STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1615
A23-0754

State of Minnesota,
Respondent,

vs.

Thomas David Fogel,
Appellant.

Filed January 29, 2024
Affirmed
Schmidt, Judge

Carver County District Court
File No. 10-CR-19-358

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

Mark Metz, Carver County Attorney, Jeffrey D. Albright, Assistant County Attorney, Chaska, Minnesota (for respondent)

Ryan M. Pacyga, Ryan Pacyga Criminal Defense, Minneapolis, Minnesota; and

John G. Westrick, Savage-Westrick, PLLP, Bloomington, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Ross, Judge; and Schmidt, Judge.

NONPRECEDENTIAL OPINION

SCHMIDT, Judge

In his appeal from a conviction of first-degree criminal sexual conduct and following a stay and remand for postconviction proceedings, appellant Thomas David

Fogel argues (1) the postconviction court abused its discretion in denying his request for in camera review of the victim's therapy records; and (2) the district court abused its discretion at sentencing in denying his motion for a downward dispositional departure.[1] Because the postconviction court properly denied Fogel's request for in camera review of the victim's therapy records, and the district court carefully considered the circumstances regarding his request for a downward dispositional departure at sentencing, we affirm.

FACTS

The state charged Fogel with three counts of criminal sexual conduct with a person under the age of 13. The victim, M.J., disclosed to her therapist that Fogel sexually assaulted her when she was 11 or 12. The therapist reported this information to Carver County Health and Human Services.

A detective from the Carver County Sheriff's Office interviewed M.J. During that recorded interview, M.J. detailed three separate occasions of abuse.

After making discovery demands, Fogel filed a motion to compel. Neither the discovery demands, nor the motion to compel, mentioned therapy records. Fogel also did not file a *Paradee*[2] motion to ask the district court to conduct an in camera review of the therapy records. After a trial, the jury found Fogel guilty on all three counts.

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[1] Fogel also argued in his brief that respondent State of Minnesota violated Minn. R. Crim. P. 9.01, subd. 1(1)(b), by failing to disclose the name and address of an individual with information relating to the case. Prior to oral argument, Fogel withdrew this issue.

[2] *State v. Paradee*, 403 N.W.2d 640 (Minn. 1987). A *Paradee* motion is the procedure by which a defendant seeks discovery of confidential material, and the district court examines the material in camera to determine if it is discoverable.

Fogel filed a motion for a downward dispositional departure prior to sentencing, arguing that he is particularly amenable to probation. At sentencing, the district court heard from the victim, noted it had read the letters from Fogel's supporters, and heard from Fogel himself. The district court then took a recess to "consider the arguments."

After the recess, the district court detailed the relevant factors with respect to whether an individual is particularly amenable to probation, including Fogel's age, prior record, behavior in court, and support system. The district court found that Fogel was not particularly amenable to probation because he had failed to accept responsibility or demonstrate remorse "at its most fundamental level." The district court further found that the failure to accept responsibility would hinder Fogel's sex-offender treatment, which would be a major condition of probation. The district court denied the motion for a downward dispositional departure and imposed the presumptive guideline sentence of 216 months in prison.

Fogel filed a notice of appeal and later moved to stay his appeal and remand for postconviction proceedings. This court granted the motion.

Fogel then filed a petition for postconviction relief, seeking in camera review of notes and records from M.J.'s therapist. The postconviction court held that the therapy records are privileged, Fogel did not make any motion prior to trial for in camera review, and Fogel's petition did not suggest he could make the required showing even if in camera review were allowed. The postconviction court denied Fogel's petition without a hearing.

Fogel filed an appeal from the postconviction court's order. This court dissolved the stay of the original appeal, reinstated the original appeal, and consolidated both appeals.

DECISION

I. The postconviction court did not abuse its discretion in denying Fogel's request for in camera review of M.J.'s therapy records.

Fogel argues the postconviction court should have conducted an in camera review of M.J.'s therapy records. We review a postconviction court's denial of a postconviction petition for an abuse of discretion. *Martin v. State*, 969 N.W.2d 361, 363 (Minn. 2022). In doing so, we review the postconviction court's findings of fact for clear error and its legal conclusions de novo. *Easton v. State*, 950 N.W.2d 258, 264 (Minn. 2020).

"Whether a discovery violation occurred is an issue of law which this court reviews de novo." *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). If a defendant requests confidential records, the district court may screen the records in camera to balance the defendant's right to present a defense against a victim's right to privacy. *State v. Hokanson*, 821 N.W.2d 340, 349 (Minn. 2012) (citing *Paradee*, 403 N.W.2d at 642). In camera review of confidential records is a discovery option, not a right; thus, a defendant must make a "plausible showing" that the records sought will be both "material and favorable to his defense." *State v. Hummel*, 483 N.W.2d 68, 72 (Minn. 1992) (quotations omitted). The Minnesota Supreme Court reiterated that the law requires a "defendant to make a plausible showing that the records will be material and *favorable* to the defense." *State v. Conrad (In re Hope Coal.)*, 977 N.W.2d 651, 659 n.6 (Minn. 2022) (emphasis in original). "'Fishing expeditions' are never sufficient." *Id.*

But the legislature has enacted laws making a person's therapy records privileged and prohibiting disclosure of those records without the person's consent. *See, e.g.*, Minn.

Stat. § 595.02, subd. 1(g) (2022); *see also In re Hope*, 977 N.W.2d at 659. Unlike confidential records, the Minnesota Supreme Court has recognized that statutorily privileged documents, like sexual-assault-counselor records, cannot be pierced through in camera review in criminal proceedings. *In re Hope*, 977 N.W.2d at 661. This court recently extended the supreme court's approach in *In re Hope* to the privileges established in Minnesota Statutes section 595.02 (2022), subdivisions (d) and (g), which relate to records maintained by medical and mental-health professionals. *See State v. Martinez Ramirez (In re State)*, 985 N.W.2d 581, 586 (Minn. App. 2023), *rev. granted* (Mar. 14, 2023) *and appeal dismissed* (Minn. May 2, 2023) ("[P]aragraphs (d) and (g) prohibit custodians of protected records from disclosing them except when a specifically stated exception applies.").[3]

Fogel argues that in camera review is a recognized discovery practice regarding both confidential and privileged materials. He also contends that the therapist records "were highly probative of impeachment of M.J.'s testimony."

This court has previously rejected the arguments that Fogel raises in this appeal. Under the *Ramirez* decision, the privilege applicable to M.J.'s mental-health records cannot be pierced without M.J.'s consent or an express exception. *See* 985 N.W.2d at 586 ("Following the supreme court's approach in *Hope Coalition*, we hold that a district court

[3] After the supreme court granted review, the State of Minnesota filed a motion to dismiss, arguing the case became moot after Martinez Ramirez pleaded guilty to, and was convicted of, an amended charge of second-degree criminal sexual conduct. The supreme court granted the motion because the appeal was moot. *See State v. Martinez Ramirez (In re State)*, No. A22-1490 (Minn. July 31, 2023) (order). The supreme court declined Martinez Ramirez's invitation to vacate this court's opinion. *Id.*

may not order the production of records protected by these privileges absent an express exception."). Because Fogel has neither demonstrated that M.J. consents to the disclosure of her records, nor established some other statutory exception applies, the records are categorically protected from disclosure—even for in camera review—and the postconviction court did not abuse its discretion by denying Fogel's request for in camera review. *Id.*; *see also* Minn. Stat. § 595.02, subd. 1(g) ("A . . . psychologist, consulting psychologist, or licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon[.]").

Even if in camera review were allowed, Fogel has not met his "plausible showing" burden. *See In re Hope*, 977 N.W.2d at 659 n.6 (stating that defendant must "make a plausible showing that the records will be material and *favorable* to the defense" (emphasis in original)). Fogel offers speculation and conjecture to suggest that the therapist records may contain information that could reflect on the consistency of M.J.'s statements. Fogel's assertion that the records are "highly probative for impeachment" and the jury "could have been swayed by therapist notes which shows M.J.'s story was inconsistent" cannot, without more, satisfy the requirement that he make a plausible showing that the evidence is material and favorable to the defense, especially considering evidence of inconsistencies were already presented at trial. *See State v. Wildenberg*, 573 N.W.2d 692, 697 (Minn. 1998) ("Evidence is material only if there is a 'reasonable probability' that disclosure would lead to a different result at trial.").

Finally, we conclude that even if the records could be disclosed for in camera review, and even if Fogel made the required showing, Fogel has not demonstrated any entitlement to relief in his postconviction petition. Before trial, Fogel did not file a *Paradee* motion or seek to subpoena M.J.'s therapy records. During trial, Fogel did not object when M.J. offered limited testimony that merely confirmed she had met with a therapist. Fogel cannot now circumvent his failure to subpoena the third parties, or raise timely objections at trial, by arguing the postconviction court should perform an in camera review. *See State v. Goldtooth*, No. A15-0077, 2016 WL 4596382, at *5 (Minn. App. Sept. 6, 2016) (holding that defendant could not circumvent his failure to subpoena third-party entities that possess the records by arguing the state had committed a discovery violation).[4]

In sum, the records sought are privileged and M.J. did not consent to their disclosure, which makes the therapist records categorically protected from disclosure. Fogel also did not make the required "plausible showing" even if the records could have been disclosed. Finally, Fogel's request for in camera review of the records in his postconviction petition failed to demonstrate any entitlement to relief. Thus, the postconviction court did not abuse its discretion in denying Fogel's petition.

[4] We cite this nonprecedential opinion for its persuasive authority. Minn. R. Civ. App. P. 136.01, subd. 1(c).

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

A district court has discretion to grant a downward dispositional departure if the defendant's characteristics show that the defendant is particularly amenable to probation. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). The supreme court has recognized that several factors may be relevant to a district court's determination of particular amenability to probation, "including the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). While a district court must give reasons for granting a departure, it need not explain its decision to impose a presumptive sentence so long as the record is clear that the court considered the reasons advanced for a departure. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984).

We will rarely disturb a district court's decision to impose a sentence within the presumptive guidelines range. *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010). "A reviewing court may not interfere with the sentencing court's exercise of discretion, 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) (quotations omitted).

Fogel argues his sentence should be reversed because "the district court did not exercise its discretion on whether to depart from the sentencing guidelines." He suggests that the record "does not show that the district court considered any of these reasons for downward departure, despite their positive weight." Fogel's arguments are unpersuasive.

At sentencing, the district court received numerous letters in support of Fogel's motion for a downward dispositional departure, received Fogel's memorandum in support of his motion, heard arguments from Fogel's counsel, and listened to Fogel himself. The district court then took an approximately 20-minute recess to "consider the arguments" before pronouncing a sentence. After the recess, the district court noted each *Trog* factor, including Fogel's age, prior record, remorse, behavior in court, and support system.

Fogel cites no requirement—and our review of the caselaw found no requirement—that the district court specifically acknowledge whether each *Trog* factor supports or contradicts a downward departure. Instead, a district court must—as the court did here—demonstrate that it considered the reasons for departure. *Curtiss*, 353 N.W.2d at 263.

Beyond properly considering Fogel's proposed reasons for a departure, the district court also expressly found that Fogel was not particularly amenable to probation:

> A major condition of probation in this case . . . would be sex offender treatment. And as it stands today, based on your refusal to accept responsibility . . . I don't believe you'd be able to get through that program and I would have significant concerns of you being in the community as an untreated sex offender.

The record shows the district court carefully evaluated all the testimony and information presented at sentencing and, within its discretion, imposed a presumptive guideline sentence. This court will not interfere with the district court's sound exercise of its discretion.

Affirmed.