

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0638**

State of Minnesota,
Respondent,

vs.

Malcom Tyree,
Appellant.

**Filed April 5, 2021
Affirmed
Slieter, Judge**

Hennepin County District Court
File No. 27-CR-19-27275

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

Michael O. Freeman, Hennepin County Attorney, Adam E. Petras, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal from his conviction for being a felon in possession of a firearm or ammunition, in violation of Minn. Stat. § 624.713, subd. 1(2) (2018), appellant Malcom Tyree challenges the district court's denial of his request for a downward dispositional

departure. Because the district court exercised its discretion to carefully consider appellant's departure motion, it did not abuse its discretion in declining to grant a downward dispositional departure. Therefore, we affirm.

FACTS

In 2019, while appellant was on probation following his 2018 convictions for felony domestic assault and threats of violence, appellant's probation officer viewed a social media photo of appellant holding a pistol. In response, the probation officer and a police officer conducted a search of appellant's residence during which they located a handgun loaded with ammunition. On this basis, appellant was charged with two violations of Minn. Stat. § 624.713, subd. 1(2), for possession of the firearm and for possession of the ammunition. Appellant appeared before the Hennepin County District Court on December 16, 2019, and pleaded guilty to one charge. The other charge was dismissed.

Appellant moved for a downward dispositional departure from the presumptive 60-month sentence.¹ Appellant argued that a downward dispositional departure was warranted because he was particularly amenable to probation and had mitigated culpability as shown by his lifelong struggles with his Fetal Alcohol Spectrum Disorder (FASD) diagnosis and repeated childhood placements in foster care. The district court denied appellant's request for a downward dispositional departure and imposed a sentence of 36 months' imprisonment.² This appeal follows.

¹ Pursuant to Minn. Stat. § 609.11 (2020), appellant's convictions for possession of a firearm and ammunition pursuant to Minn. Stat. § 609.713 (2018) carried a mandatory commitment to the commissioner of corrections of "not less than five years" (60 months).

² This was a downward durational departure which is not at issue in this appeal.

DECISION

“A dispositional departure is one that stays a presumptively executed sentence, or executes a presumptively stayed sentence.” *State v. Stempfley*, 900 N.W.2d 412, 415 n.5 (Minn. 2017). “Whether to depart from the guidelines rests within the district court’s discretion, and this court will not reverse the decision absent a clear abuse of discretion.” *State v. Khalil*, 948 N.W.2d 156, 169 (Minn. App. 2020) (quotation omitted), *review granted* (Minn. Oct. 1, 2020). “A district court can exercise its discretion to depart from the guidelines only if aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence.” *Id.* (emphasis and quotation omitted).

Appellant requested a dispositional departure based upon two factors: (1) “The offender is particularly amenable to probation,” and (2) “substantial grounds exist that tend to excuse or mitigate the offender’s culpability.” Minn. Sent. Guidelines, 2.D.3.1(5), (7) (2020). Even if mitigating factors are present, a sentencing court need not grant a downward departure: “departure is not mandatory, and an appellate court will reverse a [district] court’s refusal to depart only in a rare case.” *Kahlil*, 948 N.W.2d at 169 (alteration in original) (quotation omitted); *see also State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) (presence of mitigating factors does not require a sentencing court to depart).

The record indicates that the district court examined all those facts which appellant claimed show a particular amenability to probation and the existence of mitigated culpability. The district court acknowledged that appellant had “made incredible efforts to do the best with what [he] ha[d],” and that he was “working so hard” while on probation.

The court also considered appellant's diagnosis of FASD, which the court recognized as resulting in the appellant having difficulty regulating his emotions, and which had impacted both appellant's personal relationships as well as his attempts at completing treatment programs. The court acknowledged that appellant had been "dealt a blow before [he was] even born" because of this diagnosis—thereby mitigating his culpability. The district court additionally considered the nature of the offense itself, and how appellant had purchased a firearm "to display some ideation of self harm" because of his ongoing mental-health struggles, thereby further mitigating his culpability.

The district court also identified a number of facts which weighed against such a departure. The court noted that, due to his FASD diagnosis, it is "difficult for [appellant] to regulate [his] emotions," which included a number of "angry outbursts" during "schooling" and "treatment." Importantly, the district court also placed primary emphasis on the fact that appellant had been on probation for two prior felonies when he committed the current offense. The district court expressed concern with placing appellant back on probation: "I don't want to take away from [appellant's efforts], but I can't, in good faith, say that you're particularly amenable because you were on probation when this happened."

The record demonstrates that the district court exercised its broad discretion in considering appellant's departure motion, rejecting it and committing appellant to the commissioner of corrections. *Khalil*, 948 N.W.2d at 169 (stating decision to depart rests within district court's discretion). On this record, the district court did not abuse its discretion in denying appellant's request for a downward dispositional departure.

Affirmed.