

*This opinion is nonprecedential except as provided by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
A20-1506**

State of Minnesota,
Respondent,

vs.

Rex Christopher Kersey,
Appellant.

**Filed June 7, 2021
Affirmed
Larkin, Judge**

Hennepin County District Court
File No. 27-CR-19-4621

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

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

Kristine J. Zajac, Ryan J. Briesse, Zajac Law Firm, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Larkin, Judge; and Reyes,
Judge.

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the district court's imposition of a presumptive prison sentence for his second felony conviction of driving while impaired (DWI). Because the district court did not abuse its discretion in imposing a presumptive sentence, we affirm.

FACTS

In February 2019, respondent State of Minnesota charged appellant Rex Christopher Kersey with a felony DWI offense. The complaint alleged that Kersey had an alcohol concentration of 0.16 within an hour and a half of driving and that Kersey previously had been convicted of a felony DWI offense.

Kersey pleaded guilty as charged and argued for a probationary sentence—a downward dispositional departure—instead of the presumptive prison sentence. The district court imposed a presumptive sentence, reasoning that the probation department did not recommend probation and that “all of the good things” Kersey had done in his life had to be weighed “against the public policy . . . that dictates accountability for this offense.” The district court sentenced Kersey to serve 42 months in prison with a five-year period of conditional release. Kersey appeals.

DECISION

A sentence that is prescribed by the Minnesota Sentencing Guidelines is “presumed” appropriate. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). A district court may depart from a presumptive sentence only if “identifiable, substantial, and compelling circumstances” warrant a departure. *State v. Solberg*, 882 N.W.2d 618, 623

(Minn. 2016) (quotation omitted). If a defendant requests a downward dispositional departure, that is, a probationary sentence instead of a prison sentence, a district court focuses on the defendant and considers whether he is particularly amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (stating that in assessing whether a defendant is particularly amenable to probation, a district court may consider age, prior record, remorse, cooperation, attitude in court, and support of family and friends). But even if the record shows that the defendant would be amenable to probation, a district court is not required to depart from the presumptive sentence. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

District courts have broad discretion in sentencing. *Soto*, 855 N.W.2d at 305. This court reviews a district court's sentencing decision for an abuse of discretion. *See id.* at 307-08. In exercising that discretion, the district court must consider the arguments for a sentencing departure "alongside valid reasons for non-departure." *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (quotation omitted). "[I]t would be a rare case which would warrant reversal of the refusal to depart." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Kersey contends that he presented "substantial evidence meeting the *Trog* factors," along with documentation "of his medical condition, which [is] comprised of an immuno-compromising condition particularly susceptible to threat from the COVID-19 virus." He claims that his "condition along with the ongoing COVID-19 pandemic presented a substantial risk of harm or death to [himself] if confined to prison." Kersey argues that although the district court gave "significant consideration to the character evidence

presented,” the court “appeared to downplay the threats that his medical condition and the COVID-19 pandemic posed to [his] safety and well-being . . . in a prison setting.” Kersey therefore argues that the district court abused its discretion by denying his motion for a downward dispositional departure.

The record indicates that the district court asked the prosecutor about Kersey’s “physical health in the context of the Commissioner of Corrections” and that the prosecutor replied that the Department of Corrections could give Kersey any necessary medical attention. In response to Kersey’s argument that “COVID changes everything in this case,” the following exchange occurred between Kersey’s attorney and the district court:

THE COURT: It doesn’t forever. I mean –

DEFENSE COUNSEL: It doesn’t forever.

....

DEFENSE COUNSEL: You’re right. It’s not forever. If there was a vaccine that was – that was – that could cure up quick, but it seems as though a lot of the implementations that have taken place are – are currently – there’s no word as to when the programs are going to be back, is what I’m –

THE COURT: Don’t you think Bootcamp will be back in a year?

DEFENSE COUNSEL: Who knows?

THE COURT: All right.

DEFENSE COUNSEL: Who knows? I mean, if the fall comes and there’s another – and there’s another outbreak and an increase, it could be years before Bootcamp is back.

That exchange shows that the district court considered Kersey’s arguments related to the COVID-19 pandemic.

Moreover, the district court also considered the reasons weighing against a dispositional departure. The district court was aware that this offense resulted in Kersey’s fifth DWI conviction. The district court noted that the probation department had completed

a presentence investigation and did not recommend probation. The district court also noted that a few days before Kersey's sentencing hearing, the courtroom was "filled with people" observing a case involving a 12-year-old boy who "is a vegetable for life" because the child was a passenger in a vehicle that was struck by a drunk driver. Although the district court recognized that Kersey had done what he could to put himself "on a road to recovery," the court concluded that "public policy . . . dictates accountability for this offense."

A district court is not required to depart from the presumptive sentence even if mitigating factors are present. *See State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008) (stating that if a jury finds facts supporting a departure, a district court may, but is not required to, depart); *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (affirming denial of a request for departure despite defendant's argument that *Trog* factors were present); *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (stating that the mere existence of mitigating factors does not require the district court to place a defendant on probation). Here, the district court considered the arguments for and against a downward dispositional departure and concluded that a presumptive sentence was appropriate. This is not the "rare case" that warrants reversal of the district court's refusal to grant a downward dispositional departure.

Affirmed.