

NOT DESIGNATED FOR PUBLICATION

No. 125,432

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

JAVIER GUTIERREZ ARANDA JR.,
Appellant.

MEMORANDUM OPINION

Appeal from Barton District Court; STEVEN E. JOHNSON, judge. Opinion filed June 9, 2023. Affirmed in part, reversed in part, and remanded with directions.

James M. Latta, of Kansas Appellate Defender Office, for appellant.

Natalie Chalmers, assistant solicitor general, and *Kris W. Kobach*, attorney general, for appellee.

Before CLINE, P.J., MALONE and ATCHESON, JJ.

PER CURIAM: Defendant Javier Gutierrez Aranda Jr. has appealed the Barton County District Court's denial of his request for a dispositional departure to probation upon his conviction for possessing methamphetamine with the intent to distribute when the crime occurred within 1,000 feet of a school. The State has cross-appealed a durational departure the district court did grant—reducing Aranda's sentence by about five years—because he did not actually distribute the methamphetamine near the school. The district court acted within its judicial discretion in denying Aranda probation, but the shortened prison term deviated from the governing legal framework, constituting an abuse of that

discretion. We, therefore, affirm in part, reverse in part, and remand with directions to the district court to resentence Aranda.

FACTUAL AND LEGAL BACKGROUND

The details of the underlying crime are largely irrelevant. For our purposes, a law enforcement officer initiated a traffic stop in December 2021 when Aranda pulled into the driveway of a friend's house. The officer found 33 grams of methamphetamine and a shotgun in the motor vehicle. The house was indisputably within 1,000 feet of a public school. But there was nothing to indicate Aranda trafficked the methamphetamine around the school.

The State charged Aranda with possession of methamphetamine with the intent to distribute within 1,000 feet of a school and four other crimes. Through his lawyer, Aranda worked out an arrangement with the State calling for him to plead guilty to the methamphetamine charge in exchange for the dismissal of the other charges. As part of the deal, the State also agreed to join in a recommendation to the district court that Aranda receive a dispositional departure to probation if he appeared for sentencing and committed no new crimes. The district court accepted Aranda's plea in January 2022, and the State dismissed the other charges. Under the sentencing guidelines, the conviction presumptively called for imprisonment rather than probation even for a defendant with no criminal history.

Under K.S.A. 2022 Supp. 21-5705(d)(3)(C), possession of 33 grams of methamphetamine with the intent to distribute is a severity level 2 drug felony. But K.S.A. 2022 Supp. 21-5705(d)(5) imposes a one severity level sentencing enhancement for various drug crimes, including possession of methamphetamine with the intent to distribute, when they occur within 1,000 feet of a school. Aranda, therefore, pleaded guilty to a severity level 1 drug felony.

The Kansas appellate courts have held that the sentencing enhancement applies so long as the defendant possesses the drugs in proximity to a school, even if he or she intends to distribute them elsewhere. *State v. Barnes*, 275 Kan. 364, 373, 64 P.3d 405 (2003) (noting predecessor statute with same school enhancement); *State v. Penny*, 22 Kan. App. 2d 212, 215, 914 P.2d 960 (1994) (construing predecessor statute); *State v. Moore*, No. 116,275, 2017 WL 5016039, at *6-7 (Kan. App. 2017) (unpublished opinion); *State v. Brooks*, No. 113,636, 2017 WL 839793, at *12-13 (Kan. App. 2017) (unpublished opinion). The *Penny* court recognized that the legislative purpose was "to establish drug-free zones in and around schools." 22 Kan. App. 2d at 216. In turn, the court rejected Penny's argument that the enhancement required a defendant to intend to distribute the illegal drugs within 1,000 feet of the school. In *Barnes*, the Kansas Supreme Court endorsed the rationale and result in *Penny*. *Barnes*, 275 Kan. at 370-73. Federal circuit courts considering the issue have universally construed a comparable sentencing enhancement in 21 U.S.C. § 860(a) (2018) to apply to possession within 1,000 feet of a school regardless of where the intended distribution might take place—reasoning the Kansas appellate courts have found highly persuasive. See *Barnes*, 275 Kan. at 372-73; *Moore*, 2017 WL 5016039, at *7. The Legislature has not amended K.S.A. 2022 Supp. 21-5705(d)(5) to reflect a different purpose or result, presumably indicating endorsement of the consistent judicial reading of the drug enhancement provision for almost 30 years. See *State v. Quested*, 302 Kan. 262, 278-79, 352 P.3d 553 (2015) (continuing legislative inaction may be considered "acquiescence" in judicial reading of statute).

Aranda did not show up for his scheduled sentencing and in the meantime had committed a misdemeanor battery. At a rescheduled sentencing hearing in July 2022, the State pointed out it was no longer bound by the recommendation in the plea agreement and asked the district court to impose a guidelines sentence on Aranda without any departures.

As outlined in the presentence investigation report, Aranda's criminal history included two convictions in New Mexico for abuse of a child, one in 1997 and the other in 2001, that were scored as person felonies. Aranda also had multiple convictions from Texas between 2001 and 2016 for distributing or otherwise trafficking in illegal drugs that were scored as nonperson felonies. And he had various other unscored convictions. At the sentencing hearing, Aranda did not object to his criminal history or his placement in criminal history category B.

In a sentencing motion filed before the hearing, Aranda requested a dispositional departure to probation because the person felony convictions were more than 20 years old and because he had an ongoing "severe drug problem" better addressed with treatment outside the prison system than lengthy incarceration. During the hearing, Aranda also requested a departure on the grounds he had accepted responsibility for his wrongdoing by pleading guilty, thereby relieving the State of the obligation to prove him guilty. Aranda never presented any evidence of drug abuse, and his criminal history depicted a drug dealer rather than an addict. Moreover, Aranda's criminal history showed him to be a scofflaw for pretty much his entire adult life, continuing up to the sentencing hearing as evidenced by his recent battery conviction.

The district court alluded to Aranda's extensive and continuing criminal behavior in denying the request for a departure to probation. Aranda then requested a reduced term of incarceration—a durational departure—for the same reasons. The State did not waver in its request for a guidelines sentence for a severity level 1 drug felony that would be between 176 and 196 months in prison given Aranda's criminal history score. The district court granted a departure and sentenced Aranda to 122 months in prison, matching what would be the low presumptive guidelines punishment for a severity level 2 drug felony, to be followed by postrelease supervision for 36 months. The district court found the durational departure to be appropriate because Aranda did not distribute the methamphetamine at or near the school and merely possessed it proximately to the

building. See K.S.A. 2022 Supp. 21-6815(a) (district court required to state reason for departure when imposing sentence).

ANALYSIS

Relevant Legal Principles

As we have said, Aranda has appealed the denial of his request for probation (a dispositional departure), and the State has cross-appealed the reduced prison sentence (a downward durational departure). We have jurisdiction to hear both issues. K.S.A. 2022 Supp. 21-6820(a) (departure sentence subject to appeal); *State v. Looney*, 299 Kan. 903, 904, 327 P.3d 425 (2014) (appellate court has jurisdiction to review denial of defendant's requested dispositional departure even if defendant receives downward durational departure).

In K.S.A. 2022 Supp. 21-6815(c)(1), the Legislature has listed mitigating factors a district court may consider in granting a departure sentence. The statute describes the list as "nonexclusive," so a district court may depart from the sentencing guidelines for other reasons warranting mitigation. In reviewing a district court's reliance on a statutory factor, we apply an abuse of discretion standard and consider whether the decision deviates from the governing legal framework, relies on a material factual error, or is so far afield that no reasonable judicial officer would come to the same conclusion in comparable circumstances. *State v. Plotner*, 290 Kan. 774, 780, 235 P.3d 417 (2010). A ruling falling short in any of those respects amounts to an abuse of discretion.

When a district court relies on nonstatutory mitigation to depart from the sentencing guidelines, we similarly look for abuse of discretion and use a three-step analysis. We first ask if the ground the district court has identified constitutes a legally permissible reason to depart. That presents a question of law we review without deference

to the district court. If the district court has erred in that way, the factor falls outside the governing legal framework. Second, we ask if the evidence supports the factor in the case at hand. Insufficient evidence would amount to an abuse of discretion for factual error. Finally, we ask if the district court reasonably concluded "there was a substantial and compelling reason to depart" in the case considering all of the mitigating circumstances. An unreasonable departure would fit the third category entailing abuse of discretion. *State v. Morely*, 312 Kan. 702, 711, 479 P.3d 928 (2021).

Aranda's Appeal

With those standards in mind, we turn to the district court's decision to deny Aranda's request for a departure to probation. We consider the reasons he advanced for mitigation.

An extended lapse of time between the crime of conviction on which a defendant is being sentenced and serious felonies in his or her criminal history may be a mitigating factor. *State v. Heath*, 21 Kan. App. 2d 410, 415, 901 P.2d 29 (1995); see *State v. Montgomery*, 314 Kan. 33, 38, 494 P.3d 147 (2021) (noting *Heath* as among cases recognizing nonstatutory mitigating factors). The circumstance has some relevance in mitigation if the defendant has been reasonably law abiding during that time. Here, however, Aranda had been quite the opposite. He had a string of convictions for felonies involving drug trafficking and other less serious crimes. The district court explicitly relied on Aranda's essentially unbroken criminal conduct over two decades in rejecting the request for probation. The factual and legal premises were correct, and the district court's assessment cannot be characterized as unreasonable.

This court has recognized that active drug addiction may be a mitigating factor or contribute to mitigation in some circumstances. See *State v. Briscoe*, No. 114,278, 2016 WL 2775676, at *4-5 (Kan. App. 2016) (unpublished opinion); *State v. Wells*, No.

114,060, 2016 WL 6140608, at *6 (Kan. App. 2016) (unpublished opinion). As we have already said, however, Aranda offered no evidence that he is or was a drug addict. The mere request for mitigation on that basis is insufficient, and the district court would have been remiss in considering, let alone granting, a departure for that reason on this record.

Although pleading guilty and, thereby, accepting responsibility for the ascribed criminal conduct may be a nonstatutory ground for mitigation, a district court is not obligated to reduce a presumptive guidelines sentence merely because a defendant has entered a plea. See *State v. Bird*, 298 Kan. 393, 399, 312 P.3d 1265 (2013). In *Bird*, the court affirmed a district court's decision to grant a downward durational departure based on the defendant's guilty plea to possession of cocaine in combination with the defendant's "lack of danger to the community." 298 Kan. at 401. The court acknowledged that the plea spared the State the time and trouble of preparing for and then trying the case to a jury. But the court relied heavily on both evidence that Bird appeared to pose little risk as a probationer and legislative policy tilting toward incarcerating defendants considered "serious [or] violent offenders." 298 Kan. at 399. Here, Aranda was caught with a substantial quantity of illegal drugs and a shotgun—indicative of drug trafficking incompatible with general notions of public safety.

Although Aranda's most serious convictions for criminal history purposes occurred many years earlier, his ongoing conduct demonstrated an unwillingness or inability to remain law abiding. He had multiple felony drug convictions and committed a new crime, albeit a misdemeanor, while awaiting sentencing. There was little or nothing to suggest Aranda would be successful on probation given that history, as the district court indicated. We see no abuse of discretion in denying Aranda the opportunity to immediately continue his lawless behavior outside the confines of prison.

State's Cross-appeal

Turning to the State's cross-appeal of the district court's durational departure, we presume the decision rests on the statutory mitigating factor applicable when the harm attributable to the crime of conviction is "significantly less than typical" for the offense. K.S.A. 2022 Supp. 21-6815(c)(1)(E). The district court, however, did not characterize the mitigation as either statutory or nonstatutory and did not mention K.S.A. 2022 Supp. 21-6815(c)(1)(E). The district court did describe the factual circumstances of the crime as being less blameworthy because Aranda did not distribute or intend to distribute the methamphetamine within 1,000 feet of a school and merely possessed the drugs at a nearby residence.

During the sentencing hearing, the district court articulated no other reason for the durational departure. The journal entry refers generically to the reasons stated in Aranda's motion; those reasons did not include lack of intent to distribute the methamphetamine around the school or some similar claim under K.S.A. 2022 Supp. 21-6815(c)(1)(E). Consistent with K.S.A. 2022 Supp. 21-6815(a), the district court's pronouncement of the grounds for the departure at the hearing control over any different representations in the journal entry. *State v. Jackson*, 262 Kan. 119, 135, 936 P.2d 761 (1997); *State v. Wilson*, No. 123,619, 2022 WL 569361, at *4 (Kan. App. 2022) (unpublished opinion).

Whether the district court's reason is treated as a statutory or nonstatutory mitigating factor, it falls outside the governing legal framework and, therefore, constitutes an abuse of discretion. The district court's ruling negated the purpose of the enhancement: To create "drug-free zones" around schools. By reducing Aranda's prison term to the equivalent of that for possession of methamphetamine with the intent to distribute, the district court drained the sentencing enhancement of any punitive or deterrent effect unless a defendant actually traffics the drug within 1,000 feet of a school. If accepted as a mitigating factor, the district court's reasoning would apply to any defendant who merely

possessed illegal drugs within 1,000 feet of a school with the intent to distribute elsewhere. That reading of the statute has been repeatedly rejected in published appellate decisions as undercutting the central objective of the enhancement. The district court erred as a matter of law in reducing Aranda's presumptive sentence for that reason.

We, therefore, affirm the district court's ruling denying Aranda's request for a dispositional departure and reverse its ruling granting him a durational departure. In turn, we remand to the district court with directions to resentence Aranda.

Affirmed in part, reversed in part, and remanded with directions.