

NOT DESIGNATED FOR PUBLICATION

No. 120,913

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

BRUCE HENRY,
Appellant.

MEMORANDUM OPINION

Appeal from Sedgwick District Court; DAVID L. DAHL, judge. Opinion filed November 27, 2019.
Affirmed.

Submitted for summary disposition pursuant to K.S.A. 2018 Supp. 21-6820(g) and (h).

Before ARNOLD-BURGER, C.J., PIERRON and STANDRIDGE, JJ.

PER CURIAM: Bruce Henry appeals his sentence following his conviction of criminal possession of a weapon by a convicted felon. We granted Henry's motion for summary disposition under Kansas Supreme Court Rule 7.041A (2019 Kan. S. Ct. R. 47). After review, we affirm.

FACTUAL AND PROCEDURAL HISTORY

Pursuant to a plea agreement, Henry pled guilty to one count of criminal possession of a weapon by a convicted felon. Under the plea agreement, the State agreed to recommend that the district court sentence Henry to the low number in the appropriate sentencing guidelines grid box. The presentence investigation report scored Henry's

criminal history as A, which, based on his crime of conviction, gave him a presumptive prison sentence of 23, 21, or 19 months. Henry filed a motion for durational or dispositional departure before his sentencing and requested the district court impose either a dispositional departure to probation or a durational departure to six months in prison.

At sentencing, Henry did not object to his criminal history score and the district court granted a significant durational departure and sentenced Henry to nine months in prison but denied Henry's request for a dispositional departure to probation. The district court found there were substantial and compelling reasons to grant Henry a durational departure but determined that it would not grant a dispositional departure to probation because Henry was caught with a weapon and the court was concerned with public safety.

ANALYSIS

On appeal, Henry argues that the district court abused its discretion in refusing to grant him a dispositional departure to probation. Henry claims that the district court should have used the same substantial and compelling reasons it used to impose a downward durational departure and instead grant him a dispositional departure. Under K.S.A. 2018 Supp. 21-6815(a), a sentencing judge shall impose the presumptive sentence under the sentencing guidelines "unless the judge finds substantial and compelling reasons to impose a departure." If the district judge decides to depart, the court "shall state on the record at the time of sentencing the substantial and compelling reasons for the departure." K.S.A. 2018 Supp. 21-6815(a).

When the extent of a departure is challenged, our standard of review is for an abuse of discretion. *State v. Spencer*, 291 Kan. 796, 807-08, 248 P.3d 256 (2011). Judicial discretion is abused if the action "(1) is arbitrary, fanciful, or unreasonable, i.e.,

if no reasonable person would have taken the view adopted by the trial court; (2) is based on an error of law . . . ; or (3) is based on an error of fact." *State v. Jones*, 306 Kan. 948, Syl. ¶ 7, 398 P.3d 856 (2017). Henry bears the burden to show an abuse of discretion by the district court. See *State v. Rojas-Marceleno*, 295 Kan. 525, 531, 285 P.3d 361 (2012).

Here, the record is clear that the district court considered Henry's proffered substantial and compelling reasons for departure when it chose only to depart durationally. The district court discussed various reasons supporting its imposition of a downward durational departure: Henry quickly took responsibility for and pled guilty to his crime of conviction, Henry was caught with a "small blade" that he used for work, and several of his previous convictions were "quite dated."

That said, the district court found that these reasons were not substantial and compelling enough to depart to probation. Henry had served time in prison in the past and had been on probation in the past. The fact that Henry was caught with a weapon, albeit small, weighed heavily on the district court judge who indicated that he had "a responsibility not only just to [Henry] but to society as well" to require that Henry serve some time in prison. The judge reasoned that the significant durational departure was adequate consideration for his attorney's compelling departure motion and argument.

Henry does not submit a claim of error of law or fact, and he fails to show that no reasonable person would have taken the view of the district court. As a result, we cannot say the district court's refusal to grant Henry's dispositional departure constitutes an abuse of discretion.

Affirmed.