STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1607

Stacey Lynn Mullen, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed August 5, 2008
Affirmed
Schellhas, Judge

St. Louis County District Court
File No. 69-K7-99-600553

J. Anthony Torres, Torres Law Office, 212 Third Avenue North, Suite 545, Minneapolis, MN 55401 (for appellant)

Lori Swanson, Attorney General, 445 Minnesota Street, Bremer Tower, Suite 1800, St. Paul, MN 55101; and

Melanie S. Ford, St. Louis County Attorney, Mark S. Rubin, Assistant County Attorney, 100 North Fifth Avenue West, #501, Duluth, MN 55802-1298 (for respondent)

Considered and decided by Hudson, Presiding Judge; Schellhas, Judge; and Connolly, Judge.

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

SCHELLHAS, Judge

Appellant challenges a sentence imposed for second-degree murder. She argues that the upward durational departure in the sentence was not justified by her plea agreement or the participation of three or more people in the crime. We agree that the plea agreement did not support the departure, but conclude that the district court did not abuse its discretion in relying on the participation of three or more people and affirm.

FACTS

In March 1999, appellant Stacey Lynn Mullen participated in the kidnapping and murder of F.W. On the night the crime was committed, appellant, F.W., Daniel Deegan, and Kenneth James Budreau were all at the Red Lion Bar in Duluth, Minnesota. Budreau told appellant "that he was going to get [F.W.]." Appellant agreed to lure F.W. into a car, knowing that Budreau was going to hurt F.W. Appellant lured F.W. by taking advantage of F.W.'s romantic interest in her. Appellant reported that F.W. left the bar and got into a car with Deegan, Budreau and her, because she thought appellant shared her romantic interest. The group stopped at appellant's house to get some stolen property and then drove to the lakewalk.

On the way to the lakewalk, Budreau told F.W. he was going to kill her. Appellant and F.W. thought Budreau was joking. When the car stopped, Budreau punched F.W. in the face. F.W. fought back, and Budreau managed to get himself out of the car, open F.W.'s door, and begin hitting her on the head with part of a pool cue taken from the bar. Deegan held F.W. down while Budreau hit her repeatedly. F.W. yelled to

appellant for help. Appellant responded by taking money out of F.W.'s pocket, reportedly because she thought it would cause Budreau and Deegan to stop beating F.W. In fact, appellant told Budreau and Deegan to stop but they did not, and appellant did not otherwise help F.W.

While Budreau and Deegan continued beating F.W., appellant went to the bathroom behind the car. Somehow thereafter F.W. left the car or was removed from the car, and Budreau continued hitting F.W., but with a metal fence post with a sharp, pointed end. Budreau hit F.W. all over her body with the metal post. When F.W. was on the ground near the car, Budreau expressed concerned that appellant had no blood on her and said he wanted her "to be a part of this." Appellant then touched F.W. on the head and Budreau told her to "do it like this" and kicked F.W. hard with "blood . . . flying in all directions." Appellant then kicked F.W.

The three left F.W. on the ground and got back into the car. Budreau then decided that he needed to go back to get F.W.'s jacket and, as appellant testified, to "make sure that she was finished off." The group went back to F.W., who was breathing and making a gurgling sound. *State v. Budreau*, 641 N.W.2d 919, 922 (Minn. 2002). Budreau took F.W.'s jacket, Deegan took her shoes, and appellant cleaned under F.W.'s fingernails upon Budreau's instructions. *Id.* Although appellant did not see Budreau do anything additional to F.W. after he bent over her, F.W. stopped making the gurgling sound. *Id.* at 922. At some point in the attack of F.W., she was stabbed. *Id.* at 923. As the group left F.W., Budreau threw F.W.'s jacket at appellant and told her to hold onto it. Appellant set the jacket on the car seat, and Budreau yelled at her, telling her not to do that but, instead,

to hold onto the jacket; appellant wrapped up the jacket and stuck it on her feet. Appellant later disposed of the jacket.

Appellant was charged with first-degree murder and entered a plea agreement with the state. In February 2000, appellant pleaded guilty to the lesser-included offenses of aiding and abetting kidnapping and second-degree intentional murder. The plea agreement provided that the sentences for kidnapping and second-degree murder would be concurrent but Hernandized; thus, appellant would be sentenced first for kidnapping thereby increasing the criminal history score for the calculation of appellant's sentence for second-degree murder.[1] Under the sentencing guidelines, appellant's presumptive sentence for second-degree murder, calculated with felony points for kidnapping, was 386 months with a range of 379-393 months. Appellant agreed to a minimum sentence of 360 months and that the prosecutor would be free to argue for a departure up to 480 months. The plea petition states that appellant agreed that there were grounds for departure, but did not agree that the court should depart. When appellant entered her guilty pleas, defense counsel stated that "as part of this agreement, we have agreed that there are grounds under the sentencing guidelines for a departure, although our client is specifically not agreeing that the court should depart in this case." After the district court examined appellant about her guilty pleas and her waiver of the right to a trial, appellant testified to the facts of the killing and pleaded guilty on the record. In recounting the facts of the crimes in support of her guilty pleas, appellant admitted that after she got into

[1] The term "Hernandized" refers to the above-described sentencing method, which was approved of in *State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981).

the car, she knew F.W. was going to be beaten and stated that she felt some responsibility for F.W.'s death. The district court ordered a presentence investigation and guidelines sentencing worksheet.

Appellant was sentenced on December 2000, after she provided her promised testimony in other cases. The district court was provided two sentencing worksheets for the second-degree murder: one in which appellant's guidelines sentence is calculated pursuant to the plea agreement based on criminal history points for a kidnapping sentence; and one in which appellant's guidelines sentence is calculated without any felony points for a kidnapping sentence. The court needed the second sentencing worksheet because it decided not to impose a sentence for kidnapping. Based on the second sentencing worksheet, appellant's presumptive guidelines sentence for second-degree murder was 346 months. The prosecutor recommended a 360-month sentence, noting that the plea agreement provided that he could recommend up to 480 months. Noting that a 360-month sentence constituted an upward durational departure, defense counsel argued for the imposition of the presumptive sentence of 346 months. The court sentenced appellant to 360 months for the second-degree murder charge, stating on the record that the departure was based on the plea agreement and the aggravating factor that there was participation of three or more people in the crime.

In May 2007, appellant filed a postconviction petition, stating that she was concurrently sentenced on two charges, aiding and abetting second-degree murder and kidnapping. The petition alleges that appellant's sentence was illegal because it constituted an upward durational departure and the district court did not advise appellant

as to that fact or state on the record findings of fact that justified the departure. Appellant filed an affidavit stating that she never agreed to a departure. Construing the petition as one based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), the district court ruled that appellant was not entitled to relief under *Blakely*. Furthermore, as a factual matter, the court rejected appellant's allegation that she was not informed at the time of sentencing that the sentence constituted an upward durational departure. This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred (1) when it found that she knowingly and voluntarily waived her right to a trial and to be sentenced according to the Minnesota Sentencing Guidelines; and (2) when it found that the participation of three or more people in the crime was an aggravating factor justifying departure.

"Under Minn. Stat. § 590.01, subd. 1 (2006), an incarcerated individual may petition for postconviction relief if he alleges that his imprisonment violates his rights under state or federal law." *Brown v. State*, 746 N.W.2d 640, 641 (Minn. 2008). "On review of a denial of postconviction relief, we inquire as to whether sufficient evidence supported the postconviction court's findings, and will reverse only for an abuse of discretion." *Id.* at 641-42.

Appellant appears to challenge only the enhancement in her sentence, not the plea agreement itself. She argues that neither of the reasons given in support of the departure,

the plea agreement, or the participation of three or more in the crime, supports the departure.

The record is confusing in regard to the nature of the sentence agreed upon in the plea agreement. In disposing of appellant's postconviction petition, the district court found that in making the plea agreement, appellant agreed to a minimum sentence "greater than the presumptive sentence." The district court's finding that appellant *agreed to* a departure in her sentence is not correct, although clearly understandable. At the time appellant entered the plea agreement and her guilty pleas, the parties contemplated Hernandized sentences for both kidnapping and second-degree murder. In that event, the minimum sentence to which appellant did agree was 360 months. So, the record clearly reflects that appellant agreed to a minimum sentence of 360 months and clearly understood that the prosecutor might ask that she be sentenced up to 480 months. When the district court decided not to sentence appellant for kidnapping, there was no Hernandizing of sentences because appellant was sentenced only for second-degree murder and the presumptive sentence was 346 months, not the minimum 360-month sentence appellant faced under the plea agreement. Thus, when the court sentenced appellant to 360 months, she was sentenced to a term to which she had agreed but as a minimum sentence, not as an upward durational departure.

Appellant argues that the plea agreement did not present a valid waiver of the right to be sentenced under the Minnesota sentencing guidelines. At the time appellant was sentenced, for a plea agreement to support an upward departure, a defendant must have waived the right to be sentenced under the guidelines, and the waiver must have been

knowing, intelligent, voluntary, and made after the defendant was advised of the right to be sentenced under the guidelines. *See State v. Givens*, 544 N.W.2d 774, 777 (Minn. 1996) (stating that right to be sentenced under the guidelines can be waived and stating procedures for waiver).[2] But in this case, the district court did not rely solely on appellant's plea agreement to justify the sentence as an upward departure; the court also based the departure on the aggravating factor of the participation of three or more people in the crime. In *Givens*, once the court found that the aggravating factor relied on by the district court justified departure, it did not analyze whether a plea agreement was made with a proper waiver of the right to be sentenced under the guidelines. *Id.* at 777. Because we hold below that the aggravating factor relied on by the district court justified the departure, we do not address whether a proper waiver was made in this case.

II.

Appellant argues that the participation of three or more people in the crime of second-degree murder, given by the district court as a reason for the upward departure, does not support the departure. The abuse-of-discretion standard applies to the district court's ruling on this issue. *Brown*, 746 N.W.2d at 641-42; *see also State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (stating that the district court has broad discretion in deciding

[2] The law has changed, and it is now clear that defendants do not have a right to be sentenced under the guidelines. *State v. Misquadace*, 644 N.W.2d 65, 70-71 (Minn. 2002) (interpreting 1997 amendment to Minn. Stat. § 244.09 stating that sentencing under the guidelines is not a right and concluding it superseded the rule in *Givens*). But because *Misquadace* was not given retroactive application, *id.* at 72, in 2000, when appellant was sentenced, *Givens* was controlling precedent.

whether to depart); *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999) (stating that a departure decision will not be disturbed absent a clear abuse of discretion).

Appellant does not dispute that three people participated in the crime and does not dispute the validity of this factor for departure. *See* Minn. Sent. Guidelines II.D.2.b.(10) (stating aggravating factor for departure that the offender committed the crime as part of a group of three or more who all actively participated in the crime). Rather, appellant argues that the circumstances surrounding the participation do not present the required substantial and compelling reasons for a departure. Under Minn. Sent. Guidelines II.D, departure is allowed only when there are "identifiable, substantial, and compelling circumstances." Appellant argues that her participation does not present substantial and compelling circumstances because (1) she played a passive role, participating to get money from F.W.; (2) she allegedly did not know that Budreau intended to kill F.W.; and (3) she participated in the killing and took actions to conceal the crime only under Budreau's orders.

The aggravating factor of participation of three or more in a crime has been applied where members of a group had different roles in a crime. This factor was applied to a kidnapping where one person drove a vehicle and another two placed the victim in, and later removed the victim from, the vehicle. *State v. Losh*, 721 N.W.2d 886, 896 (Minn. 2006). This factor was also applied where a group of four drove to a victim's house, the defendant shot at the house from the vehicle, and the group departed in the vehicle. *State v. Hough*, 585 N.W.2d 393, 394 (Minn. 1998). These cases reveal the

participation of three or more in a crime is a proper factor for upward departure even when the participation of different group members is not equally severe.

Participation of three people in the commission of second-degree murder in this case justifies the upward departure. The presence of the three individuals, including appellant, was significant to the crime. Appellant took advantage of the victim's assumed romantic interest in her to lure F.W. out of the bar and into the car, knowing that F.W. would be beaten at the least. When F.W. cried out for appellant's help while being beaten, appellant took money from her, went to the bathroom, and kicked her. Appellant then attempted to conceal the crime by scraping underneath F.W.'s fingernails and discarding F.W.'s jacket. Appellant's participation, as part of a group of three, was significant and presented a substantial and compelling reason for departure. The district court did not abuse its discretion in applying this factor.

Affirmed.