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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0888**

State of Minnesota,
Respondent,

vs.

Felix Velasquez,
Appellant

**Filed March 5, 2018
Affirmed
Worke, Judge**

Ramsey County District Court
File No. 62-CR-16-6512

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

WORKE, Judge

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

FACTS

On June 22, 2016, appellant Felix Velasquez was at a wake for his uncle. Velasquez believed that J.N., another attendee, was intoxicated and disrespectful, so Velasquez tried to remove him from the wake. Velasquez followed J.N. into the street and punched him several times, causing J.N. to fall and hit his head. Velasquez recorded the incident with his phone. J.N. was transported to the hospital, where he had emergency surgery to repair a brain bleed.

Velasquez was charged with first-degree assault—great bodily harm. Velasquez entered a straight plea of guilty without an agreement concerning sentencing. At the sentencing hearing, Velasquez moved for a downward dispositional departure. The district court denied the motion and sentenced Velasquez to 98 months in prison. This appeal followed.

DECISION

Velasquez argues that the district court abused its discretion by denying his motion for a downward dispositional departure because (1) several factors demonstrated that he was particularly amenable to probation and (2) the state did not disclose his February 2017 arrest and his questioning in a homicide investigation. The decision to depart lies within the district court's discretion, and this court will not reverse absent an abuse of that discretion. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999).

The district court may depart from the presumptive sentence only if substantial and compelling circumstances warrant a departure. *State v. Cameron*, 370 N.W.2d 486, 487 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985). The district court must

deliberately consider the circumstances for and against departure. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). Several factors, including “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 to a determination of whether a dispositional departure is appropriate. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). However, the presence of a mitigating factor does not obligate the district court to dispositionally or durationally depart. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). It is a “rare case which would warrant reversal of the refusal to depart.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Velasquez argues that his age and prior record, remorse, cooperation, community support, and prior history on probation all weigh in favor of a downward dispositional departure. However, this argument conflicts with the record. At the time he committed the first-degree assault, Velasquez had been on probation for a prior drug-related offense for approximately two weeks. Prior to the completion of the pre-sentence investigation (PSI), Velasquez missed two appointments with probation, as well as two drug tests. After completion of the PSI, Velasquez missed another two appointments with probation. Velasquez was also arrested for a new drug offense in February 2017. Velasquez was “deceptive” with his probation officer about being enrolled in a GED program, and after he did enroll, Velasquez missed classes.

The probation department stated that it was “unaware of any mitigating factors that would warrant a departure from the sentencing guidelines.” Although the PSI noted that Velasquez accepted responsibility for his actions and appeared to express sincere remorse,

the probation department also concluded that the facts of the offense, including that Velasquez recorded the assault and caused the victim severe and permanent injury, outweighed those considerations. Based on this record, the district court did not abuse its discretion by denying Velasquez's motion for a downward dispositional departure.

Velasquez also argues that this court should remand to the district court due to the state's "non-disclosure" of Velasquez's February 2017 arrest and his questioning in a homicide investigation. Velasquez relies on *State v. Soto* to support this argument. *See* 855 N.W.2d 303, 308 (Minn. 2014). However, *Soto* does not address whether the state must disclose this information to the defense prior to a sentencing hearing. *See id.* Because Velasquez cites no other legal authority suggesting that the state needed to disclose this information prior to sentencing, we need not remand to the district court.

Affirmed.