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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1363**

State of Minnesota,
Respondent,

vs.

Anthony Scott David Auginaush,
Appellant.

**Filed July 29, 2019
Affirmed
Johnson, Judge**

Clearwater County District Court
File No. 15-CR-18-33

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

Alan G. Rogalla, Clearwater County Attorney, Heather L. Labat, Assistant County
Attorney, Bagley, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Johnson, Judge; and Reilly,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Anthony Scott David Auginaush pleaded guilty to first-degree criminal sexual
conduct pursuant to a plea agreement in which the state agreed to recommend a downward

dispositional departure. The district court rejected the recommendation and imposed a presumptive guidelines sentence. We conclude that the district court did not err by denying Auginaush's motion for a downward dispositional departure. Therefore, we affirm.

FACTS

In December 2017, when Auginaush was 22 years old, the state filed a juvenile-delinquency petition that charged him with one count of first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(g) (2012). The petition alleged that, between June and September of 2013, when Auginaush was 17 years old, he engaged in sexual penetration of a child who was less than 16 years old. The petition further alleged that Auginaush had sexually abused the same child and two other children on other occasions but did not include any charges based on the other incidents. The state also filed a motion to certify the case for prosecution of Auginaush as an adult in district court.

In January 2018, Auginaush waived certification proceedings and agreed to be prosecuted as an adult. The state filed a criminal complaint alleging the same facts that had been alleged in the juvenile-delinquency petition. The state and Auginaush entered into a plea agreement in which Auginaush agreed to plead guilty in exchange for the state's recommendation of a stay of execution and probation and the state's promise that it would not bring additional charges based on the reported but uncharged conduct. Auginaush signed a plea petition in which he stipulated to the facts alleged in the petition and the complaint. The district court deferred acceptance of the plea and ordered a pre-sentence investigation (PSI) and a psychosexual evaluation. Auginaush informed the district court that he would move for a downward dispositional departure at sentencing.

In February 2018, a licensed psychologist completed a psychosexual evaluation of Auginaush. In March 2018, a probation agent completed a PSI of Auginaush. Because both documents are confidential, we will not discuss their contents in this opinion.

At sentencing in May 2018, Auginaush asked the district court to adopt the parties' joint recommendation of a downward dispositional departure. Auginaush argued that he was amenable to probation because of his "young age," "family history," and "lack of criminal history." Auginaush also asked the district court to depart on the ground that he had been victimized as a child. The state submitted written victim-impact statements from the complainant, the complainant's mother, a victim of the uncharged conduct, and the father of another victim of uncharged conduct. The state noted that the victims and their families "would like the Court to impose a prison sentence" but asked the district court to follow the parties' joint recommendation of probation.

The district court accepted Auginaush's guilty plea and imposed a sentence of 144 months of imprisonment, which is the shortest sentence within the presumptive guidelines range. Auginaush appeals.

D E C I S I O N

Auginaush argues that the district court erred by denying his motion for a downward dispositional departure. The state did not file a responsive brief.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2012). For any particular offense, the presumptive sentence is "presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics." Minn. Sent. Guidelines 1.B.12 (2012).

Accordingly, a district court “must pronounce a sentence within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a [departure].” Minn. Sent. Guidelines 2.D.1 (2012). The sentencing guidelines provide non-exclusive lists of mitigating and aggravating factors that constitute identifiable, substantial, and compelling circumstances and, thus, may justify a departure if such circumstances are found to exist. See Minn. Sent. Guidelines 2.D.3 (2012).

If a defendant requests a downward dispositional departure, a district court first 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.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989), and Minn. Sent. Guidelines 2.D.1). If so, the district court has discretion to order a downward dispositional departure. *Id.*; *Best*, 449 N.W.2d at 427. In exercising its discretion, the district court must “deliberately consider[] circumstances for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), review denied (Minn. Apr. 16, 2002). “[T]he mere fact that a mitigating factor is present . . . does not obligate the court to place defendant on probation.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted). If a district court orders a departure from the presumptive sentence, the district court must state the reason or reasons for the departure. Minn. Sent. Guidelines 2.D.1.c. If the district court does *not* order a departure, the district court is *not* required to state reasons for imposing a presumptive

sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

This court generally applies an abuse-of-discretion standard of review to a district court's denial of a motion for a downward dispositional departure. *Soto*, 855 N.W.2d at 307-08. But a district court has discretion to depart from the presumptive range "only if aggravating or mitigating circumstances are present; if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart." *Best*, 449 N.W.2d at 427 (emphasis omitted). A district court abuses its discretion if "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); *see also Soto*, 855 N.W.2d at 308 n.1 (quoting *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011)). Thus, to the extent that the determination whether aggravating or mitigating circumstances are present "turns on a question of law," we apply a *de novo* standard of review. *See Soto*, 855 N.W.2d at 308 n.1. And to the extent that a district court has discretion to depart from the presumptive range, we defer to the district court's decision and reverse only if there is "insufficient evidence of record to justify the departure." *See id.* at 308 (quoting *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002)). Only a "rare case" will warrant reversal of a district court's refusal to depart from the sentencing guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016).

A.

Auginaush first contends that the district court should have granted his motion on the ground that his culpability is mitigated. Among the reasons for a downward departure

from the sentencing guidelines are “substantial grounds . . . that tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.” Minn. Sent. Guidelines 2.D.3.a(5).

Auginaush focuses on his young age at the time of the offense and his own childhood experience of being a victim of abuse. He cites several opinions in which the United States Supreme Court considered constitutional limitations on the sentencing of juvenile offenders. *See Miller v. Alabama*, 567 U.S. 460, 132 S. Ct. 2455 (2012) (holding that Eighth Amendment prohibits mandatory life imprisonment without parole for juvenile offenders); *Graham v. Florida*, 560 U.S. 48, 130 S. Ct. 2011 (2010) (holding that Eighth Amendment prohibits sentences of life without parole for juveniles who commit non-homicide offenses); *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183 (2005) (holding that Eighth Amendment prohibits execution of offenders who were under 18 years old at time of offense). In those cases, the Supreme Court acknowledged developments in psychology and neuroscience that distinguish juvenile brains from adult brains and reasoned that “children are constitutionally different from adults for purposes of sentencing” and that “the distinctive attributes of youth diminish the penological justifications for imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.” *Miller*, 567 U.S. at 471-72, 132 S. Ct. at 2464-65 (discussing *Graham* and *Roper*). Auginaush asserts that a probationary sentence in his case “is consistent with Supreme Court precedent based on extensive study of adolescent brain development and their capacity for change.”

The Supreme Court caselaw cited by Auginaush is distinguishable. Those opinions arose from cases in which juvenile offenders received a death sentence or life sentences

without the possibility of parole. Those opinions do not stand for the proposition that a person who committed an offense as a juvenile should receive a probationary sentence rather than a prison sentence based on the lesser culpability of juveniles. Although Auginaush was 17 years old at the time of the charged conduct, the district court's denial of a downward dispositional departure based on Auginaush's age at the time of the offense is not prohibited by law.

Even assuming that Auginaush's young age and his own victimization are substantial and compelling circumstances, a district court has discretion to depart or not depart from a presumptive sentence, and the mere presence of a mitigating factor does not obligate the district court to place a defendant on probation. *See Pegel*, 795 N.W.2d at 253. Auginaush asserts that the district court abused its discretion by relying on individual statements in the psychosexual evaluation report rather than the psychologist's ultimate recommendation. We disagree with Auginaush's characterization of the conclusion of the psychosexual evaluation, which did not recommend probation. In any event, the district court appears to have read and considered the entire evaluation and was not required to minimize or ignore those portions that do not support a departure. *See id.* at 253-54. In addition, Auginaush's argument that the district court failed to consider the dispositions in other juvenile criminal-sexual-conduct cases is not compelling given that he did not present that argument to the district court. Accordingly, it was within the district court's discretion to impose a presumptive sentence based on the evidence in the record.

Thus, the district court did not err by not granting Auginaush's motion on the ground that his culpability is mitigated.

B.

Auginaush also contends that the district court should have granted his motion on the ground that he is particularly amenable to probation. At the time of Auginaush's offense, being "particularly amenable to probation" was not specifically enumerated in the non-exclusive list of mitigating factors in the sentencing guidelines but was recognized by caselaw as a valid ground for a downward departure. *See State v. Wenthold*, 427 N.W.2d 10, 11 (Minn. App. 1988), *review denied* (Minn. Sept. 16, 1988). Particular amenability to probation was incorporated into the sentencing guidelines two years after Auginaush's offense. *See* Minn. Sent. Guidelines 2.D.3.a.7 (2015).

The requirement that a defendant be "particularly" amenable to probation "ensure[s] that the defendant's amenability to probation distinguishes the defendant from most others and truly presents the 'substantial[] and compelling circumstances' that are necessary to justify a departure." *Soto*, 855 N.W.2d at 309 (quoting Minn. Sent. Guidelines 2.D.1). In determining whether a defendant is particularly amenable to probation so as to justify a downward dispositional departure, a district court may consider, among other things, "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). A district court need not discuss all of the *Trog* factors if the district court denies a motion for a downward dispositional departure. *Pegel*, 795 N.W.2d at 254.

After considering the parties' recommendation and the evidence before it, the district court concluded that particular amenability to probation was not a basis for a downward departure in this case. The district court stated:

[A]lthough I note there is some evidence of record that arguably would support a departure, there is likewise evidence that cuts the other way. [The psychosexual] evaluator also noted at points in his report a lack of remorse, severe lack of accountability. And some of the testing suggested that Mr. Auginaush was not in fact motivated for treatment. So, I acknowledge that there are some facts that augur towards a basis for a departure, but there are also facts that augur the other way. I simply do not find a basis for a departure on the record.

Auginaush contends that the district court erred because the *Trog* factors support a probationary sentence. He points to his “young age, lack of criminal history, amenability to treatment, acceptance of responsibility, attitude and cooperation, family support, and the sentences of other teens who sexually abuse family members” as evidence that he is particularly amenable. He highlights a finding in the psychosexual evaluation report that he is amenable to treatment, his cooperation with police, his waiver of adult certification proceedings and guilty plea, and his family support.

Auginaush is correct that the evidentiary record includes some evidence indicating that he is amenable to probation. Both the psychosexual evaluation report and PSI report contain some findings in Auginaush’s favor. But neither document compels the conclusion that Auginaush is *particularly* amenable to probation. Furthermore, the record also contains indications that Auginaush is *not* amenable to probation. Although the district court did not discuss each of the *Trog* factors on the record, there is no indication that the district court did not consider all of the evidence before it. *See Pegel*, 795 N.W.2d at 254. Moreover, the fact that the state and Auginaush jointly recommended probation does not mean that the district court abused its discretion by not adopting the recommendation.

Thus, the district court did not err by not granting Auginaush's motion on the ground that he is particularly amenable to probation.

In sum, the district court did not err by denying Auginaush's motion for a downward dispositional departure.

Affirmed.