STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0375

State of Minnesota,
Respondent,

vs.

Michael Duane Finn, Sr.,
Appellant.

Filed December 30, 2013
Affirmed
Halbrooks, Judge

Polk County District Court
File No. 60-CR-12-959

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

Greg Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Peterson, Judge; and Ross, Judge.

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

HALBROOKS, Judge

Following his convictions of one count of first-degree criminal sexual conduct and one count of third-degree criminal sexual conduct, appellant argues that the district court

abused its discretion by denying his motion for a downward dispositional or durational departure because the district court (1) impermissibly relied on facts supporting dismissed counts in denying his motion and (2) failed to deliberately consider the circumstances for and against departure. We affirm.

FACTS

Appellant Michael Duane Finn was charged with three counts of first-degree criminal sexual conduct and two counts of third-degree criminal sexual conduct arising from his alleged long-term abuse of B.G., the daughter of his then girlfriend, now wife. The complaint alleges that B.G. was 11 years old when the abuse began, that she became pregnant by Finn at age 14, and that her two children, who were born when she was 19 and 21 years old, were fathered by Finn. Finn agrees that he is the father of B.G.'s two children, but contends that his sexual relationship with B.G. began when B.G. was 17 or 18 years old. After Finn was charged, B.G. wrote a letter recanting the allegations. She later recanted her recantation, stating that she had written the letter under pressure from her family.

Pursuant to a plea agreement, Finn entered an *Alford* plea to count three (first-degree – penetration by force or coercion resulting in personal injury) and count five (third-degree – penetration by force or coercion). Counts premised on allegations that the victim was under 16 years old at the time of the offense and that Finn had a significant relationship with his victim were dismissed.

Under the plea agreement, the state capped its sentencing recommendation at 156 months (the presumptive sentence for count three) and agreed to a concurrent sentence

for count five. The district court accepted Finn's plea and ordered a presentence investigation (PSI).

At the sentencing hearing, the district court acknowledged receipt of a diagnostic assessment, the PSI, B.G.'s victim impact statement, and the memorandum in support of Finn's motion for sentencing departures. The district court noted that it had had a chance to review each submission. Finn's counsel declined a hearing on the factual content of the PSI. The district court then heard from both attorneys on Finn's departure motion.

Finn's counsel argued that the diagnostic assessment indicates that Finn admits culpability, takes responsibility, and wants to change. Finn's counsel further noted that Finn had complied with the terms of his furlough and has the support of his family, and highlighted the victim's support for a dispositional departure. Finn's counsel also urged a downward durational departure, specifically requesting a sentence of approximately 24 months.

B.G. addressed the district court, requesting that Finn be sentenced to probation so that he could assist with caring for their children while she had surgery. Finally, Finn addressed the district court, requesting probation so that he could "take care of my [children], pay [B.G.] child support and, you know, do everything by—by the book where I can show that [I've]—changed my life and doing things for the good instead of being put away in prison."

The state argued that there are no substantial and compelling reasons to justify a departure, and that the *Alford* plea itself undercut any claim that Finn takes responsibility

for his actions. The state urged the presumptive sentence for counts three and five, to run concurrently.

The district court denied Finn's departure motion and imposed the presumptive sentence of 156 months' imprisonment on count three and a concurrent sentence of 117 months' imprisonment on count five, as contemplated by the parties' plea agreement. The district court stated that it "does not find any substantial or compelling reasons to depart from the guidelines." The district court further noted:

> What I review in the file, at best, Mr. Finn takes partial responsibility for it, but hides behind the use of alcohol and/or drugs at the time these occurred. I note that when he first became acquainted with his current wife . . . the minor child and victim here was about six or seven years of age, he was about forty years of age. This relationship occurred while she was a minor, although perhaps of consent, but there's allegations by the victim, which are uncharged, that this conduct occurred earlier in time. The Court doesn't find, given his position of authority, this victimization of the . . . individual here and is what I would characterize is, at best, a partial acceptance of responsibility to meet any grounds for any kind of mitigating factors.

This appeal follows.

D E C I S I O N

I.

Finn argues that the district court abused its discretion by referencing facts relevant to dismissed counts when it denied his departure motion. Specifically, Finn argues that the district court improperly relied on B.G.'s age and noted that Finn was in a "position of authority," despite dismissal of the counts premised on those particular facts.

A district court may consider the uncontested course of conduct underlying an offense in determining a sentence. *State v. Womack*, 319 N.W.2d 17, 19 (Minn. 1982); *State v. Pearson*, 479 N.W.2d 401, 406 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992). But if a district court contemplates disputed facts that relate solely to a dismissed charge in imposing an upward departure, the district court raises the specter of reversible error. *Pearson*, 479 N.W.2d at 406 (citing *Womack*, 319 N.W.2d at 19). Here, the district court noted that Finn is B.G.'s mother's significant other and that the abuse began while "[B.G.] was a minor, although perhaps of consent." But the district court did not impose an upward sentencing departure.

Although these considerations would arguably present improper reasons to impose an upward sentencing departure, there is no authority supporting Finn's assertion that they are improper bases for denying a motion for a downward departure. A district court is not obligated to explain its reasons for imposing the presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Accordingly, we conclude that the district court acted within its discretion in referencing facts that arguably apply only to dismissed counts when imposing the presumptive sentence.

II.

Finn also argues that the district court abused its discretion by denying his motion for a dispositional departure when the diagnostic assessment and the victim herself supported probation. He cites *State v. Trog*, 323 N.W.2d 28 (Minn. 1982), *State v. Mendoza*, 638 N.W.2d 480 (Minn. App. 2002), and *State v. Curtiss*, 353 N.W.2d 262

(Minn. App. 1984), in support of this argument. But the *Trog* factors do not apply to the denial of a sentencing-departure motion, and the rule of *Mendoza* and *Curtiss* is satisfied.

In *Trog*, the Minnesota Supreme Court held that "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family" are relevant factors to consider before granting a dispositional departure. 323 N.W.2d at 31. But a district court need not address the *Trog* factors before imposing a presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). To be clear,[1] the *Trog* factors are relevant to the district court's exercise of discretion in *granting* a downward dispositional departure, not its decision to *deny* a departure and impose the presumptive sentence. *See* 323 N.W.2d at 31; *see also Pegel*, 795 N.W.2d at 253-54. Here, Finn's sentence of 156 months' imprisonment is the presumptive sentence for first-degree criminal sexual conduct by an offender with a criminal-history score of one. Because the district court imposed the presumptive sentence, no discussion of the *Trog* factors is required. Thus, the district court acted within its discretion.

In a similar vein, citing *Mendoza* and *Curtiss*, Finn argues that the district court abused its discretion by failing to deliberately compare the factors for departure side by side with factors for non-departure. But the record belies Finn's assertion that the district court failed to exercise its discretion. The district court noted that it had reviewed all sentencing submissions, including the diagnostic assessment, the victim impact statement, and Finn's departure memorandum. The district court also heard B.G. and

[1] We reiterate this point because of the frequency with which we are called upon to address the argument that the factors outlined in *Trog* apply to the imposition of a presumptive sentence, despite our clear conclusion to the contrary in *Pegel*.

Finn's oral requests for probation rather than imprisonment. The district court considered these factors in addition to the PSI report. Thus, the record shows that the district court exercised its discretion, negating the concern raised in *Mendoza* and *Curtiss*. *See Mendoza*, 638 N.W.2d at 483; *Curtiss*, 353 N.W.2d at 264.

"[T]he mere fact that a mitigating factor is present in a particular case does 'not obligate the court to place defendant on probation or impose a shorter term than the presumptive term.'" *Pegel*, 795 N.W.2d at 253-54 (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)). Because the district court considered the evidence and arguments presented at sentencing and acted within its discretion when it imposed the presumptive sentence, we will not disturb Finn's sentence. *See Van Ruler*, 378 N.W.2d at 80-81 ("The reviewing court may not interfere with the [district] court's exercise of discretion, as long as the record shows the [district] court carefully evaluated all the testimony and information presented before making a determination.").

Affirmed.