STATE OF MINNESOTA
IN COURT OF APPEALS
A20-1576

State of Minnesota,
Respondent,

vs.

Kevin Jackson,
Appellant.

Filed September 27, 2021
Affirmed
Slieter, Judge

Steele County District Court
File No. 74-CR-19-808

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

Daniel A. McIntosh, Steele County Attorney, Julia A. Forbes, Assistant County Attorney, Owatonna, Minnesota (for respondent)

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

Considered and decided by Cochran, Presiding Judge; Worke, Judge; and Slieter, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from the judgement of conviction for second-degree assault, appellant claims that the district court abused its discretion by denying his motion for a

dispositional departure. Because the district court's imposition of a presumptive sentence does not, by this record, suggest the "rare" situation to reverse its sentence, we affirm.

FACTS

The underlying facts of this appeal stem from an altercation on May 16, 2019, during which appellant Kevin Jackson used a "rigid, metal rake" to break the windshield of the victim A.L.M.'s car. Appellant also struck A.L.M. with the rake on her shoulder and leg, puncturing her skin inches from her "neck, throat, and head" and left "bloody puncture wounds." The next morning, A.L.M. reported to the police that appellant and another individual were attempting to enter her vehicle and that an SUV was parked in front of her home. The responding officer determined that there was a liquid on A.L.M.'s vehicle that smelled like gasoline and a "small piece of burned paper below the vehicle." Officers soon located appellant driving an SUV that "smelled of gasoline" and with a gas canister in plain view. Respondent State of Minnesota charged appellant with second- and fifth-degree assault and attempted third-degree arson.

Pursuant to the terms of a plea agreement, appellant pleaded guilty to second-degree assault on September 16, 2019. The district court released appellant and required, among other terms, that he remain law abiding, appear for all court dates, and abstain from the use or possession of alcohol or mood-altering substances. On October 24, 2019, law enforcement was called to appellant's home and, upon their arrival, appellant refused a breath test and was subsequently arrested. During the bail hearing, appellant admitted that he violated his conditions of release because he "ha[d] a drink." At some point following the bail hearing and appellant's subsequent release, a warrant was issued for appellant's

arrest for a new assault charge which remained pending at the time of appellant's sentencing in this matter. Appellant failed to appear at the scheduled sentencing hearing in this matter and the district court issued a separate arrest warrant. Once appellant was arrested, the district court ordered appellant be held without bail until the sentencing hearing.

At the sentencing hearing, appellant asked the district court to impose a downward-dispositional departure based upon his particular amenability to probation. The state requested that the district court impose the presumptive sentence. A presentence investigation (PSI) report was prepared prior to sentencing, which recommended the presumptive sentence.

The district court denied appellant's dispositional departure motion and sentenced appellant to 57 months' imprisonment—the presumptive midrange prison term for second-degree assault with a dangerous weapon. This appeal follows.

DECISION

Appellate courts "afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). An abuse of discretion occurs when a district court's "decision is based on an erroneous view of the law or is against logic and the facts in the record." *Wells v. State*, 839 N.W.2d 775, 778 (Minn. App. 2013), *review denied* (Minn. Feb. 18, 2014) (quotation omitted). When the district court imposes a presumptive sentence, appellate courts will not interfere "as long as the record shows the sentencing court carefully evaluated all the testimony and information presented

before making a determination." *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted). We will reverse a refusal to depart from a presumptive sentence only in a "rare" case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quotation omitted).

The guideline 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 "identifiable, substantial, and compelling circumstances" warrant departure. *Id.*; *accord State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). Even if valid grounds for departure exist, the district court need not depart from the guidelines. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). "[T]he mere fact that a mitigating factor is present in a particular case does 'not obligate the [district] court to place defendant on probation.'" *Pegel*, 795 N.W.2d at 253-54 (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)).

In determining whether a dispositional departure is justified, courts consider, as relevant here, factors such as the "defendant's age, his prior record, his remorse, his cooperation, [and] his attitude while in court." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The *Trog* factors are non-exhaustive and not all are applicable to every case. *Soto*, 855 N.W.2d at 310. 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). Although the district court was not required to offer an explanation in

this case when it imposed the presumptive sentence, the district court orally considered the *Trog* factors during the sentencing hearing.

Appellant argues that substantial and compelling reasons support a dispositional departure, including his stated motivation to pursue treatment together with five of the *Trog* factors considered by the district court. Upon review of this record, we conclude the district court was within its discretion to deny the dispositional departure motion.

Appellant first points this court to the "efforts and progress" he made "in addressing his addiction and mental health needs" after entry of his guilty plea as a basis for the court's abuse of discretion. Appellant attributes error to the district court weighing those efforts against granting a dispositional departure. Citing *State v. Hennessy*, 328 N.W.2d 442 (Minn. 1983), he argues that he is motivated to pursue rehabilitation and the record supports that he utilized community resources, "establish[ing] [his] amenability to probation."

The district court acknowledged that it reviewed a letter of support from appellant's therapist of "several years." The district court noted that appellant had opportunities to utilize services but, in spite of those opportunities and services, appellant committed the underlying offense and another assault matter was pending. The district court then weighed appellant's recent efforts "against the likelihood of long term amenability to probation" before finding that the record did not support a basis to depart. This district court did not abuse its discretion in arriving at that conclusion.

We turn next to appellant's arguments with respect to the district court's application of the *Trog* factors.

The district court first considered that appellant was 55 years old at the time of sentencing. It addressed defense counsel's argument that "people age out of the system" and agreed that "that can be true," but the district court then noted that, according to the PSI, appellant was assessed as being a high-risk to reoffend, which weighs against departure.

The district court next considered appellant's prior convictions and determined that appellant's prior record, which consists of 12 prior felonies and 17 misdemeanors, did not support a dispositional departure. The district court stated that appellant's "record goes back to 1984" and that he is "in his fourth decade of criminal behavior."

The district court next found that appellant was "remorseful that [he was] caught." The district court's finding accurately reflects appellant's statement to the court.

> *Yes, I -- yeah, I feel sorry for what took place that I don't know about*. And there's people sitting here right here now in jail because they got drunk or high and killed someone and nobody don't even know what happened, and I don't want that life and I don't want to do that life.

(Emphasis added.)

The district court also addressed appellant's "attitude while in court," concluding that appellant had "behave[d] himself." However, it also considered appellant's violation of his conditions of release "39 or 40 days" after pleading guilty and his failure to appear at his original sentencing date, concluding that this factor did not weigh in favor of probation.

Addressing appellant's level of cooperation, the district court stated that it understood appellant was involved in working for the drug task force but that defense

counsel submitted a letter which acknowledged that appellant "did not cooperate in the fashion that was expected." That is, appellant "did some helpful things, but . . . didn't meet [his] obligations under the plea agreement." The supreme court has determined that a bargained-for plea agreement, does not, by itself, provide support for finding particular amenability to probation. *Soto*, 855 N.W.2d at 312. Appellant's cooperation with the drug task force was included as an obligation pursuant to his plea agreement. The district court's conclusion that appellant did not meet this obligation is supported by the record.

In sum, the record demonstrates that the district court carefully considered all of the information presented to it when considering each *Trog* factor and before imposing the presumptive sentence. This is not the "rare" case where this court reverses the district court's refusal to depart from the presumptive sentence.

Affirmed.