

NOT DESIGNATED FOR PUBLICATION

No. 125,519

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,
Appellee,

v.

CJ LONNIE MCPHIE,
Appellant.

MEMORANDUM OPINION

Appeal from Atchison District Court; JOHN J. BRYANT, judge. Submitted without oral argument. Opinion filed December 15, 2023. Affirmed.

Jennifer C. Roth, of Kansas Appellate Defender Office, for appellant.

Sherri L. Becker, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ATCHESON, P.J., ISHERWOOD and HURST, JJ.

PER CURIAM: C.J. Lonnie McPhie pleaded guilty to a single count of aggravated indecent liberties with a child and, despite his request for a downward durational departure, was sentenced to serve the statutorily provided term of life imprisonment under the Jessica's Law structure. It is the denial of that more lenient sentencing request that McPhie asks us to analyze for an abuse of discretion. He contends such abuse is evidenced by the district court's impermissible (1) consideration of facts not established by admission or trial, (2) inclusion of irrelevant facts, (3) balancing of mitigating and aggravating circumstances, and (4) its failure to give proper weight to McPhie's mitigating circumstances. Following a thorough review of the record we are satisfied the

district court did not abuse its discretion in arriving at its sentencing determination and affirm that decision.

FACTUAL AND PROCEDURAL BACKGROUND

McPhie pled guilty to a single count of aggravated indecent liberties with a child in violation of K.S.A. 2018 Supp. 21-5506(b)(3)(A) and (c)(3), for acts perpetrated against the then 12-year-old young daughter of a girlfriend with whom he cohabitated. In exchange for McPhie's plea, the State agreed to dismiss four other charges he faced.

The matter proceeded to a formal plea hearing during which the State requested that the court take judicial notice of the eight-page probable cause affidavit to satisfy the factual basis requirement for the plea. Defense counsel did not object to proceeding in that fashion, nor did they request that the scope of the court's usage of that document be narrowed in any way. The district court took notice of the affidavit, found that it offered a satisfactory factual basis, accepted the plea, and adjudged McPhie guilty.

Between the plea hearing and sentencing, Dr. Adebayo Ajibade, as an expert for the defense, performed a clinical evaluation of McPhie. His written report briefly summarized the probable cause affidavit, set forth measurements concerning McPhie's intelligence, assessed his symptoms of depression and anxiety, offered an estimate of McPhie's recidivism rate, and outlined the doctor's clinical impressions. McPhie offered and the district court admitted Dr. Ajibade's report at the sentencing hearing without objection from the State.

As a first-time offender under Jessica's Law, McPhie was eligible for a departure sentence and initiated his pursuit of that option via a pre-sentencing motion. As justification for his request, McPhie outlined mitigating circumstances which he believed demonstrated that an appropriate prison sentence for him would not exceed 254 months.

Specifically, McPhie highlighted his lack of a significant criminal history and alleged that he committed the crime at issue while under the influence of an emotional disturbance. He also asserted that his capacity to appreciate the criminality of his conduct was substantially impaired, that his relatively young age of 34 years was notable, and that his acceptance of responsibility, general non-threatening character, parenting obligations, and willingness to participate in rehabilitative programs were also worthy of consideration.

At sentencing, the parties argued their respective positions concerning the appropriate term of incarceration. The district court was not persuaded that substantial and compelling reasons existed to warrant a durational departure and imposed the standard sentence of life in prison with parole consideration after 25 years.

McPhie now brings his case to us for an assessment of whether the district court's denial of his request for a mitigated sentence amounts to an abuse of discretion.

LEGAL ANALYSIS

The district court did not abuse its discretion in concluding that the mitigating circumstances proffered by McPhie fell short of substantial and compelling reasons to depart from the statutorily mandated term of imprisonment.

McPhie's sentencing challenge essentially consists of a claim that the district court engaged in a series of analytical missteps en route to ultimately, and what McPhie characterizes as erroneously, denying his request for a departure from the statutorily mandated life sentence to a term set forth under the Kansas Sentencing Guidelines Act (KSGA) K.S.A. 2018 Supp. 21-6801 et seq. He takes the position that the district court impermissibly considered details contained within the probable cause affidavit as well as the dismissal of other charges, and unlawfully "balanced" the State's dismissal of other

charges against McPhie's assertion that he accepted responsibility for his conduct. We will address each contention in turn.

Standard of Review

We review a district court's assessment of proposed substantial and compelling reasons to depart for an abuse of discretion. *State v. Jolly*, 301 Kan. 313, 325, 342 P.3d 935 (2015). An abuse of discretion occurs when a court's ruling is: (1) based on an error of law; (2) based on an error of fact, in that substantial competent evidence does not support a factual finding on which a prerequisite conclusion of law or the exercise of discretion is based; or (3) arbitrary, fanciful, or unreasonable such that no reasonable person would take the view adopted by the judge. 301 Kan. at 325. An abuse of discretion may be found if the district court's decision goes outside the framework of, or fails to properly consider, statutory limitations or legal standards. *State v. Shopteese*, 283 Kan. 331, 340, 153 P.3d 1208 (2007). McPhie, as the party asserting the district court abused its discretion, bears the burden of showing such abuse occurred. *State v. Crosby*, 312 Kan. 630, 635, 479 P.3d 167 (2021).

Jessica's Law

The statutory framework commonly referred to as Jessica's Law mandates a life sentence without the possibility for parole for 25 years for those defendants who are 18 or older and convicted of one of the statutorily enumerated child sex offenses set out under K.S.A. 2022 Supp. 21-6627(a)(1). A first-time offender may pursue a reduced sentence through a motion which outlines the substantial and compelling reasons that warrant a sentence in accordance with the KSGA instead. K.S.A. 2022 Supp. 21-6627(d)(1). Something is "substantial" if it is real, not imagined; something with substance and not ephemeral, while the term "compelling" implies that the court is forced, by the facts of a case, to leave the status quo or go beyond what is ordinary. *Jolly*, 301 Kan. at 323.

When considering an offender's departure request, the district court must review the proposed mitigating circumstances and then consider the facts surrounding the crime of conviction to determine whether the defendant has provided satisfactory justification for a departure from the legislatively established sentence. If the court's conclusion is an affirmative one, it may sentence the defendant to the otherwise applicable term of months on the grid instead of the indeterminate life sentence. See K.S.A. 2022 Supp. 21-6804. The district court must identify the precise substantial and compelling reasons it relied upon for the record. *Jolly*, 301 Kan. at 324.

Did the district court consider impermissible facts when analyzing whether McPhie's case warranted a departure sentence?

Turning to McPhie's particularized complaints, we begin with his contention that the sentencing court impermissibly drew upon details set out in the probable cause affidavit when arriving at the appropriate term of incarceration. He essentially contends that the affidavit was off-limits for sentencing purposes and to assign any measure of significance to its contents amounted to an abuse of discretion.

Our review of the record, however, fails to yield any clear indication that the court truly factored that document into the sentencing equation. At the plea hearing, the district court took judicial notice of the contents of the eight-page charging affidavit on the State's request and without objection from McPhie's trial lawyer. The district court treated that as a sufficient factual basis for the guilty plea. But McPhie was not asked if he had read the affidavit, and he did not personally acknowledge or admit any of the representations in the document. All of that casts a pall over the propriety of relying on the contents of the charging affidavit for purposes of fixing an appropriate sentence. Nevertheless, the same relevant information was summarized or otherwise considered in the report from Dr. Ajibade.

Prior to sentencing, McPhie filed a motion for a durational departure which outlined several bases that he believed offered the substantial and compelling reasons required to justify a reduced sentence. He requested that the court focus on (1) his lack of a significant criminal history; (2) that he was experiencing emotional distress when the crime was committed; (3) the fact his ability to appreciate the criminality of his conduct was substantially impaired; (4) that he was only 34 years of age when the unlawful sex acts started; (5) his acceptance of responsibility by virtue of his guilty plea; (6) that he does not pose a threat to society at large; (7) his parenting obligations to his young son; and (8) the fact he is receptive to rehabilitation. The court received a copy of the motion via email and attached thereto was a copy of the evaluation that Dr. Ajibade completed with McPhie.

The sentencing proceeding got underway, and the court informed the parties that it had reviewed McPhie's motion, as well as the doctor's clinical evaluation, and it was ready to move forward with the hearing. Following the arguments of the parties, the court touched upon each of the factors advanced by McPhie in support of his departure request and explained how nearly each one was undermined by the contents of Dr. Ajibade's report.

1. Emotional distress during the commission of the crime.

First, with respect to McPhie's assertion that the crime was committed during a period of emotional instability, the court found that the emotional state addressed by the doctor was that which was present at the time the evaluation was performed. According to the court, there was no indication McPhie was similarly burdened throughout the course of conduct perpetrated against H.B. and to the extent he was, there was no showing it influenced his behavior such that it induced him to engage in criminal acts.

2. Impairment of his ability to appreciate the criminality of his conduct.

Next, the court addressed McPhie's claim that he lacked the capacity to appreciate the criminality of his conduct. In rejecting that factor, the court noted that the evaluation provided by Dr. Ajibade failed to substantiate McPhie's contention that his reduced cognitive function somehow either encouraged him to subject H.B. to unlawful touching for an extended period of time or prevented him from recognizing the nature of his conduct. And, from the court's perspective, such an assertion was undermined to some extent by the clarity of thought McPhie possessed in instructing H.B. to delete their text exchanges.

3. Acceptance of responsibility for his criminal behavior.

The court then turned to McPhie's purported acceptance of responsibility. Early in the evaluation report Dr. Ajibade set out the full extent of the initial charges McPhie was subject to. The court acknowledged that while McPhie's decision to enter a plea spared H.B. and her family the trauma of a protracted criminal prosecution, he also derived a substantial benefit from the plea in the form of dismissed charges which, in turn, reduced the potential prison term he faced.

4. McPhie's low recidivism risk

The court moved on to McPhie's fourth mitigating factor, that Dr. Ajibade's psychological assessments demonstrated he posed only a minimal risk to reoffend, as reflected by a certain percentage; thus, he generally was not a threat to society. The court was not persuaded and stated that from its experience, the fallacy of McPhie's position was that if several individuals submit to the same evaluations and receive the same percentage as McPhie, it is virtually impossible to divine which of those individuals would ultimately reoffend. Therefore, that argument carried little, if any, persuasive value for the court.

5. *The obligation to be a father to his young child.*

The judge also went on to reject McPhie's next point, that a reduced term was warranted to allow him to fulfill his parenting obligations. The fact was not lost on the court that those same responsibilities existed at the time McPhie engaged in the charged conduct, yet his child was not a sufficient deterrent for his urge to commit unlawful sex acts against another young child.

6. *McPhie's amenability to engage in rehabilitative programs.*

The final factor, McPhie's receptiveness to rehabilitative therapies, likewise did not gain any traction. The court specifically took issue with those points in Dr. Ajibade's report which referenced McPhie's claims that H.B. initiated the sexual contact, assertions which ran directly contrary to the evidence at Dr. Ajibade's disposal. In the eyes of the court, such deceptive behavior during the evaluation, coupled with McPhie's decision to blame the child victim, significantly undermined any assertion that he was amenable to, or a strong candidate for rehabilitative treatment.

The record before us reflects that the court's denial of McPhie's departure request was a product of its own generalized knowledge and information contained within Dr. Ajibade's evaluation. As noted previously, no specific mention was ever made of the probable cause affidavit at sentencing. Thus, there is no evidence to substantiate McPhie's claim that the court's sentencing decision was the product of an over-inflated significance it placed upon the affidavit.

In an effort to buttress his position, McPhie directs our attention to *State v. Pulley*, No. 112,631, 2015 WL 5750477 (Kan. App. 2015) (unpublished), and *State v. Atkisson*, 308 Kan. 919, 425 P.3d 334 (2018), and implores us to follow the reasoning outlined in those decisions. In *Pulley*, the sentencing court cited details from the probable cause

affidavit that were not part of the rather bare bones factual basis offered to shore up Pulley's guilty plea. The *Pulley* panel concluded that error occurred as a product of the court's consideration of those extraneous facts given that they were not established by either admission or trial and were not otherwise rooted in an evidentiary foundation. 2015 WL 5750477, at *6. A similar error manifested in *Atkisson* with the sentencing court's independent consideration of the probable cause affidavit and an unsworn statement from the victim's father, neither of which were introduced into evidence at sentencing. 308 Kan. at 930.

But McPhie's case presents differently. Unlike the material extracted from impermissible resources in *Pulley* and *Atkisson*, the information here was part of the court record through the evaluation prepared by McPhie's examining physician and attached to McPhie's departure motion. As we stated earlier, the record before us fails to affirmatively bear out that the affidavit played a role in the judge's sentencing determination.

Thus, this issue does not provide the foundation required to support McPhie's claim that the district court's sentencing decision was the product of an abuse of its discretion.

Did the district court impermissibly give weight to the fact that other charges were dismissed as part of the plea agreement when it denied McPhie's request for a departure sentence?

For his second specified claim of error McPhie contends the court erred in finding that his acceptance of responsibility through entry of a plea fell short of a substantial and compelling reason to depart given that he essentially derived a benefit from the plea in the form of dismissed charges and a shorter potential term of incarceration. His challenge is two-fold: (1) that this fact was not introduced into evidence, and (2) that it was merely

alleged in connection with charges that were ultimately dismissed, therefore any consideration of the same ran afoul of *Pulley* and *Atkisson*.

McPhie's first claim is rather easily resolved. The judge who sentenced McPhie was the same judge who conducted the plea hearing, and reviewed his departure motion that contained the evaluation from Dr. Ajibade which outlined the full extent of McPhie's initial charges. Thus, the court possessed a clear understanding that the terms agreed upon by the parties contemplated the dismissal of charges and that fewer crimes of conviction could translate into a shorter term of incarceration.

McPhie again attempts to draw from *Pulley* and *Atkisson* to bolster his second argument. But again, those cases found that an abuse of discretion occurred when those sentencing courts undoubtedly relied on facts from probable cause affidavits to inform their respective sentencing decisions when those affidavits were never properly admitted into evidence. McPhie's case stands in stark contrast to those two authorities. First, the court here did not clearly rely upon the affidavit in making its sentencing decision. As it relates to this claim specifically, any knowledge the judge possessed regarding the extent of McPhie's full panoply of initial charges is arguably directly attributable to the role he served in presiding over the plea hearing.

When engaging in the analysis to determine whether substantial and compelling reasons exist to warrant a departure from the status quo, sentencing courts are advised to consider "whether the evidence bears on the decision to be made, i.e., whether the mitigating circumstances advanced both exist and supply a substantial and compelling reason to depart from the hard 25 life sentence." *State v. Powell*, 308 Kan. 895, 915, 425 P.3d 309 (2018). The sentencing judge is not confined to the facts surrounding the crime of conviction. *Atkisson*, 308 Kan. at 928. Rather, the decision must arise out of that information which might reasonably bear on the proper sentence for a particular offender, given the crime committed, the circumstances inherent in that offense, and the prescribed

sentence. *Jolly*, 301 Kan. at 324. The manner in which a crime is committed and the circumstances inherent in the crime are not inevitably limited to the strict legal elements of the offense. *State v. McCormick*, 305 Kan. 43, 50, 378 P.3d 543 (2016).

In *Powell*, the Kansas Supreme Court declined to find that error occurred when Powell's prior charged offenses were afforded some degree of consideration by the sentencing court despite the fact they never resulted in convictions. 308 Kan. at 912-17. In so finding, the *Powell* court noted that the prior alleged crimes were admitted as evidence and properly fell within that body of information that might reasonably bear on the proper sentence or was relevant to whether Powell successfully established his claimed mitigating circumstances. 308 Kan. at 912-17. The Court identified Powell's background, public safety, and the facts of the case as a noncomprehensive list of factors which might assist with the determination of an appropriate sentence. 308 Kan. at 915. The list supplemented that of the *Atkisson* Court which determined that the age difference between the defendant and the victim, as well as the nature of their relationship, and whether the offense encompassed a series of events or occurred in multiple counties, were likewise relevant to the ultimate determination of whether substantial and compelling reasons existed to depart. *Atkisson*, 308 Kan. at 928.

Considering the caselaw above, McPhie's argument lacks merit. The dismissal of other charges as part of the plea agreement was a relevant fact in evidence for the district court to properly consider because it undermined the notion that McPhie pled guilty purely out of concern for the victim or solely from a desire for repentance, as he argued in his pursuit for a departure sentence.

The district court did not abuse its discretion in considering the benefits McPhie received as a product of his plea agreement when determining whether his claimed acceptance of responsibility amounted to a substantial and compelling reason to grant his

departure request. The fact was properly before the court and relevant to the ultimate sentencing decision.

Did the district court impermissibly balance McPhie's proposed mitigating factors against aggravating factors in its sentencing analysis?

When conducting its analysis, the district court stated that the lesser sentence McPhie received as a product of the dismissal of other charges under his plea agreement "*balanced out* with the acceptance and responsibility." McPhie argues that the district court's use of the phrase "balanced out" raises a red flag and reveals that it improperly weighed the mitigating circumstances in his case against the aggravated ones.

The Kansas Supreme Court has strictly policed the language used by district courts when analyzing departure motions in Jessica's Law cases. For instance, in *State v. McCormick*, 305 Kan. at 50-51, the district court explicitly referred to a particular piece of evidence as an "aggravating factor." The Supreme Court vacated the sentence because it was not "wholly confident" that the statutory directive to refrain from weighing aggravators against mitigators was scrupulously honored. 305 Kan. at 50. *McCormick* has been criticized for elevating "form over substance." 305 Kan. at 53 (Stegall, J., dissenting).

Similarly, in *Powell*, the Kansas Supreme Court identified three categories of cases where district courts committed reversible error through their use of improper language when analyzing motions seeking departures from a Jessica's Law sentence. Relevant here is the second of those categories, those cases in which sentencing courts described their rulings as products of a weighing process but without specifically identifying the facts as aggravating circumstances. 308 Kan. at 906. As examples, *Powell* highlighted two cases, *Atkisson*, and *State v. Berriozabal*, No. 108,303, 2015 WL 4094103 (Kan. App. 2015) (unpublished opinion). In the former, a panel of this court

vacated Atkisson's sentence upon finding that the district court improperly weighed mitigating factors "against the other items," such as the fact that related charges spanned multiple counties, the charged offense was not an isolated incident, and the significant age difference between Atkisson and his victim. *State v. Atkisson*, 2015 WL 6457797, at *1 (Kan. App. 2015) (unpublished opinion). The *Berriozabal* panel took similar action, noting that the sentencing court impermissibly found that the mitigating circumstances proffered by Berriozabal in support of his departure request were outweighed by the most troublesome facts of the case even though it stopped short of labeling them "aggravating." 2015 WL 4094103, at *1. Specifically, the sentencing court had noted the violent nature of the offenses and the somewhat lengthy history of the abuse, as well as Berriozabal's violation of his position of authority, refusal to stop when asked, and decision to flee the county once the abuse came to light. *State v. Berriozabal*, No. 108,803, 2014 WL 1707417 (Kan. App. 2014) (unpublished opinion), at *14. In sum, these cases show that Kansas appellate courts are apt to vacate Jessica's Law sentences that appear to result from a weighing process.

Reviewing courts will intervene to light the way when a sentencing court wanders too far afield from what is considered to be the appropriate analytical pathway for these matters. But despite McPhie's contention to the contrary, the district court judge in this case did not engage in such impermissible wandering.

In his quest for relief, McPhie focuses on the district court's use of the phrase "balanced out" due to the heightened sensitivity surrounding the term "balanced" in the Jessica's Law arena. But a review of what is truly intended to be avoided during departure proceedings, alongside the context in which the word was used in McPhie's case, reveals why this claim is not sufficient to secure the new sentencing hearing that McPhie seeks.

For that analysis we return to *Powell*, where the court attempted to "chart a discernible path" for how Jessica's Law related departure hearings should be conducted in

order to adhere to the procedure contemplated by K.S.A. 2022 Supp. 21-6627(d). 308 Kan. at 908. When considering such motions to depart, the district court must first review the mitigating circumstances without any attempt to weigh them specifically and unquestionably against any aggravating circumstances. However, a district court is not required to make an affirmative declaration that it refrained from engaging in such impermissible weighing. *Powell*, 308 Kan. at 911-12. The court must next determine, after collectively considering all the facts of the case, whether the mitigating circumstances proffered by the offender rise to the level of "substantial and compelling reasons" to depart from the mandatory minimum sentence. 308 Kan. at 913-14 (quoting *Jolly*, 301 Kan. at 324).

In determining whether substantial and compelling reasons exist to depart from a Jessica's Law's sentence, "[t]he sentencing judge is to consider information that reasonably might bear on the proper sentence for a particular defendant, given the crime committed, including the manner or way in which an offender carried out the crime." *Jolly*, 301 Kan. at 324. That is, "a judge does not sentence in a vacuum." 301 Kan. at 324.

For their part, a reviewing court is charged with determining whether the evidence presented truly related to the decision to be made, i.e., "whether the mitigating circumstances advanced both exist and supply a substantial and compelling reason to depart from the hard 25 life sentence." *Powell*, 308 Kan. 895, Syl. ¶ 9. The *Powell* court cautioned against engaging in "intellectual contortions" by applying the label of 'aggravators' to certain factors or affixing other characterizations to the same, because to do so sidesteps the actual and intended inquiry of whether the claimed mitigating circumstances truly exist and supply substantial and compelling reasons to depart from the status quo. 308 Kan. at 906, 915.

We find that McPhie's instant claim consists of just such a contortion by attributing conduct to the district court's use of the term "balance" which the surrounding

context of the word reveals did not truly occur. The district court was not balancing a mitigating circumstance against an aggravating circumstance as that procedure has come to be scrutinized. Rather, in exchange for McPhie's plea to the charged offense the State agreed to dismiss other charges against him. Once those other charges were dismissed McPhie necessarily faced a potentially lesser sentence. Thus, the court's use of the term "balance" was internal to that singular factor and was intended to communicate the dismissal coupled with the reduction in possible incarceration time rendered it a neutral factor.

We decline to find the challenged term indicates the district court failed to follow the statutory framework which guides the departure sentence analysis in Jessica's Law cases, and therefore committed a legal error which amounts to an abuse of its discretion.

Whether the court erred in finding there were not substantial and compelling reasons to support a departure?

In his final claim of error, McPhie asserts that the district court failed to give sufficient weight to his mitigating circumstances and, as a result, it reached an erroneous conclusion regarding whether substantial and compelling reasons existed to justify a departure from the presumed sentence.

We are only at liberty to reverse the district court's conclusion on this issue if that conclusion is arbitrary, fanciful, or unreasonable, i.e., no reasonable person would take the view adopted by the judge or is otherwise legally or factually flawed. *Biglow v. Eidenberg*, 308 Kan. 873, 893, 424 P.3d 515 (2018). It is the sentencing judge alone who determines the appropriate sentence to be imposed by exercising his or her best judgment, common sense, and judicial discretion after considering all of the reports, the defendant's background, the facts of the case, and the public safety. *Jolly*, 301 Kan. at 324.

The State highlights and our research reveals several cases where appellate courts upheld the denial of departure requests under analogous circumstances. See, e.g., *State v. Klavetter*, 60 Kan. App. 2d 439, 454-57, 494 P.3d 235, *rev. denied* 314 Kan. 857 (2021) (denial of departure motion under Jessica's Law upheld even where defendant lacked any criminal history); *Powell*, 308 Kan. at 897, 918 (denial of departure motion under Jessica's Law affirmed despite the fact defendant had no criminal history; was employed; had supportive family; and was truthful with law enforcement officers during the investigation); *State v. Harsh*, 293 Kan. 585, 587-88, 265 P.3d 1161 (2011) (court upheld denial of departure motion under Jessica's Law where defendant's criminal history was twenty years old and unrelated to the offense of conviction, he accepted responsibility for his actions, and he pled guilty to save his victims the trauma of testifying); *State v. Plotner*, 290 Kan. 774, 780-81, 235 P.3d 417 (2010) (denial of departure motion under Jessica's Law affirmed even though defendant took responsibility for his actions, expressed remorse, pleaded guilty to spare the victims the trauma of testifying, had no significant criminal record, and was relatively young at time of conviction).

These cases demonstrate that the district court's refusal to find that substantial and compelling reasons existed to warrant a departure sentence in McPhie's case was not arbitrary, fanciful, or unreasonable. McPhie has failed to sustain his burden to demonstrate that the district court abused its discretion in denying his request for a departure from a Jessica's Law term.

CONCLUSION

The record before us fails to substantiate McPhie's claim that the rejection of his plea for leniency amounted to factual or legal error or was otherwise unreasonable. The court's denial of McPhie's motion was the product of its collective consideration of the motion, his procedural awareness of the case, and the psychological evaluation McPhie admitted into evidence at sentencing. The affidavit of probable cause which the court

took judicial notice of to provide the factual basis at the plea hearing did not clearly and unquestionably factor into its sentencing determination. We decline to find the court abused its discretion either in the manner in which it analyzed McPhie's departure request or through its ultimate decision that substantial and compelling reasons did not exist to warrant a departure in this case.

Affirmed.