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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-376**

State of Minnesota,
Appellant,

vs.

Amos Erving LaDuke,
Respondent.

**Filed July 16, 2011
Affirmed
Cleary, Judge**

Clay County District Court
File No. 14-CR-11-786

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

Brian J. Melton, Clay County Attorney, Pamela Harris, Assistant County Attorney,
Moorhead, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Brian Wambach, Assistant Public
Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Cleary,
Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Respondent pleaded guilty to failure to register as a predatory offender, in violation of Minn. Stat. § 243.166, subd. 5(a) (2010). When imposing respondent's sentence, the district court departed from the presumptive sentence under the Minnesota Sentencing Guidelines (sentencing guidelines) and stayed execution of a 30-month prison sentence. The state appeals, arguing that no substantial and compelling circumstances existed to justify the departure and that the parties had agreed that respondent would go to prison. Because we hold that the district court did not abuse its discretion by departing from the presumptive sentence, we affirm.

FACTS

In 1999, respondent was convicted of third-degree criminal sexual conduct and was thereafter required to register as a predatory offender.

Respondent was previously involved with a criminal gang, but later began to cooperate with the federal government and became a witness against members of the gang. Since then, respondent has been involved in numerous altercations with members of the gang, both inside and outside of prison, and has been stabbed and shot multiple times.

For his protection, federal officers moved respondent to a town in Minnesota, and respondent registered as a predatory offender at that address. Thereafter, respondent came to believe that members of the gang knew where he was living, and he moved to another town. Respondent did not notify federal officers or the police that he had moved

and did not register as a predatory offender at his new address. The state charged respondent with failure to register as a predatory offender. Respondent filed a notice that he would be claiming the defenses of necessity and duress.

At a subsequent court hearing, respondent pleaded guilty to the offense of failure to register as a predatory offender. When questioned, respondent affirmed that he was no longer claiming that he had failed to register out of necessity or duress, and that he was giving up any right to assert a defense in the matter. The district court accepted the guilty plea, entered a conviction, ordered a pre-sentence investigation (PSI), and set the matter for sentencing. Respondent's attorney stated that he was "going to be requesting the bottom of the box [sentence under the sentencing guidelines] at the time of the sentencing."

During the sentencing hearing, the parties agreed to credit respondent with six criminal history points. The presumptive sentence under the sentencing guidelines for the offense of failure to register as a predatory offender, when a defendant has six criminal history points, is a prison commitment of 36 months, with a range of 31 to 43 months. Respondent's attorney argued for a 30-month sentence¹ and asked that respondent not be sent to a prison within the State of Minnesota because "if he does, he's a marked man and may well be murdered there." The state argued for a 36-month sentence. The district court then said that the guilty plea had been "an open plea" and

¹ It appears that the parties and the district court mistakenly believed that the bottom-of-the-box sentence under the sentencing guidelines was 30 months, not 31. In any case, the departure report noted that respondent's sentence was a durational departure, as well as a dispositional one. The state did not challenge this one-month durational departure.

that it was going to depart from presumptive sentence and was not sending respondent to prison. The court stated:

And I think if I send [respondent] to prison, someone is going to kill [him], and I am not going to take responsibility for that. I'm just not. And the probation agent also put in the PSI the reason that he didn't register is because he didn't want anybody to know where he was because he probably feels he's going to be shot or stabbed again.

The court also stated:

I'm going to depart. I have the authority to do that. It was a straight up plea. There was no plea agreement. It was a straight up plea. I wrote it down in my notes.

And I don't take failure to register lightly. I never have and I never will. But in this particular case the underlying offense is quite old. The fact of the matter is [respondent] has been shot at and stabbed and one of his kids was with him when he was shot when someone was trying to get him. I'm not going to send him to prison knowing that someone is going to kill him. I'm not going to do it.

The court sentenced respondent to 30 months in the custody of the Commissioner of Corrections, and stayed that sentence for up to five years provided respondent completes 180 days in jail and complies with the terms and conditions of probation. Lastly, the court stated that the sentence was a "departure from the guidelines. The Court has made the determination that [respondent] is amenable [sic] to probation and if I sent him to prison, I feel he would be harmed if not killed and I'm not going to do it." The district court completed a sentencing guidelines departure report listing as reasons for its departure that respondent is amenable to probation and that his life is at risk if sent to prison. This appeal follows.

DECISION

Respondent's sentence was a dispositional and durational departure from the presumptive sentence under the sentencing guidelines. District courts are afforded great discretion in the imposition of sentences, and a district court's decision to depart from a presumptive sentence is reviewed for an abuse of discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). "A [district] judge sits with a unique perspective on all stages of a case, including sentencing, and the [district] judge is in the best position to evaluate the offender's conduct and weigh sentencing options." *State v. Hough*, 585 N.W.2d 393, 397 (Minn. 1998). A district court's departure from a presumptive sentence should be modified only when the appellate court, after consideration of the entire record, has a "strong feeling" that the sentence imposed is inappropriate. *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981).

The sentence ranges provided in the Sentencing Guidelines Grids are presumed to be appropriate for the crimes to which they apply. Thus, the judge shall pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range on the grids.

Minn. Sent. Guidelines II.D. (2010). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). "The district court has discretion to depart from the presumptive guidelines sentence only if there are aggravating or mitigating factors present." *State v. Murphy*, 545 N.W.2d 909, 917 (Minn. 1996).

“The question presented to the [district] court when considering a departure is whether 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.” *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). When determining whether to grant a dispositional departure, the court can also focus “on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The sentencing guidelines provide a nonexclusive list of mitigating factors that may be used as reasons for departure, including that “[o]ther substantial grounds exist which tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.” Minn. Sent. Guidelines II.D.2.a.(5) (2010). Additionally, “a defendant’s particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

The district court’s principal reason for staying execution of respondent’s sentence was the court’s belief that respondent would be harmed or killed if sent to prison. When deciding to grant this dispositional departure, the district court could appropriately focus “on the defendant as an individual and on whether the presumptive sentence would be best for him.” *Heywood*, 338 N.W.2d at 244. Respondent’s history of altercations with his former gang, after becoming a federal witness against members of the gang, is a substantial and compelling circumstance that supports a dispositional departure in this case. The district court also listed respondent’s amenability to probation as a reason to

support departure, although the court did not elaborate on why it believed respondent was amenable to probation. Consequently, while respondent's amenability to probation was an appropriate factor for the court to consider, it is difficult for this court to review the district court's finding on this factor. However, it does appear that respondent has been discharged from federal probation and was not on probation at the time of the sentencing.

Although not specifically noted on the departure report, the district court mentioned other factors during sentencing to justify departure. The court discussed the circumstances of the offense, stating that the PSI indicated that the reason respondent did not register as a predatory offender was that he did not want anyone to know where he was because he felt he was in danger. Although respondent waived it as a defense during the plea hearing, this motivation for failing to register was a mitigating factor that the court could consider when deciding to depart from the presumptive sentence. *See* Minn. Sent. Guidelines II.D.2.a.(5).

The state argues that respondent's plea was not an "open plea" and that the state and respondent had agreed that respondent would go to prison. Even if the parties did have such an agreement, "under the [separation-of-powers] doctrine, the final disposition of a criminal case is ultimately a matter for the judiciary." *Johnson v. State*, 641 N.W.2d 912, 917 (Minn. 2002). "[A] district court may, in its discretion, refuse to accept a plea agreement and is not bound by a plea agreement as to any sentence to be imposed." *Id.* at 918. The district court was not required to send respondent to prison even if the parties did so agree.

Taken together, there are substantial and compelling circumstances that make this case atypical and justify a dispositional and durational departure from the presumptive sentence under the sentencing guidelines. The district court did not abuse its discretion by departing from the presumptive sentence.

Affirmed.