STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0634

State of Minnesota,
Respondent,

vs.

Angel Gabriel Aviles,
Appellant.

Filed May 3, 2021
Affirmed
Bratvold, Judge

Anoka County District Court
File No. 02-CR-19-3135

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

Anthony C. Palumbo, Anoka County Attorney, Kelsey R. Kelley, Assistant County Attorney, Anoka, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Bjorkman, Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges the sentence imposed for his second-degree criminal-sexual-conduct conviction, arguing that the district court abused its discretion by failing to consider factors supporting a downward dispositional departure. We affirm.

FACTS

In May 2019, respondent State of Minnesota charged appellant Angel Gabriel Aviles with three counts of criminal sexual conduct for acts committed against victim 1, his 17-year-old daughter, and victim 2, his 13-year-old stepdaughter.

According to the complaint, victim 1 lived with her mother until her mother became ill. She then moved to Fridley to live with Aviles. Victim 1 was around 12 years old, and Aviles sexually abused her for four years. Victim 1 reported that Aviles punished her by taking her phone, and if she wanted it returned, she had to "manually stimulate his penis until he ejaculated in her hand." Victim 1 stated that this "happened too many times to count." Victim 1 also reported that Aviles once penetrated her anally. Aviles stopped abusing victim 1 when her mother died. When victim 1 told victim 2 that Aviles had abused her, victim 2 disclosed that Aviles had once put her hand on his penis.

In August 2019, Aviles pleaded guilty to one count of second-degree criminal sexual conduct committed against victim 1. He agreed that victim 1 was correct that his sexual conduct had happened "too many [times] to count." Although Aviles acknowledged the sexual conduct that he committed against victim 2, the state dismissed that count as well as a third count in exchange for Aviles's guilty plea to the count against victim 1. The state also agreed to furlough Aviles to chemical-dependency treatment before sentencing. Aviles's attorney stated he intended to seek a downward dispositional departure. The district court accepted Aviles's guilty plea and set sentencing for about four months later. The district court told Aviles that there were "no promises" about a departure, and the court would give him "an opportunity to show if [he] can earn a departure."

Aviles cooperated with a psychosexual evaluation and a presentence investigation (PSI). During the PSI interview, Aviles disclosed that he has little interaction with his family, who does not know about his criminal offenses, but he has two close friends who are aware of his offenses and support him. Aviles added that, while he has had no contact with his wife since the arrest, they plan to stay together. The PSI interviewer, however, contacted Aviles's wife, victim 2's mother, who denied that she intended to remain married to him. The PSI report stated that Aviles has zero criminal-history points, but also noted that several offenses in his criminal history have decayed. The PSI report concluded that Aviles had no understanding of his crimes or how he has affected his victim. And while Aviles appeared to assume responsibility, he attempted to mitigate his actions by stating that alcohol contributed to his conduct. Aviles's excuse, however, failed to account for his own admission that alcohol was *not* always involved during each instance of abuse.

The PSI report recognized that Aviles sought a departure and stated that his chemical-dependency-treatment participation is a mitigating factor, but concluded that treatment did not warrant a departure in this case. The PSI report concluded that substantial factors support a prison sentence; for example, Aviles would benefit from intensive correctional programming, community safety would be served by Aviles completing institutional programming, and a departure would depreciate the seriousness of the offense. The PSI report recommended a 90-month prison sentence. The presumptive range, given Aviles's offense and criminal-history score, was between 90 and 108 months.

On January 27, 2020, at the sentencing hearing, victim 1's grandparents read two statements: one prepared by victim 1 and one they prepared themselves. Before reading

victim 1's statement, the grandmother explained that victim 1 was not at sentencing because "she lives in constant fear" of Aviles. The grandfather read a separate statement, commenting that Aviles "groomed" victim 1 and "abused his parental power." He asked for the "longest no-contact order possible."

As read by her grandmother, victim 1 wrote that she had always wanted Aviles in her life, even though he left the home when she was two years old. For four years, Aviles forced victim 1 to "touch his penis and manipulate him to orgasm, have oral sex with him, and undergo the horrors of frequent sexual intercourse anally." She always fought and begged him to stop. She could not sleep because she feared he would come into her room at night. She still has nightmares, worries about victim 2, and hopes to never see Aviles again. Victim 1 fears that she will "never amount to anything" because Aviles made her "feel like a nothing." She has been diagnosed with "post-traumatic stress disorder, major depressive disorder with recurrent episodes of anxiousness."

The state argued for a 108-month prison sentence because the offense was "more egregious than" the typical second-degree criminal-sexual-conduct offense given the frequency of abuse against victim 1 and her mother's illness. Aviles's attorney argued for a downward dispositional departure because of Aviles's progress in chemical-dependency treatment, which showed that he was amenable to probation. His attorney also argued that Aviles was "very forthcoming" and "wants to get help." Alternatively, Aviles's attorney asked for a 90-month prison sentence.

Aviles apologized, claiming that he "let foolish desire, foolish pleasures overcome" him. He claimed that he is "better than this" and wants to "enjoy life." He asked the district

court to "have mercy" on him. The district court responded: "Fair enough," and sentenced Aviles to 108 months in prison with a ten-year conditional-release term. This appeal followed.

DECISION

Aviles argues that the district court abused its discretion by failing to consider factors that support a downward dispositional departure. The state responds that the district court imposed a presumptive sentence and did not abuse its discretion in doing so.

A sentence that is prescribed under the Minnesota Sentencing Guidelines is "presumed" appropriate. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court may depart from a presumptive sentence only if "identifiable, substantial, and compelling circumstances" warrant a departure. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). Appellate courts "afford the [district] court great discretion in the imposition of sentences and reverse . . . only for an abuse of that discretion." *Soto*, 855 N.W.2d at 307-08 (quotation omitted). "[I]t would be a rare case which would warrant reversal of the refusal to depart." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In considering a motion for a downward dispositional departure, a district court focuses on whether the defendant is particularly amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). *Trog* identified several factors that show amenability to probation, commonly called the "*Trog* factors." *See id.* at 31 (stating that, in determining whether to grant a dispositional departure, a district court may consider age, prior record, remorse, cooperation, attitude in court, and support of family and friends).

A district court is not required to depart from a presumptive sentence even if the record shows that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). But if a defendant requests a departure, the district court must "exercise [its] discretion by deliberately considering circumstances for and against departure." *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted).

When the record shows that the district court did not consider the circumstances for and against a departure, this court will remand the case for consideration of the departure motion. *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). This court, however, will not reverse the district court's denial of a departure request when the record shows that the district court "carefully evaluated all the testimony and information presented before making a determination." *Pegel*, 795 N.W.2d at 255 (quotation omitted). And while a district court must state reasons that support a departure when granting a departure, it is not required to explain reasons for denying a departure request following consideration of the circumstances for and against a departure. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Aviles argues that the district court failed to consider the *Trog* factors. Aviles also asserts that the PSI report shows that he is particularly amenable to probation, and claims that the district court did not even consider the circumstances that supported a departure. He argues that, at 47 years old, he is less likely to reoffend because of his advanced age and because his victims were "victims of convenience." Aviles also points out that his criminal-history score is zero, his past offenses are decayed, he expressed remorse and

apologized, he cooperated with the psychosexual evaluation and the PSI, he was respectful, he voluntarily entered chemical-dependency treatment, and he has two supportive friends.

Aviles accurately points out that, during the sentencing hearing, the district court did not state its reasons for denying Aviles's request for a departure. But a district court is not required to do so. *Van Ruler*, 378 N.W.2d at 80. For four reasons, we conclude that the record shows the district court "carefully evaluated all the testimony and information presented before making a determination." *See Pegel*, 795 N.W.2d at 255.

First, when the district court accepted Aviles's guilty plea, it told Aviles that he had an opportunity "to show if [he] can earn a departure." Second, the PSI report noted that Aviles planned to seek a departure and provided information on the *Trog* factors. Third, at Aviles's sentencing, the district court asked the parties if they had reviewed the psychosexual evaluation and the PSI report and whether they had changes, corrections, or additions, suggesting that the district court had reviewed the information and sought to ensure that the information was accurate and complete. Fourth, before imposing Aviles's sentence, the district court heard victim 1's statement, a statement from victim 1's grandparents, arguments for and against a departure, and Aviles's allocution. Thus, the record shows that the district court considered information for and against a departure before imposing the presumptive sentence.

At sentencing, and again on appeal, Aviles argues for departure by relying largely on his progress in chemical-dependency treatment and his acceptance of responsibility for his conduct. We are not persuaded that the district court failed to consider these reasons for departure. The PSI report provided information about Aviles's participation in treatment

and stated it was a mitigating factor. But the PSI report also pointed out that treatment did not support a departure in this case. The PSI report stated that Aviles tried to mitigate his offending behaviors by claiming alcohol was a contributing factor, but the PSI report also disclosed that Aviles admitted alcohol was not involved during each instance of abuse. And, as for Aviles's acceptance of responsibility, the PSI report stated that Aviles's remorse was superficial. Aviles's own statements at sentencing underscored the conclusions of the PSI report. Aviles told the district court that he "let foolish desire, foolish pleasures overcome" him.

On appeal, Aviles claims that other *Trog* factors also support a departure, even though his attorney did not raise these points during the sentencing hearing. The record reflects that the district court also considered this information. First, Aviles claims that he is unlikely to reoffend because the victims were "victims of convenience." This is mentioned in the PSI report as one factor, along with Aviles's age, that lowers the probability he would reoffend. But the PSI report also flagged Aviles's inability to empathize with his victims. Second, Aviles's criminal-history score is zero, but he has committed assaults, including one against his wife. Third, although Aviles claims to have the support of two friends, the PSI report showed he does not have support from his family or his wife.

Additionally, victim 1's written statement explained how the years of sexual assaults affected her, and described Aviles as manipulative. She also described, in statements summarized in the PSI report, that Aviles was sexually inappropriate with her friends. And Aviles admitted to criminal sexual conduct with victim 2. Finally, Aviles's

statement at sentencing asked the district court for "mercy." The district court responded, "Fair enough."

The district court appropriately considered all of this information in deciding whether to grant a dispositional departure. *See State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (stating a district court may consider offense-related factors in deciding whether a dispositional departure is appropriate). We conclude that the record shows the district court considered information for and against departure before imposing the presumptive sentence, and properly exercised its discretion in doing so.

Affirmed.