STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1200

State of Minnesota,
Respondent,

vs.

Donald Albert Achman,
Appellant.

Filed April 29, 2013
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CR-11-2394

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

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

WORKE, Judge

Appellant argues that the district court abused its discretion by denying his request for a downward dispositional departure in his sentence. We affirm.

D E C I S I O N

Appellant Donald Albert Achman pleaded guilty to terroristic threats and argued for a downward dispositional departure. The district court imposed the presumptive 24-month sentence under the sentencing guidelines. Appellant challenges the district court's decision to impose the presumptive sentence.

A district court must impose the presumptive sentence unless the case involves "identifiable, substantial, and compelling circumstances" that warrant a departure. Minn. Sent. Guidelines II.D (2010). The decision to depart from the presumptive sentence is within the district court's discretion and this court will not reverse absent a clear abuse of that discretion. *State v. Stanke*, 764 N.W.2d 824, 827 (Minn. 2009). Only a "rare case" warrants reversal of the district court's decision to decline to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant argues that the district court should have sentenced him to probation because of substantial and compelling circumstances. *See State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985) (stating that substantial and compelling circumstances "make the facts of a particular case different from a typical case"). Appellant asserts that many of the factors that the Minnesota Supreme Court identified as relevant in determining whether a probationary sentence is appropriate existed in his case, but that the district court failed to consider them. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

In determining whether to grant a departure, a district court considers factors relevant to the individual, such as "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 address all of the *Trog* factors before imposing the presumptive sentence. *See State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985). Therefore, we will "not interfere with the [district] court's exercise of discretion [in sentencing] as long as the record shows the [district] 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) (quotation omitted).

Appellant contends that "[m]any of the mitigating factors recognized in *Trog* apply to [his] case." Appellant suggests that these circumstances include: (1) he was cooperative, (2) he is interested in receiving chemical-dependency and anger-management treatment, (3) he participated in weekly compliance hearings, (4) after initial violations of a domestic abuse no contact order (DANCO) he has been compliant, (5) he pleaded guilty and took responsibility for his conduct, (6) he wishes to change his life and stop drinking, and (7) he has done what he can in jail to understand and improve himself. Regrettably, the "substantial and compelling" circumstances that appellant presents are not the relevant *Trog* factors. *See* 323 N.W.2d at 31 (factors include age, prior record, remorse, cooperation, attitude in court, and familial support).

Appellant is 50 years old and has an extensive criminal history dating back to 1980, including 17 DWI convictions; three felony domestic-assault convictions; two gross-misdemeanor domestic-assault convictions; an interference-with-a-911-call conviction; a fifth-degree-assault conviction; an escape-from-custody conviction; two disorderly-conduct convictions; and several theft-related convictions.

Appellant's remorse is not clearly demonstrated from the record. Appellant faced charges of terroristic threats, felony domestic assault, domestic assault by strangulation, and interference with a 911 call resulting from an assault against his girlfriend, T.A.M. Appellant threated to kill T.A.M. with a sledge hammer, punched her, grabbed her by her hair and pulled her down to the floor, choked her, and interfered with her attempt to call 911. Apparently, much of appellant's behavior was influenced by alcohol consumption. At his sentencing hearing, appellant stated that he wanted to change his drinking behavior because his son cried when he learned that appellant might go to prison. But this does not indicate remorse for his terroristic-threats conviction. When appellant provided the factual basis for his plea, he was asked: "You understand that the allegation is that you . . . threatened to kill [T.A.M.] with a sledge hammer." Appellant replied that he did not have a sledge hammer on the premises. Appellant does not show remorse by implying that he may not have threatened to kill T.A.M. with a sledge hammer because he did not own one.

Further, appellant was not as cooperative as he suggests. First, when appellant was conditionally released, he was subject to a no-contact order as to T.A.M. and her children, but he refused to sign the conditional-release order. The district court also issued a DANCO, which appellant violated twice by calling T.A.M. while incarcerated. The record does not disclose appellant's attitude while in court, and he failed to show that he has support of friends and family. He lived with T.A.M., but the record does not show that she would welcome him back into her home. Appellant is also unemployed and he is not close to his siblings.

Appellant's sole argument to support his assertion that he should have been placed on probation is that he wants to stop drinking and change his life. But, as the district court noted, appellant failed on probation numerous times. And there exists concern for T.A.M.'s safety considering that appellant's prior domestic-assault convictions were committed against her. Finally, appellant claims that he will have no incentive to change if he serves a prison sentence, but this casts doubt on whether he is sincerely motivated to change his life. The district court did not abuse its discretion by imposing the presumptive sentence.

Affirmed.