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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1404**

State of Minnesota,
Respondent,

vs.

Bielmar Alvarez-Agular aka Bielmar Alvarez-Aguilar,
Appellant.

**Filed May 22, 2017
Affirmed
Connolly, Judge**

Freeborn County District Court
File No. 24-CR-15-1049

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

Craig S. Nelson, Freeborn County Attorney, David J. Walker, Assistant County Attorney,
Albert Lea, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Larkin, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

CONNOLLY, Judge

On appeal from his conviction of first-degree criminal sexual conduct, appellant argues that the district court abused its discretion by considering immigration consequences when denying his motion for departure. We affirm.

FACTS

Appellant Bielmar Alvarez-Agular pleaded guilty to first-degree criminal sexual conduct pursuant to an agreement with respondent State of Minnesota. At sentencing, appellant made motions for both durational and dispositional departures, and the state argued for a top-of-the-box sentence under the sentencing guidelines. The district court inquired of counsel as to appellant's amenability to probation given the possibility that he is not a resident of the United States and would therefore likely be deported as a result of this conviction. The district court also considered other factors before denying appellant's departure motion and imposing a presumptive prison sentence of 144 months. This appeal follows.

DECISION

The district court must sentence a defendant according to the presumptive guidelines sentence unless the case involves "substantial and compelling circumstances" supporting a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). A defendant must also be *particularly amenable* to probation for a dispositional departure to be appropriate. *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014). Departure, or a refusal to depart, is within the district court's discretion. *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989).

This court will only reverse a sentencing court's refusal to depart in the rare case. *Kindem*, 313 N.W.2d at 7. "A reviewing court may not interfere with the sentencing court's exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted).

Appellant argues that the district court abused its discretion when it considered deportation before imposing a presumptive sentence. He contends that this court has held that a district court abuses its discretion "by considering the defendants' immigration status and possible deportation when sentencing them to prison terms." See *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002) (finding error where a district court considered *only* immigration consequences). Finally, appellant argues that there are mitigating circumstances supporting a departure, and that this court should reverse and remand the case to the district court for reconsideration of his departure motion.

Appellant correctly asserts that "possible deportation because of immigration status is not a proper consideration in criminal sentencing." *Id.* As a result, consideration of immigration status is an error, but "does not require reversal unless circumstances exist that would support a departure." *Id.* In *Mendoza*, this court found legitimate reasons for both departure and for imposing a presumptive sentence, and remanded to the district court because it could not conclude from the record that "the district court made a deliberate decision to impose presumptive sentences by weighing reasons for and against departure." *Id.*

But here, the district court did weigh reasons for and against departure apart from the appellant's immigration status, thereby exercising its discretion: "Now, to be honest, in the [presentence investigation], I didn't really see any mitigating factors that would justify a dispositional departure." Though appellant apologized numerous times in the record, the district court did not consider these apologies genuine—it quoted the psychosexual evaluator's comment that appellant "did tend to focus heavily upon what he had lost as a result of the violence," and found that this was "[n]ot a ringing endorsement for remorse." It also noted that appellant did not have a family-support network in the United States. These factors weigh on an amenability determination. *See Soto*, 855 N.W.2d at 310 (outlining factors relevant to particular amenability to probation, including age, criminal history, remorse, cooperation, respectfulness in court, and family support).

Appellant argues that the district court abused its discretion when it found that appellant had a lack of remorse and no family-support system, and when it found no factors in support of a departure. This court rarely reverses a district court's imposition of a presumptive sentence and refusal to depart, and only does so when the record does not reflect a careful evaluation of the testimony and information. *Kindem*, 313 N.W.2d at 7; *Pegel*, 795 N.W.2d at 253. Appellant suggests that the record reflects mitigating circumstances of youth, no criminal history, repeated acceptance of responsibility, respectfulness in court, relatively low risk of reoffense, and amenability to treatment. But as previously discussed, the district court did not interpret appellant's apologies on the record to be genuine in light of his focus on what he had lost, about which he spoke at the psychosexual evaluation and his sentencing hearing. The record also shows that while

appellant does have an uncle in Minnesota, his father lives in California and he has no other family in the country. Finally, the district court twice indicated at the sentencing hearing that it had carefully considered the presentence investigation and the psychosexual evaluation.

Given the above, appellant has not demonstrated that this is one of the rare cases in which this court should reverse the district court's denial of a departure motion. The record reflects consideration of the testimony and information presented to the district court, and supports the district court's reasons weighing against departure. The district court did not find that appellant demonstrated particular amenability to probation as required by *Soto*, 855 N.W.2d at 309. In conclusion, we agree that considering appellant's immigration status was error. Nevertheless, the district court properly weighed other legitimate reasons for and against departure, and did not abuse its discretion in denying appellant's departure motion.

Affirmed.