This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0419

State of Minnesota,
Respondent,

vs.

Blake Scott Veen,
Appellant.

Filed January 31, 2022
Affirmed
Reyes, Judge

Big Stone County District Court
File No. 06-CR-20-53

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

Joseph P. Glasrud, Big Stone County Attorney, Ortonville, Minnesota (for respondent)

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

Considered and decided by Frisch, Presiding Judge; Reyes, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

REYES, Judge

In this appeal from his conviction of and sentence for first-degree criminal sexual conduct, appellant argues that the district court abused its discretion when it relied on his

voluntary presentence statements to a psychosexual evaluator to deny his motion for a downward dispositional departure. We affirm.

FACTS

Neither party contests the facts in this case. Between January and February 2020, appellant Blake Scott Veen, while 18 years old, sexually penetrated a 12-year-old victim twice. Respondent State of Minnesota charged appellant with two counts of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1 (2018).

Appellant first pleaded not guilty to the charges, but still voluntarily participated in a psychosexual evaluation. During the evaluation, appellant denied having sex with the victim. The evaluator recommended that appellant attend outpatient sex-offender treatment, which appellant began soon after.

Three months later, appellant pleaded guilty to one count of first-degree criminal sexual conduct. Before sentencing, appellant moved for a downward dispositional departure, arguing that he was particularly amenable to probation. At sentencing, appellant argued that he had accepted responsibility for his offense, in part because he began sex-offender treatment. The state responded that appellant's conduct and statements before his guilty plea suggested that he did not accept responsibility for his actions.

The district court denied appellant's motion. It noted that appellant failed to accept responsibility in his psychosexual evaluation. The district court sentenced appellant to the presumptive sentence of 144 months in prison, followed by ten years of conditional release. This appeal follows.

DECISION

Appellant argues that the district court impermissibly punished him for exercising his Fifth Amendment right against self-incrimination by relying on his preplea statements to the psychosexual evaluator to deny his motion for a downward dispositional departure. We disagree.

District courts have broad discretion in sentencing. *State v. Soto*, 855 N.W.2d 303, 305 (Minn. 2014). We review a district court's sentencing decision for an abuse of discretion. *See id.* 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." *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011).

The Minnesota Sentencing Guidelines, which prescribe sentences that are "presumed to be appropriate," limit the district court's sentencing discretion. Minn. Sent. Guidelines 2.D.1 (Supp. 2019); *see Soto*, 855 N.W.2d at 308 (citing this provision of guidelines). To maintain uniformity and proportionality in sentencing, departures from the presumptive sentence are discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotation omitted).

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). But even if a mitigating factor is present, the district court has broad discretion on whether to grant a dispositional departure. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted).

We 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) (quotation omitted).

The guidelines provide a nonexclusive list of mitigating factors that may support a departure, including whether the defendant is particularly amenable to probation. Minn. Sent. Guidelines 2.D.3.a.(7) (Supp. 2019). To determine whether a defendant is particularly amenable to probation, district courts apply the *Trog* factors. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). These factors include the defendant's age, prior record, remorse, cooperation, attitude in court, and support of family and friends. *Id.*

Appellant argues that the district court abused its discretion by determining that he was not particularly amenable to probation. We are not persuaded for two reasons. First, even if the district court determined that appellant is particularly amenable to probation, the district court was not obligated to depart from the presumptive sentence. *See Pegel*, 795 N.W.2d at 253-54.

Second, the district court's decision that appellant was not particularly amenable to probation is supported by the record. The district court stated to appellant during sentencing that "when you voluntarily participated in a psycho-sexual evaluation, and when you were required to be honest and forthright, instead of being honest and forthright and accepting responsibility, you blamed the victim." The psychosexual evaluator's report stating that appellant denied criminal conduct during the evaluation supports that conclusion. Further, the presentence investigation recommended the presumptive sentence, and the district court explicitly relied on that recommendation during sentencing.

We therefore conclude that the district court did not abuse its discretion by determining that appellant was not particularly amenable to probation.

Appellant argues that the district court's reliance on his statements to the psychosexual evaluator violated his Fifth Amendment right against self-incrimination. Appellant cites to several non-binding federal cases to support his argument, as well as *Estelle v. Smith*, 451 U.S. 454 (1981). There, the Supreme Court held that the state's use during sentencing of a doctor's testimony about the defendant's competency to stand trial violated the Fifth Amendment. *Id.* at 462-63.

But *Estelle* is factually distinct from this case in a critical aspect. In *Estelle*, the district court *required* the defendant to speak with the doctor to determine his competency. *Id.* at 456-57. Here, however, appellant voluntarily submitted to the psychosexual evaluation. "When the government does nothing to compel a person who is not in custody to speak or to remain silent . . . then the voluntary decision to do one or the other raises no Fifth Amendment issue." *State v. Borg*, 806 N.W.2d 535, 543 (Minn. 2011) (citing *Jenkins v. Anderson*, 447 U.S. 231, 241 (1980) (Stevens, J., concurring)). Because appellant voluntarily spoke to the psychosexual evaluator, his right against self-incrimination does not protect his discussions with the evaluator. As a result, the district court could consider at sentencing appellant's denials of sexual misconduct from the psychosexual evaluation.

Affirmed.