STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1801

State of Minnesota,
Respondent,

vs.

Ramiro Alejandro Pena,
Appellant.

Filed August 19, 2019
Affirmed
Rodenberg, Judge

Mower County District Court
File No. 50-CR-17-1636

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Kristen Nelsen, Mower County Attorney, Scott K. Springer, Assistant County Attorney, Austin, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Bjorkman, Judge; and Rodenberg, Judge.

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

RODENBERG, Judge

Ramiro Alejandro Pena directly appeals from the judgment of conviction, arguing that the district court abused its sentencing discretion in refusing to depart from the

Minnesota Sentencing Guidelines. We affirm appellant's sentence. He also raises a number of claims in a pro se brief, which we decline to address because the record is insufficient for appellate review.

FACTS

On July 8, 2017, police officers executed a search warrant at a house as part of investigating an earlier shooting. Inside the house, officers recovered a loaded shotgun and nine rounds of ammunition. Officers executed a second search warrant at the same home on July 20, 2017, during which appellant was arrested. Appellant admitted that he owned the shotgun recovered on July 8. He was charged with being a violent felon in possession of a firearm under Minn. Stat. § 624.713, subd. 1(2) (2016).

On March 12, 2018, appellant pleaded guilty to the felon-in-possession charge and admitted to possessing the shotgun that officers found in the home on July 8. Appellant sought a downward dispositional departure from the sentencing guidelines. The state opposed the motion.

At sentencing, appellant argued that a dispositional departure was warranted because he took responsibility for his crime, showed remorse, had no mental illness that would compromise treatment, did not engage in the use of force in connection with this offense, had a low likelihood of reoffending, and did not have a chemical-dependency issue. The district court found that appellant was not particularly amenable to probation. It considered appellant's admission to the presentence investigator that he is a member of a gang and that he does not intend to leave it. The district court also considered that appellant did not have any treatment needs and has no mental-health issues. The district

court further considered appellant's acceptance of responsibility, but decided to "follow the sentence at law here" and sentenced appellant to 60 months in prison.

This appeal followed.

D E C I S I O N

I. The district court's sentencing decision was within its discretion.

Appellant argues that the district court erred because it denied his motion for a downward dispositional departure despite his "young age, cooperation, acceptance of responsibility, lack of criminal history, and willingness to accept treatment." The state argues that the district court did not abuse its sentencing discretion.[1]

A district court may depart from the sentencing guidelines if there are "identifiable, substantial, and compelling" circumstances that distinguish a case and overcome the presumption of a guidelines sentence. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). If such circumstances are present, then a district court "must exercise its discretion and consider the factors." *State v. Kier*, 678 N.W.2d 672, 677 (Minn. App. 2004), *review denied* (Minn. June 15, 2004). A district court has broad discretion in deciding whether to depart from the sentencing guidelines, *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981), and we will only reverse if there is "a clear abuse of discretion," *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). "[T]he mere fact that a mitigating factor is present in a particular case does not

[1] The state also argues that the district court was prohibited from departing under Minn. Stat. § 609.11, subd. 5(b) (2016). The state did not make this argument to the district court and we therefore do not consider it. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

obligate the court to place defendant on probation or impose a shorter term than the presumptive term." *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted).

In considering a dispositional departure, the district court "can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983); *Abrahamson*, 758 N.W.2d at 337. The district court may consider the defendant's "particular amenability to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). A district court is not required to depart "from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation." *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009).

Appellate courts generally will affirm the imposition of a presumptive guidelines sentence when it is clear that the district court evaluated the circumstances presented. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013). A district court is not required to explain its reasoning for imposing a presumptive sentence "as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985).

Appellant argues that the district court abused its discretion by declining to dispositionally depart in light of relevant sentencing factors including his young age, lack of prior adult felonies, cooperation with police, family support, and employment.

Appellant does not contend that the district court failed to consider these factors, but argues that the combined weight of these factors should have resulted in a dispositional departure.

In support of this argument, appellant cites to *State v. Malinski* where we "affirmed a dispositional departure under less persuasive circumstances than those presented here." 353 N.W.2d 207, 208 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984). This reliance is misplaced. In *Malinski*, we affirmed a district court's *grant* of a dispositional departure where the district court found that the defendant was particularly amenable to probation. 353 N.W.2d at 210-11. *Malinski*, like this case, involved a district court making findings about whether a defendant was particularly amenable to probation and, in light of its findings, exercising its discretion on the question of whether to dispositionally depart from the sentencing guidelines. *Id.*

Here, the district court stated before sentencing that it had reviewed the sentencing worksheet, presentence investigation report, rule 15 petition, motion for departure, department of corrections report, and recent positive drug tests for alcohol and marijuana. The district court also heard arguments regarding the requested downward dispositional departure. Contrary to appellant's argument, the district court found that appellant was not particularly amenable to probation, considering that he did not have any treatment or mental-health needs. The district court stated that it "acknowledge[d]" and "appreciate[d] everything that [appellant is] telling me, I think [he] do[es] accept responsibility, I think [he] do[es] understand the circumstance that [he is] in," but ultimately imposed a guideline sentence.

It is clear from the record that the district court exercised its discretion. It heard arguments from counsel, considered the record evidence before it, and declined to depart from the guidelines. A district court is not obligated to depart, even if mitigating circumstances are present, so long as it carefully considers the record evidence and exercises its discretion. *See State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984); *Pegel*, 795 N.W.2d at 254; *Olson*, 765 N.W.2d at 663; *Van Ruler*, 378 N.W.2d at 80-81. The district court did so here.

We affirm appellant's sentence.

II. We decline to address appellant's pro se arguments.

Appellant also filed a pro se supplemental brief in which he raises multiple claims of ineffective assistance of counsel.

To prevail on an ineffective-assistance-of-counsel claim, an appellant must first show that his counsel's representation fell below an objective standard of reasonableness, despite the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland v. Washington*, 466 U.S. 668, 669, 689, 104 S. Ct. 2052, 2065 (1984); *see State v. Jones*, 392 N.W.2d 224, 236 (Minn. 1986). Next, an appellant must demonstrate that there is "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S. Ct. at 2089.

Typically, an ineffective-assistance-of-counsel claim is raised in a petition for postconviction relief, rather than on direct appeal. *State v. Gustafson*, 610 N.W.2d 314,

321 (Minn. 2000); *State v. Ellis-Strong*, 899 N.W.2d 531, 535 (Minn. App. 2017). "A postconviction hearing provides the court with additional facts to explain the attorney's decisions, so as to properly consider whether a defense counsel's performance was deficient." *Gustafson*, 610 N.W.2d at 321 (quotation omitted). If an ineffective-assistance-of-counsel claim can be determined on the basis of the trial record, then that claim must be brought on the direct appeal. *Ellis-Strong*, 899 N.W.2d at 535. However, appellate courts may decline to address an ineffective-assistance-of-counsel claim if the record is insufficient for appellate review. *See Gustafson*, 610 N.W.2d at 321; *Ellis-Strong*, 899 N.W.2d at 540-41.

Our review of the record before us reveals that the record is insufficiently developed to address any of the claims appellant raises in his pro se brief. In the absence of a sufficient record, "any conclusions reached by this court as to whether [appellant's] attorney's assistance was deficient would be pure speculation on our part." *Gustafson*, 610 N.W.2d at 321. Accordingly, we decline to address these issues.

Affirmed.