

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Case Type: Criminal
Court File No. 27-CR-21-7460

Plaintiff,

vs.

**STATE'S MEMORANDUM OF LAW
REGARDING SENTENCING**

Kimberly Ann Potter,

Defendant.

TO: The Honorable Judge Chu, Judge of District Court, the above-named defendant and defendant's counsel, Earl Gray, 1st Bank Building, 332 Minnesota Street, Ste. W1610, St. Paul, MN 55101; Paul Engh, Ste. 2860, 150 South Fifth Street, Minneapolis, MN 55402.

INTRODUCTION

The State submits this memorandum for the Court's consideration for purposes of sentencing.

ARGUMENT

I. THE PRESUMPTIVE SENTENCE PROVIDED BY THE MINNESOTA SENTENCING GUIDELINES IS A PROPER SENTENCE.

The "power to fix the limits of punishment for criminal acts lies with the legislature." *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002). The legislature enacted the Sentencing Guidelines to define the limits of sentences for specific offenses, but courts retain discretion to sentence in the individual case. *Id.* Accordingly, the starting point for any sentence is the presumptive sentence provided by the legislature through the Sentencing Guidelines. The presumptive sentence represents the judgement of the legislature, as the directly elected representatives of the people, for the proper sentence for criminal conduct. Here, the jury found

that Defendant Potter committed manslaughter in the first degree for the reckless handling of her firearm which caused the death of Daunte Wright.¹ The legislature assigned that crime a severity level of nine. For a defendant with a criminal history score of zero, the presumptive sentence is a commitment to prison for a period of 86 months (with a range of 74 to 103 months).

The presumptive sentence takes into account the two basic elements of the conviction. It must always be remembered first and foremost that this case is about the death of Daunte Wright. Daunte Wright was a living, breathing human being, who loved, and was loved by his family and friends. Life is something this society holds in the highest regard. In this case, that life is Daunte Wright, and his life must be held in the highest regard as well. The presumptive sentence reflects the seriousness of the loss of his life.

In addition, the presumptive sentence reflects the culpability of the Defendant's recklessness in causing Daunte Wright's death. The sanctity of Daunte Wright's life deserved the protection of the law like any other person. Defendant Potter was a highly trained law enforcement officer. She had received firearms proficiency training every year for 26 years and Taser proficiency training every year for nearly 20 years. A jury of her peers found Defendant Potter's conduct was reckless; that she committed a conscious or intentional act in connection with the handling of her handgun that created a substantial and unjustifiable risk that she was aware of and disregarded, and thereby caused Daunte Wright's death. This level of recklessness certainly has a higher degree of culpability than mere negligence. The presumptive sentence reflects this higher culpability.

¹ The jury found Defendant guilty of two counts of manslaughter, but the Court must enter a conviction and sentence on the most serious of the two offenses; first-degree manslaughter. *See State v. Kebaso*, 713 N.W.2d 317, 322 (Minn. 2006).

Daunte Wright's death must not be ignored or even minimized.² The degree of Defendant Potter's recklessness in handling her firearm and causing Daunte Wright's death cannot be excused or even minimized. The presumptive sentence takes into account the main elements of the conviction: the death of Daunte Wright and Defendant's recklessness.

II. THE COURT SHOULD DENY DEFENDANT POTTER'S MOTIONS FOR DISPOSITIONAL AND DURATIONAL DEPARTURES.

The Minnesota Sentencing Guidelines were created "to establish rational and consistent sentencing standards that promote public safety, reduce sentencing disparity, and ensure that the sanctions imposed . . . are proportional to the severity of the offense and the offender's criminal history." Minn. Sent. Guidelines 1.A. The Guidelines "promote uniformity, proportionality, and predictability in sentencing." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015). The presumptive ranges listed within the Guidelines are "deemed appropriate for the felonies covered by them." Minn. Sent. Guidelines 1.A.6.

A court may only depart from the presumptive sentence when they can articulate "substantial and compelling" circumstances that justify a departure. Minn. Sent. Guidelines 2.D.1; *State v. Barthman*, 938 N.W.2d 257, 267, 270 (Minn. 2020). "Substantial and compelling" circumstances are those in which "the defendant's conduct in the offense of conviction was *significantly* more or less serious than that typically involved in the commission of the crime in question." *Barthman*, 938 N.W.2d at 270 (emphasis in original). Only when such circumstances are present may a judge depart from the presumptive disposition or duration prescribed in the Guidelines. Minn. Sent. Guidelines 2.D.1.

² In her memorandum in support of her request for a dispositional departure, counsel for Defendant minimizes the death of Daunte Wright, calling any reference to his death by the State in support of the presumptive sentence faulty and reflexive. Defendant's Motion For Dispositional Departure (Dispositional Mot.), at 6. This is hardly an expression of remorse for the victim, Daunte Wright.

A. A Downward Dispositional Departure Is Not Warranted Because There Has Been An Insufficient Showing That Defendant Potter Is Particularly Amenable To Probation.

A defendant's particular amenability to probation may justify a downward dispositional departure. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But this requires more than just a showing that a defendant is amenable to probation. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). Instead, a defendant must be *particularly* amenable to probation before the district court can use this basis as a substantial and compelling reason to justify staying a presumptively executed sentence. *Id.* "'Particular' means 'exceptional' or 'distinctive among others of the same group,' and 'particularly' means 'especially' or 'specifically.'" *Id.* at 309 (quoting *The American Heritage Dictionary of the English Language* 1285-86 (5th ed. 2011)). "By requiring a defendant to be *particularly* amendable to probation," the Sentencing Guidelines reserve downward dispositional departures only for circumstances where the defendant is clearly distinguished "from most others and truly presents 'substantial[] and compelling circumstances' that are necessary to justify a departure." *Soto*, 855 N.W.2d at 308 (alterations in original).

In determining whether a defendant is particularly amenable to probation, the district court may consider "[n]umerous 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." *Trog*, 323 N.W.2d at 31. While a defendant's prior record is a factor that may be considered, "a defendant's clean record does not by itself justify mitigation of sentence because that factor, in the form of [the] defendant's criminal history score, has already been taken into account by the Sentencing Guidelines in establishing the presumptive sentence." *Id.* (citing *State v. Cizl*, 304 N.W.2d 632, 634 (Minn. 1981)). And the existence of a valid departure ground does not *require* the district court to deviate from the sentencing guidelines. *State v. Evenson*, 554 N.W.2d 409, 412 (Minn.

Ct. App. 1996). Indeed, the existence of a mitigating factor does not obligate the court to order probation or even to impose a shorter sentence. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

Defendant bases her dispositional departure argument on the factors outlined in *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). *Trog* and the cases that follow it recognize that in particular cases society is better served if the defendant receives treatment in a probationary setting and lengthier supervision than can be provided by a prison disposition. *Id.* (citing *State v. Wright*, 310 N.W.2d 461, 462-63 (Minn. 1981)). An important aspect of this concept is that society's interests will be better served by a probationary disposition than a prison sentence. *Wright*, 310 N.W.2d at 463. Further, the Court in *Soto* held that the court must find the defendant is "particularly" amenable to probation, meaning exceptional, distinctive, especially, or specifically. 855 N.W.2d at 309.

The arguments Defendant puts forth in her memorandum to this Court in support of a dispositional departure are not particularly compelling. Defendant claims her remorse supports the departure, but she does not offer any argument as to *why* her remorse should support a departure to probation other than citation to case law. "Remorse" is defined as "[m]oral anguish arising from repentance for past misdeeds; bitter regret." *The American Heritage College Dictionary of the English Language*, 1154-55 (3rd ed. 1997). "Remorse" is also defined as "a gnawing distress arising from a sense of guilt for past wrongs." *Webster's Third New International Dictionary of the English Language*, 1921 (1976). Presumably, in the criminal justice context, remorse is a potential protective factor against recidivism, as it represents an emotional reaction to the wrongfulness of conduct (at least after-the-fact). To this extent, Defendant's argument about remorse is then simply duplicative of her argument that she will not recidivate. Dispositional Mot., at 7-8.

But even so, for remorse to be truly operative here it must be remorse for the *wrongfulness* of the conduct towards those who are harmed by one's conduct, not just regret for what has happened to one's self. The most important question here is whether Defendant Potter has established remorse for the wrongfulness of her conduct that caused Daunte Wright's death. To date, the record may not adequately answer that question.

Much of the rest of Defendant's arguments are based on fear and divisiveness. She makes personal attacks on the prosecution, alleging the State's presumed reliance on the presumptive sentence is only "a political statement." Dispositional Memo., at 6. It is difficult to see how this makes *Defendant Potter* particularly amenable to probationary treatment. She goes on to argue that the State's charge is to enforce the law and support police officers, Dispositional Memo., at 7, as if the State should give her the "break" she seeks just because she is a police officer. There is no case law support for this assertion nor is it good policy. Thereafter, Defendant attempts to invoke fear in this Court and the community about the disposition, arguing that if she receives the presumptive sentence violent crime will increase. Dispositional Memo., at 8-9. Again, these are not particularly compelling arguments for a dispositional departure.

Rather, for the Court to depart on this basis Defendant would need to establish that society's interests are better served, not just her own. She would need to show that something good can come of a probationary disposition.

The State acknowledges that there are aspects of this case that suggest a probationary disposition could be more beneficial to society's interests than a lengthy prison sentence. Society's interests in criminal punishment include deterrence, rehabilitation, and retribution. The State accepts that Defendant Potter is unlikely to recidivate. She will never work as a police officer again, she will not be allowed to carry a gun, and she has no prior violations of the law. She has

demonstrated some remorse for her conduct. Importantly, Defendant Potter is in a unique position to help prevent another case of “weapons confusion:” she could speak to law enforcement groups, trainers, or legislators about this experience and how real the dangers are, and she could speak to manufacturers in hopes of convincing them to make design changes that could also help.

Community restoration is an important goal of the criminal justice system too. Defendant Potter made a colossal, lethal error, an error she was trained to avoid. But she did not intend to kill Daunte Wright. By acknowledging her failure and that she is subject to the law like all others, she could help the community heal. She might even be able to help the Wright family heal. And all this could honor the memory of Daunte Wright. Having been convicted, Defendant Potter is now legally and morally responsible for Daunte Wright’s death. No prison sentence can bring Daunte Wright back to life. A prison sentence is just a number, and that number cannot undo this tragedy or bring Daunte Wright back to his family. Fostering healing and community restoration is valuable too.

It is Defendant’s burden to establish to the satisfaction of the Court that she is amenable to probation; that is, that society’s interests are better served by a probationary disposition. Blaming the victim, claiming to be a victim of a political prosecution, fomenting fear and divisiveness, and denying responsibility does not satisfy that burden. It is up to Defendant Potter to establish that she can better serve society’s interests during a probationary disposition. The record to date does not shed much light on whether Defendant Potter can make this showing. Alternatively, in the event the Court should find that society’s interests are better served by a probationary disposition, the State contends that certain conditions at a minimum would need to be a part of any probationary disposition: 1) Defendant should serve one year in jail to reflect the seriousness of Daunte Wright’s death; 2) Defendant should speak publicly about the dangers of weapons confusion to law

enforcement agencies; 3) Defendant should make herself available to the Wright family if they decide, at a time of their choosing, to speak with her about their loss; 4) Defendant must remain law abiding; and 5) Defendant should be placed on probation for a period of 10 years.

It is the considered judgment of the legislature, as the directly elected representatives of the people, that a conviction for recklessly causing the death of another warrants a prison sentence. It is Defendant's burden to prove that a departure from this judgment is warranted in this case. To date, she has not done so.

B. A Downward Durational Departure Is Not Warranted Because Defendant Potter's Conduct Was Not Significantly Less Severe Than Typical.

In contrast to dispositional departures, which focus on the defendant, durational departures “must be based on factors that reflect the seriousness of the *offense*, not the characteristics of the offender.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (citing *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995)) (emphasis in original). A downward durational departure is warranted only where the defendant's conduct was “significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). “The requirement that aggravating or mitigating factors must relate to the seriousness of the offense—and not to the characteristics of the offender—narrows the range of factors that may justify a durational departure.” *Solberg*, 882 N.W.2d at 624. And, as noted above, the existence of mitigating factors does not obligate the court to impose a shorter sentence. *Wall*, 343 N.W.2d at 25.

“[A] defendant's remorse generally does not bear on a decision to reduce the length of a sentence.” *Solberg*, 882 N.W.2d at 625; *see also State v. Back*, 341 N.W.2d 273, 275 (Minn. 1983) (“As a general rule, a defendant's remorse bears only on a decision whether or not to depart dispositionally, not on a decision to depart durationally.”). “[U]nless a defendant can show that

[her] demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction, remorse cannot justify a downward durational departure.” *Solberg*, 882 N.W.2d at 626 (emphasis omitted). When the defendant does “not engage in any remorse-driven conduct that lessen[s] the impact of the crime on the victim” or makes the crime less serious than typical, statements of remorse and regret during an investigation and court proceedings “do not amount to ‘substantial and compelling circumstances’ justifying a downward durational departure.” *Id.* Defendant Potter makes no claim that any of her conduct in causing Mr. Wright’s death was remorse-driven.

Again, Defendant’s arguments in her memorandum to this Court are not particularly compelling. Defendant first relies on the Guidelines factor for cases in which the victim was the initial aggressor. Durational Memo., at 1. Her reliance on this factor is misplaced. First, Defendant again simply tries to deflect responsibility for her own conduct and to place blame on Daunte Wright for his own death. Daunte Wright was not an “aggressor” against Defendant. Daunte Wright made no aggressive or violent movements toward Defendant Potter or the other officers. Daunte Wright simply pulled away from Officer Luckey in an attempt to drive off.³ It was then that Defendant Potter decided to use a high level of force (her Taser), even after the other officers had the situation in hand, to try to stop him. It was Defendant Potter’s recklessness in carrying out this decision that forms the basis of her liability.

Relatedly, this factor should not apply when the defendant’s criminal conduct in reaction to the victim’s conduct is disproportionate to the victim’s conduct. *See State v. Harrell*, No. A15-1988, 2016 WL 6670670, *3 (Minn. Ct. App. Nov. 14, 2016) (affirming denial of durational

³ Defendant’s hyperbole is telling. Her descriptions of Daunte Wright’s conduct as “violent and aggressive resistance” and “violent conduct,” Durational Memo., at 1, 2, are exaggerations of Daunte Wright’s conduct.

departure where defendant contended the victim was the initial aggressor because the defendant's conduct was disproportionate to the domestic argument that preceded it). The basis of Defendant Potter's criminal liability in this case is the recklessness of her response. Taken to its logical extension, Defendant Potter's argument here is that any time a police officer acts to restrain a person, but does so recklessly or inappropriately, the officer should receive a shorter sentence than other defendants charged with the same crime.

Further proof that this argument is really just an attempted diversion from her own culpability, Defendant goes on to discuss allegations of Daunte Wright's prior conduct that have nothing to do with whether he was the initial aggressor: "This avenue for departure further resonates in light of Mr. Wright's past violent behavior" Durational Memo., at 6-8.⁴ Defendant then goes on to list unproven allegations that have nothing to do with Daunte Wright's encounter with Defendant Potter on April 11, 2021. This attempt at publicly smearing Daunte Wright is just that; it is certainly not relevant to whether Defendant should get a shorter sentence.

Finally, it is incredulous that, notwithstanding the impact of her conduct on her community, Defendant would attempt to support her request for a shorter sentence by comparison to *Koon v. United States*, the case arising out of the beating of Rodney King. Durational Memo., at 2-6.

But matters of poor taste and judgment aside, the bottom line ruling in *Koon* was that the sentencing court did not abuse its discretion in concluding that the presumptive sentence under the federal guidelines for aggravated assault did not take into consideration cases where the victim provoked the legal use of force and the criminal conduct (the aggravated assaults) immediately

⁴ Defendant asserts that Daunte Wright was at "fault" for the bench warrant. Durational Memo., at 2. However, there is nothing in the record to support any assertion that Daunte Wright even knew about, or actually received notice of a court appearance that he missed. Again it is telling that Defendant is quick to assert blame for the warrant when no fault has actually been established.

followed. *Koon v. United States*, 518 U.S. 81, 105 (1996). This case is factually distinguishable from *Koon*. As Defendant even admits in her memo, Mr. King was combative with the officers, charged towards one of the officers, and tried to get up after the officers struck him to the ground. Durational Memo., at 3 (citing *Koon*, 518 U.S. at 86-87). Here, Daunte Wright was not combative with the officers, he made no threats to the officers, and he did not act aggressively towards the officers. He simply tried to get in the driver's seat and drive off. In other words, the alleged provocative acts are nothing like those in *Koon*.

Moreover, *Koon* is a decision about the federal sentencing guidelines and is not precedential here. And Minnesotans should be loath to accept the reasoning in *Koon* as worthy of application here.

Defendant has failed to establish that her conduct in recklessly handling her firearm and shooting Daunte Wright in the chest was “significantly less serious than that typically involved in the commission of the offense.” *Mattson*, 376 N.W.2d at 415. The Court should deny her motion for a downward durational departure.

While the State does not agree with the formulation of Defendant's arguments asserted in support of a durational departure, the State recognizes that this is a unique case given the context in which Defendant Potter recklessly handled her firearm. If this Court should conclude that the facts of this case are sufficient to establish that Defendant Potter's crime is less serious than the typical first-degree manslaughter, and therefore support a durational departure, the Court should impose a sentence duration between the presumptive sentence for second-degree manslaughter and first-degree manslaughter. To impose anything less would fail to take into account Daunte Wright's death and the jury's finding that Defendant Potter committed first-degree manslaughter.

CONCLUSION

For the foregoing reasons, the appropriate sentence has to be the presumptive sentence set by the legislature until Defendant Potter can convince the Court that society's interests, including those of Daunte Wright's family and friends, can be met by some other disposition.

Dated: February 15, 2022

Respectfully submitted,

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