STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1958

State of Minnesota,
Appellant,

vs.

Wayne Dennis Kluver,
Respondent.

Filed September 9, 2013
Affirmed in part, reversed in part, and remanded
Stoneburner, Judge

Meeker County District Court
File No. 47CR111038

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

Anthony Spector, Meeker County Attorney, Rick F. Lanners, Assistant County Attorney, Litchfield, Minnesota (for appellant)

Sharon E. Jacks, Minneapolis, Minnesota (for respondent)

Considered and decided by Stoneburner, Presiding Judge; Peterson, Judge; and Toussaint, Judge.[*]

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

STONEBURNER, Judge

Approximately 54 days after a jury found respondent guilty of three counts of possession of a firearm by an ineligible person, the district court sua sponte granted judgment of acquittal on two counts and granted a downward-dispositional departure from the presumptive mandatory sentence for the remaining count. The state appeals, arguing that the district court (1) erred by untimely acquitting respondent of two counts after the jury returned the verdict and (2) abused its discretion by ordering a downward-dispositional sentencing departure on the remaining count. Because the district court did not have the authority to enter judgment of acquittal months after return of the verdict, we reverse judgment of acquittal on counts two and three and remand for further proceedings. Because the district court did not abuse its discretion in sentencing, we affirm the downward sentencing departure for count one.

FACTS

In November 2011, Meeker County Sheriff's Deputy Jeff Pederson responded to a call that someone was shooting rifles over a rural road. When he arrived at the reported location, he spoke to respondent Wayne Dennis Kluver, the registered owner of the property. Kluver informed Deputy Pederson that he was showing his grandson how to sight-in the grandson's new rifle. Kluver asserted that zoning permitted shooting on the property and that he could shoot there as long as he shot into a berm. Later the same day, after learning that Kluver was ineligible to possess firearms, Deputy Pedersen and another deputy returned to the property. They collected four firearms from the property:

the grandson's Rossi single-shot .22, an old Winchester bolt-action .22, and two antique firearms that were hanging on the walls (a Stevens single-shot rifle and an 1894 Winchester rifle). The deputies arrested Kluver.

Kluver was subsequently charged with four counts of possession of a firearm by an ineligible person, in violation of Minn. Stat. § 624.713, subd. 1(2) (2010). A jury found Kluver not guilty of possession of his grandson's Rossi .22 rifle but guilty of the three remaining counts.

More than a month after the verdict was returned, Kluver moved for judgment of acquittal and alternatively for a dispositional and durational sentencing departure. The district court denied Kluver's motion for judgment of acquittal as untimely, but the district court then sua sponte entered judgment of acquittal on counts two and three, involving the antique guns that had been hanging on the walls. The district court granted Kluver's motion for a dispositional sentencing departure on count one, staying the statutory mandatory minimum sentence of 60 months and placing Kluver on supervised probation for 15 years with conditions, including jail time, a fine, no possession of firearms, and no possession or use of drugs. This appeal by the state followed.

D E C I S I O N

I. The district court lacked authority to grant post-verdict judgments of acquittal.

The state argues that the district court's "motion" for acquittal was untimely and that the district court applied the wrong standard in granting its own motion. We construe the state's argument as a challenge to the district court's authority to grant judgment of acquittal after return of a verdict and after the time for a defense motion for acquittal had expired. We conclude that the district court did not have such authority, and because that issue is dispositive, we do not reach the state's argument on the standard applied by the district court.

"The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). Minn. R. Crim. P. 26.03, subd. 18(1), provides, in relevant part, that before a jury begins deliberations, a court, on its own, may order a judgment of acquittal on one or more of the charges if the evidence is insufficient to sustain a conviction. The rule does not provide for the district court to sua sponte grant acquittal after the jury returns a verdict of guilty. *See* Minn. R. Crim. P. 26.03, subd. 18(3) (providing for post-verdict judgment of acquittal only on a timely motion by the defendant). And Minn. R. Crim. P. 34.02 specifically prohibits a district court from extending the 15-day time limit for a defendant's post-verdict motion for judgment of acquittal.

It is undisputed that Kluver's motion for acquittal was untimely filed. There is no authority for the district court to sua sponte grant acquittal after return of a guilty verdict

and after the time for a defense motion for acquittal has expired. We conclude therefore that the district court lacked authority to grant judgments of acquittal on counts two and three at the sentencing hearing, which occurred more than 50 days after return of the verdict. The judgments of acquittal are reversed and this case is remanded to the district court for further proceedings as necessary on those counts.

II. The district court did not abuse its discretion by granting a downward sentencing departure.

The state argues that the district court abused its discretion by granting a downward-dispositional departure from the statutory mandatory-minimum sentence on count one. Specifically, the state argues that a circumstance cited by the district court as a substantial and compelling mitigating factor is, in fact, an aggravating factor that cannot support a downward departure. We disagree.

Minn. Stat. § 609.11, subd. 5(b) (2010), requires that "[a]ny defendant convicted of violating section . . . 624.713, [subd. 1(2)], be committed to the commissioner of corrections for not less than five years." But Minn. Stat. § 609.11, subd. 8(a) (2010), provides that a district court, on its own motion, may sentence without regard to this mandatory minimum sentence "if the court finds substantial and compelling reasons to do so. A sentence imposed under this subdivision is a departure from the Sentencing Guidelines."

"We review a sentencing court's departure from the sentencing guidelines for abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). The question of whether a stated reason for departure is "proper" is a question of law, reviewed de

novo. *Dillion v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). "[S]ubstantial and compelling circumstances are those demonstrating that 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. Jones*, 745 N.W.2d 845, 848 (Minn. 2008) (quotation omitted). A district court may use offense-related factors in considering a dispositional departure, *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998), and may focus on the defendant and whether the presumptive sentence is best for him and society, *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

At the sentencing hearing, the district court stated that it was not imposing the mandatory minimum sentence because this was a "light" case:

> Certain things occurred during the case that, although not giving rise to a new trial or a mistrial, caused the [district c]ourt to think that if the defendant was convicted, [the district court] should cut him some slack with regard to the mandatory minimum. It appears that the defendant was assisting, or working with grandchildren target shooting and that the reasons for the mandatory minimum sentence for possession of a firearm or use of a firearm during the commission of a crime are not present in this case. . . . [The district court] also believe[s] that justice will be served in this case by using this particular sentence as opposed to sending the defendant to prison.

On the departure report, the district court stated its reasons for departure: "Facts of case less onerous than usual[.] Def. helping grandchildren sight in their own guns. Def. did not own firearms[.]"

We find no merit in the state's argument that because commission of an offense in the presence of a child may be an aggravating factor under Minn. Sent. Guidelines 2.D.3.b(13) (2012), the district court was precluded from finding that the presence of children was a mitigation factor in this case. The guidelines permit the district court to consider as mitigating factors any "substantial grounds exist[ing] that tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines 2.D.3.a(5) (2012). And the record supports the district court's conclusion that Kluver's interaction with his grandchildren does not implicate any of the reasons for imposing the mandatory minimum sentence and does constitute a substantial ground mitigating Kluver's culpability.

Additionally, factors relevant to dispositional departures under supreme court precedent include amenability to probation. *State v. Donnay*, 600 N.W.2d 471, 473-74 (Minn. App. 1999) (citing *State v. Love*, 350 N.W.2d 359, 361 (Minn. 1984)). The district court found that placing Kluver under supervision for fifteen years will better serve Kluver and society than imprisonment for five years.

Because the district court's stated reasons for its downward-dispositional sentencing departure are proper, we conclude that the district court did not abuse its discretion by departing from the mandatory minimum sentence.

Affirmed in part, reversed in part, and remanded.