This opinion is nonprecedential except as provided by Minn.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
A21-1080

State of Minnesota,
Respondent,

vs.

Derek Steven Serbus,
Appellant.

Filed April 4, 2022
Affirmed
Smith, John, Judge*

Anoka County District Court
File No. 02-CR-20-3623

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

Kirk M. Anderson, Anderson Law Firm, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Gaïtas, Judge; and Smith, John, Judge.

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* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We affirm the district court's denial of appellant's motion for a dispositional departure because the district court did not abuse its discretion in imposing a presumptive sentence.

FACTS

Appellant Derek Steven Serbus pushed his significant other, J.W., into a bonfire in his backyard after an argument. J.W. sustained numerous severe burns, among other injuries, and has had to undergo multiple surgeries and skin grafts. The state charged Serbus with first-degree and third-degree assault, both felonies. Serbus pleaded guilty to first-degree assault in exchange for the dismissal of the third-degree charge and the state agreeing to a "bottom of the box" sentence, which was 74 months in prison. The top of the presumptive sentencing range was 103 months.

Before sentencing, Serbus moved for a downward dispositional departure to probation from the presumptive 74 months agreed to by the state. Serbus argued he was particularly amenable to probation because he was willing and likely able to succeed in treatment for alcohol and anger issues while on probation. The pre-sentence investigatory report recommended the district court sentence Serbus to 74 months in prison. At the sentencing hearing, the district court heard testimony from J.W., Serbus, and two persons on behalf of Serbus. The district court then sentenced Serbus to the bottom-of-the-box 74 months in prison.

Serbus appeals, arguing the district court abused its discretion by denying his motion for a downward dispositional departure because he is particularly amenable to probation.

DECISION

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. *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 prescribe sentences that are "presumed to be appropriate" and limit the district court's sentencing discretion. Minn. Sent. Guidelines 2.D.1 (2018); *see Soto*, 855 N.W.2d at 308 (citing this provision of the 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). 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). 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) (quotation omitted).

Serbus makes two arguments on appeal: that the district court abused its discretion (1) by denying his motion for a downward dispositional departure, and (2) by failing to provide an explanation for its reasoning in denying his motion. Both of these arguments fail.

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

The sentencing guidelines provide a nonexclusive list of mitigating factors that may support a departure. Minn. Sent. Guidelines 2.D.3.a (Supp. 2019). Serbus argues one mitigating factor supports a downward dispositional departure in his case: that he "is particularly amenable to probation." *Id.* at 2.D.3.a(7). To determine whether a defendant is particularly amenable to probation, district courts apply the factors derived from *State v. Trog*, 323 N.W.2d 28 (Minn. 1982). These factors include the defendant's age, prior record, remorse, cooperation, attitude in court, and support of family and friends. *Id.* at 31. The district court need not address all the *Trog* factors and may consider outside factors. *Pegel*, 795 N.W.2d at 254. And even if the district court determines that a defendant is particularly amenable to probation, the district court need not downwardly depart from the presumptive sentence. *See id.* at 253-54 (stating that "the mere fact that a mitigating factor is present . . . does not obligate the court to place defendant on probation." (quotation omitted)).

Serbus appears to misunderstand the law on this point, arguing in his briefing that he "easily met all of the *Trog* factors. If [he] was not entitled to a downward dispositional departure, then who is?" Serbus does not acknowledge that the district court need not have

downwardly departed from the presumptive sentence even if it had determined that Serbus was particularly amenable probation. *Id.* As a result, the state argues that Serbus has failed to adequately brief this issue for consideration on appeal. But we have a responsibility "to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted).

The question is whether this is one of the "rare" cases in which we should reverse a district court's refusal to depart. *Walker*, 913 N.W.2d at 468. Serbus cites no authority on this point. The state, as part of its argument that Serbus has forfeited this issue, claims "there exists a narrow line of cases justifying reversal of a guidelines sentence when the trial court declines to consider valid mitigating factors" and cites to *State v. Mendoza*, 638 N.W.2d 480 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002), and *State v. Curtiss*, 353 N.W.2d 262 (Minn. App. 1984).

The state misreads *Mendoza* and *Curtiss*. In *Mendoza*, we reversed the district court's imposition of a presumptive sentence and remanded for rehearing because the district court "erred by considering [the defendants'] immigration status and possible deportation," which were not "valid consideration[s] in deciding whether to impose a presumptive sentence or to depart from the guidelines." 638 N.W.2d at 484. We then expressly stated that "[t]his is not that 'rare' case in which we interfere with the district court's exercise of its discretion, but one in which, we conclude, that such an exercise of discretion may not have occurred" because "we cannot conclude from the record that the district court made a deliberate decision to impose presumptive sentences by weighing

reasons for and against departure." *Id.* (citing *Curtiss*, 353 N.W.2d at 264). Likewise, in *Curtiss*, we reversed the presumptive sentence and remanded for rehearing because the district court failed to "deliberately consider[]" the "arguments for departure . . . alongside valid reasons for non-departure." 353 N.W.2d at 264 (quotation omitted). And again, we expressly noted that "[t]his is not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred." *Id.* *Mendoza* and *Curtiss* illustrate that we will reverse and remand a sentence when the district court fails to exercise its discretion. They are thus inapposite here because Serbus argues the district abused its discretion, not that it did not exercise it in the first place.

We hold that this case is not one of the "rare" cases in which we will reverse a district court's refusal to depart. As explained above with *Mendoza* and *Curtiss*, we have previously reversed a district court's decision not to depart where the district court fails to exercise its discretion. But when a district court exercises its discretion by considering the reasons for and against departure, we will not disturb the district court's decision. *See, e.g.*, *Pegel*, 795 N.W.2d at 255 (refusing to reverse a sentence where "the record demonstrates that the district court carefully considered circumstances for and against departure and deliberately exercised its discretion."). Here, before sentencing Serbus, the district court stated:

> I've taken everything I've heard into account, everything I've read in this matter, everything that's been said today, and I've done my best to try to weigh what's fair, what's just, with the understanding that regardless of what I pick, someone is not going to think it's fair. Someone is not going to think it's just, and that's just the way this job goes sometimes.
>
> I say all of that to say that I do believe in redemption. I do believe in people changing. I do believe in people bettering themselves. All of those are good things. But I also believe that sometimes even one bad day can change the trajectory of a person's life in a way that you can't—you can't fix it, and this is one of those occasions.

The district court considered Serbus's request for a downward dispositional departure, the reasons for and against the departure, and exercised its discretion to sentence Serbus to the presumptive 74 months in prison. Therefore, we will not disturb the district court's decision. *Id.* Thus, the district court did not abuse its discretion in denying Serbus's motion for a downward dispositional departure because it considered circumstances for and against departure in exercising its discretion.

II. The district court did not abuse its discretion by not providing an explanation for its denial of Serbus's motion.

The district court did not make written findings or issue a written memorandum in response to Serbus's motion for a downward dispositional departure. Serbus asserts "the district court abused its discretion when it denied [his] motion for a downward dispositional departure without giving any reasons for doing so." But, "[a]lthough the trial 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); *see, e.g.*, *State v. Johnson*, 831 N.W.2d

917, 925-26 (Minn. App. 2013) (applying this rule). The presumptive sentence includes the so-called sentencing "box" or "range." *See State v. Jackson*, 749 N.W.2d 353, 358 (Minn. 2008) ("The presumptive sentence was 88 months, with a presumptive sentencing range of 75-105 months.").

Here, the district court sentenced Serbus to 74 months in prison, the bottom of the presumptive sentencing range. Serbus does not argue that 74 months in prison is not a presumptive sentence, and he referred to that sentence as the "bottom of the box" in his guilty plea. Thus, the district court sentenced Serbus to the presumptive sentence here.

In *Pegel*, the "[a]ppellant," like Serbus here, "accurately assert[ed] that the district court did not discuss all of the *Trog* factors before it imposed the presumptive sentence." 795 N.W.2d at 254. There, we reiterated that "there is no requirement that the district court must do so" and affirmed the district court's refusal to depart because "the record demonstrates that the district court deliberately considered circumstances for and against departure and exercised its discretion." *Id.* (citing *Van Ruler*, 378 N.W.2d at 80). Here, before sentencing Serbus, the district court judge stated, as quoted at length above, that: "I've taken everything I've heard into account, everything I've read in this matter, everything that's been said today, and I've done my best to try to weigh what's fair, what's just . . . ." Therefore, like the record in *Pegel*, the record here "demonstrates that the district court deliberately considered circumstances for and against departure and exercised its discretion." 795 N.W.2d at 254. Thus, the district court did not abuse its discretion by not providing an explanation for its denial of Serbus's motion because it imposed the

presumptive sentence and deliberately considered circumstances for and against departure in exercising its discretion.

Affirmed.