STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1800

State of Minnesota,
Respondent,

vs.

Jace Steven Matthees,
Appellant.

Filed April 29, 2013
Affirmed
Larkin, Judge

Dodge County District Court
File No. 20-CR-11-870

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Paul Kiltinen, Dodge County Attorney, Mantorville, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Larkin, Judge; and Harten, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges his sentence for third-degree criminal sexual conduct, arguing that the district court abused its discretion by denying his motion for a downward dispositional sentencing departure. We affirm.

FACTS

Respondent State of Minnesota charged appellant Jace Steven Matthees with first-degree criminal sexual conduct. Pursuant to a plea negotiation, Matthees pleaded guilty to an amended charge of third-degree criminal sexual conduct. The agreement called for a 60-month cap on any prison time, which was a downward durational departure from the presumptive sentence range of 65 to 91 months, under the sentencing guidelines. The guidelines called for an executed prison sentence, but the plea agreement allowed Matthees to argue for a dispositional departure.

Prior to sentencing, Matthees moved for a downward dispositional departure, contending that the court should depart because he (1) had maintained a stable residence and employment, (2) had not incurred any new offenses, (3) was aware he needed a chemical-dependency evaluation and would complete one within 30 days, (4) completed a psychosexual assessment, which indicated that he was amenable to treatment, and (5) "has shown the [c]ourt that he is amenable to probation since his release from incarceration nine months ago and that he is, therefore, a good candidate for probation."

Community corrections filed a presentence investigation report (PSI) recommending that Matthees be sentenced to 76 months in prison, the presumptive

sentence under the sentencing guidelines. The PSI noted that Matthees had a previous conviction of solicitation of a child to engage in sexual conduct. Matthees did not complete probation on that offense; he served a 15-month prison sentence. Although he attended sex-offender treatment before his incarceration, his participation ended when he went to prison. He briefly attended treatment while on supervised release after his prison term, but he stopped participating when his supervision ended.

At the sentencing hearing, Matthees argued for a dispositional departure. He argued that his psychosexual assessment indicates that he has a number of mental-health issues, that the assessment recommended both sex-offender and chemical-dependency treatment, that he would complete a chemical-dependency assessment within 30 days, that he expressed remorse, that he had not committed any new offenses, that he maintained a job and a stable residence, and that he has never had the chance to finish sex-offender treatment because his sentence for his prior offense was executed after he violated probation.

The district court stated that it did not find "an adequate basis for a downward departure." The court explained that "[t]he parties themselves came to an agreement that to a large extent minimized the potential punishment to which Mr. Matthees would have been subject," and "I see no reason now to be departing from what was agreed upon as a reasonable compromise some three months ago." The district court sentenced Matthees to serve 60 months in prison. The court further explained

> that we've got a situation where this is not a first-time offense, and at some point you look past I think a little bit all of the rehabilitative things that courts attempt to accomplish,

> and you look at what might be an appropriate level of punishment given the adverse effects on the life of another human being caused solely by Mr. Matthees. And I can't ignore that harm that he's done, nor I think does rehabilitation necessarily in every case outweigh other considerations such as deterrence and such as punishment. And so, you know, consider this perhaps punishment that I believe is appropriate given the harm that he's done.

Matthees appeals his sentence.

D E C I S I O N

A district court may depart from the presumptive sentence under the sentencing guidelines only if "substantial and compelling" circumstances warrant such a departure. Minn. Sent. Guidelines II.D (2010). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Whether to depart from the guidelines rests within the district court's discretion, and this court will not reverse the decision "absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Matthees argues that he "put forth substantial and compelling reasons to justify a dispositional departure and demonstrated his amenability to probation through his success while in the community on bond." Matthees relies on several cases to support his argument. *See State v. Hennessey*, 328 N.W.2d 442, 443 (Minn. 1983) (affirming a dispositional departure because "the [district] court was justified in concluding that

defendant was particularly amenable to treatment in a probationary setting"); *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) ("Numerous factors, including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting."); *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984) ("The sentencing court here has identified sufficient factors to show the defendant is amenable to supervision rather than imprisonment."), *review denied* (Minn. Oct. 16, 1984).

It is not at all clear that Matthees was amenable to probation at the time of sentencing. Although Matthees reportedly held a job and did not commit a new offense during his pretrial release, this is his second felony-level conviction for a sexual offense. He violated probation on his first offense, was imprisoned, and never completed sex-offender treatment. Although Matthees argued that he was aware that he needed a chemical-dependency evaluation, he neither completed one nor started treatment during the approximately nine months that he was not in custody pending resolution of this case.

But even if Matthees were amenable to probation, it would not follow that the district court abused its discretion by refusing to depart from the presumptive disposition. A "district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation." *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). But a district court does not abuse its discretion by refusing to depart "from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation." *Id.* at 663.

Matthees also argues that "the district court did not deliberately consider factors for departure by comparing them side by side with factors for non-departure when it sentenced [him]." He cites *State v. Curtiss*, in which this court held that the district court "erred in putting aside arguments for departure rather than considering them alongside valid reasons for non-departure," and remanded "for reconsideration of the departure question." 353 N.W.2d 262, 264 (Minn. App. 1984) (quotation omitted). The record belies Matthees's assertion: the district court considered his reasons for departure alongside reasons for nondeparture. The district court noted that this was not Matthees's first sex offense, and stated that "at some point you look past . . . all of the rehabilitative things" and "look at what might be an appropriate level of punishment given the adverse effects on the life of another human being caused solely by Mr. Matthees." Thus, the record shows that the district court exercised its discretion, negating the concern raised in *Curtiss* that the district court did not consider the departure argument. *See id*. ("This is not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred.").

In his pro se supplemental brief, Matthees offers additional reasons why the district court should have granted his request for a downward dispositional departure. We have considered his argument but ultimately conclude that the district court did not abuse its discretion by denying his request. We therefore do not disturb the sentence. *See State v. Abeyta*, 336 N.W.2d 264, 265 (Minn. 1983) (stating that an appellate court

ordinarily will not disturb the district court's imposition of a presumptive guidelines sentence, even where reasons for a downward dispositional departure exist).

Affirmed.