STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0026

State of Minnesota,
Respondent,

vs.

Michael Alan Bunnell,
Appellant.

Filed November 4, 2019
Affirmed
Smith, Tracy M., Judge

Olmsted County District Court
File No. 55-CR-17-7699

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

Mark A. Ostrem, Olmsted County Attorney, Jennifer D. Plante, Senior Assistant County Attorney, Rochester, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina Schulz, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Smith, Tracy M., Judge; and Peterson, 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

SMITH, TRACY M., Judge

On appeal from his conviction for a second-degree controlled-substance crime, appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure from the presumptive prison sentence under the Minnesota Sentencing Guidelines. We affirm.

FACTS

Appellant Michael Alan Bunnell was found with methamphetamines in two separate contacts with law enforcement in November 2017. As a result, the state charged Bunnell with three counts: (1) second-degree controlled-substance crime (intent to sell), (2) third-degree controlled-substance crime (possession), and (3) fleeing an officer in a motor vehicle.

In March 2018, pursuant to a plea agreement, Bunnell pleaded guilty to the first count and the state dismissed the remaining counts. As part of the agreement, the state agreed to recommend a downward dispositional departure if Bunnell could "demonstrate 60 days of uninterrupted residential treatment during which time he is making a good faith effort and meets program requirements." The district court ordered Bunnell to cooperate with a presentence investigation (PSI).

Bunnell failed to appear for his PSI interview. In June, a bench warrant was issued, and he was arrested. Bunnell stayed in custody until July 26, when he started an inpatient treatment program at the Beauterre Recovery Institute in Owatonna. Bunnell completed the treatment program 28 days later, on August 23. The record does not indicate that

Bunnell took part in any other treatment program. Seven days after completing the Beauterre program, Bunnell tested positive for methamphetamine.

Several days later, on September 3, Bunnell was the driver in a car crash in which he and his girlfriend were injured. On September 26, Bunnell failed to appear for his original sentencing hearing, and his lawyer stated that Bunnell's family had reported that he had fallen out of bed and been taken to the hospital. Bunnell appeared for a hearing two days later, and his sentencing was rescheduled to October 8.

At the sentencing hearing, both Bunnell and the state recommended a downward dispositional departure, arguing that Bunnell had complied with the material terms of the plea agreement. The district court declined to depart from the sentencing guidelines and imposed an executed sentence of 84 months in prison.

This appeal follows.

D E C I S I O N

Bunnell argues that the district court abused its discretion by denying his motion for a downward dispositional departure and imposing an 84-month executed sentence under the sentencing guidelines.

A sentence or range of sentences prescribed under the Minnesota Sentencing Guidelines "is presumed to be appropriate." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). A district court may depart from the presumptively appropriate guidelines sentence only if "identifiable, substantial, and compelling circumstances" warrant doing so. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). To maintain

uniformity and proportionality in sentencing, departures from the guidelines sentence are discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

If a defendant requests a downward dispositional departure, a district court must determine whether "mitigating circumstances are present" and, if so, whether "those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *Soto*, 855 N.W.2d at 308 (quotations omitted). "[T]he mere fact that a mitigating factor is present in a particular case does not obligate the court to place [a] defendant on probation . . . ." *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted). And, "[a]lthough the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Appellate courts "afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *Soto*, 855 N.W.2d at 307-08 (quotation omitted). A district court "abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). We will reverse a district court's refusal to depart only in a "rare" case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

Though an appellate court may review sentencing decisions for an abuse of discretion, it will not decide matters not raised before the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). "Nor may a party obtain review by raising the same general

issue litigated below but under a different theory." *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Particular Amenability to Probation

Bunnell argues that his case warrants a downward dispositional departure because he is particularly amenable to probation.

Under the sentencing guidelines, a defendant's particular amenability to probation can qualify as a mitigating factor warranting a downward dispositional departure. Minn. Sent. Guidelines 2.D.3.a.(7) (Supp. 2017). In determining whether a defendant is particularly amenable to probation, courts consider a number of factors, often referred to as the *Trog* factors, which include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Bunnell claims that the *Trog* factors "generally weigh" in his favor. In particular, he contends that (1) his age and admitted immaturity, (2) his desire to reform to be there for his family, (3) his admitted remorse, and (4) his efforts to take responsibility by pleading guilty and working with the state to get treatment all show that he would be particularly amenable to probation.[1]

At sentencing, however, the district court rejected the assertion that Bunnell was particularly amenable to probation and concluded that there were no substantial and compelling reasons to depart from the sentencing guidelines. In doing so, the district court

[1] Bunnell and his counsel also indicated that Bunnell was working with the police, presumably as an informant, but the details in the record are limited.

reviewed Bunnell's sentencing memorandum and the plea transcript, and reviewed and re-reviewed the PSI report. The district court also considered the arguments and recommendations from both parties and gave each party an opportunity to point out any errors or omissions in the record up to that point. The record indicates the court gave serious consideration to the request for a departure and determined that a presumptive sentence was appropriate in Bunnell's case. No further explanation was required. *See Van Ruler*, 378 N.W.2d at 80.

Additionally, while no explanation was required, the district court went on to explain that its decision to impose a presumptive sentence was based on (1) Bunnell's failure to complete the agreed-upon 60 days of inpatient treatment, although he had completed a 28-day program; (2) his positive methamphetamine test after treatment; (3) his failure to appear for his PSI interview and original sentencing hearing; and (4) his previous failures under probation supervision.

Given the court's consideration of the entire record, as well as its stated concerns about Bunnell's conduct, it was reasonable for the court to conclude that Bunnell was not particularly amenable to probation. Therefore, the district court did not abuse its discretion by denying Bunnell's motion for a downward dispositional departure on that basis.

Acceptance into an Approved Treatment Program

Bunnell next argues that his chemical dependency and acceptance into treatment, along with his ability to respond to such treatment, provide a substantial reason for a downward dispositional departure.

Under the sentencing guidelines, another potential mitigating factor that may justify a downward dispositional departure is that "the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minnesota Statutes 2014, section 152.152." Minn. Sent. Guidelines 2.D.3.a.(8) (Supp. 2017). Section 152.152 states that a court may stay the execution of sentences for certain controlled-substance convictions based on amenability to probation "only if the offender presents adequate evidence to the court that the offender has been accepted by, and can respond to, a treatment program that has been approved by the commissioner of human services." Minn. Stat. § 152.152 (2014).

Bunnell did not raise his argument under section 152.152 to the district court. Therefore, it is forfeited, as an appellate court "will not decide issues which were not raised before the district court." *Roby*, 547 N.W.2d at 357. But, even assuming the argument was properly raised, Bunnell's claim at most provides another potential mitigating factor for the district court to consider during sentencing. The fact that a mitigating factor is present does not obligate the court to depart from a presumptive sentence. *Pegel*, 795 N.W.2d at 253.

Furthermore, while this particular argument was not raised to the district court, the record indicates the district court did consider Bunnell's admission into a treatment program at sentencing. It determined that, even putting aside that Bunnell had failed to complete the 60 days of treatment contemplated in his plea agreement, there were sufficient reasons to decline his motion for a dispositional departure. As noted above, the district

court cited Bunnell's failure to appear for his PSI interview and original sentencing hearing, as well as his previous failures under probation supervision, as reasons why it was imposing a presumptive sentence, despite Bunnell's participation in treatment.

Still, Bunnell's failure to raise the section 152.152 argument to the district court means there are no findings on the issue for this court to review in determining whether the district court abused its discretion by declining a downward dispositional departure on that basis. The issue is forfeited, and, on this record, the district court did not abuse its discretion by denying a dispositional departure.

Affirmed.