STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0143

State of Minnesota,
Respondent,

vs.

Cory Anthony Klingelhoets,
Appellant.

Filed December 7, 2020
Affirmed
Bjorkman, Judge

Hennepin County District Court
File No. 27-CR-18-17642

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his guidelines sentence for felony driving while impaired (DWI), arguing that he is entitled to a downward dispositional departure because he is

particularly amenable to probation. Because we discern no abuse of discretion by the district court, we affirm.

FACTS

This case arises from appellant Cory Anthony Klingelhoets's fourth alcohol-related driving offense. In 2012, as a result of separate incidents, he was convicted of misdemeanor DWI and felony criminal vehicular operation while under the influence of alcohol. In 2015, he was convicted of felony test refusal. And in July 2018, while on conditional release for the 2015 conviction, Klingelhoets was arrested after driving the wrong way down a one-way street. Breath testing revealed that his alcohol concentration was over the legal limit and the state charged him with felony DWI, and gross misdemeanor driving after cancellation of his driver's license. Klingelhoets pleaded guilty in exchange for the state's agreement to recommend a bottom-of-the-box, 46-month sentence.[1] The presentence investigator recommended a guidelines sentence.

Klingelhoets moved for a downward dispositional departure, arguing that he is particularly amenable to probation. He cited significant changes in his life, including securing long-term stable housing, starting two successful businesses, undergoing substance-abuse treatment, receiving support from family and friends, and complying with the terms of his conditional release. And he pointed to his cooperation with the prosecution, positive attitude in court, and that fact he had learned his lesson. At the sentencing hearing defense counsel argued that, but for a person being injured during his

[1] The guidelines sentencing range is 46-64 months. Minn. Sent. Guidelines 4.A (2017).

second alcohol-related driving offense, Klingelhoets would be facing his first felony-level sentence, and therefore he should have another opportunity to serve a probationary sentence.

The district court denied the departure motion. Citing Klingelhoets's long history and continued use of alcohol and controlled substances, family history of alcohol abuse, previous probation violations, and the fact he was on conditional release at the time of the offenses, the district court found that Klingelhoets is not particularly amenable to probation. Accordingly, the court imposed the agreed-to 46-month executed sentence. Klingelhoets appeals.

D E C I S I O N

Sentences provided in the Minnesota Sentencing Guidelines are presumed to be appropriate. Minn. Sent. Guidelines 2.D.1 (2017). A district court must impose a sentence within the guidelines "unless there exist identifiable, substantial, and compelling circumstances to support a departure." *Id.*; *accord State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A court may only depart if there is a substantial and compelling reason to do so. *Soto*, 855 N.W.2d at 308. That a defendant is particularly amenable to probation is one such reason. *Id.* at 308-09. But the existence of valid grounds for departure does not require a court to depart from the guidelines. *See State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996) ("Even assuming [the defendant] is exceptionally amenable to treatment, his amenability does not dictate the result."), *review denied* (Minn. Oct. 29 1996).

We may reverse a sentencing decision only if the district court has abused its discretion. *Soto*, 855 N.W.2d at 307-08. "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." *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). It is the rare case where an appellate court will reverse the district court's refusal to depart from a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010) (noting this court seldom overturns presumptive sentences without compelling circumstances), *review denied* (Minn. July 20, 2010).

Klingelhoets argues that the district court abused its discretion because the record establishes that he is particularly amenable to probation. We are not persuaded. First, the record demonstrates that the district court carefully considered the arguments for and against a departure. Klingelhoets presented evidence of his housing, business endeavors, and treatment for substance abuse, and asserted that his young age, remorse, acceptance of responsibility, cooperation, and familial and community support demonstrate his particular amenability to probation. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (listing the factors a court should consider when deciding particular amenability). The district court weighed these along with other relevant factors in determining there were no substantial and compelling reasons to depart:

> THE COURT: Mr. Klingelhoets, I have reviewed the file thoroughly. I've reviewed the presentence investigation and I've read your submission and I've taken everything into consideration today. And it sounds like right now you do have some very positive things going for you. And you have

accepted responsibility for your behavior and that you are growing as a person and that is all great. But these changes are very recent changes. And your commitment to change is still to be determined. It's easy for people to do things when they're pending sentencing on a felony DWI, it's about what happens after.

And history is unfortunately a good predictor of future behavior. And you—you could have committed to your sobriety at any time after your first DWI or even your second DWI. And I've not seen that. I hear what you're saying, and I think maybe you're getting there in terms of committing to sobriety, but I just don't think you're quite there yet, and I'll tell you why.

You've had a number of alcohol-related offenses. You were on conditional release with the [department of corrections] at the time . . . you picked up this case. You had no driver's license, you were canceled inimical to public safety, and yet you were driving. And not only were you driving, but you were driving after drinking. You had prior probation violations.

. . . .

And despite going to prison and despite getting in an accident where you hurt people, your substance abuse behavior, the call for you has been so strong that you have not been able to stop it for any lengthy period of time. And you've disregarded public safety in the past. And unfortunately you already have a [criminal vehicular operation], you already hurt people by your bad choices.

And I have looked and I can't find grounds for departure here. I cannot say that you are particularly amenable to probation because you've shown to this point that you are not particularly amenable. It doesn't mean amenable can the person do probation. This requires particular amenability, and that's not here. . . . I mean, the law requires me if I'm going to depart I have to have substantial and compelling reasons. Probation didn't find them; I don't find them either, Mr. Klingelhoets.

We see no legal error or illogic in the district court's analysis.

Second, we are not persuaded by Klingelhoets's suggestion that he should have received a probationary sentence because of his "atypical" criminal history. Klingelhoets notes that he did not receive the same access to probation services as others convicted of felony DWI because his 2012 criminal-vehicular-operation conviction elevated both his 2015 and 2018 DWIs to felonies. He cites no legal authority to support his suggestion that he is particularly amenable to probation because of the unusual circumstances that made this his second felony DWI. Indeed, it is proper for district courts to consider prior criminal offenses when determining a defendant's particular amenability to probation. *See State v. Hopkins*, 486 N.W.2d 809, 812 (Minn. App. 1992) (holding it was proper for the district court to rely on prior sexual offenses when it declined to grant a dispositional departure in sentencing for criminal sexual conduct).

Nor are we persuaded by Klingelhoets's supplemental pro se arguments. To the extent his arguments repeat those advanced by his lawyer that we have rejected, they are unavailing. To the extent his arguments refer to matters outside the record, we do not consider them. *See* Minn. R. Crim. P. 28.02, subd. 8 ("The record on appeal consists of the documents filed in the district court, the offered exhibits, and the transcript of the proceedings, if any."); *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.").

In sum, when there are arguments for a departure but also "valid reasons for adhering to the presumptive sentence," the decision whether to depart is "clearly a

discretionary decision for the [district] court." *Kindem*, 313 N.W.2d at 7-8. That is the case here. The district court concluded that Klingelhoets's amenability to probation does not distinguish him from other offenders. *See Soto*, 855 N.W.2d at 309. On this record, we discern no abuse of discretion by the district court in imposing the presumptive sentence.

Affirmed.