STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0831

State of Minnesota,
Respondent,

vs.

Gary Eick,
Appellant.

Filed July 15, 2008
Affirmed
Shumaker, Judge

Lyon County District Court
File No. 42-CR-06-674

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Richard R. Maes, Lyon County Attorney, Lyon County Government Center, 607 West Main Street, Marshall, MN 56258 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Shumaker, Judge; and Schellhas, Judge.

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

SHUMAKER, Judge

Appellant challenges the denial of his motion for a downward dispositional departure from the presumptive guidelines sentence, arguing that the district court abused its discretion when it failed to consider and make a ruling on the record analyzing the *Trog* factors. Because we find that the district court did not abuse its discretion, we affirm.

FACTS

Appellant Gary Eick engaged in sexual intercourse with his 15-year-old daughter in July 2006. Eick's ex-wife brought the abuse to the attention of local law enforcement. When police investigators interviewed Eick, he admitted to having sexual contact with his daughter during the past year, and he acknowledged that the sexual abuse progressed until he had intercourse with her in early July. Eick was charged with three counts of criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1 (2004).

Eick pleaded guilty to one count of first-degree criminal sexual conduct in exchange for the state's dismissal of the other charges. On October 23, 2006, Eick filed a notice and motion for downward departure under Minn. Stat. § 609.342, subd. 3 (Supp. 2005). To warrant a departure under subdivision 3 of section 609.342, the court must determine that "a stay is in the best interest of the complainant or the family unit" and that "a professional assessment indicates that the offender has been accepted by and can respond to a treatment program." Minn. Stat. § 609.342, subd. 3(a)-(b).

At the sentencing hearing on January 23, 2007, the district court heard testimony from a corrections agent, Eick's father, and two of Eick's friends. The court denied Eick's motion for a downward dispositional departure under Minn. Stat. § 609.342, subd. 3. The district court did not consider the motion under the factors outlined in *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982), because the sole basis on which Eick premised his departure motion was section 609.342, subdivision 3. The court imposed the presumptive sentence of 144 months. This appeal followed.

D E C I S I O N

Eick argues that that the district court erred by failing to consider the *Trog* factors in its denial of his motion for a downward dispositional departure. A district court must impose the presumptive sentence provided by the sentencing guidelines unless the case involves substantial and compelling circumstances that warrant a departure. Minn. Sent. Guidelines II.D.; *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Whether to depart from the guidelines rests within the district court's discretion and this court will not reverse the decision "absent a clear abuse of that discretion." *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only in a "rare case" would the refusal to depart warrant reversal. *Kindem*, 313 N.W.2d at 7.

Eick contends that the district court abused its discretion by denying his motion for a downward departure because the court did not consider the *Trog* factors on the record. He argues that many of the *Trog* factors support a departure from the presumptive sentence. The Minnesota Sentencing Guidelines provide a list of nonexclusive factors that a district court may use as reasons for granting a downward

departure, including amenability to probation. Minn. Sent. Guidelines II.D.2. In determining a defendant's amenability to probation, the district court may consider the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But a defendant's amenability to probation does not require that a district court depart from the presumptive sentence. *State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996), *review denied* (Minn. Oct. 29, 1996).

The district court thoughtfully considered the merits of Eick's motion upon the ground asserted by Eick. The court heard testimony in favor of a downward departure from Eick's friends, father, and a corrections agent. The court also received the presentence investigation assessment, which indicated that Eick was a risk to a vulnerable victim, his daughter. The assessment noted that Eick blamed other factors besides himself for his actions, such as his parents' divorce, the loss of his job, and problems with his other daughter. These were all factors before the court, none of which, or even all taken together, provide plausible substantial and compelling circumstances that warrant a departure from the presumptive sentence.

Had the court decided to broaden its consideration of Eick's motion to include each of the *Trog* factors, the record still conclusively supports the denial of the departure motion. The presentence investigation indicates that, although Eick accepts some responsibility for his crime, he continues to shift blame on external conditions within his immediate family, thus tending to diminish the remorse he claims to feel. Furthermore, his adult sex-offender assessment describes Eick's habit of minimizing the gravity of his

sexual contact with his daughter, noted that Eick is uncommitted to abiding by the order that he have no contact with his daughter, and specified that he "does not appear to fully accept what no contact means." *See Trog*, 323 N.W.2d at 31 (finding remorse and cooperation to be factors to consider when determining an offender's amenability to probation).

The district court determined that it was in the best interest of society and Eick to sentence him to the presumptive sentence. The court is not required to analyze the *Trog* factors, especially when a single statutory ground is urged for departure, but instead is only required to analyze factors for and against the presumptive sentence, which the district court did. The court determined, after hearing testimony both for and against the departure, that the presumptive executed sentence was the appropriate disposition in this case. The court did not abuse its discretion when it addressed the very issue Eick presented to it.

Eick also submitted a pro se supplemental brief, urging this court to "give [him] a second chance." Eick's brief contains no legal argument, and we decline to address an emotional plea that is unsupported by argument or authority. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) ("An assignment of error based on mere assertion and not supported by any argument or authorities in appellant's brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection." (quotation omitted)).

Affirmed.