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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1062**

State of Minnesota,
Respondent,

vs.

Jason Nathaniel Oliger,
Appellant.

**Filed April 1, 2019
Affirmed
Connolly, Judge**

Dakota County District Court
File No. 19HA-CR-17-2148

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

James C. Backstrom, Dakota County Attorney, Elizabeth M. Swank, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his sentence for possession of pornographic work involving minors by a registered predatory offender, arguing that the district court abused its discretion in denying his motion for a downward dispositional departure based on his mental illness. Because we see no abuse of discretion, we affirm.

FACTS

Appellant Jason Oliger had a 2015 conviction for possession of pornographic work involving minors. He was placed on probation for this offense. In February 2017, police executed a search warrant at his home and seized a computer, an iPod, and a disk, on which they found 2,786 images of suspected child pornography, which were then sent to the National Center for Missing and Exploited Children (NCMEC) to be identified.

Appellant was charged with felony possession of pornographic work involving minors (registered predatory offender) and felony possession of pornographic work involving minors (prior conviction). He entered a straight guilty plea to possession of pornographic work involving minors by a registered predatory offender, for which the guidelines sentence is 45 months in prison, executed, with ten years of conditional release.

Appellant moved for a downward dispositional departure and probation on the grounds of mental illness. The district court found no substantial and compelling circumstances warranting departure and sentenced appellant to prison according to the sentencing guidelines. Appellant challenges the denial of his motion, arguing that the

district court's failure to depart on the basis of appellant's mental illness was an abuse of discretion.

DECISION

A district court must order the presumptive sentence provided by the sentencing guidelines unless “substantial and compelling circumstances” support a departure, in which case the district court has discretion to depart; however, a refusal to depart will be reversed only in a “rare” situation. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Solberg*, 882 N.W.2d 618, 623, 625 (Minn. 2016) (noting that, because the goal of the guidelines is uniformity in sentencing, departures are justified only in exceptional cases when “identifiable, substantial and compelling circumstances” support the departure).

When a court intends to commit an offender with a serious and persistent mental illness . . . for imprisonment at a state correctional facility . . . the court, *when consistent with public safety, may* instead place the offender on probation . . . and require as a condition of the probation that the offender successfully complete an appropriate supervised alternative living program having a mental health treatment component.

Minn. Stat. § 609.1055 (2016) (emphasis added). Appellant argues that the district court “did not consider any of the factors relevant to this departure ground and instead focused on irrelevant issues.” But the district court focused on two relevant issues in denying appellant’s motion for a dispositional departure.

First, the district court focused on the extent to which appellant is a risk to public safety while on probation. The district court told appellant at the hearing on his motion:

[You are] for the second time before the court on a possession of child pornography conviction.

. . . [L]ess than two years after you pled guilty you're back in court again. . . . At first you denied that you had possession of porn. You were saying, well, you had no access to the computer. It was your mom's computer. That proved to be wrong.

You were then confronted with the fact that you had this child porn on a flash drive. . . . [Y]ou said . . . [t]hat child porn was on there when [you] bought [the flash drive] I don't think [it's] likely that that happened that way. So I've got somebody in front of me here who is not really taking responsibility. . . . You knew that you were not to possess child porn. You were convicted of that. You were told back in 2015 when you pled guilty that you had to stay away from this stuff. . . .

. . . [O]bviously, it goes without saying you are a high risk to reoffend because you did reoffend.

. . . You're not amenable to probation because you reoffend [by committing] the exact same crime while you're on probation.

The district court's view is corroborated by the psychosexual evaluation included in appellant's presentence investigation, which stated that:

[Appellant] . . . denied purposefully accessing child pornography. He has a history of non-cooperation with the conditions of his probation, as well as non-compliance with psychiatric and sex-offender treatment. Many of these factors are associated with an increased risk for re-offending.

. . . [Appellant] presents with factors that suggest he is at a higher risk for reoffending. He has a prior conviction for a similar offense. . . .

[Appellant] has failed to comply with the conditions of his probation. . . .

. . . .

Challenges in community supervision [of appellant] include his history of non-compliance with conditions of probation (both by using computers and accessing child pornography).

Appellant was placed on probation for the 2015 offense with the assumption that he would not reoffend while on probation. That assumption proved inaccurate, and the district court did not abuse its discretion by declining to repeat it.

Second, the district court focused on the inadequacy of outpatient sex-offender treatment for appellant, rejecting his request to be placed in an adult foster-care program where “he can start outpatient sex offender treatment.” Appellant’s psychosexual evaluation noted that

[i]n regard to sex specific treatment, [appellant] has been discharged from two outpatient Sex Offender Treatment programs already. The combination of his psychiatric symptoms and sexual behaviors suggest[s] that outpatient [treatment] would be inappropriate at this time. . . . If [he] is incarcerated, Sex Offender Treatment is recommended while he is incarcerated as well as a higher level of support once he is released (e.g., group home).

The psychosexual evaluation also noted that outpatient treatment was not appropriate for appellant’s mental condition:

. . . [A]lthough [appellant’s] symptoms of depression appear at least partially in remission, he has failed to comply with psychiatric recommendations and is at risk of having another depressive or manic/hypomanic episode without appropriate treatment. . . . If [he] is not incarcerated, he would likely need a high level of support to maintain compliance with mental health treatment recommendations (e.g., a facility or group home).

Appellant’s desire to be in outpatient treatment rather than incarcerated is not a substantial or compelling circumstance that would justify departure from the guideline sentence. The district court’s decision not to depart was not an abuse of discretion.

Affirmed.