

*This opinion is nonprecedential except as provided by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
A23-0216**

State of Minnesota,
Respondent,

vs.

Jessica Ann Kong,
Appellant.

**Filed December 26, 2023
Affirmed
Johnson, Judge**

Ramsey County District Court
File No. 62-CR-22-651

Keith Ellison, Attorney General, Thomas R. Ragatz, Assistant Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Jessica Ann Kong pleaded guilty to a charge of offering a forged check. The district court imposed an executed prison sentence of a duration within the presumptive range. We

conclude that the district court did not err by not ordering a downward dispositional departure. Therefore, we affirm.

FACTS

In February 2022, the state charged Kong with offering a forged check, in violation of Minn. Stat. § 609.631, subd. 3 (2020). In the complaint, the state alleged that Kong presented a \$1,500 check to a bank, which contacted the account holder, who said that the check had been stolen.

The state and Kong entered into a plea agreement in September 2022. Kong agreed to plead guilty, and the state agreed to recommend a downward dispositional departure and to dismiss an auto-theft charge in another pending case. Kong also agreed to remain law-abiding until sentencing and to cooperate with a pre-sentence investigation (PSI). But she later was charged with a first-degree controlled-substance crime based on an allegation that she possessed methamphetamine in late October 2022, only six weeks after her guilty plea in this case.

The district court conducted a sentencing hearing in November 2022. At the outset of the hearing, the prosecutor informed the court that the state was withdrawing from the plea agreement because Kong did not remain law-abiding. But the state nonetheless recommended that the district court order a downward dispositional departure by imposing a stayed 28-month prison sentence with three years of probation, which would include 270 days in a workhouse with an opportunity for in-patient chemical-dependency treatment. Kong joined in the state's request for a downward dispositional departure.

The district court imposed an executed sentence of 21 months of imprisonment, which is within the presumptive sentencing range. Kong appeals.

DECISION

Kong argues that the district court erred by imposing an executed guidelines sentence instead of ordering a downward dispositional departure.

The Minnesota Sentencing Guidelines prescribe presumptive sentences for felony offenses. Minn. Sent’g Guidelines 2.C (Supp. 2021). For any particular offense, the guidelines sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent’g Guidelines 1.B.13 (Supp. 2021). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range . . . unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2021). “Substantial and compelling circumstances are those demonstrating that the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotations omitted).

If a defendant requests a downward departure, a district court first 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.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (alteration in original) (quoting *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989), and Minn. Sent’g Guidelines 2.D.1 (2012)). If

substantial and compelling reasons exist, the district court has discretion to order a downward departure. *Id.*; *Best*, 449 N.W.2d at 427.

If a district court departs from the presumptive sentence, the district court is required to state the reason or reasons for the departure. Minn. Sent’g Guidelines 2.D.1.c (Supp. 2021). But if the district court does not depart, the district court is not required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

This court applies an abuse-of-discretion standard of review to a district court’s denial of a request for a downward departure. *Soto*, 855 N.W.2d at 307-08; *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only in a “rare case” will an appellate court reverse a district court’s imposition of the presumptive sentence. *Bertsch*, 707 N.W.2d at 668; *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Kong’s primary argument is that the district court erred by concluding that she is not particularly amenable to probation. Particular amenability to probation is one of the mitigating factors recognized in the sentencing guidelines as a basis for a downward departure. Minn. Sent’g Guidelines 2.D.3.a(7) (Supp. 2021). Particular amenability to probation is not established if the defendant is only somewhat amenable to probation. *Soto*, 855 N.W.2d at 308-09. Rather, the defendant must be “*particularly*” amenable to probation in a way that “distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Id.* at 309 (quotation omitted). In determining whether a defendant is particularly amenable to

probation so as to justify a downward dispositional departure, a district court may consider, among other things, “the defendant’s age, [her] prior record, [her] remorse, [her] cooperation, [her] attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). A district court need not discuss all the *Trog* factors if the district court denies a motion for a downward dispositional departure. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011).

In this case, the district court stated several reasons for denying the request for a downward dispositional departure. The district court noted that Kong had ten criminal-history points based on multiple prior convictions of a variety of crimes. The district court also noted that Kong had not taken advantage of prior probation opportunities. The district court further noted that Kong had been in drug court but was terminated from the program without success. Moreover, the district court noted that Kong had been arrested on a drug charge only six weeks after pleading guilty in this case. For these reasons, the district court concluded that substantial and compelling reasons for a sentencing departure do not exist. The district court did not abuse its discretion in forming that conclusion.

Kong contends that the district court erred by not considering mitigating factors. Specifically, she contends that her age (28 years old), her acceptance of responsibility, and her cooperation with court proceedings and the PSI support a downward departure. The district court did not specifically comment on those factors. But a district court is not required to comment on the factors argued by a defendant; rather, a district court need not give any reasons for imposing a presumptive sentence. *Johnson*, 831 N.W.2d at 925; *Pegel*, 795 N.W.2d at 254; *Van Ruler*, 378 N.W.2d at 80.

In any event, the three factors identified by Kong are not persuasive reasons for a downward departure. First, Kong does not explain why her age at the time of sentencing, “only” 28 years old, makes her particularly amenable to probation. The supreme court’s caselaw indicates that Kong’s age, by itself, is unlikely to be a sufficient basis for a finding of substantial and compelling reason to depart. *See Soto*, 855 N.W.2d at 310 (rejecting district court’s reasoning that appellant’s age of “only” 37 years old made him particularly amenable to probation). Second, Kong’s argument about acceptance of responsibility is undercut by the district court’s comment that she continues to engage in multiple forms of criminal behavior. Third, Kong does not cite any caselaw providing that cooperation with court proceedings and a PSI is a substantial and compelling reason for a departure, and we are unaware of any such caselaw. The precedential caselaw indicates that “cooperation” means cooperation with law enforcement. *See State v. Solberg*, 882 N.W.2d 618, 622, 624 (Minn. 2016); *Soto*, 855 N.W.2d at 312; *Trog*, 323 N.W.2d at 29. In addition, Kong’s cooperation with the PSI was required by her plea agreement.

More importantly, the record reflects that the district court carefully reviewed the PSI report and gave Kong’s arguments thoughtful consideration. At the outset of the sentencing hearing, the district court stated, “I thought hard about this one, and I just can’t get to where the parties want me to be based on the record that I have in front of me.” Thereafter the district court listened to Kong’s attorney’s arguments and gave Kong multiple opportunities to personally address the court. The district court ultimately stated several valid reasons for its conclusion that substantial and compelling reasons are not present.

Kong further contends that the district court should have ordered a downward dispositional departure because the parties had agreed on such a sentence. But the caselaw is clear that an agreement between the parties is not, by itself, a sufficient basis for a downward dispositional departure. *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002). Rather, a district court may order a sentencing departure only if there are “substantial[] and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (Supp. 2021); *see also Soto*, 855 N.W.2d at 308; *Misquadace*, 644 N.W.2d at 71-72. The district court squarely considered that issue and concluded that substantial and compelling reasons are not present.

Before concluding, we note the state’s request for a precedential opinion stating that Kong’s argument fails as a matter of law because she does not assert that the district court failed to exercise discretion. *See* Minn. R. Civ. App. P. 128.02, subd. 1(f). We decline to issue such an opinion because the rule of law proposed by the state appears to be in tension with supreme court caselaw, which allows for reversal of a discretionary departure decision in a “rare case,” even if a district court has *not* failed to exercise discretion. *See Soto*, 855 N.W.2d at 310-15 (reversing grant of downward departure); *State v. Hennum*, 441 N.W.2d 793, 800-01 (Minn. 1989) (reversing denial of downward departure). In addition, we have no difficulty resolving this appeal in the state’s favor without articulating and applying a new rule of law.

In sum, the district court did not err by denying Kong’s request for a downward dispositional departure and imposing a presumptive sentence.

Affirmed.