STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1316

State of Minnesota,
Respondent,

vs.

Ian Russell Herold,
Appellant.

Filed April 23, 2012
Affirmed
Bjorkman, Judge

Sherburne County District Court
File No. 71-CR-10-493

Lori Swanson, Attorney General, Matthew Frank, Assistant Attorney General, St. Paul, Minnesota; and

Kathleen A. Heaney, Sherburne County Attorney, Tim Sime, Assistant County Attorney, Elk River, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Chief Judge; Bjorkman, Judge; and Huspeni, Judge.*

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

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges the district court's denial of his motion for a downward dispositional departure without express consideration of the factors listed in *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Because the district court is not required to make express findings regarding the *Trog* factors before imposing a presumptive sentence and because the record shows that the district court deliberately considered circumstances for and against departure, we affirm.

FACTS

Appellant Ian Russell Herold broke into J.G.'s home in the middle of the night while J.G. was sleeping and repeatedly stabbed J.G. with a knife. Appellant was charged with first-degree assault, second-degree assault, and first-degree burglary.

Appellant claimed he did not remember the attack because he had been drinking. He underwent a rule 20 evaluation, which revealed that he was not suffering from a serious mental illness that would impair his judgment or ability to remember the night in question. Appellant pleaded guilty to first-degree assault. In exchange, the state dismissed the remaining charges and pursued the bottom-of-the-box presumptive sentence of 94 months' imprisonment. Appellant moved for a downward dispositional departure based on his serious and persistent mental illness and chemical dependency.

The district court delayed the sentencing hearing beyond its originally scheduled date in order to review extensive documentation of appellant's psychological/medical history and appellant's sentencing memorandum. The district court also reviewed the

pre-sentence investigation report (PSI), which recommended a guidelines sentence of 110 months based on the circumstances of the offense, appellant's prior record, his failure to take responsibility for his actions, and his lack of remorse. At the sentencing hearing, the district court heard arguments and concluded that no compelling circumstances warrant a dispositional departure. In imposing the 94-month sentence, the district court noted the severity of the attack, appellant's apparent awareness of his actions during the attack, and the lack of evidence that the attack occurred while appellant was experiencing a "psychotic break."

D E C I S I O N

A district court must order the presumptive sentence provided in the sentencing guidelines unless "substantial and compelling circumstances" warrant a departure. *State v. Cameron*, 370 N.W.2d 486, 487 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985); Minn. Sent. Guidelines II.D (2008). We review a district court's decision to grant or deny a departure for an abuse of discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). A reviewing court rarely reverses the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant argues that the district court abused its discretion by imposing a presumptive sentence without expressly considering the factors listed in *Trog*. 323 N.W.2d at 31. We disagree. *Trog* provides a non-exhaustive list of factors that are relevant to whether a dispositional departure is justified: "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *Id.* But the district court is not required to *discuss* the *Trog* factors

before imposing a presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011) (affirming the denial of a dispositional departure where the district court did not address any of the *Trog* factors on the record). Indeed, the district court need not *explain* any of its reasons for imposing a presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Rather, the district court must "exercise [its] discretion by deliberately *considering* circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002) (emphasis added), *review denied* (Minn. Apr. 16, 2002).[1]

The record evinces the district court's deliberate consideration of circumstances for and against departure. The district court continued the sentencing hearing for two weeks to consider all of the materials referenced in appellant's sentencing memorandum:

> [T]he Court believes that it would be appropriate, and also prudent, to examine *every document* that might be referenced in [the memorandum] so that the Court can get a *full and complete picture* of the [motion for a downward dispositional departure] being submitted by the defense.
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> . . . .
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> . . . [The Court] wants to have *all the evidence and information* so that the Court, in exercising its discretion in handing down a sentence, can be as *fair to all sides* as is possible.
>
> . . . I hope you'll appreciate the importance of the Court having an opportunity to review *all of those documents*.

[1] *Mendoza* does not, as appellant argues, require the district court to "compar[e] factors for departure side by side with factors for non-departure." *See Mendoza*, 638 N.W.2d at 483.

And the district court stated that it reached its decision "[a]fter going through all of the medical records, the alternative disposition reports, [and] the arguments." Specifically, the district court reviewed the rule 20 assessment and the PSI, which discussed most of the *Trog* factors as well as victim impact, the cruelty of the offense, and appellant's mental illness and chemical dependency.

Moreover, the district court discussed and rejected appellant's primary argument for a departure: that appellant acted in an uncharacteristic way due to his mental illness.

> [I]n reading the medical reports, the Rule 20 report, and the files before me, it's clear to me that the nature of your mental illness is not such that it would be expected for you to engage in the kind of outburst that you exhibited on that night. Most of the assessments have pointed to various levels of a depressed state on your part. The activities that you engaged in that fateful evening would be more consistent with someone having a psychotic break with reality. It's clear to the Court that you did not have such a psychotic break, nor do you have a history of such psychotic breaks. It's clear to the Court that you didn't have that kind of a psychotic break because your actions following that attack were so clearly contrived and calculated to protect yourself from being discovered. That's not consistent with someone operating under a psychotic delusional state. That is somebody who's acutely aware of self-preservation and a need to protect themselves.

On this record, we conclude that the district court did not abuse its discretion by imposing the presumptive sentence.

Affirmed.