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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1324**

State of Minnesota,
Respondent,

vs.

Michael Jon Schluessler,
Appellant.

**Filed May 13, 2019
Affirmed
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19HA-CR-18-272

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

James C. Backstrom, Dakota County Attorney, Heather Pipenhagen, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge;
and Larkin, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

On appeal from a judgment of conviction for possessing pornographic works involving minors, appellant argues that the district court erred in denying his motions for

downward durational and dispositional departures from the presumptive sentence under the Minnesota Sentencing Guidelines. We affirm.

FACTS

Appellant Michael Jon Schluessler is a 50-year-old man with a criminal history that includes a 1992 conviction for third-degree sexual assault against a 13-year-old child. Consequently, Schluessler is required to register as a predatory offender.

On August 30, 2017, the Minnesota Bureau of Criminal Apprehension (BCA) forwarded a tip to the Hastings Police Department that a large number of child pornography photos had been uploaded to Google photos. The upload came from an email address associated with Schluessler. A week later, law enforcement executed a search warrant of Schluessler's residence. Officers recovered an iPod, three SIM cards, and three cell phones. After searching the cell phones, the Electronic Crimes Unit (ECU) found images of suspected child pornography on two of them. The ECU sent the images to the National Center for Missing and Exploited Children (NCMEC) to determine if they matched pictures of known child victims. The NCMEC found that, of the images on Schluessler's phone, 23 contained nine different identified child victims. At least four of the child victims were involved in sexual acts in the images.

Respondent State of Minnesota charged Schluessler with four counts of possessing pornographic work involving minors, in violation of Minn. Stat. § 617.247, subd. 4(b) (2016). Schluessler pleaded guilty to all counts, with the intention of arguing for a downward departure at sentencing. The district court ordered a psychosexual evaluation to be completed along with the presentence investigation. The doctor who completed the

evaluation diagnosed Schluessler with multiple mental disorders, including “unspecified paraphilic disorder” and “schizotypal personality disorder.” Schluessler self-reported major depressive disorder and posttraumatic stress disorder.

On May 14, 2018, the district court held a sentencing hearing. Schluessler argued for a downward dispositional departure of being placed on probation rather than being committed to prison. He cited his difficult life and the fact that he has been a victim of sexual assault himself. In the alternative, Schluessler argued for a downward durational departure from the presumptive guidelines range of sentences. He argued that his offense was less serious than typical because he was not looking specifically for these images, but that they were downloaded from the internet in a “hodge podge” of material.

The state argued for a sentence at the top of the guidelines range, which was 70 months’ imprisonment.¹ As to the dispositional-departure motion, the state argued:

Most importantly, if you just look at his history on probation and his history in treatment, it’s—he’s been entirely unsuccessful. He has been revoked every single time he’s been on probation. He reports at least eleven stints in treatment in the last four years. Says he completes the programs but he—the only time he ever maintained sobriety was for six months while he was in custody. So there’s simply nothing in his history to support such a finding.

¹ Because Schluessler’s crime involved multiple victims, he was subject to multiple sentences. After application of the rules for determining criminal history, *see State v. Hernandez*, 311 N.W.2d 478, 480-81 (Minn. 1981) (stating that, when multiple offenses are sentenced by the same court on the same day, the offense for which the defendant is first sentenced is included in the criminal history of the next offense sentenced), the longest presumptive range of sentence for Schluessler’s convictions was 51 to 70 months.

As to the durational-departure motion, the state argued that Schluessler’s offense was not less serious than the typical offense, observing that it involved 23 images that contained pictures of nine different child victims.

The district court denied both motions and imposed a guideline sentence of 59 months in prison.² The court stated that “for the court to depart, whether it’s dispositional or durational, there has to be substantial and compelling reasons . . . there’s nothing in this case that stands out as being substantial and compelling.”

This appeal follows.

DECISION

Schluessler argues that the district court abused its discretion by refusing to grant a downward dispositional or durational departure from the presumptive guidelines sentence.

A sentence or range of sentences prescribed under the Minnesota Sentencing Guidelines “is presumed to be appropriate.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). A district court may depart from the presumptively appropriate guidelines sentence only if “identifiable, substantial, and compelling circumstances” warrant doing so. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016); *see also* Minn. Sent. Guidelines 2.D.1 (2016) (a departure requires “identifiable, substantial, and compelling circumstances”). The guidelines include nonexclusive lists of mitigating and aggravating factors that constitute substantial and compelling circumstances and may justify departure. *See* Minn. Sent. Guidelines 2.D.3 (2016). To maintain uniformity and

² The district court also imposed concurrent sentences of equal or shorter duration for the three other convictions.

proportionality in sentencing, departures from the guidelines sentence are discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

If a defendant requests a downward departure, a district court must determine whether “mitigating circumstances are present” and, if so, whether “those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *Soto*, 855 N.W.2d at 308 (quotations omitted). “[T]he mere fact that a mitigating factor is present in a particular case does not obligate the court to place [a] defendant on probation” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted). And, “[a]lthough the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *Soto*, 855 N.W.2d at 307-08 (quotation omitted). A district court abuses its discretion when its decision is premised on legal errors or clearly erroneous findings of fact. *Solberg*, 882 N.W.2d at 623. We will reverse a district court’s refusal to depart only in a “rare” case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

The guidelines define two types of sentencing departures: dispositional and durational. Minn. Sent. Guidelines 1.B.5.a, b (2016). A dispositional departure occurs when a district court orders a disposition other than that recommended in the sentencing guidelines. Minn. Sent. Guidelines 1.B.5.a. For example, a downward dispositional departure occurs when the sentencing guidelines recommend a prison sentence but the

district court instead stays the sentence. Minn. Sent. Guidelines 1.B.5.a(2). A durational departure, on the other hand, occurs when a district court orders a length of the sentence that differs from the length recommended in the guidelines. Minn. Sent. Guidelines 1.B.5.b.

Downward Dispositional Departure

Schluessler first argues that the district court abused its discretion when it denied his motion for a downward dispositional departure because he is particularly amenable to probation and unamenable to incarceration.

Substantial and compelling circumstances justifying a downward dispositional departure include “a defendant’s particular amenability to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *see also* Minn. Sent. Guidelines 2.D.3.a(7). Factors relevant to determining if a defendant is particularly amenable to treatment in a probationary setting 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.” *Id.*

The district court found that no substantial and compelling circumstances were present, including particular amenability to probation. The record shows the following. At the time of sentencing, Schluessler was 50 years old. He had a significant criminal history, including a prior conviction for a sexual offense against a child. Schluessler’s remorse was questionable. During sentencing, he expressed that he was “truly sorry” for his actions and any hurt he caused. However, he also qualified this by stating that “I truly did not know I had these in my possession;” still seeming to refuse full responsibility. Finally, Schluessler

had very little family support and did not know where he would live if released. The district court considered all of these facts and reasonably concluded that they weighed against departure. Therefore, the district court did not abuse its discretion by finding that Schluessler was not particularly amenable to probation.

Schluessler also argues that he is particularly unamenable to incarceration. He relies heavily on *State v. Wright*, 310 N.W.2d 461 (Minn. 1981). In that case, the supreme court upheld a district court's dispositional departure on the basis that the defendant "is particularly unamenable to incarceration" because there was a strong reason to suspect that the defendant would be victimized in prison and that both the defendant and society would be better off if he were on probation. *Id.* at 462-63. Here, Schluessler makes a similar argument—that he is likely to be victimized in prison and that he has mental health needs that are better attended to outside of prison.

Wright does not demand reversal here. The supreme court in *Wright* affirmed a district court's decision to depart—it did not compel the district court to do so. Again, the fact that a mitigating factor is present does not obligate a district court to exercise its discretion to depart. *Pegel*, 795 N.W.2d at 253. Moreover, this case is distinguishable from *Wright* in a key respect. In *Wright*, both the psychiatrist and the author of the presentence investigation report opposed incarceration because of the defendant's unique needs. *Wright*, 310 N.W.2d at 462. That is not the case here. In this case, the author of the presentence investigation report recommended imprisonment on the basis of Schluessler's "well above average risk level" and "prior noncompliance issues." The author of the psychosexual evaluation also recommended incarceration. The evaluation

concluded that Schluessler was not appropriate for outpatient treatment and required a structured and secured setting.

The supreme court in *Wright* emphasized that relying on the factor of being unamenable to incarceration should be used carefully so as not to “loosely apply” the standard. *Id.* Here, the probation officer and psychiatrist both recommended that Schluessler serve time in prison, despite his mental health issues. The district court did not abuse its discretion in denying Schluessler’s motion to depart on this ground.

Downward Durational Departure

Schluessler next argues the district court abused its discretion in denying his motion for a durational departure because his offense was less serious than the typical child-pornography offense.

Substantial and compelling circumstances supporting a downward durational departure are those that “demonstrate that the defendant’s conduct was significantly . . . less serious than that typically involved in the commission of the crime in question.” *Rund*, 896 N.W.2d at 532 (quotation omitted). “Durational departures may be justified by offense-related reasons only.” *Id.* at 533. Again, the record supports the district court’s determination that no such reasons exist. Nothing in the record supports the argument that Schluessler’s actions were less serious than those surrounding the typical child-pornography offense. Schluessler argues that “the images [he] was convicted for possessing were available on the internet in the same way as many other legal pornographic images.” However, this is likely true of many child-pornography images. The fact that they are available on the internet, alongside legal images, does not lessen their illegality.

The district court did not abuse its discretion by denying Schluessler's motion for a downward durational departure.

Affirmed.