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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1898**

State of Minnesota,
Respondent,

vs.

Arron Michael Bergstrom,
Appellant.

**Filed June 8, 2020
Affirmed
Florey, Judge**

Hennepin County District Court
File No. 27-CR-18-28061

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Robert M. Christensen, Robert M. Christensen P.L.C., Minneapolis, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Worke, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges the district court's denial of his motion for a downward dispositional departure, arguing that he is particularly amenable to probation and individualized treatment. We affirm.

FACTS

In November 2018, at approximately 1:00 a.m., law-enforcement officers witnessed a vehicle driving abnormally slow and swerving over several lanes of traffic. The officers stopped the vehicle and identified the driver as appellant Arron Michael Bergstrom. Upon approach, the officers noticed an “overwhelming odor of intoxicants.” They administered a preliminary breath test at the scene which returned an alcohol concentration of 0.15. After arresting Bergstrom and taking him to the police station, officers attempted to administer a second breath test, but Bergstrom refused to provide a sample. Bergstrom was later charged with one count of refusal to submit to a chemical test under Minn. Stat. § 169A.20, subd. 2(2), and one count of driving while impaired in violation of Minn. Stat. § 169A.20, subd. 1(1).

Pursuant to a plea agreement, Bergstrom pleaded guilty to the driving-while-impaired charge, and the state dismissed the charge of refusal to submit to a test. With Bergstrom's prior convictions, the sentencing guidelines called for a presumptive sentence of 42 months' imprisonment with a range of 36 to 50 months. Prior to the sentencing hearing, Bergstrom filed a motion for a downward dispositional departure, specifically requesting one year in jail and an extended period of probation, arguing that a number of

personal and situational factors favor such a departure. A presentence investigation report acknowledged the legitimacy of some of the factors Bergstrom identified as making him particularly amenable to probation, but ultimately concluded that the totality of Bergstrom's personal and situational circumstances did not support the requested departure.

In August 2019, the district court denied Bergstrom's motion for a downward departure and sentenced him to 36 months with a five-year conditional release. Citing his intent to appeal that denial, Bergstrom filed a motion to stay his sentence. The district court denied the motion, finding that Bergstrom posed a risk to public safety in light of his "dangerous and continued pattern of driving while intoxicated."¹ Bergstrom appeals the denial of his downward-departure motion.

DECISION

While the presumptive sentence will be appropriate in most cases, the district court has discretion to depart from it when there are "substantial and compelling circumstances" supporting such a departure. *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *Id.* This court "may vacate or modify a sentence on many grounds, including that the sentence is unreasonable or inappropriate, or that such a result is in the interest of fairness and uniformity." *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (citation omitted). "However, we will not ordinarily interfere with

¹ The district court identified, in particular, DWI offenses committed in 2003, 2004, 2007, and 2011.

a sentence falling within the presumptive sentence range, either dispositionally or durationally, even if there are grounds that would justify a departure.” *Id.* (quotation omitted). Therefore, while Minnesota courts have not seen fit to altogether preclude the ability to appeal sentencing decisions that comport with the guidelines, the supreme court has observed that “it would be a rare case which would warrant reversal of the refusal to depart.” *Id.* (quoting *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981)). Accordingly, we review a district court’s denial of a motion to depart for an abuse of discretion. *See id.*

Bergstrom argues the district court has abused its discretion in denying his motion to depart. Specifically, Bergstrom argues that his age, vulnerability, amenability to probation, remorse, record on prior probations, cooperation, attitude, social support, and minimal risk to public safety—as well as the financial cost of his confinement and the contents of the probation officer’s report and recommendations—all weigh in favor of a downward departure.

With respect to his age, Bergstrom argues that his forty-seven years give him the benefit of added intelligence or experience, which make him more likely to succeed in a rehabilitation program. However, Bergstrom cites to no authority in support of this proposition. In fact, the only case he cites in which the court expressly considers the defendant’s age supports the opposite rationale. In *State v. Patton*, this court affirmed the district court’s downward departure in part because the court “cited [the defendant’s] immaturity, at nineteen years of age, and exhibited a concern that incarceration was not appropriate for him.” 414 N.W.2d 572, 575 (Minn. App. 1987). Bergstrom’s argument that his more advanced age renders him more fit for probation is unsubstantiated.

Bergstrom also argues that he is “extraordinarily vulnerable” to abuse and sexual assault in prison due to his “unique smallish physical characteristics.” He cites a number of cases that take into account a defendant’s vulnerability to abuse when considering dispositional departures. Bergstrom also cites several studies and reports that discuss the prevalence of abuse in prison and characteristics that statistically make one more likely to suffer sexual abuse. Specifically, Bergstrom argues that he “is virtually the poster child for a likely target of prison assault” because he is unimposing, a nonviolent offender, appears younger than he is, and smaller in stature. This argument is unconvincing. While it is true that prior cases have supported departure from guideline sentences on the basis of special vulnerability to abuse, all of the cases to which Bergstrom cites contained highly unusual circumstances that rendered the defendant exceptionally vulnerable. There is no support for his argument that appearing somewhat smaller and less imposing than average justifies a dispositional departure—much less renders a refusal to depart an abuse of discretion.

Bergstrom argues that he has demonstrated that he is particularly susceptible to rehabilitation, given that he enrolled in a dependency program after his arrest and received treatment for his mental-health conditions. For this argument, he cites *State v. McCalister*, 462 N.W.2d 407 (Minn. App. 1990). However, the *McCalister* court affirmed a downward departure *despite* the fact that “the trial court had a proper concern for [the defendant’s] future ability to stay straight.” *Id.* at 409. While this court observed that the district court “did not consider [the defendant] totally unamenable to probation,” this was not framed as a justification or reason for the departure—only as something that did not weigh as heavily

against the departure as it might otherwise have. *Id.* Bergstrom simply cites no authority that enrollment and success in a substance-abuse program after arrest warrants a downward departure.

Bergstrom identifies a number of other considerations courts have used to support downward departures, but he provides little more than bare assertions that those considerations would support departure in this case. He identifies remorse, cooperation, attitude, and completion of prior probations as relevant factors, but then only states that these weigh in his favor in this case, sometimes pointing to isolated elements of the case or transcript that do not preclude that inference. Notably, Bergstrom asserts that he has successfully completed prior probations, but then he also argues that he displayed cooperation by freely admitting that he managed to continue drinking while on past probations. Finally, Bergstrom argues, without any legal authority, that the fact that incarceration is financially costly for the state should be considered and support departure. The district court considered all of these factors and did not abuse its discretion by finding them insufficient to support departure.

With respect to the social-support consideration, Bergstrom had many of his family and friends write to the district court to express their commitment to supporting him. While we agree that this consideration would support a decision to depart, we cannot say that the district court abused its discretion by declining to depart on this basis alone—especially given that the district court sentenced Bergstrom to the lowest end of the presumptive range. We agree with the state that Bergstrom is essentially asking us to substitute our

judgment for that of the district court, which we cannot do on review for an abuse of discretion.

Affirmed.