

NOT DESIGNATED FOR PUBLICATION

No. 103,145

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellant,

v.

JENNIFER D. LISKEY,
Appellee.

MEMORANDUM OPINION

Appeal from Shawnee District Court; JAN W. LEUENBERGER, judge. Opinion filed November 19, 2010. Affirmed.

Chadwick J. Taylor, district attorney, *Jason E. Geier*, assistant district attorney, and *Steve Six*, attorney general, for appellant.

Randall L. Hodgkinson and *Patrick Dunn*, of Kansas Appellate Defender Office, for appellee.

Before MALONE, P.J., CAPLINGER and LEBEN, JJ.

Per Curiam: The State appeals the district court's imposition of a dispositional and durational departure sentence for Jennifer D. Liskey, who pled no contest to two counts of aggravated indecent liberties with a child and one count of criminal sodomy. The district court cited 11 reasons for granting the departure sentence. The State claims that all 11 reasons relied upon by the district court were insufficient grounds for granting a departure sentence. The State further claims the district court abused its discretion in the extent of the downward departure. Based on our standard of review, we conclude that two of the reasons cited by the district court for the departure sentence were supported by

substantial competent evidence and constituted substantial and compelling reasons for a departure. Accordingly the judgment of the district court is affirmed.

In May 2005, M.B. was 13 years old and had just completed seventh grade. Liskey, who was 35 years old, was employed as the paraprofessional for the gifted program in which M.B. was a student. Liskey and M.B. first kissed in May 2005, and Liskey began performing oral sex on M.B. around July 30, 2006, when M.B. was 14 years old. On approximately July 30, 2007, when M.B. was 15 years old, he and Liskey began to have sexual intercourse. The sexual acts continued until November 2008, when M.B. disclosed the relationship to his mother because he was concerned that Liskey was suicidal. On November 10, 2008, Detective Heather Stults-Lindsay of the Topeka Police Department interviewed M.B. and Liskey separately.

On November 14, 2008, the State filed a complaint charging Liskey with one count of aggravated indecent liberties with a child. On December 29, 2008, the State amended the complaint, charging Liskey with three counts of aggravated indecent liberties with a child and one count of aggravated criminal sodomy. Ultimately, Liskey pled no contest to two counts of aggravated indecent liberties with a child and one count of criminal sodomy. The district court committed Liskey to Larned State Security Hospital for a presentence mental examination and evaluation pursuant to K.S.A. 22-3429.

On March 23, 2009, Liskey filed a motion for dispositional departure based on six factors: (1) M.B. was the aggressor and participated in the conduct; (2) the degree of harm or loss caused by the crime is significantly less than typical; (3) Liskey has no criminal history; (4) Liskey has family support; (5) Liskey's waiver of her preliminary hearing and trial rights resulted in judicial economy and also preserved the privacy of M.B. and his family; and (6) Liskey is ready to follow court orders and is amenable to probation. On August 26, 2009, Liskey filed an amended motion for departure, adding a

request for durational departure based on the same factors. The next day, the district court filed a *sua sponte* motion for dispositional and/or durational departure.

The sentencing hearing commenced on September 4, 2009. M.B.'s father spoke at the hearing and requested that the court sentence Liskey to prison. M.B.'s mother and aunt both requested the maximum possible sentence and lifetime postrelease supervision. The State read into the record a letter written by M.B. in which he asked that Liskey receive at least 3 years in prison. Liskey's sister addressed the court and asked for mercy for Liskey. Liskey also spoke and admitted that the relationship was her fault and that she was sorry for her actions.

The State recommended 61 months' imprisonment and a postrelease term of 36 months for Count I. For Counts II and III, the State recommended 61 months' imprisonment for each count and lifetime postrelease supervision. The State recommended that the sentences run concurrently and asked the district court to deny Liskey's motion for dispositional and durational departure.

On September 9, 2009, the district court granted Liskey's departure motion and sentenced her to 30 months' imprisonment on Count I, with a postrelease period of 36 months. On Counts II and III, the district court sentenced Liskey to 30 months' imprisonment, with lifetime postrelease supervision for each count. The district court ordered the sentences to run concurrently. The district court suspended the sentence and placed Liskey on 36 months' intensive supervised probation. The district court cited 11 reasons for granting the departure sentence and found that the reasons for departure were substantial and compelling "as set forth in the record both individually and when taken together." In conjunction with the hearing, the district court filed a 48-page memorandum decision and order setting forth the reasons for granting the departure sentence. The State timely appealed.

Appellate review of a departure sentence employs a mixed standard of review and is limited to whether the district court's findings of fact and reasons justifying a departure (1) are supported by substantial competent evidence in the record and (2) constitute substantial and compelling reasons for a departure. K.S.A. 21-4721(d); *State v. Blackmon*, 285 Kan. 719, 724, 176 P.3d 160 (2008). A sentencing court is not required to provide separate and distinct reasons for downward durational and dispositional departures when both are imposed in a single case. See *State v. Minor*, 268 Kan. 292, 306, 997 P.2d 648 (2000), citing *State v. Favela*, 259 Kan. 215, 221, 911 P.2d 792 (1996). Finally, each factor cited by the district court does not need to provide a substantial and compelling basis to depart so long as one or more constitutes such a basis for departure. *Blackmon*, 285 Kan. at 725.

K.S.A. 21-4716(c)(1) provides a nonexclusive list of mitigating factors that may be considered to determine whether there are substantial and compelling reasons for a departure. The Kansas Supreme Court has held that statutory factors for departure should not be reviewed with greater deference than nonstatutory factors, and factors not enumerated in the statute are not subject to stricter scrutiny than those that are listed. *State v. Martin*, 285 Kan. 735, 747, 175 P.3d 832 (2008). The only additional consideration when reviewing nonstatutory factors is that the factors should be consistent with the principles underlying the Kansas Sentencing Guidelines Act (KSGA). *Blackmon*, 285 Kan. at 725.

Here, the district court outlined the following factors as justifying departure: (1) Liskey accepted responsibility by waiving preliminary hearing and entering a plea; (2) Liskey will be punished for the rest of her life through the stigma attached to being a sex offender; (3) Liskey had no previous criminal history; (4) on several occasions, Liskey tried unsuccessfully to end the relationship and her inability to do so or to cope with her or M.B.'s sexual urges was due to a personality disorder and emotional immaturity; (5) due to her mental impairment, Liskey lacked substantial capacity for judgment; (6) there

is a lack of evidence of the form and extent of harm to M.B. from the offense; (7) M.B. was a participant in the conduct; (8) M.B., in his police interview, stated he did not want Liskey to go to prison, did not want her on lifetime supervision, and believed she would benefit from counseling; (9) Liskey has family support; (10) Liskey is not a present danger to society; and (11) the relationship between Liskey and M.B. was neither established nor promoted for the purpose of victimizing M.B.

The State argues that all 11 factors relied upon by the district court in order to justify the departure sentence are either unsupported by evidence, not substantial and compelling, or both. Liskey asserts that every factor was supported by evidence in the record and was a substantial and compelling reason for departure. In this opinion, we will address only two of the factors relied upon by the district court for the departure sentence. As stated, if any of the factors articulated by the district court would justify the departure, the decision will be upheld on appeal. *Blackmon*, 285 Kan. at 725.

DUE TO LISKEY'S MENTAL IMPAIRMENT,
SHE LACKED SUBSTANTIAL CAPACITY FOR JUDGMENT

In granting the departure sentence, the district court relied on the fact that Liskey's mental impairment prevented her from having substantial capacity for judgment. This reason parallels the statutory factor that "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." K.S.A. 21-4716(c)(1)(C).

The State concedes there was substantial competent evidence to support the finding; at least two doctors indicated Liskey suffered from mental impairments that affected her capacity for judgment. William L. Albott, Ph.D, diagnosed Liskey with an adjustment disorder and a personality disorder. Mitchell R. Flesher, Ph.D, diagnosed Liskey with dependent personality disorder and chronic depression. Therefore, the State only contends that this factor is not a substantial and compelling reason for a downward

departure. Whether the facts relied upon by the sentencing court constitute substantial and compelling reasons for a departure is a question of law over which an appellate court has unlimited review. *State v. McKay*, 271 Kan. 725, 728, 26 P.3d 58 (2001).

The State argues that this factor is not applicable to "someone like Liskey, with above average intelligence, a college degree and a good career," but rather only to defendants whose lack of capacity for judgment stems from immaturity due to age. However, as Liskey points out, a plain reading of the statute makes no reference to this mitigating factor being limited to defendants in a specific age group. We have found only two published Kansas cases that specifically refer to this statutory factor, and neither case limits its application to defendants whose immaturity correlates to their physical age. *State v. Haney*, 34 Kan. App. 2d 232, 239-41, 116 P.3d 747, *rev. denied* 280 Kan. 987 (2005); *State v. Ussery*, 34 Kan. App. 2d 250, 257-58, 116 P.3d 735, *rev. denied* 280 Kan. 991 (2005).

To be substantial, the reason justifying a departure must be real, not imagined, and of substance, not ephemeral. To be compelling, the reason must be one which forces the court, by the facts of the case, to abandon the status quo and to venture beyond the sentence that it would ordinarily impose. *Blackmon*, 285 Kan. at 724. Here, if the evidence establishes that Liskey suffered from mental impairments that affected her capacity for judgment, as the State concedes, this fact could certainly compel a sentencing court to abandon the status quo and venture beyond the sentence that it would ordinarily impose. Based on the record presented for our review, we conclude this factor rises to the level of a substantial and compelling reason for departure. Accordingly, the district court did not err in granting a departure sentence based on this factor.

M.B. WAS A PARTICIPANT IN THE CONDUCT

Another reason given by the district court for granting the departure sentence was that M.B. was a participant in the conduct. This reason parallels the statutory factor that a departure may be granted when the "victim was an aggressor or participant in the criminal conduct associated with the crime of conviction." K.S.A. 21-4716(c)(1)(A). Here, the district court did not find that M.B. was an *aggressor* in the criminal conduct, but the district court found that M.B. was a *participant* in the conduct.

The first question is whether the finding that M.B. was a participant in the conduct was supported by substantial competent evidence in the record. The State argues that when the relationship began, M.B. was not a willing participant and at best M.B. willingly participated only after the relationship had substantially progressed. However, the State's argument is not supported by the record. In his interview with the police detective, M.B. stated that he initiated the kissing in May 2005. M.B. also told the detective that he had reassured Liskey when she expressed concern over the illegality of their relationship, that he had used the internet to research successful relationships between people with age differences, and that it was at his request that Liskey returned to Topeka after moving to New Mexico to escape the relationship.

In her police interview, Liskey stated that M.B. talked her into having sex in a car, that M.B. gave her a ring, and that they thought of themselves as husband and wife. In addition, the record includes Albott's psychological assessment of Liskey, in which he stated that "it would appear that [M.B.] was instrumental in initiating the process that ultimately led to sexual activities." Based on the record, we conclude there was substantial competent evidence to support the district court's finding that M.B. was a participant in the conduct.

We must next consider whether M.B.'s participation constitutes a substantial and compelling reason for departure. In *Minor*, 268 Kan. at 313, the Kansas Supreme Court upheld the district court's downward durational departure sentence in a conviction for aggravated criminal sodomy because of the victim's participation and actions leading to oral sex. The victim was 13 years old when the offense was committed. The defendant testified that the victim initiated the oral sex. This testimony was corroborated by the investigating officer, who testified that the victim was a willing and active participant, and by a friend of the victim, who testified that the victim stated she wanted to have intercourse with the defendant. The victim also corroborated that the oral sex was consensual. The Supreme Court concluded that the victim was an aggressor or participant in the criminal conduct and that this evidence supported the statutory ground for a departure sentence. 268 Kan. at 311.

State v. Sampsel, 268 Kan. 264, 997 P.2d 664 (2000), is similar to *Minor*. In *Sampsel*, the Kansas Supreme Court upheld the district court's downward durational departure sentence in a conviction for aggravated indecent liberties with a child because of the victim's participation and actions leading to intercourse. The victim, who was 13 years old when the offense was committed, stated that she wanted to have intercourse with the defendant, made advances toward him, and had consensual intercourse according to multiple witnesses. The Supreme Court concluded that the evidence supported the statutory ground that the victim was a participant in the criminal conduct. 268 Kan. at 281.

Here, the facts are very similar to the facts of *Minor* and *Sampsel*. M.B. told a police officer that he initiated the relationship with Liskey in May 2005. M.B. also told a police officer that he actively pursued Liskey when she moved to another state purportedly to end the relationship. Based on the precedent of *Minor* and *Sampsel*, we conclude that M.B.'s participation in the conduct constituted a substantial and compelling reason for the departure sentence.

The State briefly argues that due to the more than 20-year-age difference between Liskey and M.B., M.B. was not capable of participating in the conduct. The State offers little to support this argument other than citing to cases in which the victims and perpetrators were closer in age than M.B. and Liskey. However, prior decisions such as *Minor* and *Sampsel* reveal no analytical emphasis on the proximity in age of the victim and the perpetrator when considering the victim's participation as a reason for a departure. Furthermore, in both *Minor* and *Sampsel*, the Kansas Supreme Court found the victim's participation in the criminal conduct justified the departure sentence even though the victim in each case was only 13 years old when the offenses were committed.

Here, there was substantial competent evidence of M.B.'s participation in the conduct and this factor constituted a substantial and compelling reason for departure. Accordingly, the district court did not err in granting a departure sentence based on this factor.

EXTENT OF DEPARTURE

Finally, the State claims the district court abused its discretion in the extent of the downward departure. A district court possesses broad discretion in determining the extent of a departure so long as the departure is consistent with the purposes and principles of the KSGA and the departure is proportionate to the severity of the crime committed and the offender's criminal history. When reviewing the extent of a downward durational departure sentence, the standard of review is abuse of discretion. *Favela*, 259 Kan. at 343-44. "Judicial discretion is abused when judicial action is arbitrary, fanciful, or unreasonable. If reasonable persons could differ as to the propriety of the action taken by the trial court, then it cannot be said that the trial court abused its discretion. [Citation omitted.]" *State v. Gant*, 288 Kan. 76, 81-82, 201 P.3d 673 (2009).

Liskey's presumptive sentence for each count was 55-61 months' imprisonment. The district court sentenced Liskey to 30 months' imprisonment on each count to be served concurrently. The district court then suspended the sentence and placed Liskey on 36 months' intensive supervised probation.

The State argues that the extent of the downward departure in this case is excessive and an abuse of discretion. The State chiefly relies on the fact that the departure sentence was approximately half the presumptive sentence and the district court suspended the prison sentence and imposed 36 months' intensive supervised probation. The State also points out that much of the evidence relied on for the departure is contested, one of the crimes of conviction has been statutorily deemed a "sexually violent" crime and this was not an instance of an isolated occurrence; the crimes occurred over a period of 3 years.

In *Minor*, the defendant's presumptive mid-range sentence was 256 months' imprisonment and the departure sentence imposed was 72 months. 268 Kan. at 302. This departure sentence was affirmed by the Kansas Supreme Court. 268 Kan. at 313. The departure sentence in *Minor* was over a 70% departure, much more than the approximately 50% departure the State complains of here. As for placing Liskey on probation, the principles upon which the sentencing guidelines are based, according to legislative history and interpretation by Kansas appellate courts, include reserving prison space for violent offenders, protecting public safety, and reducing prison overcrowding. *Favela*, 259 Kan. at 233-34. Here, the district court apparently decided that Liskey is not such a threat to public safety that she requires imprisonment. Based on the record, we conclude that reasonable persons could agree with the propriety of the departure sentence imposed by the district court. Accordingly, the district court did not abuse its discretion in the extent of the departure sentence.

Affirmed.