

*This opinion is nonprecedential except as provided by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
A21-0601**

State of Minnesota,
Respondent,

vs.

Robert Kent Pioro,
Appellant.

**Filed April 18, 2022
Affirmed
Johnson, Judge**

Carlton County District Court
File No. 09-CR-20-1053
St. Louis County District Court
File No. 69DU-CR-20-2119

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

Lauri A. Ketola, Carlton County Attorney, Jeffrey L.H. Boucher, Assistant County Attorney, Carlton, Minnesota; and

Kimberly J. Maki, St. Louis County Attorney, Jonathan D. Holets, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Reyes, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

In 2020, Robert Kent Pioro pleaded guilty to four counts of third-degree criminal sexual conduct based on his admission that, from 2000 to 2002, he engaged in sexual conduct toward a student athlete at the high school where he was a teacher and a coach. Before sentencing, Pioro moved for a downward dispositional departure. The district court denied the motion and imposed an executed sentence of 33 months of imprisonment, which is a presumptive sentence under the 2000 sentencing guidelines. We conclude that the district court did not err by denying Pioro's motion for a downward dispositional departure. Therefore, we affirm.

FACTS

From 2000 to 2002, when Pioro was in his early 40s, he was a high school teacher and basketball coach. During that time period, Pioro engaged in a sexual relationship with a student who was a member of the basketball team that he coached.

Years later, in November 2019, the former student athlete reported Pioro's conduct to the Carlton County Sheriff's Office. In July 2020, in Carlton County, the state charged Pioro with three counts of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(e) (2000), for conduct occurring in Carlton County between October 2000 and March 2001. On the same day, in St. Louis County, the state charged Pioro with three counts of third-degree criminal sexual conduct, in violation of Minn. Stat. § 609.344, subd. 1(e), for conduct occurring in St. Louis County between February 2001 and April 2002.

In December 2020, Pioro pleaded guilty to counts 1 and 2 in each case. The district court ordered Pioro to cooperate with a psychosexual evaluation and a pre-sentencing investigation (PSI).

In January 2021, Pioro moved for a downward dispositional departure. He argued that he is particularly amenable to probation. One sentence of his memorandum of law in support of the motion states, “He struggles with chronic health conditions which he fears would become unmanageable in a custodial setting.” Pioro’s attorneys later submitted to the district court a one-page letter from Pioro’s physician, which states that Pioro has a particular rare lung condition. The physician stated further that Pioro is at “increased risk of developing severe life-threatening respiratory infections” and that the COVID-19 pandemic and “close proximity to others” in prison “would very likely adversely affect Mr. Pioro’s overall marginal health.”

At the consolidated sentencing hearing in February 2021, the former student athlete provided a victim-impact statement. Pioro’s attorney argued in support of the motion for a downward dispositional departure. The state urged the district court to deny Pioro’s motion and to impose an executed sentence “at the high end of the box.” Pioro spoke in allocution and expressed remorse.

In the Carlton County case, the district court imposed and executed a sentence of 33 months of imprisonment on count 2. The district court denied Pioro’s motion for a downward dispositional departure by stating, “I am going to conclude, based on everything that I’ve reviewed, read, and heard, that there are not substantial and compelling reasons for me to depart, either durationally or dispositionally, downward from the guidelines.”

With respect to count 1, the district court imposed a concurrent sentence of 28 months of imprisonment but expressed its intention to stay execution of that sentence. In the St. Louis County case, the district court imposed concurrent sentences of 18 months and 23 months of imprisonment on counts 1 and 2, respectively, but expressed its intention to stay execution of those sentences. At Pioro's request, the district court executed the three stayed sentences. Pioro appeals from the judgments in both district court cases.

DECISION

Pioro argues that the district court erred by denying his motion for a downward dispositional departure from the presumptive sentencing range with respect to count 2 in the Carlton County case.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines II.C (2000). For any particular offense, the presumptive sentence is "presumed to be appropriate" for all typical cases sharing criminal history and offense-severity characteristics. Minn. Sent. Guidelines II.D (2000); *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court "shall utilize the presumptive sentence provided in the sentencing guidelines unless the individual case involves substantial and compelling circumstances." Minn. Sent. Guidelines II.D (2000). "Substantial and compelling circumstances are those demonstrating that the defendant's conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question." *State v. Hicks*, 864 N.W.2d 153, 157 (Minn. 2015) (quotations omitted).

In reviewing a decision on a motion to depart from the applicable sentencing range, this court applies an abuse-of-discretion standard of review. *Soto*, 855 N.W.2d at 307-08. A district court “has broad discretion to depart” from the sentencing guidelines “only if aggravating or mitigating circumstances are present.” *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989) (emphasis omitted). But “if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart.” *Id.* One way in which a district court may abuse its discretion is by basing its decision “on an erroneous view of the law.” *Soto*, 855 N.W.2d at 308 n.1 (quotation omitted). Whether an aggravating or mitigating circumstance is present is, in essence, a question of law. *See Best*, 449 N.W.2d at 427. “[T]o the extent a decision to depart turns on a question of law, reviewing the decision for an abuse of discretion . . . calls for resolving the legal question de novo.” *Soto*, 855 N.W.2d at 308 n.1; *accord State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008); *State v. Dentz*, 919 N.W.2d 97, 101 (Minn. App. 2018); *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010); *State v. Grampre*, 766 N.W.2d 347, 350 (Minn. App. 2009), *rev. denied* (Minn. Aug. 26, 2009).

Pioro’s primary argument for reversal is that the district court erred by not concluding that he is particularly amenable to probation. In determining whether a defendant is particularly amenable to probation so as to justify a downward dispositional departure, a district court may consider, among other things, “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). A district court need not discuss all of the *Trog* factors if the district court denies a motion for a downward

dispositional departure. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). Particular amenability to probation is not established if the defendant is only somewhat amenable to probation. *Soto*, 855 N.W.2d at 308-09. Rather, the defendant must be “particularly” amenable to probation in a way that “distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Id.* at 309 (alteration omitted) (quotation omitted).

In this case, the district court indicated that it had reviewed the parties’ submissions and listened to the parties’ arguments and considered all relevant information before denying Pioro’s motion. The district court specifically stated that there are not “substantial and compelling reasons” for a departure from the sentencing guidelines.

Pioro contends that the district court erred on the ground that he is particularly amenable to probation because he admitted his guilt, accepted responsibility, expressed remorse, engaged in chemical-dependency treatment before the offense, is willing to attend sex-offender treatment, is now in his 60s, has support in his family and in the community, and has no other criminal history. In response, the state argues that Pioro has not expressed remorse for the harm he has caused to the victim but, rather, for the impact his crime has had on his own life. The state further contends that Pioro has blamed the victim and his wife, has denied that he needs sex-offender treatment, and has deceived persons in the community who support him.

We have reviewed the district court record, which provides some support for Pioro’s arguments but also some support for the state’s counter-arguments. The mixed factual record indicates that Pioro may be “somewhat” amenable to probation but is not

“particularly” amenable to probation in a way that distinguishes him from most other defendants. *See Soto*, 855 N.W.2d at 308-09. Thus, the district court did not err by determining that Pioro is not particularly amenable to probation.

Pioro’s secondary argument for reversal is that the district court erred by not concluding that a presumptive sentence would be “unreasonable, inappropriate, and excessive” in light of his physical health. He cites one relevant opinion: *State v. Kraft*, 326 N.W.2d 840 (Minn. 1982). In that case, the supreme court considered but rejected the appellant’s argument that a probationary jail term should not have been imposed because he had been diagnosed with leukemia and was taking prescription medications. *Id.* at 840-41. The supreme court stated that—notwithstanding *State v. Kindem*, 313 N.W.2d 6 (Minn. 1981) and other opinions expressing a general reluctance to reverse a presumptive sentence—an appellate court may modify a presumptive sentence if a defendant, “because of his physical condition, is particularly unamenable to this form of incarceration at this time.” *Id.* at 842. But the supreme court rejected the appellant’s argument in that case because his condition did not prevent him from being a full-time college student and because his physician’s statement was “apparently without scientific foundation.” *Id.*

In this case, Pioro relies on the one-page letter from his physician and the existence of the COVID-19 pandemic. The district court was not necessarily obligated to depart from the presumptive sentencing range merely because a physician had submitted a letter urging that action. *See Soto*, 855 N.W.2d at 309. In our view, the physician’s letter does not present a compelling case for a downward dispositional departure. The letter states that Pioro “requires meticulous care” because of his condition but does not state that such

care cannot be provided in prison. Similarly, the letter states that Pioro would be “at increased risk of developing severe life-threatening respiratory infections,” but the letter does not elaborate on the extent of the increased risk in Pioro’s case. It is notable that Pioro’s physical health was mentioned only in passing in the memorandum of law in support of Pioro’s motion and in his attorney’s oral argument at the sentencing hearing. Given the nature of the evidence and the manner in which Pioro presented his arguments concerning sentencing, the district court did not err by not modifying his presumptive sentence as an accommodation to his physical health.

Thus, the district court did not err by denying Pioro’s motion for a downward dispositional departure.

Affirmed.