

No. 13-110130-A

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS

Plaintiff – Appellant

v.

MILES E. THEURER

Defendant – Appellee

BRIEF OF APPELLEE

**Appeal from the District Court of Riley County, Kansas
Honorable John F. Bosch, Judge
District Court Case No. 12-CR-538**

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NATURE OF THE CASE

Pursuant to K.S.A. 2012 Supp. 21-6820(d), the State of Kansas appeals the district court's granting of a downward dispositional sentencing departure.

STATEMENT OF THE ISSUE

Was the district court's decision to grant a downward dispositional sentencing departure based on substantial and compelling reasons and supported by substantial competent evidence of record?

FACTUAL STATEMENT

The defendant has no disagreements with the State's recitation of the relevant facts.

ARGUMENTS AND AUTHORITIES

The district court's decision to grant a downward dispositional sentencing departure was based on substantial and compelling reasons supported by substantial competent evidence of record, and therefore does not constitute an abuse of discretion.

STANDARD OF REVIEW

The standards of review for appeals involving sentence departures under the Kansas Sentencing Guidelines Act (hereinafter KSGA) were recently clarified by the Kansas Supreme Court.

(1) When the question is whether the record supported a sentencing judge's particular articulated reasons for departure, an appellate court's standard of review is substantial competent evidence; (2) when the question is whether a sentencing judge correctly concluded that particular mitigating factors constituted substantial and compelling reasons to depart in a particular case, including whether those mitigating factors outweighed any aggravating factors if such a balance was necessary, *the appellate standard of review is abuse of discretion*; (3) when the question is whether a particular mitigating or aggravating factor can *ever*, as a matter of law, be substantial and compelling in *any* case, the appellate standard of review is de novo; and (4) when the challenge focuses on the extent of a durational departure, the appellate standard of review is abuse of discretion, measuring whether the departure is consistent with the purposes of the guidelines and proportionate to the crime severity and the defendant's criminal history.

State v. Spencer, 291 Kan. 796, 807-08, 248 P.3d 256, 265 (2011) (emphasis added).

The State correctly sets out this standard of review, as well as the statutory provision that in appeals such as this the review is limited to whether the trial court's finding of facts and reasons justifying a departure are (1) supported by evidence in the record and (2) constitute substantial and compelling reasons for departure. K.S.A. 2012 Supp. 21-6820(d).

However, the State also adds that the latter issue is reviewed "with no deference given to the sentencing court", citing *State v. Martin*, 285 Kan. 735, 175 P.3d 832 (2008),

and others. Brief of Appellant, at 4. The State appears to misread the decision in *State v. Martin*, which in pertinent part held that the court “expressly reject[ed] any notion that a sentencing court’s use of statutory factors for departure should be reviewed with great deference and that its use of nonstatutory factors for departure should be reviewed with stricter scrutiny.” *Id.* at 747, 840. As indicated in the *State v. Spencer* decision, at 248 P.3d 270, the *Martin* decision reflects that the courts no longer give analytical weight to such a distinction. It is also true, however, as a practical matter, that to the extent that review is *de novo* when the issue is whether a particular factor can ever be substantial and compelling in any case, no deference is being given to the sentencing court. Likewise, in effect, some level of deference is being given to the trial court when the abuse of discretion standard is applied to the issue of whether the court correctly determined whether mitigating factors were substantial and compelling in the particular case.

DISCUSSION

The district court properly weighed mitigating factors intrinsic to the underlying principles of the KSGA when considering whether there were substantial and compelling reasons to grant a dispositional departure. The district court was clear, concise and deliberate in its findings of nonstatutory mitigating factors; the judge’s explanations were exhaustive and clearly developed the process by which he arrived at the conclusion that he was compelled to depart in sentencing this defendant.

a. Intent and Purpose of Guidelines

The State contends that the trial judge erred in his declaration that:

Legislative policy to be followed is to be liberally construed to the end that persons convicted of crimes shall be dealt with in accordance with individual characteristics, circumstances, needs and potentialities as revealed by case studies; that dangerous offenders be correctively treated in custody for long

terms as needed; and that other offenders shall be dealt with by probation, suspended sentence, fined or assignment to a community correctional service program whenever such disposition appears practicable and not detrimental to the needs of the public safety and the welfare of the offender.

R. III, 42, substantially quoting K.S.A. 2011 Supp. 21-6601.

The State's technical contention is accurate: the departure statutes do not fall within the range of statutes to which the quoted language applies. K.S.A. 2012 Supp. 21-6601 - 6629 deal with "sentencing" generally. However, included within those sections is the provision (Jessica's Law) for sentencing certain sex offenders to mandatory 25 or 40-year sentences, which includes its own provision for departure. K.S.A. 2012 Supp. 21-6627. Does the State suggest that sex offenders who seek dispositional departures are entitled to have their application judged in light of a different set of general "sentencing" principles than what should be applied to departure applications by other offenders?

Moreover, the language of K.S.A. 2012 Supp. 21-6802(a)&(b) does not remove all discretion from the trial court to consider individual offender characteristics as the State suggests:

- (a) The sentencing guidelines and prosecuting standards, as contained in K.S.A. 21-6801 through 21-6824, and amendments thereto, shall apply equally to all offenders in all parts of the state.
- (b) *The sentencing court may consider in all cases a range of alternatives with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case, consistent with these guidelines and the permitted dispositional and durational departures contained in K.S.A. 21-6801 through 21-6824, and amendments thereto.*

Id. (emphasis added).

Although that statute refers to individual "case", rather than individual "offenders," it is impossible to have a criminal case sentencing without a defendant to be sentenced. The State places too fine a distinction on the reference to "characteristics" as

opposed to “cases.” If sentencing in general is to be imposed with consideration for individual characteristics, would the law require that departure sentencing be imposed without such consideration? More to the point, defendant suggests that nothing in K.S.A. 2012 Supp. 21-6802 restricts the trial court’s consideration of individual offender characteristics as suggested by the State. There is nothing in any of the departure statutes to suggest that they are to operate in a vacuum separate from the considerations that are to govern sentencing in general.

K.S.A. 2012 Supp. 21-6802(b) provides a sentencing court multiple factors to consider. In addition, the Kansas Supreme Court recognizes three legislative purposes of the guidelines: “(1) reduce prison overcrowding, (2) protect public safety, and (3) standardize sentences so similarly situated offenders are treated the same in order to reduce the effects of racial or geographic bias.” *State v. Sampsel*, 268 Kan. 264, 997 P.2d 664 (2000) (quoting *State v. Favela*, 259 Kan. 215, 233-34, 911 P.2d 792, 805 (1996)).

Most recently the Supreme Court again held that “[r]easons which may in one case justify departure may not in all cases justify a departure.” *State v. Bird*, ____ Kan. ____, 312 P.3d 1265, 1269 (2013); *State v. McKay*, 271 Kan. 725, 730, 26 P.3d 58 (2001) (quoting *State v. Grady*, 258 Kan. 72, 83, 900 P.2d 227 (1995)). While the language of the court is not as direct as the language in K.S.A. 2012 Supp. 21-6601, it is clearly an indication that during a court’s deliberation of whether or not the argued factors are substantial and compelling, it is not bound to rigid and narrow interpretations in determining whether a departure is justified.

If the legislative intent were to remove all discretion in the circumstances that constitute the primary facts of this case, the legislature could amend the departure

limitations to reflect that goal. K.S.A. 2012 Supp. 21-6818(a) accomplishes this in regard to specific crimes:

(a) When a departure sentence is appropriate, the sentencing judge may depart from the sentencing guidelines as provided in this section. *The sentencing judge shall not impose a downward dispositional departure sentence for any crime of extreme sexual violence, as defined in K.S.A. 21-6815, and amendments thereto.* The sentencing judge shall not impose a downward durational departure sentence for any crime of extreme sexual violence, as defined in K.S.A. 21-6815, and amendments thereto, to less than 50% of the center of the range of the sentence for such crime.

Id. (emphasis added).

Absolute prohibition on downward dispositional departure for crimes of extreme sexual violence is codified; if the legislature desired to include such a prohibition for Involuntary Manslaughter while Driving Under the Influence of Alcohol, it clearly knows how to do so.

As the State notes, the departure statutes do include a list of nonexclusive mitigating factors, at K.S.A. 2012 Supp. 21-6815(c):

(c)(1) Subject to the provisions of subsections (c)(3) and (e), *the following nonexclusive list of mitigating factors may be considered in determining whether substantial and compelling reasons for a departure exist:*

(A) The victim was an aggressor or participant in the criminal conduct associated with the crime of conviction.

(B) The offender played a minor or passive role in the crime or participated under circumstances of duress or compulsion. This factor may be considered when it is not sufficient as a complete defense.

(C) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants, drugs or alcohol does not fall within the purview of this factor.

(D) The defendant, or the defendant's children, suffered a continuing pattern of physical or sexual abuse by the victim of the offense and the offense is a response to that abuse.

(E) The degree of harm or loss attributed to the current crime of conviction was significantly less than typical for such an offense.

Id. (emphasis added).

Nowhere does section 21-6815 state that one or more of the listed factors must be used in a court's determination to grant a downward departure. This has been further demonstrated recently by the Kansas Supreme Court in *State v. Bird*. The Supreme Court upheld the decision of the trial court which had used two nonstatutory factors in its determination that there were substantial and compelling reasons to depart. "Finally, we conclude that when considered together, [defendant's] acceptance of responsibility and his lack of danger to the public provide substantial and compelling reasons to depart. Therefore, the district court did not abuse its discretion in departing." *Bird*, 312 P.3d 1271.

Therefore, a trial court does not err in using exclusively individual characteristics of the defendant to determine whether there are substantial and compelling reasons to depart. A sentencing court is charged with the duty to enforce the guidelines; inseparable from that duty is the obligation to weigh all factors and alternatives available to the court.

b. Factors Considered by the Trial Court

The State argues that the reasons for departure, even taken as a whole, were not substantial and compelling, but completely ignores the sentencing court's statements made immediately before the sentence was handed down: "I think the court can find that Mr. Theurer is not a threat to public safety, that he accepts his responsibility, and that it's doubtful he would present a threat to public safety in the future based on the LSI-R and the Pawnee report." R. III, 55: 14-18.

The court considered a number of factors during its deliberation, and made specific findings of judicially recognized factors as quoted above. These findings were made after an articulated enumeration of facts that caused the court to conclude that based on the totality of the circumstances, in the defendant's case, the record supported substantial and compelling reasons for departure. The trial court relied on multiple resources that were properly before the court. The court did not err in using those resources to develop its findings.

A trial court must consider a plethora of information in order to properly assess a motion to depart, pursuant to K.S.A 21-6815(d):

- (d) In determining aggravating or mitigating circumstances, the court shall consider:
 - (1) Any evidence received during the proceeding;
 - (2) the presentence report;
 - (3) written briefs and oral arguments of either the state or counsel for the defendant; and
 - (4) any other evidence relevant to such aggravating or mitigating circumstances that the court finds trustworthy and reliable.

The trial court can reasonably rely on a compilation of evidentiary facts to establish a valid nonstatutory factor supporting departure, especially when that factor is as substantial as a defendant not being a threat to the public. Furthermore, “[w]hen even one factor relied upon by the sentencing court is substantial and compelling, the departure sentence should be upheld.” *Bird*, 312 P.3d 1269; *State v. Blackmon*, 285 Kan. 719, 725, 176 P.3d 160, 165 (2008). That policy, if nothing else, operates in favor of the sentence reached in this case, as is developed below.

Acceptance of Responsibility

The trial court identified that the defendant “accepts responsibility” as one of the factors for departure. (R. III, 55: 14-18). The court substantiated this factor by stating that the defendant “has expressed remorse;” “I think there is no doubt in anybody’s mind that Mr. Theurer is remorseful;” and “[he] completed a 32-hour alcohol education program on his own.” R. III, 51 - 52. A defendant’s acceptance of responsibility is a factor, recognized by the Kansas Supreme Court, which can be a mitigating factor in support of a departure. *Bird*, 312 P.3d 1265. The Court in *Bird* stated that “acceptance of responsibility is consistent with the principles and purposes of the guidelines and can be an appropriate departure factor.” *Id.* at 1269. There is substantial competent evidence of record to show that the defendant accepted responsibility for his crimes, including his statement to the court at sentencing, R. III, 37-40, and his no contest plea, R. I, 80.

Criminal History

It is well established that in most cases a defendant’s criminal history cannot be used as justification for a departure sentence when the sentencing guidelines have already taken the defendant’s criminal history into account in determining the presumptive sentence within the grid. *State v. Richardson*, 20 Kan.App.2d 932, 941, 901 P.2d 1, 7-8 (1995). However, the court in *Richardson* did affirm that a “sentencing court remains free to consider factors that a defendant’s criminal history does not take into account.” *Id.* The Court of Appeals held that the time between Richardson’s last felony conviction and the instant conviction was not taken into account on the sentencing grid and therefore the trial court could consider it a factor in sentencing. *Id.*, at 942, 8.

K.S.A. 2012 Supp. 21-6809 describes the criminal history for category “I”:

The offender's criminal history includes no prior record; or, one adult conviction or juvenile adjudication for a person, nonperson, or select misdemeanor, but no adult conviction or juvenile adjudication for either a person or nonperson felony.

The State rightfully contends that the absence of any criminal conviction on the part of Mr. Theurer is adequately represented in the sentencing guidelines. The trial court did not deny this; instead, the court stated: “But not all history scores I’s are the same. There is absolutely nothing on Mr. Theurer’s record. And a defendant’s complete lack of criminal contacts can be considered in departing. It’s not a factor by --in and of itself to justify departure, but it can be considered in the overall picture.” R. III, 52: 12-16. The trial court was fairly made the distinction that lack of a conviction is not the same as a complete lack of evidence of any criminal behavior. Also, as is addressed below, a full recounting of a defendant’s criminal history is permissible and necessary in the event it is an element of a substantial factor such as a defendant’s level of threat to public safety.

Threat to Public Safety

The Kansas Supreme Court has established that a defendant’s lack of threat to public safety is a substantial factor in determining if departure is justified. Recently in *State v. Bird* the court held, “Evidence that a defendant is peaceful, mild-mannered, and nonviolent supports the conclusion that the defendant is not a threat to society, which may be a factor that serves as a substantial and compelling reason to depart from a presumptive sentence.” *Bird*, 312 P.3d 1270, citing *State v. Grady*, 258 Kan. 72, 90, 900 P.2d 227, 239 (1995).

Furthering the intent of the legislation, the Supreme Court has found that even in the event that a defendant is found guilty of voluntary manslaughter a trial court possesses the same discretion to grant departure when the record reflects substantial and

compelling reasons supported with “substantial evidence”. *Grady*, 258 Kan. at 90, 900 P.2d at 239. Mr. Grady went to the victim’s home, provoked him out of the house and shot the victim 11 times. *Id.* at 75-76, 230-231. The trial court at sentencing expressed its determination to punish the defendant locally, stating:

“The issue is is Mr. Grady a threat to society and what is [the] appropriate way for that punishment to be done? The issue is becoming increasingly, if we don't know it already then we better start to take notice of it now, that we are coming to a place where local corrections and state corrections are going to be more sharply defined.

“The state government is reducing its state corrections and looking more to the local community to undertake corrections. The question is are we in a posture where local corrections are sufficient punishment for what Mr. Grady has done or is it a state matter? I'm going to take the position that if he were a threat to society, a threat to anybody around, if I thought for one instant anything like this might occur again I would send him to the state penal system.

“I believe that this is a matter which since there is no threat to society that his 49 months of punishment must somehow be done within the tools available to us locally.”

Id. at 90, 239, (quoting the sentencing court).

The Supreme Court found that based on this rationale the sentencing court imposed the most severe nonprison sentence it thought possible, and went on to hold that “[t]he departure findings made by the trial court [were] supported by substantial evidence in the record, and as a whole the findings constitute substantial and compelling reason for a downward dispositional departure”. *Id.*

For a factor supporting departure to be substantial “the reason must be real, not imagined, and of substance, not ephemeral.” *State v. Hines*, 296 Kan. 608, 620, 294 P.3d 270, 278 (2013). The trial court in the instant case relied on a large amount of evidence to establish this factor as substantial and compelling, such as:

- (1) Letters and testimonials from family, friends, colleagues, and professors speaking to the defendant's character, credentials, accomplishments, and ability to do great things for humanity. R. III, 43-51.
- (2) Absolute lack of evidence that the defendant has ever broken the law before. R. III, 52: 7-8.
- (3) Exceptional school and work history. R. III, 53: 19-21.
- (4) The defendant has a supportive family. R. III, 53: 17.
- (5) LSI-R score, indicating that there is a low risk that he will reoffend. R. III, 51: 3-12.
- (6) SASSI assessment, indicating that there is a low probability of a substance dependence disorder. R. III, 51: 13-22.

As recited above, each factor is treated differently for each individual case. *State v. Bird*, 312 P.3d 1265, 1269 (Kan. 2013); *State v. McKay*, 271 Kan. 725, 730, 26 P.3d 58 (2001); *State v. Grady*, 258 Kan. 72, 83, 900 P.2d 227 (1995). The evaluation of evidence regarding defendants' threat levels reveals a spectrum of varying levels of threat to society. If a court could determine in one instance that a particular individual is a threat to society and needs to be confined to prison, then on the other end of that spectrum would be not only the individual who is not a threat, but also the individual who is not a threat and can be treated and punished locally while potentially doing something good for the community at large. The trial court's contemplation of the defendant's propensity for public speaking and ability to "share his story throughout the nation," R. III, 54: 17-25; 55:1-3, need not be viewed as separate mitigating factors but rather as evidence that bolsters the finding that defendant does not pose a present or future threat to society and can be treated and punished locally.

The trial court properly articulated the position that the defendant was not a threat to society with evidence of his school and work history, support of his family, and the ample number of character reference letters. The exhibits filed with Defendant's Motion

for Downward Durational and Dispositional Departure included 112 letters of character reference and/or support for the departure. They are itemized at R. IV 37-42.

This Court's attention is directed to the trial court's discussion of these letters, wherein are mentioned specifically a letter from Mr. Theurer's high school agriculture teacher [James Ryan]; one from his Kansas State professor in microbiology [T.G. Nagaraja, M.V. Sc., Ph.D.], who describes Mr. Theurer's dual degree program to obtain both a D.V.M. degree and a Ph.D.; a letter from Dr. [Bob L.] Larson, [D.V.M., Ph.D.], defendant's academic advisor, who anticipates Mr. Theurer's service to livestock producers in rural communities; and a letter from the Dean of the College of Veterinary Medicine [Ralph C. Richardson, D.V.M., Dipl ACVIM (Oncology, Internal Medicine)] who explained that only one or two students per year at most have undertaken to obtain both the veterinary degree and the Ph.D. degree simultaneously, which path Mr. Theurer has pursued in order to be an effective leader in beef cattle veterinary medicine. R. III, 44-46. These letters in full are found at R. IV, Tabs 83, 69, 56 and 78 respectively.

Defendant also directs this Court's attention to the letter of Barry L. Flinchbaugh, Professor of Agricultural Economics, a veteran of 41 years of teaching at Kansas State University who rated Mr. Theurer in the top two percent academically in terms of activity in his junior/senior level agricultural policy class. He closed his letter to Judge Bosch by thanking him for "listening to an old professor that does know students and their character." R. IV, Tab. 32. While these letters certainly do reflect the defendant's extensive personal contacts, it is an unfair presumption by the State that this level of interpersonal connection is only attainable by influence gained from affluence and social status. The letters were from a diverse group of acquaintances, family members, present

and past professors, and even high school teachers. They were reflective of a person who has worked hard and attempted to do good for a long time; they did not reflect a stereotypical “spoiled rich kid” seeking credit where it is not deserved. Moreover, there is no evidence that defendant’s background is one of affluence. In fact, evidence was presented of his \$102,000 in student loans. R. IV, 4 and Tab E.

It is also important to note that although the State characterizes the letters as requests for leniency, they were for the most part more than that. The focus of a number of them was on the cost to society that would occur from defendant being incarcerated rather than fulfilling his promise, and specifically many of the authors urged the court to fashion a sentence that would allow defendant to complete his degrees so that he could go on to be of significant benefit to society. R. IV at Tabs 5, 16, 17, 44, 45, 50, 56, 60, 61, 64, 67, 69, 102, 108 and 109. The Court responded to that input in telling defendant, as it pronounced sentence, “[w]hat I think is best for society is that you get your degree” R. III, 57 (emphasis added).

A trial court is clearly justified in relying on a defendant’s personal circumstances in its determination that the defendant is not a threat to society. In *Bird*, the Kansas Supreme Court upheld the trial court’s determination that based on specific characteristics of the defendant there was substantial and compelling evidence to depart:

Instead, the district court's questioning and comments at the sentencing hearing reveal that in finding Bird to be a low risk of danger to the community, *the court relied on Bird's personal circumstances, including family and church support, as well as the nonviolent nature of all of his past crimes, not just the theft crimes.*

Bird, 312 P.3d 1270 (emphasis added).

A defendant's personal circumstances, the nature of his/her past criminal record (or lack thereof), and existence or lack of family/community support are all appropriate elements for a court to analyze in its determination of whether or not the defendant is a threat to the public safety currently or expected to be in the future. Each of the elements listed above, and relied upon by the trial court in the instant case, was legitimate; together they demonstrated substantial and compelling support for the trial court's finding that this defendant is no threat to society, and impliedly that punishment could be carried out with the tools available locally. The trial court's departure is consistent with the holding in *Grady* and its progeny. The court's rationale is in keeping with the principle behind the KSGA in favor of reserving incarceration for serious or violent offenders who present a threat to public safety. *Grady*, 258 Kan. 90, 900 P.2d 239.

Defendant's Diabetes

The State argues that the defendant would be in better circumstances medically given the medical treatment available in the Kansas Department of Corrections facilities; that he would not be at any greater risk in prison than if he were walking the street; that there are hundreds of other KDOC inmates in the same condition as the defendant. Appellant's Brief, at 12. These arguments are without support.

According to the State's own witness at sentencing, the defendant's health condition would not make him one among hundreds in KDOC custody as asserted by the state. Although the State's witness testified that there are several hundred Type I diabetics among KDOC inmates, she admitted that currently there are twelve (12) prisoners serving time while relying on an insulin pump to regulate glucose levels. R. III, 13-14. The witness, the Director of Healthcare for KDOC, was familiar with complaints

levied against Correct Care Solutions, the private contractor servicing KDOC, alleging inappropriate care. R. III, 15: 17-23. Further, she admitted on redirect examination that because “[she is] not an M.D.” she could not speak to the “concerns for an inmate with a specific Type 1 Diabetes diagnosis and insulin pump.” R. III, 16: 5-17. As was disclosed in the Defendant’s Motion for Downward Durational and Dispositional Departure:

Mr. Theurer was diagnosed at the age of one with Type 1 diabetes. He currently uses an insulin pump with a present dosage of 70.15 units (.7015 mL) per day. Additionally, Mr. Theurer takes Lisinopril as a precautionary measure to deal with high blood pressure that may have significant negative impacts on his condition. Mr. Theurer’s diabetes is difficult to stabilize, and requires close monitoring. Monitoring Mr. Theurer’s condition is expensive and requires specialized professional care, without which, very serious health risks may occur. Currently Mr. Theurer must see his specialist 2-3 times per year to monitor his medication consumption, and its effects on his health.

R. I, 34-35.

If the State’s witness did nothing else, she made the trial court aware that the defendant would not be part of a large population of similar inmates, but in fact would be one of an extreme minority in the prison population. She offered no testimony to substantiate that there are no concerns for an inmate similarly situated. Evidence that a few inmates possess the same condition as defendant and are surviving does nothing to illustrate the access that a person relying on an insulin pump has to a physician in an emergent situation within the prison system; nor is it evidence that such individuals receive the same level of care that they would among the general population.

The trial court stated: “Is Mr. Theurer’s diabetes a factor that would require departure? Kansas law is clear it’s not in and of itself. But a defendant’s poor health is related to a defendant’s amenability to incarceration. It’s unrelated to culpability.” R. III, 53: 7-10. At no point does the trial court attempt to use this as a substantial and

compelling factor in its own right in the determination. Based on the evidence presented at sentencing the trial court would have had to disregard competent evidence, presented by the State, that the defendant's condition would be very rare in the prison population. There was also evidence within the reference letters of defendant's nearly life-long condition and the struggle to stabilize it, specifically letters from defendant's father and sister-in-law, and two secondary school educators. R. IV, Tabs 98, 99, 106 and 112. As stated above, K.S.A. 2012 Supp. 21-6802(b) provides that the sentencing court may "*consider in all cases a range of alternatives with gradations of supervisory, supportive and custodial facilities at its disposal so as to permit a sentence appropriate for each individual case....*" *Id.* (emphasis added). The trial judge would have done the defendant an injustice if evidence of his ailment were not considered in determining if there were alternatives to incarceration.

c. *The Trial Court's Reasons for Departure Were Substantial and Compelling*

Judge Bosch began the explanation of his reasoning for the sentence by stating: "So the first question this Court is looking at is, do we have a typical situation here or an atypical situation?" R. III, 41: 2-3. This is a question that is essentially a parallel to the Supreme Court's definition of compelling: "In order to be compelling, the mitigating factor '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.'" *State v. Hines*, 296 Kan. 608, 620, 294 P.3d 270, 278 (2013) (quoting *State v. Blackmon*, 285 Kan. 719, 724, 176 P.3d 160, 165 (2008)). In *Hines*, the Supreme Court also reiterated the definition of substantial: "Again, in order for a mitigating factor to be substantial, 'the reason must be real, not imagined, and of substance, not ephemeral.'" *Id.*

The trial court went to great lengths to enumerate all of the substantial and compelling reasons that justified granting a departure sentence, concluding:

I don't believe any of the factors that I have mentioned, Mr. Theurer, standing alone, would justify a downward departure. But I can't imagine a situation where we have -- I have ever have someone come before me again where they have done everything that society expects to be done by a person except for this one thing. You have been described as, you know, a role model to children, described as a stellar student, as a star student. It's too many to cover, but you are an exceptional person that I find to be an atypical case. And in this case that, when considering the totality of all of the facts of your life up to this point, I find that you should be granted a downward departure and that there are substantial, compelling reasons when considered in all their totality.

R. III, 56: 7-20.

The State contends that anyone convicted of this crime should go to prison and the court correctly disagreed with this notion:

[The State], I think, would like me to believe that anybody standing convicted of this crime should automatically go to jail -- prison. I don't believe that's what the law provides. I think I am required to decide is there anything atypical about this case that requires justice be anything different. And that's what I'm attempting to do.

R. III, 50:21 – 51:1.

Following its extended evaluation of a number of factors, the trial court found that all of the listed findings and factors in their totality provided substantial and compelling reason to depart. Some of the factors used in its determination are nonstatutory factors that the Kansas Supreme Court has previously upheld as substantial and compelling. One of those, the defendant's lack of threat to society, is extremely substantial and compelling. Not only is it consistent with current precedent, it is also an integral part of the KSGA's intent and purpose. There is substantial competent evidence in the record to support this finding by the trial court.

The State argues that defendant's speaking ability a matter of law can never be a substantial and compelling reason to depart. Appellant's Brief, at 13. However, defendant suggests that it cannot fairly be said that Judge Bosch made a determination that it was. Defendant's motion for departure did propose that some form of probation with a requirement of extensive speaking to youth audiences of the dangers and consequences of drunk driving would be an appropriate disposition and one that could accommodate defendant completing his degree programs. There was a great deal of support for this suggestion within the character reference/support letters, from which the court quoted. R., III, 54-55.

However, no where does the trial court indicate that speaking ability was itself a substantial reason to depart. It did seemingly play a role in the court's crafting of a non-prison sentence in the sense that a program of such speaking is a required part of Mr. Theurer's conditions of probation. However, as to this argument of the State, and the State's other suggestions that the trial court was unreasonable to consider defendant's employment, education, good character, supportive family and recommendation letters as reasons for departure, defendant refers the Court to the reasoning in *Grady*:

The final analysis is not whether any departure factor, in isolation, *can* be a substantial and compelling reason for departure but whether, *as a whole*, the factors are substantial and compelling reasons for imposing a departure sentence in this case in light of the offense of conviction, the defendant's criminal history, and the purposes of the sentencing guidelines.

Grady, 258 Kan. 72, 89; 900 P.2d 227, 238 (emphasis in original).

Defendant believes that those considerations support Judge Bosch's decision that in their totality the factors he had discussed provided substantial and compelling reason to depart from guideline sentencing. The State is not required to agree with the trial court's

exercise of discretion, but it is incorrect in its argument that no reasonable person would consider the factors relied upon by the district court as substantial and compelling in their totality.

CONCLUSION

There is no denying that the consequences associated with defendant's crime were of the most severe nature. This was not ignored during sentencing; the trial court addressed appropriate evidence within the scope of the statutes and in furtherance of the purpose and principals of the guidelines. The evidence relied upon to conclude that the defendant: (1) does not pose a threat to the public and (2) has accepted full responsibility for his actions, was significant in quality and quantity and more than sufficient upon which to determine that those factors, alone, comprised substantial and compelling reasons to depart downward. The trial court, however, as indicated above and in the transcript of sentencing, looked at other factors in addition and made its determination based on the totality. A stated goal of the Kansas sentencing scheme is to reserve prison space for violent, dangerous offenders. The sentencing court imposed the most severe nonprison sentence it thought possible, which, as the Supreme Court has held in similar circumstances, is not an abuse of discretion. Based on the substantial and compelling factors considered by the trial court, there was no abuse of discretion in the downward departure sentence given to this defendant.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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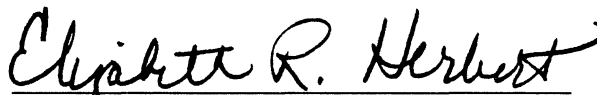
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