

NOT DESIGNATED FOR PUBLICATION

No. 124,917

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellant,*

v.

TONY EUGENE HENDERSON JR.,  
*Appellee.*

MEMORANDUM OPINION

Appeal from Riley District Court; GRANT D. BANNISTER, judge. Opinion filed March 3, 2023.  
Affirmed.

*David Lowden*, deputy county attorney, *Barry R. Wilkerson*, county attorney, and *Derek Schmidt*, attorney general, for appellant.

*Patrick H. Dunn*, of Kansas Appellate Defender Office, for appellee.

Before ARNOLD-BURGER, C.J., BRUNS and ISHERWOOD, JJ.

PER CURIAM: The State appeals the district court's decision to grant Tony Eugene Henderson Jr.'s probation after he entered a guilty plea to criminal possession of a firearm. Prior to sentencing, Henderson filed a motion for a dispositional departure from a presumptive prison sentence. Based on several nonstatutory factors, the district court granted Henderson's motion and imposed a sentence of 19 months suspended to probation for a term of 18 months. Although reasonable minds could disagree regarding whether a dispositional departure should have been granted in this case, we do not find that the district court erred in granting Henderson probation. Thus, we affirm.

## FACTS

On July 29, 2016, the State charged Henderson with unlawfully, feloniously, and knowingly possessing a firearm in violation of K.S.A 2013 Supp. 21-6304(a)(2). At the same time, the State also charged Henderson with transporting liquor in an open container in violation of K.S.A. 8-1599. Because Henderson had an outstanding warrant from Texas for what would be charged in Kansas as aggravated battery, he was extradited to Texas prior to his first appearance.

After pleading in the Texas case, Henderson was sentenced to five years in prison. Upon his release from prison on February 5, 2021, law enforcement officers transported him to Kansas to face the charges pending against him in this case. A few days later, Henderson bonded out of the Riley County Jail.

On May 13, 2021, Henderson entered into a written plea agreement with the State. Among other things, the plea agreement provided that Henderson would plead guilty to the charge of criminal possession of a firearm and the State would dismiss the misdemeanor open container charge. The State also agreed to recommend the low number in the appropriate grid box and to recommend that Henderson's sentence run consecutive to any other existing sentences. In addition, in the event that the district court granted Henderson dispositional departure, the State agreed not to oppose him serving his probation in Oklahoma.

Henderson entered a guilty plea to one count of criminal possession of a firearm on June 14, 2021. In compliance with the plea agreement, the State moved to dismiss the open container charge with prejudice. Accordingly, the district court found Henderson to be guilty on the firearm charge and granted the State's motion to dismiss the misdemeanor charge. Following the plea hearing, a presentence investigation report (PSI) was prepared showing that Henderson's criminal history score was B and that his criminal

history included two previous person felonies—one as a juvenile for aggravated robbery and one as an adult for the equivalent of aggravated battery in Texas. Additionally, his criminal history included convictions for criminal use of weapons, aggravated burglary, domestic battery, driving under the influence, and unlawful possession of a controlled substance.

Prior to sentencing, Henderson filed a motion for dispositional departure from a presumptive prison sentence. At the sentencing hearing held on December 1, 2021, Henderson testified that he was currently living and employed in Oklahoma but hoped to move to Russell to work at a business owned by his aunt. Although he would take a slight cut in pay from his job in Oklahoma, the job would allow him to live closer to three of his children.

Henderson further testified about the classes and programs he voluntarily participated in while incarcerated in Texas. These classes and programs included a peer health education course, a drug education course, a financial management course, a manhood and parenting course, as well as a disease and sex protection program. According to Henderson, he used the skills obtained from the financial management course to prepare a budget that allowed him to pay off certain debts and to start saving money to buy a vehicle. Several members of Henderson's family and his girlfriend were present at the hearing to support him.

On cross-examination, Henderson acknowledged that his criminal activity began as a juvenile. He also acknowledged that he had been convicted of crimes in Kansas, Oklahoma, and Texas. Likewise, Henderson admitted that he had a gun inside the vehicle he was driving on the day he was arrested in the present case. Henderson confirmed that he voluntarily informed the officer who stopped him that he had the gun in the vehicle as well as where it was located. However, Henderson denied telling the officer that the firearm was his. When asked whether he told the officer that he was lucky he was nice to

him or he would have used the gun on him, Henderson replied, "I may have said that." Finally, when asked at the sentencing hearing whether he would pass a drug test, Henderson testified that he did not know because he had used drugs recently.

On redirect examination, Henderson testified that he was tired of disappointing his family and was willing to change to make things better. He also testified that he was willing to abstain from drugs and alcohol while on probation and that he believed the structure of probation would help him stay sober. Henderson further testified that he had successfully completed a six-month term of probation in Great Bend and a three-month parole term in Norman, Oklahoma. He further testified that if the district court ordered him to complete drug and alcohol treatment that he would comply.

Before concluding the sentencing hearing, the district court asked Henderson several clarifying questions. Henderson testified that he received his high school diploma as a resident in a juvenile facility. He also testified that he had been incarcerated for approximately 11 of his 32 years of life. After reviewing the PSI and Henderson's motion and attached exhibits, considering the testimony, and listening to the arguments of counsel, the district court granted Henderson's motion for a dispositional departure.

In granting Henderson's motion, the district court found that he had been a "forthright and credible" witness. The district court also found that Henderson has family support that included employment and other financial assistance. Additionally, the district court noted Henderson's progress on paying off financial debts and addressing issues with his family as well as with society. The district court found it significant that during the approximately six years since he committed the crime that is the subject of this case, Henderson had made efforts to rehabilitate himself, particularly while incarcerated in Texas. The district court further found that Henderson had taken responsibility for his actions.

The district court concluded that "reformation, rehabilitation and responsibility" constitute a sufficient basis to grant Henderson's motion for dispositional departure. Consequently, although the district court sentenced Henderson to 19 months in prison with post release supervision, it suspended the sentence to 18 months of supervised probation. Thereafter, the State timely filed a notice of appeal.

#### ANALYSIS

On appeal, the State contends that the district court's departure sentence was not supported by the evidence or by substantial and compelling reasons. Nevertheless, the State agrees that the three reasons articulated by the district court—reformation, rehabilitation, and responsibility—can be valid factors to justify a dispositional departure. Although the State does not contest that the record contains substantial competent evidence to support the district court's findings as to Henderson's rehabilitation efforts as well as taking responsibility for his crime of conviction, it argues that the record does not contain sufficient evidence to support a finding that Henderson has been reformed. Furthermore, the State argues that the district court's decision to grant a dispositional departure in this case was not reasonable based on the circumstances presented.

In response, Henderson contends that there is substantial competent evidence in the record to support the district court's findings that he made significant efforts to reform his life. Henderson also points to his willingness to participate in a drug and alcohol treatment program. Henderson argues that a showing of absolute reformation is not required. Rather, he suggests that his "efforts at reformation" are sufficient. Henderson also argues that the district court's decision to grant him probation under the unique circumstances presented in this case was reasonable.

### *Standard of Review*

The State may appeal a dispositional departure sentence. K.S.A. 2021 Supp. 21-6820(a). Our review of a dispositional departure sentence is limited to determining whether the sentencing court's findings of fact are supported by the evidence and whether the reasons articulated to support the departure are substantial and compelling. K.S.A. 2021 Supp. 21-6820(d); see *State v. Montgomery*, 314 Kan. 33, 36, 494 P.3d 147 (2021).

K.S.A. 2021 Supp. 21-6815(c)(1) sets forth a list of factors a district court may consider in determining whether to grant a dispositional departure. This list is nonexclusive and the district court may exercise its discretion by considering nonstatutory factors in determining whether probation is appropriate in a particular case. *State v. Morley*, 312 Kan. 702, 711, 479 P.3d 928 (2021). Here, the district court relied upon three nonstatutory factors in granting Henderson's motion for a dispositional departure.

When a sentencing court grants a departure based on nonstatutory factors, we must determine whether those factors can be considered to be mitigating factors under K.S.A. 2021 Supp. 21-6815(c)(1). Because this step involves a legal question, our review is unlimited. Second, we must decide whether substantial competent evidence supports the nonstatutory factors found by the district court. Finally, we are to determine whether the district court acted reasonably in granting a dispositional departure based on those nonstatutory factors. *Montgomery*, 314 Kan. at 36.

### *Application of Nonstatutory Factors*

A district court is required to impose the presumptive sentence under the sentencing guidelines based on a defendant's crime of conviction and criminal history score. Nevertheless, a district court has the authority to grant a dispositional departure if

it reasonably finds substantial and compelling reasons to do so. K.S.A. 2021 Supp. 21-6815(a). If a motion for dispositional departure is granted, the district court must "state on the record at the time of sentencing the substantial and compelling reasons for the departure." K.S.A. 2021 Supp. 21-6815(a). As indicated above, the district court based its decision on the nonstatutory factors of "reformation, rehabilitation and responsibility" in granting Henderson's motion for dispositional departure.

In Kansas, a district court is permitted to rely on nonstatutory factors "as long as the factors are consistent with the principles underlying the [Kansas Sentencing Guidelines Act]." *State v. Bird*, 298 Kan. 393, 398-99, 312 P.3d 1265 (2013). The Kansas Supreme Court has held that the legislative purposes of the sentencing guidelines are: "(1) to reduce prison overcrowding, (2) to protect public safety, and (3) to standardize sentences so similarly situated offenders are treated the same." *Bird*, 298 Kan. at 399. Moreover, Kansas courts have recognized that—consistent with the sentencing guidelines—acceptance of responsibility, rehabilitative efforts, and ability to reform may be appropriate nonstatutory mitigating factors for a district court to consider. See *Morley*, 312 Kan. at 703 (acceptance of responsibility); *State v. Crawford*, 21 Kan. App. 2d 859, 861, 908 P.2d 638 (1995) (rehabilitative efforts); and *State v. Bolden*, 35 Kan. App. 2d 576, 580, 132 P.3d 981 (2006) (probability of reformation and amenability to rehabilitation).

After determining the validity of the nonstatutory factors considered by the district court, the next step in our analysis is to decide whether substantial competent evidence supports the existence of one or more of these factors. *Morley*, 312 Kan. at 711.

"Substantial competent evidence does not require evidence to *prove* a fact; rather, it simply requires evidence to sufficiently *support* the fact-finder's conclusion." *Morley*, 312 Kan. at 712. When reviewing a district court's factual findings, we do not reweigh the evidence or reassess credibility of witnesses. *Morley*, 312 Kan. at 713.

The State does not dispute that the record contains substantial competent evidence to support the district court's finding that Henderson made rehabilitative efforts. The State also does not dispute that the record contains substantial competent evidence to support the district court's finding that Henderson took responsibility for his crime of conviction by pleading guilty to the charge. We pause to note that our Supreme Court has held that a defendant can take responsibility for his or her crime without admitting full wrongdoing or conceding every material fact. *Morley*, 312 Kan. at 712.

This appeal boils down to a disagreement over whether there is substantial competent evidence to establish that Henderson has reformed his life. The State argues that the district court "conflated [Henderson's] efforts to rehabilitate and reform with actual reformation." Furthermore, the State points to Henderson's admission to recent drug use at the sentencing hearing as evidence that he has not reformed. Although we agree with the State that there is indeed evidence in the record to call into question whether Henderson has actually reformed, we also find substantial competent evidence in the record showing his efforts at reformation.

A review of the record reveals that Henderson has completed various voluntary classes in an attempt to reform during the approximately five years that he was incarcerated in Texas following his arrest in this case. At least one of the classes was focused on preventing recidivism. Henderson also testified that he has been working in Oklahoma following his release from prison and has saved about \$900. In addition, Henderson testified that he has been able to pay off over \$3,000 in outstanding fines. Henderson further testified about his plans to move to Russell where his aunt—who was present at the sentencing hearing—would employ him and where he would be closer to some of his children. Likewise, Henderson admitted to recent drug use and testified regarding his willingness to participate in drug and alcohol treatment while on probation.

The record also reflects that the district court found Henderson's testimony to be "forthright and credible." Of course, as discussed above, it is not our role to reweigh the evidence or to make credibility decisions. Moreover, it is not our role to replace our judgment for that of the district court. Rather, our role is limited to reviewing the record to determine whether there is substantial competent evidence to support the district court's findings. *Morley*, 312 Kan. at 712. Based on our review of the record we find that there is substantial competent evidence to support the existence of each of the nonstatutory factors articulated by the district court.

### *Reasonableness of Granting Probation*

Finally, we must determine whether the district court acted reasonably in concluding that the nonstatutory factors relied upon to grant Henderson a dispositional departure constitute—either individually or collectively—substantial and compelling reasons to justify placing him on probation. *Morley*, 312 Kan. at 711. The term "substantial" means "real, not imagined, and of substance, not ephemeral. [Citation omitted.]" *State v. Reed*, 302 Kan. 227, 250, 352 P.3d 530 (2015). Furthermore, a "compelling" reason is one that convinces the district court "to abandon the status quo and to venture beyond the sentence that it would ordinarily impose. [Citation omitted.]" *Reed*, 285 Kan. at 250.

It is important to recognize that the Kansas Supreme Court has held that "[a]s long as one factor relied upon by the sentencing court is substantial and compelling, the departure sentence should be upheld. [Citation omitted.]" *Montgomery*, 314 Kan. at 37. However, in *Morley* our Supreme Court held that the acceptance of responsibility by itself does not constitute a substantial and compelling reason for the imposition of a departure sentence. *Morley*, 312 Kan. at 714. In other words, acceptance of responsibility must be combined with one or more other nonstatutory factors in order to justify the granting of a disposition departure. See *State v. Cato-Perry*, 50 Kan. App. 2d 623, 632-

33, 332 P.3d 191 (2014) (defendant's age, amenability to rehabilitation, and fact he had served prison time since committing his crime were collectively found to constitute substantial and compelling reasons to justify probation).

Here, the State does not challenge that there is substantial competent evidence to support the district court's findings that Henderson accepted responsibility in this case and that he has made significant efforts at rehabilitation since the crime was committed. As the State suggests, the evidence of reformation is weaker but—as discussed above—there is substantial competent evidence to support this finding by the district court. Of course, it is impossible to ever know with certainty whether anyone has truly reformed. Nevertheless, we find that a reasonable person could agree with the district court that the collective nonstatutory factors of "reformation, rehabilitation and responsibility" were substantial and compelling reasons to grant Henderson a disposition departure. Now, it is up to Henderson to show that he can comply with the terms of his probation and live up to the faith placed in him by the district court.

#### CONCLUSION

In conclusion, we find that the district court relied on appropriate nonstatutory factors in granting Henderson's motion for dispositional departure. We also find that the district court's findings of fact are supported by substantial competent evidence. Likewise, we find that the reasons articulated by the district court in support of its decision are substantial and compelling. Finally, although we recognize that reasonable minds could differ regarding whether to grant probation to Henderson based on his criminal history, we do not find the district court's decision to be unreasonable.

Affirmed.