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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1608**

State of Minnesota,
Respondent,

vs.

Eduardo Delariva-Larios,
Appellant.

Filed July 20, 2020
Affirmed in part, reversed in part, and remanded
Reilly, Judge

Ramsey County District Court
File No. 62-CR-18-4976

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

John J. Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Smith, Tracy M., Presiding Judge; Reilly, Judge; and Florey, Judge.

UNPUBLISHED OPINION

REILLY, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by denying his motion for a downward

dispositional departure, and erred by imposing a lifetime term of conditional release. We affirm appellant's conviction and prison sentence. But we reverse the district court's imposition of a lifetime term of conditional release and remand for resentencing.

D E C I S I O N

I. The district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure.

The Minnesota Sentencing Guidelines prescribe a sentence or a range for the sentence that is "presumed to be appropriate." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). The district court "must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances" distinguishing the case and overcoming the presumption in favor of a guidelines sentence. *Id.* (quotation omitted). The decision to depart from the sentencing guidelines rests within the discretion of the district court and will not be disturbed absent a clear abuse of discretion. *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015); *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). Our review of a district court's decision whether to impose a sentencing departure is "extremely deferential." *Dillon v. State*, 781 N.W.2d 588, 595-96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

Appellant Eduardo Delariva-Larios pleaded guilty to first- and second-degree criminal sexual conduct for touching the victim's bare vagina and breasts with his hands when she was fifteen and he was more than 48 months older than the victim and in a position of authority. Appellant moved for a downward dispositional or durational departure from the presumptive guidelines sentence. The district court denied the motion,

adjudicated appellant guilty, and imposed the presumptive sentence. Appellant challenges the district court's denial of his motion for a downward dispositional departure¹ on the grounds that he is particularly amenable to treatment in a probationary setting, showed remorse, cooperated with the police, and has the support of his friends and family.

A defendant's "particular amenability to individualized treatment in a probationary setting" may justify a downward dispositional departure from a presumptive commitment to prison. *Soto*, 855 N.W.2d at 308 (emphasis omitted) (quoting *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). Minnesota courts are guided by several factors, known as *Trog* factors, to determine whether a defendant is particularly amenable to individualized treatment in a probationary setting. *Trog*, 323 N.W.2d at 31. These factors include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of [the defendant's] friends and/or family." *Id.* Even so, "the presence of mitigating factors does not obligate the court to place a defendant on probation or impose a shorter term than the presumptive term." *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Feb. 18, 2014).

The district court reviewed all of the evidence in the record to evaluate appellant's amenability to treatment in the community. The district court did not make specific determinations related to appellant's age, or his cooperation and attitude in court. As for appellant's prior record, our caselaw "specifically endorse[s] referring to a defendant's criminal history" to determine whether a defendant is particularly suited to treatment in a

¹ Appellant does not challenge the district court's denial of his durational-departure motion.

probationary setting. *Soto*, 855 N.W.2d at 311 (citing *Trog*, 323 N.W.2d at 31). The district court considered appellant's prior criminal record and concluded that this factor did not support departure. The district court also noted that appellant failed to express remorse for the pain suffered by his victim. Finally, the district court determined that appellant continued to remain a threat to the community and noted that his recovery "will not be helped by a family that wants to deny that [he] did anything wrong." After weighing the *Trog* factors, the district court determined that appellant was not entitled to a downward dispositional departure because he was not amenable to individualized treatment in a probationary setting.

We have reviewed all of the evidence in the record, including the confidential documents, and we have determined that the evidence supports the district court's reasoning. And even assuming appellant did present evidence that he was particularly amenable to probation, the district court still would not have been required to grant a downward dispositional departure. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (recognizing that appellate courts "will not ordinarily interfere with a [presumptive] sentence . . . even if there are grounds that would justify departure" (quotation omitted)).

The Minnesota Supreme Court recognizes that only the "rare case" merits reversal based on the district court's refusal to depart from the sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This is not the "rare case" compelling reversal. And we will affirm the imposition of a presumptive sentence when, as here, "the record shows that the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Johnson*, 831 N.W.2d 917, 925 (Minn.

App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013). The district court considered the circumstances for and against departure and concluded that appellant was not entitled to a downward dispositional departure from the sentencing guidelines. We discern no abuse of discretion, and we affirm.²

II. The district court erred by imposing a lifetime term of conditional release.

Appellant argues that the district court erred by imposing a lifetime term of conditional release, and we agree. The state charged appellant with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1(b) (2016), and second-degree criminal sexual conduct under Minn. Stat. § 609.343, subd. 1(b) (2016). Appellant pleaded guilty to both counts. Minnesota law mandates a ten-year conditional-release term for offenders convicted of criminal sexual conduct in violation of Minn. Stat. §§ 609.342 or 609.343. Minn. Stat. § 609.3455, subd. 6 (2016). However, an offender convicted under these sections may be sentenced to a lifetime conditional-release term if the offender “has a previous or prior sex offense conviction.” *Id.*, subd. 7(b) (2016).

It is uncontested that appellant does not have a previous or prior sex-offense conviction as established under Minn. Stat. § 609.3455 and, as such, he is entitled to resentencing. The parties agree, as do we, that the case should be remanded with instructions to reduce the conditional release term to ten years. We remand the case to the district court for resentencing consistent with this opinion. *See State v. Brown*, 937 N.W.2d

² Appellant submitted a pro se supplemental brief in support of his departure request. Appellant failed to support his arguments with relevant facts or legal authority, and we consider them waived. *See State v. Manley*, 664 N.W.2d 275, 286 (Minn. 2003) (deeming as waived pro se arguments that do not cite to relevant legal authority).

146, 157 (Minn. App. 2019) (determining that district court improperly imposed lifetime conditional-release term and remanding to district court to vacate term for resentencing).

Affirmed in part, reversed in part, and remanded.