

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1050**

State of Minnesota,
Respondent,

vs.

Kent Michael Hamre,
Appellant.

**Filed May 28, 2019
Affirmed
Worke, Judge**

Sherburne County District Court
File No. 71-CR-16-885

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Kalitowski,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's denial of his presentence motion to withdraw his guilty plea. Alternatively, he argues that the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

On July 5, 2016, appellant Kent Michael Hamre got into an argument with his roommate, put all of his belongings into his car, and walked to a bar. After having several drinks, Hamre returned to his car and went to sleep with the keys next to him on the seat. A police officer found Hamre asleep in his vehicle with the emergency flashers on. Based on his initial observations, the officer suspected that Hamre was intoxicated. Hamre admitted that he had been drinking, and took a preliminary breath test which revealed an alcohol concentration of 0.194. Hamre was placed under arrest and read the implied-consent advisory. Hamre refused to submit to a chemical test.

Hamre was charged with driving while impaired (DWI)-test refusal, pursuant to Minn. Stat. § 169A.20, subd. 2 (2014), and DWI pursuant to Minn. Stat. § 169A.20, subd. 1(1) (2014). Hamre was released from custody prior to trial with several conditions. A conditional-release violation report was filed on July 3, 2017, because Hamre tested positive for methamphetamine. Additional conditional-release violation reports were filed because Hamre failed to report for testing in August, September, and October of 2017. Hamre failed to appear for his conditional-release violation hearing on October 18, 2017.

On September 25, 2017, Hamre pleaded guilty to the test-refusal charge. While it was a straight plea, the state indicated that it would dismiss the DWI charge at sentencing. The district court found that there was a sufficient factual basis to support Hamre's guilty plea, but did not accept the plea at that time. The district court ordered a presentence investigation (PSI).

In October 2017, Hamre was contacted by someone from community corrections and incorrectly informed that his PSI was cancelled because he was a mandated prison commit. Hamre then failed to appear at his sentencing hearing on December 11, 2017.

On February 22, 2018, Hamre moved to withdraw his guilty plea. Following a hearing, the district court denied the motion on the record. At sentencing on April 6, 2018, Hamre moved for downward durational and dispositional departures. The district court denied Hamre's motion, adjudicated him guilty of the test-refusal charge, and sentenced him to a presumptive 62 months in prison. This appeal followed.

D E C I S I O N

Withdrawal of guilty plea

Hamre argues that the district court abused its discretion in denying his motion to withdraw his guilty plea prior to sentencing. "We review a district court's decision to deny a withdrawal motion for abuse of discretion, reversing only in the rare case." *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010) (quotation omitted). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017).

“A defendant has no absolute right to withdraw a guilty plea after entering it.” *Raleigh*, 778 N.W.2d at 93. But a district court may allow plea withdrawal any time before sentencing if it is “fair and just” to do so. Minn. R. Crim. P. 15.05, subd. 2. A district court must consider the reasons advanced by a defendant in support of withdrawal, and any prejudice to the state. *Raleigh*, 778 N.W.2d at 97. Hamre bears the burden of demonstrating that withdrawal is warranted; the state bears the burden of demonstrating prejudice. *Id.*

Hamre relies on the phone call from community corrections cancelling his PSI to meet his burden of demonstrating that withdrawal of his guilty plea is fair and just. Hamre argues that but for the phone call, he would have been more diligent in abiding by the terms of his conditional release, thus placing him in a better position to move for a sentencing departure. Hamre pleaded guilty without an agreement. At that time, both Hamre’s attorney and the district court emphasized that in pleading guilty he was agreeing to a lengthy prison term unless his attorney was able to successfully argue for a sentencing departure, which was not guaranteed. The district court found that the incorrect information provided by community corrections did not warrant withdrawal of the guilty plea based on Hamre’s “prior exposure to the criminal justice system.”

While Hamre may have received false information that influenced his decision to not appear at his original sentencing hearing, the district court did not abuse its discretion by denying his withdrawal motion based upon the entire context of his plea. *See State v. Abdisalan*, 661 N.W.2d 691, 695 (Minn. App. 2003) (stating “the entire context” in which the plea occurred, “as demonstrated by the record,” must be considered in determining

whether the district court abused its discretion in denying a plea-withdrawal motion), *review denied* (Minn. Aug. 19, 2003). During his plea hearing, Hamre acknowledged that he likely faced a lengthy prison sentence. When he received the call from community corrections, he never reached out to his attorney or the district court for clarification or confirmation. He did not even appear at his sentencing hearing.

The district court did not abuse its discretion by denying the motion to withdraw on the basis that the phone call from community corrections, standing alone and in light of Hamre's failure to seek clarification or attend his hearings, did not satisfy his burden of demonstrating that withdrawal was fair and just under the circumstances. Because the district court did not abuse its discretion in finding that Hamre failed to meet his burden, we do not need to consider the state's prejudice. *See Raleigh*, 778 N.W.2d at 98 (stating that even if there was no prejudice to the state, denial of the withdrawal motion was not an abuse of discretion where the defendant failed to meet his burden of demonstrating that withdrawal was fair and just).

Finally, Hamre argues that this court should recognize an absolute right to withdraw a guilty plea prior to acceptance. However, a recent opinion from this court disposes of Hamre's argument. In *State v. Nicholas*, this court held that "once a defendant has put formally before the court a valid guilty plea, he has entered it and has no absolute right to withdraw it." 924 N.W.2d 286, 292 (Minn. App. 2019) (quotation omitted), *pet. for review filed* (Minn. Mar. 13, 2019). Therefore, Hamre did not possess an absolute right to withdraw his plea prior to its acceptance by the district court.

Sentencing departure

Hamre argues that the district court abused its discretion in denying his motion for a downward dispositional departure because he was particularly amenable to probation. “This court will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only in a “rare” case will an appellate court reverse a sentencing court’s refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

A defendant’s particular amenability to probation is a mitigating factor that may support a downward departure from a presumptive sentence. Minn. Sent. Guidelines 2.D.3.a.7 (2014). “The requirement that a defendant be ‘particularly’ amenable to probation ensures that the defendant’s amenability to probation distinguishes the defendant from most others and truly presents the substantial and compelling circumstances necessary to justify a departure.” Minn. Sent. Guidelines cmt. 2.D.303 (2014).

Hamre argues that the district court abused its discretion by not finding him particularly amenable to probation under the *Trog*¹ factors, but this assertion is not supported by the record. Hamre was arrested on July 6, 2016, and placed on conditional release pending trial. On July 3, 2017, a pretrial violation report was filed because Hamre tested positive for, and admitted to taking, methamphetamine. Additional pretrial violation

¹ The factors that a district court considers in determining whether a defendant is particularly amenable to probation include: “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

reports were filed because Hamre failed to appear for random drug-and-alcohol testing three times. Hamre also failed to appear at the pretrial violation hearing on October 18, 2017. Finally, Hamre was still on probation for a prior felony DWI conviction when he was arrested in the present matter. The record supports the district court's decision to deny a downward departure because Hamre failed to show that he is particularly amenable to probation.

Affirmed.