STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0784

State of Minnesota,
Respondent,

vs.

Damion Aharon Vasquez,
Appellant.

Filed February 5, 2018
Affirmed in part, reversed in part, and remanded
Jesson, Judge

Hennepin County District Court
File Nos. 27-CR-16-15206, 27-CR-16-28128

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Florey, Presiding Judge; Connolly, Judge; and Jesson, Judge.

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

JESSON, Judge

The victim in this case, D.L., had an order for protection and a domestic abuse no contact order against appellant Damion Aharon Vasquez, yet he came to her home on

multiple occasions and contacted her via text. Vasquez pleaded guilty to violations of the order for protection and was convicted and sentenced for violations of both the order for protection and the domestic abuse no contact order. Vasquez challenges his domestic abuse no contact order conviction, his calculated criminal-history score, and his sentence. We affirm in part, reverse in part, and remand.

FACTS

Appellant Damion Aharon Vasquez and D.L., the victim, had a romantic relationship that began in 2010. D.L. petitioned for both an order for protection (OFP) and a domestic abuse no contact order (DANCO) against Vasquez. Both were granted in February of 2016.

On April 2, 2016, Vasquez was found in his vehicle outside D.L.'s duplex. D.L. had recently moved to the home, but had not informed Vasquez. Police were called after D.L.'s neighbors reported to D.L. that Vasquez had knocked on the duplex door and asked if D.L. lived there. Vasquez also admitted to texting D.L.

Two months later, on June 4, 2016, law enforcement responded to a possible burglary at D.L.'s home. A neighbor reported seeing a man climb through a window. When officers arrived on the scene, D.L. informed them no one else should be in the home and consented to a search of the home. During that search, officers found Vasquez in D.L.'s bedroom closet.

Vasquez was charged for both incidents. For the April 2016 incident, he was charged with violating an OFP, in violation of Minnesota Statutes section 518B.01, subdivision 14(d)(1) (2014). For the June 2016 incident, Vasquez was charged with

violating an OFP, in violation of the same statute, and with violating a DANCO, in violation of Minnesota Statutes section 629.75 (2014). Both charges were enhanced to felonies based on Vasquez's previous domestic violence-related convictions.

In October 2016, Vasquez pleaded guilty to two out of these three charges. He pleaded guilty to the sole count for the April incident, violation of the OFP. But while entering his guilty plea to the DANCO violation from June, Vasquez became upset during the factual basis portion and his attorney asked that Vasquez be allowed to plead to the second OFP violation from that same date instead. The state had no objection and the court allowed this change in plea. Vasquez then pleaded guilty to the OFP violation from the June incident. In exchange for these pleas, the state agreed to dismiss the second count from the June incident (the DANCO violation) as well as two other county files, and one charged out on the same facts by the Minneapolis city attorney. The agreement capped Vasquez's sentence at 27 months, established that this was the duration the state would request, and further affirmed that Vasquez would request a sentencing departure. The parties agreed to a sentencing date several months out from the plea hearing in order to allow Vasquez to demonstrate that he was amenable to probation.

Vasquez was conditionally released pending sentencing, but he violated that release by failing to comply with required drug testing, failing to appear for his pre-sentence investigation (PSI) interview, and testing positive for amphetamine. A hearing was held, and Vasquez's conditional release was revoked until sentencing.

Prior to sentencing, Hennepin County probation calculated Vasquez's criminal-history score. For the June offenses, both of the criminal-history points calculated for the

OFP and DANCO violations included (1) a custody-status point (2) and a felony half-point for a fifth-degree controlled-substance conviction in 2000, which was then classified as a felony. Vasquez's total criminal-history score for both offenses was four, and the presumptive sentence was 24 months. Including a criminal-history point from the first charged offense, Vasquez's criminal-history on the second charged offense, the violation of an OFP in the April incident, was five and the presumptive sentence was 27 months.

At sentencing, the state asked for the presumptive 27-month sentence on the violation of the OFP in April. Vasquez moved for a dispositional departure, or in the alternative, a downward durational departure. Vasquez argued that he was, or at least could be, amenable to probation, but that he had an addiction that needed to be addressed through treatment in order to be fully successful. He also argued that his offenses were less serious than typical because he was at the victim's home at her invitation. Neither Vasquez nor the state challenged the criminal-history score calculation at the sentencing hearing.

While acknowledging the seriousness of Vasquez's addiction, the court determined Vasquez was not particularly amenable to probation, nor was his offense less serious than typical. The court denied Vasquez's departure motions. The court then sentenced Vasquez for the OFP violation in April, which Vasquez pleaded guilty to, but then also for the DANCO violation in June, which Vasquez had begun to plead guilty to but then stopped and alternatively pleaded guilty to the OFP violation from that date. The court sentenced Vasquez to the presumptive sentences, based on the PSIs, for Vasquez's convictions—to 24 months and a consecutive 27 months.

Vasquez appeals.

D E C I S I O N

Vasquez argues that his conviction for the DANCO was in error, that his criminal-history score erroneously included a custody-status point, that his criminal-history score erroneously included a felony half-point, and that the court abused its discretion by denying his downward departure motions. We affirm in part, reverse in part, and remand.

I. The district court erroneously convicted Vasquez of an offense for which he did not plead guilty.

Both parties agree that Vasquez was improperly convicted of a violation of a DANCO in the June offense. The record supports the parties' assertion.

While Vasquez did originally indicate he would plead to the violation of the DANCO, when testifying as to the factual basis of that charge, he became upset, stating no DANCO was in effect. His counsel then asked if he could plead instead to the violation of the OFP on the same file. The state agreed, and Vasquez provided a factual basis to that charge. Despite this plea, the district court at sentencing entered a conviction for violation of the DANCO and sentenced Vasquez to 27 months based on that conviction.[1] This conviction was entered in error by the district court.

A "court may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. Instead of requiring an additional post-conviction motion to correct this conviction, we hold that Vasquez is convicted of violation of an order for protection on or

[1] The guideline calculation for the OFP violation and the DANCO violation are the same, therefore a change in the conviction would not change the presumptive sentencing range. *See* Minn. Sent. Guidelines 5.B (2014) (both OFP and DANCO violations are severity level four).

around June 4, 2016, on file 27-CR-16-15206, and not a violation of a domestic abuse no contact order.[2]

II. Vasquez's criminal-history score incorrectly included a custody-status point.

Both parties agree that a custody-status point was improperly computed as a part of Vasquez's criminal-history, and the record supports that conclusion. Whether Vasquez should have a custody-status point under the Minnesota Sentencing Guidelines is a question of statutory interpretation, subject to de novo review. *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012) ("We apply the rules of statutory construction to our interpretation of the sentencing guidelines.").

The Minnesota Sentencing Guidelines indicate that an offender should be given a custody-status point when under one of the following custody statuses:

> (i) probation;
> (ii) parole;
> (iii) supervised release;
> (iv) conditional release following release from an executed prison sentence (see conditional release terms listed in section 2.E.3);
> (v) release pending sentencing;
> (vi) confinement in a jail, workhouse, or prison pending or after sentencing; or
> (vii) escape from confinement following an executed sentence.

Minn. Sent. Guidelines 2.B.a.1 (2014). At the same time, the sentencing guidelines specifically state that a custody-status point should *not* be assigned "if probation is revoked

[2] We make this holding based on our inherent authority as a court. "The judicial power of this court has its origin in the Constitution; but when the court came into existence, it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not." *In re Greathouse*, 189 Minn. 51, 55, 248 N.W. 735, 737 (1933).

and the offender serves an executed sentence." Minn. Sent. Guidelines 2.B.2.a.4 (2014). If the language of the guidelines is unambiguous, this court applies the plain meaning. *See Campbell*, 814 N.W.2d at 4.

The PSI received by the district court stated that Vasquez received one custody-status point for the April 2014 conviction. Neither Vasquez nor the state objected and the court sentenced Vasquez with the custody-status point.

But while the April 2014 conviction did originally carry with it a probationary period of three years, in August 2014 the sentence was executed and he was sentenced to serve one year and one day, minus 45 days of jail credit he already had. Therefore, Vasquez was not under any of the required custody statuses in either April or June 2016 when the offenses in this case occurred. Instead, including this custody-status point directly contradicts the Sentencing Guidelines prohibition against assigning a custody-status point when probation is revoked and a sentenced is executed. Minn. Sent. Guidelines 2.B.2.a.4. Because Vasquez's sentence was executed, he should not have received a custody-status point.

Without this custody-status point, Vasquez's criminal-history scores for the offenses at issue in this case should have been three and four, instead of four and five. This change in criminal-history score would change the presumptive sentences to a stayed 21 months on one offense, and a commit to prison for a duration of between 21 to 28 months on the other.[3] Minn. Sent. Guidelines 4.A. (2014).

[3] The state argues that Vasquez can be resentenced to the full 27 months in prison, since that sentence is still within the 21- to 28-month sentencing range. This is inconsistent with

A case should be remanded for resentencing based on an incorrect criminal-history score. *See State v. Maurstad*, 733 N.W.2d 141, 151 (Minn. 2007) (remanding a case for resentencing based on an erroneously assigned custody-status point). We reverse the district court's calculation of Vasquez's criminal-history score including the custody-status point, and remand for sentencing without that point.

III. Vasquez's criminal-history score correctly included a felony half point for a 2000 fifth-degree drug possession offense.

Vasquez argues that his criminal-history score erroneously included a felony half point for a fifth-degree possession offense committed in 2000. He asserts that conviction could currently be classified as a gross misdemeanor following classification changes made through the Drug Sentencing Reform Act (DSRA). This, too, is a question of statutory interpretation, subject to de novo review. *Campbell*, 814 N.W.2d at 4.

For the purpose of calculating a criminal-history score, "The severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense." Minn. Sent. Guidelines 2.B.1 (2014). The district court sentenced Vasquez with the felony half point for a 2000 fifth-degree possession offense because it classified the offense as a felony. Prior to the DSRA, all fifth-degree possession offenses were felonies. *See* Minn. Stat. § 152.025, subd. 2 (2014). Post-DSRA, a fifth-degree drug possession conviction could be either a felony or a gross misdemeanor, depending on the

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the idea that Vasquez was erroneously sentenced to that 27 months based on a higher criminal-history score, but because the "trial court is in a best position to weigh the various sentencing options," this is a decision for the district court. *See Massey v. State*, 352 N.W.2d 487, 487 (Minn. App. 1984).

circumstances. *See* Minn. Stat. § 152.025, subd. 4 (2016). But the DSRA change did not go into effect until August 1, 2016. 2016 Minn. Law ch. 160. And the current offenses took place in April and June 2016, prior to that effective date.[4] Therefore, at the time of the current offenses, the 2000 possession offense was still classified as a felony, rated at a severity-level two under the guidelines and carried with it one half-point. Minn. Sent. Guidelines 5.B & 2.B.1.a. Including a felony half-point for this 2000 offense was proper.

IV. The district court did not abuse its discretion by denying Vasquez's motions for downward durational or dispositional departures.

Vasquez finally argues that the district court abused its discretion by denying his downward departure motions. The district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). If the case involves substantial and compelling circumstances, it is within the district court's discretion whether to depart. *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989). "[I]t must exercise that discretion by deliberately considering circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). Only in a rare case will an appellate court reverse a sentencing court's refusal to depart. *Kindem*, 313 N.W.2d at 7. And even if a mitigating factor exists, a court is still under no obligation to depart. *State v. Pegel*, 795 N.W.2d 251,

[4] Other provisions of the DSRA went into effect in May 2016, but those provisions had to do with sentencing guideline ranges and not the classification of offenses.

253-54 (Minn. App. 2011). We address the court's denial of Vasquez's motions for durational and dispositional departures, each in turn.

In order for a court to grant a downward durational departure, the court must focus on offense-related factors and only grant such a departure when an offense is significantly less serious than what would be considered typical. *State v. Solberg*, 882 N.W.2d 618, 623-24 (Minn. 2016). The district court here reviewed the PSI and heard from Vasquez's counsel, as well as Vasquez himself. In regard to the seriousness of Vasquez's offense, the court stated "this isn't any less serious. It's exactly what it is. It's a violation of a no contact order twice . . . there aren't any grounds for departure." The court considered the testimony and information presented and it was within the court's proper discretion to deny the departure motion.

Vasquez argues that both his offenses were less serious by bringing up facts with scant support in the record. While Vasquez claims that his April offense was less serious than typical because he was merely outside the victim's residence and he did not personally contact her, he neglects to note that, according to the complaint, he knocked on D.L.'s door, talked to her neighbors, and texted D.L. that day. Vasquez argues his June offense was less serious because he was in the victim's home with her consent, but the complaint describes officers arriving at D.L.'s home and D.L. informing them that no one else should be at her home. And even in the factual basis Vasquez asserted to establish his guilty plea,

he provided no facts regarding D.L.'s consent.[5] The facts of both incidents support the district court's conclusion that Vasquez's behavior was not less serious than typical.

Vasquez contrasts his behavior in April and June of 2016 with that of more serious behavior in other cases where durational departures were denied.[6] But the fact that courts have not granted durational departures in those cases does not establish that the behavior in those cases is "typical," and that any less serious behavior warrants a downward departure.[7] While Vasquez may not have engaged in threatening or abusive behavior, such behavior is not an element of an OFP violation. *See* Minn. Stat. § 518B.01, subd. 14 (2014). The district court acted within its discretion to determine Vasquez's offenses were not less serious than typical.

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[5] Only in Vasquez's version of events recorded in the PSI does he state that he entered the home to assist D.L., who was locked out.

[6] *See, e.g.*, *State v. Jones*, 848 N.W.2d 528 (Minn. 2014) (defendant violated OFP by sending frightening text messages); *State v. Beaty*, 696 N.W.2d 406 (Minn. App. 2005) (defendant violated OFP by sending a letter to the victim threatening her life); *State v. Colvin*, 645 N.W.2d 449 (Minn. 2002) (defendant violated OFP by entering the victim's home without her knowledge or consent); *State v. Rocha*, No. A11-27 (Minn. App. Apr. 30, 2012) (defendant violated OFP by approaching victim in a vehicle, exiting vehicle, and grabbing the victim), *review denied* (Minn. July 17, 2012); *State v. Anduaga*, Nos. A03-641, 644, 646 (Minn. App. Apr. 27, 2004) (defendant violated OFP by chasing the victim with his vehicle), *review denied* (Minn. Jun. 29, 2004).

[7] Because it is difficult to determine what a typical case is, "Departure decisions are therefore often based upon intuition, anecdotal experience of lawyers and judges, or at best a small sampling of reported cases." 9 Henry W. McCare & Jack S. Norby, Minn. Prac. § 36:41 (4th ed. 2012). Vasquez cites the cases listed above, which have different facts, in an attempt to provide that sampling of cases. But, as the state aptly points out, these cases, with the exception of *Beaty*, do not clearly indicate whether a sentence within or outside of the presumptive sentencing range was imposed. And in *Beaty*, the district court imposed an upward departure, which was overturned on appeal because the relevant findings were made by a trial court, denying defendant's right to a jury trial. 696 N.W.2d at 412. This sampling does not provide any basis to support a downward durational departure in this case.

Vasquez further argues, through a pro se brief, that he should have been granted a dispositional departure and asks this court for another chance on probation in order to enter treatment to address his chemical use. A court may grant a dispositional departure based on offender-related factors. *State v. Behl*, 573 N.W.2d 711, 712 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998). Those factors can include age, prior record, remorse, cooperation, attitude in court, and family support. *State v. Case*, 350 N.W.2d 473, 475 (Minn. App. 1984). Another factor can be an offender's particular amenability to probation, and that amenability can be demonstrated in individualized treatment. *Id*.

The district court explicitly considered several of these offender-related factors. The court noted Vasquez's problematic criminal-history and that he has violated his probation on virtually every prior offense. The court considered his attitude toward the court, noting that it seemed Vasquez had been living with the victim in violation of the no-contact order for an extended period of time. The court found that Vasquez was not particularly amenable to probation, a finding supported by the record as Vasquez failed to appear for required drug testing and multiple appointments to be interviewed for his PSI, and his conditional release prior to sentencing was revoked. The court explicitly considered the factors relevant to a possible dispositional departure.

In sum, the district court examined the proper factors in considering whether to grant a durational or dispositional departure in this case. The court's decision not to depart was fully within its discretion.

Affirmed in part, reversed in part, and remanded.