

*This opinion is nonprecedential except as provided by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
A21-0550**

State of Minnesota,
Respondent,

vs.

Terrance Lee Tonnessen,
Appellant.

**Filed March 28, 2022
Affirmed
Slieter, Judge**

Becker County District Court
File No. 03-CR-19-1586

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

Brian W. McDonald, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Halbrooks,
Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant argues that the district court's decision to conduct his sentencing hearing remotely was unconstitutional and the district court's denial of his motion for a downward dispositional departure was an abuse of its discretion. Because a presumed violation of Tonnessen's constitutional rights is harmless beyond a reasonable doubt and the district court acted within its discretion to deny Tonnessen's departure motion, we affirm.

FACTS

Appellant Terrance Lee Tonnessen pleaded guilty to second-degree criminal sexual conduct, in violation of Minn. Stat. § 609.343, subd. 1(e)(i) (2018). Tonnessen admitted to coercing the 15-year-old victim to have sexual contact with him when he was 40 years old.

The district court ordered the preparation of a psychosexual evaluation. *See* Minn. Stat. § 609.3457, subd. 1 (2020) (requiring the district court “order an independent professional assessment” before sentencing someone convicted of a sex offense). Tonnessen filed a motion for a downward dispositional departure based upon his claim that he is particularly amenable to probation.

The district court scheduled a sentencing hearing to be conducted remotely. Tonnessen's trial counsel sent a letter to the district court requesting an in-person sentencing hearing. The letter asked that the hearing be continued and rescheduled as an in-person hearing because “it is best to handle matters involving potential prison

commitment in-person.” The district court, without ruling on Tonnessen’s request, held the sentencing hearing remotely.

During the sentencing hearing, the district court denied Tonnessen’s motion for a downward dispositional departure and sentenced Tonnessen to a presumptive 90 months’ imprisonment. Tonnessen appeals.

DECISION

Tonnessen argues two issues on appeal. First, by holding his sentencing hearing remotely, the district court violated his constitutional right to be present at all critical stages of his criminal proceedings. Second, the district court abused its discretion when it denied his motion for a downward dispositional departure.

I. A presumed constitutional error is harmless.

We first note that Tonnessen has forfeited this argument because he did not present it to the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (holding that appellate courts “generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure.”). Tonnessen never formally moved the district court, based upon a constitutional violation, to hold an in-person sentencing hearing. Instead, his trial counsel sent a letter to the district court “requesting that the sentencing hearing . . . be continued” until the hearing could be held in person. Moreover, once the remote sentencing hearing began, Tonnessen’s trial counsel did not orally object to the remote nature of the hearing.

We decline to reach issues on appeal that were not raised before the district court. *See State v. Vasko*, 889 N.W.2d 551, 559 n.6 (Minn. 2017) (citing *In re Welfare of C.L.L.*,

310 N.W.2d 555, 557 (Minn. 1981)). Because Tonnessen failed to raise his constitutional argument to the district court, he forfeits this argument on appeal.

Though we need not analyze Tonnessen's constitutional argument, upon review of its merits, it fails. We will presume, without so deciding, that by holding his sentencing hearing remotely, it violated Tonnessen's constitutional right to be present in-person during his sentencing hearing. However, it was harmless beyond a reasonable doubt. When a defendant is wrongly denied the right to be present at a critical stage of trial, reversal is necessary "unless the error was harmless beyond a reasonable doubt." *Peterson v. State*, 672 N.W.2d 612, 616 (Minn. App. 2003), *rev. denied* (Minn. Mar. 16, 2004).

Criminal defendants have a due-process right to be present at their sentencing hearing. U.S. Const. amend. XIV; *State v. Martin*, 723 N.W.2d 613, 619 (Minn. 2006); *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). *See also Gardner v. Florida*, 430 U.S. 349, 358, 362 (1977) (concluding that a defendant was "denied due process of law when [a] death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."). The concept of due process is meant to be fluid and dynamic with "such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In Minnesota, this right is codified at Minnesota Rule of Criminal Procedure 1.05, subdivision 2. However, in response to the COVID-19 pandemic, the supreme court temporarily suspended strict compliance with rule 1.05. *Order Governing the Continuing Operations of the Minnesota Judicial Branch*, No. ADM20-8001, at 3 (Minn. Jan. 21, 2021). The order, which was in effect during Tonnessen's sentencing hearing, required

that all proceedings other than jury trials and grand juries “be conducted remotely unless the chief judge of the district in which the proceeding is to be held grants an exception for an in-person proceeding.” *Id.* at 2-3.¹

Tonnessen argues that this constitutional error was not harmless because the district court could not adequately assess his remorse. It is his claim of remorse, Tonnessen argues, that was the primary basis for his claim to be amendable to probation. And, absent an in-person expression of his remorse, Tonnessen claims, the district court was not able to fully assess his sincerity. The record belies Tonnessen’s claim.

First, the record is clear that the district court considered Tonnessen’s oral statement of remorse before explaining its reason why, given the presence of other factors also supported in the record, it found the absence of substantial and compelling circumstances to depart. During his allocution, Tonnessen stated the following:

TONNESSEN: This is the single most shameful and humiliating experience time of my life. I violated [the victim] and abused my friendship with [the mother of the victim] in ways that will be difficult for them . . . and I will carry the shame and pain for having done that for the rest of my life.

I know when I was having sexual contact with [the victim], I knew it was wrong, but I did it anyways.

....

The best thing to do with this case [was plead guilty], and I respect the decision of the Court and I want [the mother of the victim] and [the victim] to know that I’m truly sorry.

¹ Our court recently held that a generalized concern about the COVID-19 pandemic is an insufficient policy reason to justify the curtailing of a criminal defendant’s Confrontation Clause right. *State v. Tate*, 969 N.W.2d 378, 388 (Minn. App. 2022); *see also State v. Modtland*, ___ N.W.2d. ___, ___, 2022 WL 433245, at *5-6 (Minn. App. Feb. 14, 2022) (holding that the district court made sufficient case-specific findings to justify denying defendant’s request that a witness remove their face covering while testifying).

THE COURT: All right, Thank you. . . .

TONNESSEN: Did you get all that?

THE COURT: I did. Thank you. . . . [T]hank you for your statement, Mr. Tonnessen.

Though not all these statements involved remorse for the harm he caused the victim, he did ultimately express his apology and the district court clearly heard it.

However, a showing of remorse is but one factor for district courts to consider when adjudicating dispositional departure motions. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (providing a non-exhaustive list of offender-related factors district courts may consider, including the defendant’s age, prior record, remorse, cooperation, attitude in court, and support of family and friends). The record supports the district court’s conclusion that, considering all factors, which included Tonnessen’s remorse, there did not exist substantial and compelling circumstances to depart from the sentencing guidelines.

When explaining its reasons not to depart, the district court told Tonnessen that “when you committed this offense you were 40 and she was 15,” and “[i]t was not a one time occurrence and so it didn’t just happen. . . . [Y]ou had time to reflect upon your actions after the first time that it happened.” The district court also stated that because the victim was “the daughter of a friend . . . there was an established and trusted relationship that existed” between Tonnessen and the victim.

The district court’s conclusions are supported by the record. Neither party contests the age difference between Tonnessen and the victim.² The victim also provided a statement to the PSI author that Tonnessen arranged several sexual encounters and sometimes would help her out of her bedroom window so that he could have sex with her in his car. Finally, both the victim and her mother—once a close friend of Tonnessen’s—presented compelling oral impact statements to the district court prior to its sentence. The victim explained that Tonnessen “played on [her] mental health, [her] low self-esteem,” and her mother stated that Tonnessen’s actions heightened her worry about her children’s safety and whom she can trust.

In sum, any additional impact of an in-person showing of remorse would not have affected the district court’s sentencing decision. *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017). Thus, a presumed error by conducting a remote sentencing hearing is harmless beyond a reasonable doubt.

II. The district court acted within its discretion by imposing a presumptive sentence.

District courts have broad discretion in sentencing. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). We review a district court’s sentencing decision for an abuse of discretion. *Id.* A district court “abuses its discretion when its decision is based on an

² Tonnessen argues that, by relying on the age disparity between the parties, the district court used an element of the offense to deny his motion for a downward departure. *See State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006) (stating that sentencing courts may not use elements of an offense as an aggravating factor during sentencing). We disagree. The district court noted the vast age difference between Tonnessen and the victim to highlight Tonnessen’s manipulation of the victim.

erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). The Minnesota Sentencing Guidelines, which prescribe sentences that are “presumed to be appropriate,” limit the district court’s sentencing discretion. Minn. Sent. Guidelines 2.D.1 (2018); *see Soto*, 855 N.W.2d at 308 (quoting this provision of guidelines).

If a defendant requests a downward dispositional departure, a district court 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.” *Soto*, 855 N.W.2d at 308 (quotations omitted). Among those mitigating factors is whether appellant is “particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a(7) (2018); *see Soto*, 855 N.W.2d at 308-09. But even if a mitigating factor is present, the district court is not obligated to grant a dispositional departure. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011) (quotation omitted).

To determine whether a defendant is particularly amenable to probation, a district court may consider “both offender- and offense-related factors” for a downward dispositional departure. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018); Minn. Sent. Guidelines 2.D.3.a(7); *see also Trog*, 323 N.W.2d at 31 (providing a non-exhaustive list of offender-related factors district courts may consider).

Tonnessen’s argument that the district court abused its discretion is unpersuasive for two reasons. First, even if the district court determined that Tonnessen is particularly amenable to probation, the district court would still not be obligated to downwardly depart from the presumptive sentence. *See Pegel*, 795 N.W.2d at 253-54.

Second, the district court's decision that Tonnessen is not particularly amenable to probation is supported by the record for all the reasons described in part I above. Thus, the district court did not abuse its discretion by denying Tonnessen's motion for a downward dispositional departure.

Affirmed.