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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1407**

State of Minnesota,
Respondent,

vs.

Erik Paul Ellingson,
Appellant.

**Filed April 9, 2018
Affirmed
Bjorkman, Judge**

Douglas County District Court
File No. 21-CR-16-1655

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

Chad M. Larson, Douglas County Attorney, Alexandria, Minnesota (for respondent)

Charles F. Clippert, Clippert Law Firm, P.L.L.C., St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Bjorkman, Judge;
and Rodenberg, Judge.

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

BJORKMAN, Judge

Appellant challenges his sentence for first-degree criminal sexual conduct, arguing that the district court abused its discretion by denying a downward dispositional departure.

We affirm.

FACTS

In October 2016, appellant Erik Ellingson threatened, physically restrained and assaulted, and sexually assaulted his female roommate. Ellingson pleaded guilty to first-degree criminal sexual conduct.

At sentencing, Ellingson moved for a downward dispositional departure. He supported his request with the testimony and report of a forensic psychologist who recounted Ellingson's mental-health and chemical-dependency problems and recommended that Ellingson receive inpatient treatment rather than a prison sentence. The state urged the district court to follow the presentence investigation report (PSI), which noted Ellingson's lack of empathy or remorse and recommended an executed prison sentence "in accordance with the upper range of the presumptive guidelines sentence." The district court denied Ellingson's motion and imposed a presumptive 172-month prison sentence. Ellingson appeals.

DECISION

We review a district court's denial of a sentencing departure for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). We will reverse a presumptive sentence only in "rare" cases. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quotation omitted).

A district court must impose a presumptive sentence unless "identifiable, substantial, and compelling circumstances" justify a departure. Minn. Sent. Guidelines 2.D.1 (2016). Dispositional departures are based on the defendant's characteristics, focusing on whether he is "particularly suitable for individualized treatment in a

probationary setting.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). A court may consider a defendant’s age, prior record, remorse, cooperation, attitude in court, and the support of friends and family in determining whether he is particularly amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *see also State v. Bauerly*, 520 N.W.2d 760, 762 (Minn. App. 1994) (explaining that remorse, or lack thereof, bears on amenability to probation, particularly in sentencing for crimes against a person). But even when a mitigating factor is present, the district court is not obligated to depart. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011).

Ellingson argues that the district court abused its discretion by denying a downward dispositional departure because he is particularly amenable to probation, “as demonstrated by” the psychologist’s testimony. This argument is unavailing.

Some aspects of the psychologist’s testimony are consistent with Ellingson’s contention. The psychologist opined that Ellingson has a relatively good sex-offender treatment prognosis because he “is willing to admit that his sexual adjustment is profoundly problematical,” and he cautioned against sending Ellingson to prison because he would present a suicide risk and learn inappropriate behaviors. But that is not the whole picture. The psychologist described some positive indicators, but he did not expressly opine that Ellingson is particularly amenable to treatment in a probationary setting. And he acknowledged countervailing considerations, including Ellingson’s critical need for intensive chemical-dependency and mental-health treatment before he is able to pursue sex-offender treatment, and the risk of behavioral violence and re-offense presented by his untreated anger and chemical dependency. He also acknowledged that Ellingson may

receive treatment in prison. Moreover, the PSI highlights concerns that the psychologist did not address. It notes that Ellingson not only failed to verbalize any empathy toward the victim but “appeared to blame [her] for his actions.” Ellingson expressed anger and resentment toward her: “She knew there was a problem with [his alcohol abuse], but she did nothing about it. She didn’t say anything. She wasn’t a friend.”

This record amply establishes that Ellingson needs intensive, multi-faceted treatment. But it contains conflicting indications regarding his amenability to treatment and other aspects of probation. The district court considered those indications, particularly Ellingson’s lack of empathy or remorse for his violent offense, and determined that they did not support a downward dispositional departure. *See Bauerly*, 520 N.W.2d at 762 (stating that lack of remorse bears on amenability to probation). We discern no abuse of discretion by the district court in imposing the presumptive prison sentence.

Affirmed.