.

At about the same time, Janssen saw a man who matched Bennett's description walking down the front stairs carrying two full plastic grocery bags. Janssen asked the man his name, and the man replied, "George Bennett." Janssen told Bennett to drop the bags and to put his hands above his head. She then searched him and radioed for assistance from McNeely and Mortenson. McNeely and Mortenson returned to the front of the apartment, and the officers placed Bennett under arrest.

Janssen observed that the grocery bags contained wet clothes. She felt the bags for weapons or other hard objects, but found

nothing. The clothing was later sent to the Bureau of Criminal Apprehension (BCA) for testing. The testing showed that a blood specimen extracted from the clothing had a pattern consistent with the profile obtained from Wildenauer's blood, but inconsistent with Bennett's.

At trial, Jackson testified that Bennett arrived at his apartment after first calling and telling him that he had killed a cab driver. Jackson saw blood on Bennett's clothing and shoes. Bennett removed his clothing, washed it in Jackson's bathtub, and put it into the two grocery bags.

***2** The district court sentenced Bennett to the statutory maximum of forty years in prison, an upward durational departure of 134 months (more than eleven years) from the presumptive sentence of 346 months (more than twenty-eight years). The district court found that Bennett acted gratuitously and egregiously by shooting the victim twice in the back of the head. The court also found that Wildenauer was vulnerable because he was facing the opposite direction from Bennett when Bennett shot him and that Wildenauer was vulnerable because, as a cab driver, he was required to pick up Bennett. Bennett appeals (1) the denial of his motion to suppress the DNA evidence and (2) the upward sentencing departure.

DECISION

I

Bennett challenges the court's decision to allow the DNA testing into evidence. He maintains that the blood specimen was obtained as the result of an unlawful arrest made without probable cause. In determining whether probable cause exists, this court asks

> whether the officers in the particular circumstances, conditioned by their own observations and information and guided by the whole of their police experience, reasonably could have believed that a crime had been committed by the person to be arrested.

State v. Moorman, 505 N.W.2d 593, 598 (Minn.1993) (citation omitted). The reasonableness of the officer's actions at the time of arrest is an objective inquiry. *Id.* The existence of probable cause is dependent on the facts of each case. *State v. Cox,* 294 Minn. 252, 256, 200 N.W.2d 305, 308 (1972). Because the decision of whether the arresting officers had probable cause affects constitutional rights, this court makes an independent review of the facts to determine the reasonableness of the police officer's actions. *Moorman,* 505 N.W.2d at 599 (quoting *State v. Olson,* 436 N.W.2d 92, 96 (Minn.1989)).

The supreme court affirmed a probable cause finding based on comparable facts in *State v. Carlson,* 267 N.W.2d 170 (Minn.1978). In *Carlson,* a twelve-year-old girl who was murdered was last seen in the company of the defendant. When the police interviewed the defendant shortly after the crime was committed, the defendant gave evasive answers to questions about a dark-colored stain on his jacket. The answers aroused the suspicions of the interviewing officers. When the defendant refused to accompany the officers to the station voluntarily, the officers placed him under arrest. The supreme court, commenting that it was a close case, held that there was sufficient probable cause to arrest the defendant. *Id.* at 174.

The officers investigating Wildenauer's death knew that Bennett was the last fare that he had picked up; that the drop-off address was fictitious; that, despite the early morning hour, Bennett was not at home; that a man matching Bennett's description was exiting through the front door while officers were seeking him in the rear of the building; that the man was carrying two large plastic grocery bags; and that the man acknowledged that he was Bennett. Based on Janssen's police experience and training, it was not unreasonable for her to conclude that Bennett was involved in the murder of Wildenauer. Janssen had probable cause to arrest Bennett, and the blood sample extracted from the clothes in the grocery bag was not the product of an unlawful arrest.

II

***3** Bennett argues the district court erred in departing from the sentencing guidelines. The court imposed the forty-year maximum permitted for second degree murder.

A sentencing court may depart from the presumptive sentence under the guidelines only if the case involves substantial and compelling circumstances. Minn. Sent. Guidelines II.D. Substantial and compelling circumstances are those that make a defendant's conduct "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). If substantial and compelling aggravating or mitigating factors are present, a sentencing court has broad discretion to depart from the sentencing guidelines. *State v. Best,* 449 N.W.2d 426, 427

(Minn.1989). Absent such circumstances, the sentencing court has no discretion to depart. *Id.* When substantial and compelling circumstances are present, the sentencing court's decision to depart will be reversed only if the sentencing court abused its discretion. *State v. Garcia,* 302 N.W.2d 643, 647 (Minn.1981), *overruled in part on other grounds by State v. Givens,* 544 N.W.2d 774, 777 (Minn.1996).

The district court found that an upward durational departure was justified given Wildenauer's vulnerability because of his occupation as a taxi cab driver and because he was shot in the back of the head. On appeal, the state argues that the court's upward departure is justified when Wildenauer was "vulnerable due to his occupation," he was treated with particular cruelty because he was shot twice in the back of the head, and his murder was a random act of violence. Bennett, on the other hand, argues that the crime was not committed in a manner more serious than the typical case of second degree intentional murder.

The sentencing guidelines recognize that vulnerability due to age, infirmity, or reduced mental or physical capacity is an aggravating factor sufficient to justify an upward departure. Minn. Sent. Guidelines II.D.2(b)(1). The list of aggravating factors set forth in the sentencing guidelines is not exclusive. *See State v. Givens,* 544 N.W.2d 774, 776 (Minn.1996) (noting that the sentencing guidelines provide "a nonexclusive list of appropriate aggravating and mitigating factors to assist a trial court considering departure.")

We agree with the district court's focus on the circumstances of Wildenauer's employment as a basis for the departure, but we would describe it more as a violation of a trust relationship than as a special vulnerability. Wildenauer's occupation and duties as a cab driver allowed Bennett to create and take advantage of a defined relationship with Wildenauer. By retaining Wildenauer to transport him, Bennett was in a position to dominate and control Wildenauer; Bennett and Wildenauer were in a confined area with Bennett directing the activity. Bennett determined where Wildenauer would go and had authority to tell Wildenauer, whose driving responsibilities required him to keep his back turned to Bennett, to stop the cab at any point. This position of control gives rise to a trust relationship. Bennett relied on this trust position to manipulate the circumstances and commit the crime. Because Bennett abused his position of trust and commercial authority over Wildenauer, it was not reversible error for the district court to impose an upward departure. *See State v. Lee,* 494 N.W.2d 475, 482 (Minn.1992) (holding that defendant's abuse of authority as victims' instructor and leader in the community to maneuver victims into positions where he could sexually assault them constituted aggravating factor sufficient to justify upward departure).

***4** The district court imposed a departure that is less than fifty percent of the original sentence and does not exceed the statutory maximum. Under these circumstances we conclude that the departure was not an abuse of discretion.

Affirmed.

RANDALL, Judge (dissenting).

***4** I respectfully dissent. The intentional second-degree murder at issue is composed of facts, simply put, that place this case squarely within the rebuttable presumption of a presumptive sentence under the guidelines, here 346 months. The presumptive sentence in Minnesota for intentional second-degree murder already results in the longest number of years in the United States of America before a defendant becomes eligible for release. *See* Minn. Sent. Guidelines IV (based on a criminal history score of 2, intentional second-degree murder carries a presumptive sentence guidelines range of 339-353 months). The mandatory behind bars portion of two-thirds of 346 months is 221 months, or 18-1/2 years. That is far and away as lengthy a mandatory sentence behind bars for second-degree murder as will be found anywhere.

The trial court's departure reasons are nothing more than a reiteration of the facts that surround every crime:

> This offense has had a dramatic impact on the victim's family as well as the community. This was a totally random act of violence. It was a-you acted gratuitously and egregiously. You shot the victim twice, even though the first shot had caused the victim's death. And you picked on somebody who was facing the opposite direction of you and shot him in the back.
>
> This man was vulnerable. He was a cab driver who put himself out on the line and was in a position of having to just pick up everybody. Yes, he was vulnerable and he was in a vulnerable position, and the court finds that to be an aggravating factor.

All homicides have dramatic impacts on the victim's family and on the community. If those were grounds for upward

departure, the presumptive guidelines would be abolished overnight and statutory maximums imposed as a matter of law. That would put Minnesota's already lengthy sentences in the unenviable position of being the longest and the most unjustified in the country and would hasten the bankruptcy of state government. Statutory maximums were set decades ago at a time when it was known and understood that only a fraction of the maximum would ever actually be served behind bars, with the remainder to be served on parole or probation.

The trial court states that the defendant "acted gratuitously and egregiously." The gratuitousness lends itself to the reason why the jury came back with second-degree intentional murder, which involves only an intentional act, not a premeditated act. Murder in the first degree, which is also intentional, is usually not classified as gratuitous because it involves planning and forethought, which we call premeditation.

It is true that appellant's crime was egregious. But, by definition, all homicides and other serious crimes are egregious. I have never seen a trial court or an appellate court review a nonegregious homicide, nor will I.

***5** It is true that there were two shots, but there is no "one shot" or "one stab wound" rule in Minnesota, nor, as far as I know, in any other state. I will take judicial notice from the hundreds of case histories through the past decades in Minnesota, both before and after the passage of the Minnesota sentencing guidelines in 1980, that with gunshot or stab wound homicides, multiples like two to five for instance, are *more typical than not* when a gun or a knife is used.

Upward departures are to be reserved only for cases involving substantial and compelling circumstances. Minn. Sent. Guidelines II.D.; *accord* *State v. Best,* 449 N.W.2d 426, 427 (Minn.1989).

Even when there are substantial and compelling circumstances present, *the presumptive sentence remains the presumptive sentence.* We are falling into an unwarranted mentality where virtually every single assault or homicide case is accompanied by automatic requests for upward departure.

The trial court and respondent partially rely on the fact that appellant shot the victim in the back of the head and that somehow that fact produced "vulnerability" and "gratuitous cruelty." I find there is no basis for either argument. Why would it change the crime if appellant had said to the victim, "Turn toward me" and then shot the victim? Most likely the state would have been in court arguing that because the victim now knew he was going to be shot, that was "an egregious act" and "particular cruelty."

Vulnerability and gratuitous cruelty are two of the most overworked and watered down reasons used to sustain upward departures. As the supreme court stated in *State v. Johnson,* 327 N.W.2d 580 (Minn.1982), "we are all equally vulnerable in the face of a deadly weapon." *Id.* at 584 (quoting *State v. Luna,* 320 N.W.2d 87, 89 (Minn.1982)).

The trial court and the majority focus on the victim's employment as a basis for a departure from an already lengthy presumptive sentence on up to the statutory maximum. They cite no law for this. People who drive taxicabs, people who are in any business of home delivery, such as pizza delivery, dry cleaning, flower delivery, etc., are all in a "position of trust" in the sense that part of the job is answering requests, often over the telephone, for the company's services, and, as part of that job, they respond without going into a computer search or other background check of the person requesting services. Every salesperson working at night in the thousands of gas stations/convenience stores dotting this country is in a "position of trust" in that when people walk in and ask for something, they are duty-bound to respond to that customer's request. At times the customer's request is a subterfuge to pull a gun on the service person and hold up the station.

The vast majority of holdups and stickups of taxicab drivers come exactly this way. Someone calls for a cab posing as a customer. Then en route the defendant pulls a gun on the cab driver and robs him, and at times the robbery, as it did here, turns into a homicide. Unfortunately, this is not an untypical crime of homicide committed against a taxicab driver. Rather, it fits the pattern for all such previous incidents, both in this state and across the country.

***6** The Minnesota Supreme Court in *State v. Holmes,* 437 N.W.2d 58, 59-60 (Minn.1989), held that defendant's conduct in stabbing his estranged wife three times with a large hunting knife after an argument was not significantly different from that typically involved in commission of second-degree intentional murder so as to justify imposition of double presumptive sentence. I find *Holmes* controlling. Its facts and its legal analysis are directly on point and compel the conclusion, to me, that the presumptive sentence is warranted

on these facts and that it was reversible error for the trial court to depart upward.

The court stated in *Holmes:*

> "The general issue that faces a trial court in deciding whether to depart durationally is whether the defendant's conduct was significantly more or less serious than that typically involved in the commission of the crime in question."

Id. at 59 (citation omitted).

The subjectivity of this decision is apparent. As the *Holmes* court stated:

> In the final analysis, our decision whether a particular durational departure by a trial judge was justified "must be based on our collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts."

* * * *

> Cruelty is a matter of degree and it is not always easy to say when departure is or is not justified. It is true that there was no excuse for what defendant did and that his conduct was reprehensible. But the same may be said in every case in which a defendant stands convicted of second-degree intentional murder. We have no choice but to conclude that the departure was unjustified because we believe that the conduct involved in this case of intentional murder was not significantly different from that typically involved in the commission of that crime.
>
> *Id.* at 59-60 (citation omitted).

The majority points out that the departure "is less than 50% of the original sentence." That is a nonissue. The trial court could not have gone any higher, as it went all the way up to the statutory maximum. It is wrong to "assume" there is a rule of thumb in Minnesota whereby any upward departure up to but not exceeding double somehow gets less scrutiny and can be sustained with weak or minimal facts.

> We have in a series of cases established that upward departures greater than double the presumptive sentence require facts "so unusually compelling" that such a departure is justified.

State v. Givens, 332 N.W.2d 187, 190 (Minn.1983) (citations omitted).

With Minnesota's already lengthy sentences, many defendants, like appellant here, *cannot have their sentence doubled* as the law is clear that no one can be sentenced past the statutory maximum set by the legislature. Thus, when an already lengthy sentence is increased by, for instance, 20%, 30%, or 50% up to the statutory maximum, common sense and clear legal thinking tell us that it has to be scrutinized as strictly as any double or triple upward departure from a shorter sentence. Not to do so would create an unconscionable "window" wherein every defendant whose presumptive sentence exceeded half the statutory maximum could now be subject to an upward departure to the statutory maximum without meaningful appellate review on the theory that, well, after all, it is less than a double departure.

***7** This unfortunate homicide involving a taxicab driver and a customer is no less serious, but is also just as typical as the multiple-stab-wound homicide in *Holmes.*

I dissent and would have reversed the trial court and remanded with instructions to impose the presumptive sentence of 346 months (28 years, 10 months) for this crime.

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