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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1544**

State of Minnesota,
Respondent,

vs.

Cornelius Johnson,
Appellant.

**Filed June 17, 2019
Affirmed
Florey, Judge**

Stearns County District Court
File Nos. 73-CR-18-2298; 73-CR-18-2619

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,
St. Cloud, Minnesota (for respondent)

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

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

UNPUBLISHED OPINION

FLOREY, Judge

Appellant Cornelius Johnson argues that, because he is particularly amenable to probation, the district court abused its discretion by denying his motion for a downward dispositional departure and imposing, instead, a presumptive sentence. We affirm.

FACTS

On the night of March 16, 2018, officers from the Sartell Police Department were dispatched to a reported domestic assault. When officers arrived, J.K.M., appellant's girlfriend at the time, was visibly upset and crying. J.K.M. reported to officers that appellant, who she believed had been drinking that night, had assaulted her after she discovered that he was cheating on her. She reported that she instructed appellant to leave her residence, but he refused.

J.K.M. reported to officers that appellant grabbed her by her throat and pushed her against the wall. Despite telling appellant to leave several times, J.K.M. reported that he continued to assault her, including slapping her face and hitting her head. J.K.M. reported that she observed blood coming from her nose. Officers observed a small amount of blood behind J.K.M.'s ear, as well as red marks on her left arm. Officers also observed blood on appellant's shirt and a mirror hanging crookedly in the hallway.

Officers spoke with A.M., J.K.M.'s 8-year-old son, who witnessed the assault. A.M. reported that he heard appellant and J.K.M. yelling at each other in the entryway and in the garage. He reported that he went to the top of the stairs and observed appellant grab J.K.M.'s wrists and push her against the wall. He heard J.K.M. say, "Get off of me," and

“Stop hitting me.” A.M. reported that appellant and J.K.M. then went downstairs, and he continued to hear banging and yelling.

Appellant denied touching J.K.M. He reported that she made her own nose bleed and then wiped her blood on his shirt. At the time of the incident, appellant had two qualifying domestic-violence-related-offense convictions from 2015.

The state charged appellant with two felony counts of domestic assault. *See* Minn. Stat. § 609.2242, subd. 4 (2016). That same day, the district court issued a Domestic Abuse No Contact Order (DANCO) prohibiting appellant from having contact with J.K.M. While in jail, and in violation of the DANCO, appellant placed a phone call to J.K.M. The state charged appellant with one felony count of violating a DANCO. *See* Minn. Stat. § 629.75, subd. 2(d)(1) (2016). In both cases, the state filed a notice of its intention to seek an aggravated durational departure.

On May 18, 2018, appellant entered guilty pleas in both cases. In the domestic-assault case, he pleaded guilty to count two, and in the DANCO case, he pleaded guilty to the sole count of violating the DANCO. In exchange for appellant’s guilty pleas, count one in the domestic-assault case was dismissed; the state agreed to argue for no more than 39 months’ imprisonment, concurrent on both case files; the state agreed to dismiss its motions for an aggravated durational departure; and it agreed to not charge any outstanding offenses as of the date of the plea hearing. The parties also agreed that appellant could seek a downward dispositional departure asking the district court to both place him on probation and allow him to participate in domestic-violence programming.

The following month, appellant's presentence investigation (PSI) reports for both cases were filed. The reports concluded that appellant lacked amenability to probation supervision and recommended 39 months' imprisonment. The reports contained a summary of appellant's criminal history, including "at least 31 convictions on his record," 18 of which were felony convictions. In the domestic-assault case, appellant had 12 criminal-history points, with a presumptive commit of 29-39 months, and in the DANCO case, he had 13 criminal-history points, with a presumptive commit of 29-39 months.

The reports noted that appellant, age 44 at the time of the presentence investigation, had a criminal history that began "as early as the age of 12," and that it appeared "his criminal activity was essentially constant when he wasn't incarcerated." The reports found that "much of his criminal activity involv[ed] drugs and alcohol."

In the risk-assessment categories evaluating appellant's criminal history, education and employment, relationships with family and friends, alcohol and drug use, and involvement with prosocial activities, appellant scored between "high risk" and "very high risk." On the domestic-abuse risk assessment, appellant scored a seven, placing him "in the highest risk category" of which only "6 [percent] of men f[a]ll."

Both of the PSI reports acknowledged appellant's troubled upbringing. The reports stated that appellant had "reported growing up in a chaotic environment with his parents being regular crack cocaine users who engaged in acts of domestic violence in the home," that appellant "described being neglected," "being placed in group homes as early as the age of 12," and "never wanting to leave the group homes when he was close to being discharged because he didn't want to return home."

The PSI reports also acknowledged appellant's strengths. The reports found that appellant showed "some self-awareness that he lack[ed] the skills to adequately adjust to the real world," and that appellant was "respectful" during the meetings with the probation officer. However, the PSI reports also found that it was "apparent" that appellant was "most motivated when he [wa]s in significant legal trouble," and that appellant's version of the offense did not "match the injuries that [J.K.M.] had or the statements made by [J.K.M.] and [her] young son."

The PSI reports found that appellant had been "placed on community supervision several times in the past without any meaningful amount of behavior change." The reports noted that appellant had recently been released from prison to a work-release program in June 2017, and that his supervised-release was revoked in early January 2018. He was then released to supervision, again, in late January 2018, but thereafter failed to report for chemical testing three times in February 2018, and, on March 16, 2018, appellant assaulted J.K.M. Additionally, the PSI reports noted that appellant committed the two felony offenses while on supervised release for first-degree burglary, an offense that was also domestic-violence related.

The reports concluded that there was "no assurance that [appellant], if given probation, would abide by any no contact order," and that, while "[p]rison time most likely [would] not rehabilitate him," appellant was "deserving of prison time for his actions." Based on appellant's criminal history and repeated patterns of probation violations, the reports found that there were no "substantial and compelling reasons to depart from

Minnesota Sentencing Guidelines” and “recommended that [appellant] be committed to the custody of the Commissioner of Corrections for a period of 39 months.”

Following the release of the PSI reports, a sentencing hearing was held. At the hearing, appellant acknowledged his history of criminal activity, but stated that most of his behavior stemmed from substance abuse and asked that the district court “give [him] a second chance.”

The district court denied appellant’s motion for a downward dispositional departure and sentenced him to an executed prison term of 39 months for both convictions, to be served concurrently. The district court acknowledged appellant’s remorse for his actions, but ultimately found that the law did not allow for it to grant his motion. The district court stated:

I love your answers, and when I read through the PSI the first time I really liked the answers you gave. I really hope they’re genuine. When I got to the end and I read the agent’s rationale, then I went back to the top again because I wanted to look at the dates because that—a lot of times as a judge the dates can get by me pretty easily. That’s where I got hung up. So the fact that you were on supervised release when these happened and that you’d only been out of prison for, like, two months made it really hard, you know. That’s where it’s—it’s really hard to find that there are substantial and compelling reasons you’re amenable to probation when you committed two felonies while on parole, so that’s where I came down is—I truly hope that you genuinely want to make change I thought about figuring out if I run them consecutively and I put more time over your head, would that give me more leverage to make—to force you to make the change, but then I came back to what the law requires of me and I don’t know how I can find substantial and compelling reasons to say you’re amenable—well, I have to find you’re particularly amenable—when this happened while you’re on parole. So I have to send you to prison is the short version. I do wish you luck and I do

hope that you can make those changes, but I like to be honest with people in terms of my thought process.

This appeal followed.

DECISION

I. The district court did not abuse its discretion by denying appellant’s motion for a downward dispositional departure.

“In sentencing, district courts have a great deal of discretion.” *State v. Soto*, 855 N.W.2d 303, 305 (Minn. 2014). The district court’s discretion is limited, however, by the Minnesota Sentencing Guidelines, which prescribe a sentence that is “presumed to be appropriate.” Minn. Sent. Guidelines 2.D.1 (Supp. 2017); *see Soto*, 855 N.W.2d at 308. A district court may exercise its discretion to depart from the guidelines only if there are “identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentences.” *Soto*, 855 N.W.2d at 308 (quotation omitted); *see also State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999) (“In fact, a sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present.”).

Substantial and compelling circumstances justifying a downward dispositional departure include that “[t]he offender is particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a.(7) (Supp. 2017). In determining whether a defendant is particularly amenable to probation, district courts consider factors such as “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).

On appeal, this court reviews a district court’s sentencing decision for an abuse of discretion. *Soto*, 855 N.W.2d at 307-08. An appellate court cannot simply substitute its judgment for that of the district court, and, absent a clear abuse of discretion, appellate courts “generally will not interfere.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985) (“The reviewing court may not interfere with the sentencing court’s exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination [to impose the presumptive sentence].”).

Only in a “rare” case will an appellate court reverse a sentencing court’s refusal to depart. *Kindem*, 313 N.W.2d at 7. Moreover, “[t]his 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).

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure. While appellant acknowledges that he has a significant criminal history, he argues that the best interests of the community weigh in favor of a probationary sentence—specifically, a probationary sentence wherein he would participate in a program designed for repeat domestic-violence offenders. He argues that his criminal record demonstrates that “incarceration has not helped him remain law abiding.”

For support, appellant cites to *State v. Hennessy*, 328 N.W.2d 442, 443 (Minn. 1983) (affirming district court’s dispositional departure in presumptive commit case), and *State*

v. *Malinski*, 353 N.W.2d 207, 211 (Minn. App. 1984) (concluding district court did not err in granting defendant’s motion for dispositional departure), *review denied* (Minn. Oct. 16, 1984). Appellant argues that both cases “make plain” that “amenability to probation may be premised on a motive to reform, irrespective of criminal history.”

The district court’s denial of appellant’s motion was not an abuse of discretion. First, the district court’s imposition of an executed sentence of 39 months was within the presumptive guidelines range.¹ See *Delk*, 781 N.W.2d at 428. Second, the sentencing judge carefully evaluated all of the testimony and information before it made its determination. See *Van Ruler*, 378 N.W.2d at 80-81. Indeed, the district court expressed the time it spent reviewing the PSI reports and the PSI recommendations and that it “thought about figuring out” a sentencing scheme that would “put more time over [appellant’s] head” to give the court “more leverage.” However, as the district court articulated to appellant, ultimately, it could not find “substantial and compelling reasons” to warrant a departure.

And third, the record supports, in light of the factors enunciated in *Trog*—including the defendant’s age, prior record, remorse, cooperation, attitude in court, and relationships with friends and family—the district court’s finding that appellant was not particularly

¹ With offense-severity levels of 4, and a criminal-history score of 12, and then 13, appellant’s presumptive sentence was between 29-39 months. See Minn. Sent. Guidelines 4.A. (Supp. 2017) (showing a presumptive sentence for a severity-level offense of 4 and a criminal-history score of 6 or more to be between 26-36 months); Minn. Sent. Guidelines 2.B.2.c. (Supp. 2017) (“An additional three months must be added to the duration of the appropriate cell time, which then becomes the presumptive duration, when: (1) a custody status point is assigned; and (2) the offender’s total Criminal History Score exceeds the maximum score on the applicable Grid (i.e., 7 or more).”).

amenable to probation. *See Trog*, 323 N.W.2d at 31. As the reports noted, appellant was 44 years old at the time of the presentence investigation, and, since the age of 12, “his criminal activity [has been] essentially constant when he [has not been] incarcerated.” Appellant has an extensive criminal record, including at least 31 convictions, 18 of which are felonies, and many of which are violent offenses. Appellant received a criminal-history score of 12 in the domestic-assault case, and a 13 in the DANCO case. Further, appellant scored between “high risk” and “very high risk” in the PSI reports’ risk-assessment categories evaluating his criminal history, education and employment, relationships with family and friends, alcohol and drug use, and involvement with prosocial activities. And, on the domestic-abuse risk assessment, appellant fell in the “highest risk category” of which only “6 [percent] of men f[a]ll.”

Appellant uses his extensive criminal history to support his contention that he is “a perfect candidate” for repeat-offender domestic-violence programming. However, appellant’s violent criminal history and continuous disregard for the law—including when he is on supervised-release or confined—demonstrate that the best interests of the community weigh in favor of incarceration.

Moreover, a defendant’s *mere suitability* for community-based programming does not reach the standard necessary to warrant a dispositional departure. “A dispositional departure typically focuses on characteristics of the defendant that show whether the defendant is *particularly* suitable for individualized treatment in a probationary setting.” *See State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (emphasis added) (quotation omitted); *see also Soto*, 855 N.W.2d at 309 (“By requiring a defendant to be *particularly*

amenable to probation, therefore, we ensure 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." (emphasis in original) (quotation omitted)). The district court acknowledged this threshold in its statement: "I don't know how I can find substantial and compelling reasons to say you're amenable—well, I have to find you're *particularly* amenable—when this happened while you're on parole." (Emphasis added.)

With regard to the cooperation factor, the record establishes that, despite violating the DANCO, appellant was cooperative throughout the court proceedings. Similarly, with regard to attitude, the record does not indicate that appellant was anything but respectful in court. With regard to the remorse factor, however, the PSI reports questioned appellant's sincerity. While the reports noted that appellant felt "[s]hame" when looking back at the domestic assault, the reports concluded, "It is apparent that [appellant] is most motivated when he is in significant legal trouble versus exhibiting any proactive internal motivation to address his issues before he engages in the criminal behavior that results in arrest and incarceration."

The PSI reports found that appellant's relationships with and lack of support from friends and family were factors that added to his risk of reoffending. The reports noted that appellant reported "having zero friends that are crime free and at least '3-5' of his close friends have been arrested for drug related offenses." The PSI reports also noted that appellant "has five children, all of them currently residing in Georgia," and that appellant had "played a very limited role in his children's life." Further, the reports found that

appellant had a “history of domestic violence within his relationships with women.” The *Trog* factors do not weigh in appellant’s favor.

Lastly, we are not persuaded by appellant’s proposition that, irrespective of his criminal record, “amenability to probation may be premised on a motive to reform.” And his reliance on *Hennessy* and *Malinski* to support his proposition is misplaced. *Hennessy* involved a 24-year-old nonviolent offender who had “a substantial record of nonviolent, nonaggressive criminal conduct.” 328 N.W.2d at 442. Similarly, *Malinski* involved a 27-year-old nonviolent offender who, “despite his long criminal history,” had “not physically harmed anyone” and “present[ed] no danger if given a chance to contribute to society.” 353 N.W.2d at 209. Appellant’s significant criminal history, involving multiple violent offenses, and spanning from the age of 12 up until his latest offense at the age of 44, does not compare to either of the aforementioned defendants. As the PSI reports indicated, the best interests of the community weigh in favor of placing appellant in temporary confinement, and opportunities for rehabilitation will remain available for appellant in the community when he is released from custody.

Affirmed.