STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0999

State of Minnesota,
Respondent,

vs.

Decarieon Dupra Scurlock,
Appellant.

Filed April 28, 2014
Affirmed
Hudson, Judge

Sherburne County District Court
File No. 71-CR-11-1383

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Suzanne Bollman, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrea Barts, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Peterson, Judge; and Hudson, Judge.

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

HUDSON, Judge

Appellant challenges the district court's imposition of the presumptive consecutive sentence on his conviction of fourth-degree assault of a correctional officer, arguing that

the district court abused its discretion by declining to order a sentencing departure in the form of concurrent sentencing. We affirm.

FACTS

After an altercation with a correctional officer at Minnesota Correctional Facility-St. Cloud (MCF-St. Cloud), appellant Decarieon Scurlock pleaded guilty to one count of fourth-degree assault of a correctional officer—demonstrable bodily harm, in violation of Minn. Stat. § 609.2231, subd. 3(1) (2010). Although the Minnesota Sentencing Guidelines provide that the presumptive sentence for appellant's offense is one year and one day, consecutive to the sentence appellant is currently serving, the parties agreed that, after submission of the presentence investigation (PSI), the defense could argue for a departure in the form of concurrent sentencing. *See* Minn. Sent. Guidelines II.F.1 (2010).

As the factual basis for his plea, appellant told the district court that, when he was in line to receive his medicine for schizophrenia and bipolar disease, an officer told him to pull up his pants, surrender his badge and return to his room. According to appellant, he declined to go to his room, the officer became disrespectful, appellant "flinched" and then stepped back, and the officer maced him. Appellant stated that he was on the ground, tussling, and that he remembered kicking someone, but he did not know who it was. Appellant told the district court that the scuffle occurred because he needed his medication. He understood that he caused a second officer to suffer a cut lip, a chipped tooth, and a black eye.

At sentencing, the prosecutor referred to the complaint, which contained another version of the incident. According to the complaint, appellant threw his prison

identification card at the first officer and punched him in the ribs, the second officer then ordered appellant to the ground, and appellant swung at the first officer but missed, hitting the second officer. The prosecutor noted appellant's criminal history, which included felony convictions of first-degree criminal sexual conduct and second-degree burglary. The defense argued that the officer was injured in a "generalized scuffle" in which appellant participated but that appellant had been provoked and took responsibility for his actions.

The district court declined to order a downward departure in the form of concurrent sentencing and sentenced appellant to the presumptive consecutive sentence. The district court judge stated that it was aware of its discretion to issue a downward departure and its duty to consider the seriousness or non-seriousness of the assault, as well as whether appellant had shown a change in his behavior, but that it had reviewed the PSI and did not find compelling circumstances to warrant a departure. This appeal follows.

D E C I S I O N

A district court "shall pronounce a sentence within the applicable range" for a crime unless "identifiable, substantial, and compelling circumstances" exist to support a departure from the presumptive sentence. Minn. Sent. Guidelines II.D (2010). In considering a departure, a district court should consider whether the defendant's conduct is significantly more or less serious than that typically involved in the crime in question. *State v. Cox*, 343 N.W.2d 641, 643 (Minn. 1984). A district court must deliberately consider grounds for and against departure that are suggested by the record. *State v.*

Mendoza, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002); *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). An appellate court will not disturb a district court's decision to impose a presumptive sentence except in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

If an offender is incarcerated on a prior felony offense and commits a new felony offense, it is presumptive to impose the new sentence consecutive to the sentence for the prior offense. Minn. Sent. Guidelines II.F.1. Because appellant committed this offense while he was incarcerated, the presumptive sentencing disposition for his current offense is commitment to prison, sentenced consecutively. *See id*. But the guidelines suggest that the district court "consider carefully whether the purposes of the sentencing guidelines (in terms of punishment proportional to the severity of the offense and the criminal history) would be served best by concurrent rather than consecutive sentences." Minn. Sent. Guidelines cmt. II.F.01.

The sentencing guidelines provide a list of mitigating factors that may be used as reasons to depart downward. Minn. Sent. Guidelines II.D.2.a (2010). Those factors include that "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." *Id*., (3). They also include "[o]ther substantial grounds . . . which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." *Id*., (5).[1]

[1] Appellant also cites language in the sentencing guidelines providing that "a special nonexclusive, mitigating departure factor may be used by the judge to depart . . . and impose a concurrent sentence." But this factor applies specifically when "there is evidence that the defendant has provided substantial and material assistance in the

Appellant argues that the district court abused its discretion by denying his request for a downward departure in the form of concurrent sentencing. First, he maintains that his conduct was less serious than that associated with a typical assault on a corrections officer because he did not commit an unprovoked assault, but only kicked the officer in the midst of a melee and was unsure whom he had kicked. But the state indicated at sentencing that the assault occurred after appellant swung at one officer and missed, hitting a second officer in the eye, and that when the second officer took him to the ground, appellant struck him in the mouth with a closed fist. The district court was not required to believe appellant's assertion that he acted reflexively in considering whether his conduct was significantly less serious than that typically involved in the commission of the offense, and it did not abuse its discretion by failing to depart downward based on that factor. *See* Minn. Sent. Guidelines II.D.2.

Appellant also argues that the district court should have considered his mental health as a mitigating factor in imposing a sentence. *See* Minn. Sent. Guidelines II.D.2.a (3). Minnesota appellate courts have upheld a district court's consideration of a defendant's mental illness as a sentencing factor. *See State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) (holding that, in view of a defendant's mental illness, the district court abused its discretion by imposing an upward durational sentencing departure). But the Minnesota Supreme Court has stated that "in order to constitute a mitigating factor in sentencing, a defendant's impairment must be 'extreme' to the point that it deprives the

---

detection or prosecution of crime." Minn. Sent. Guidelines II.F.1. This record contains no evidence of such circumstances.

defendant of control over his actions." *State v. McLaughlin*, 725 N.W.2d 703, 716 (Minn. 2007) (quotation omitted). "The degree to which [a defendant] lacked substantial capacity for judgment is the type of factual issue best decided by the [district] court." *State v. Barsness*, 473 N.W.2d 325, 329 (Minn. App. 1991), *review denied* (Minn. Aug. 29, 1991). Appellant points out that the assault occurred while he was waiting in line to receive antipsychotic medication. But the record contains no indication that his mental illness resulted in extreme impairment, which deprived him of control over his actions during the offense. *See McLaughlin*, 725 N.W.2d at 716. The district court did not abuse its discretion by failing to depart downward based on mental illness as a departure factor.

Appellant also argues that the district court was permitted to depart based on the mitigating factor that his presumptive sentence was commitment to prison, the offense was a severity-level I offense, and he received all of his prior felony sentences during less than three separate court appearances. *See* Minn. Sent. Guidelines II.D.2.a(4)(a). But the guidelines do not require departure in those circumstances, and the district court did not abuse its discretion by declining to do so. And although appellant maintains that the district court should not have considered the contents of the PSI because he was in segregation and unable to participate in its preparation, he was not prejudiced because he was permitted to explain any mitigating circumstances at sentencing.

Finally, appellant argues that he displayed remorse, took responsibility for his actions, and spared the victim additional stress by not demanding a trial. "[A] reviewing court must defer to the district court's assessment of the sincerity and depth of [a

defendant's] remorse and what weight it should receive in the sentencing decision." *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). We defer to the district court's opportunity to assess appellant's demeanor and statements at sentencing and will not disturb its decision to impose the presumptive consecutive sentence.

Affirmed.