

*This opinion is nonprecedential except as provided by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
A21-0616**

State of Minnesota,
Respondent,

vs.

Nicholas Rodriguez,
Appellant.

**Filed April 18, 2022
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Dakota County District Court
File No. 19HA-CR-19-2806

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

Kathryn M. Keena, Dakota County Attorney, Jessica Bierwerth, Assistant County Attorney, Hastings, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

ROSS, Judge

After Nicholas Rodriguez pleaded guilty to six counts of possession of child pornography, the district court sentenced him to 51 months in prison and imposed a ten-year conditional-release term. On appeal Rodriguez argues that the district court should

have granted his motion for a downward dispositional departure and not ordered the conditional-release term. Because the district court acted within its discretion by sentencing Rodriguez to the presumptive prison term, we affirm in part; but because the child-pornography statute does not authorize the ten-year conditional-release period in this case of simultaneous convictions, we reverse in part and remand for an adjusted sentence.

FACTS

The state charged Nicholas Rodriguez with six counts of possessing pornographic material involving minors based on photographs investigators discovered on his computer. Rodriguez pleaded guilty and the district court adjudicated him guilty on all six counts simultaneously.

Before sentencing Rodriguez, the district court considered information suggesting that he failed to appreciate his culpability. A preplea investigation report stated that Rodriguez “does not accept responsibility for the child pornographic images.” He first told the investigator that he tried to delete the photos from his computer, then said the photos “looked fake,” and then he said that former roommates placed them on his computer. The report referenced a psychosexual evaluation that found that Rodriguez’s responses raised concerns of improper sexual behavior. The evaluator concluded that Rodriguez’s answers suggested that he had viewed the photos and that he seemed to be “underreporting with regard to his sexual interests and behaviors.” She added, “There is an abundance of evidence of sexual preoccupation and behavior, yet he presents himself as largely asexual.”

The district court also received a presentence investigation report that similarly indicated that Rodriguez was minimizing his guilt. It recounted that he claimed to have

simply discovered the violative images on his computer, that he had tried to delete them, and that the images were merely “computer-generated.” And he again insinuated that his former roommates were responsible. He expressed remorse for failing to delete the photographs from his computer, not for possessing child pornography. He said that he was willing to enter treatment. But he clarified that he wanted to complete treatment only to establish his innocence, saying, “[It will] prove to you guys this case is not me . . . I will prove you guys were wrong.”

Rodriguez moved for a downward dispositional departure, seeking a stayed prison sentence with five years of supervised probation. At his sentencing hearing, Rodriguez informed the district court that, although he had pleaded guilty, he maintained that he was not responsible for the images on his computer. He reiterated his desire to “prove you all wrong.”

The district court denied Rodriguez’s motion for a downward departure. It sentenced him to 51 months in prison, which is the presumptive sentence under Minnesota Sentencing Guidelines 4.B. The district court set a conditional-release term of five years for count 1 and ten years for counts 2 through 6.

Rodriguez appeals.

DECISION

Rodriguez challenges two elements of his sentencing. He first argues that the district court improperly denied his motion for a downward dispositional departure and second that the child-pornography statute does not authorize a ten-year conditional-release term in this case of simultaneous convictions. Only his second argument prevails.

We are unpersuaded by Rodriguez’s contention that we must reverse the district court’s decision denying his motion for a downward dispositional departure. We review a district court’s sentencing decision for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014). A district court may (but is not required to) depart from a presumptive sentence when “identifiable, substantial, and compelling circumstances” justify doing so. Minn. Sent. Guidelines 2.D.1 (2020); *Soto*, 855 N.W.2d at 308. This deference to the district court exists because a guidelines-generated sentence is presumed to be correct, departures are by nature unusual, the district court is not required to give reasons justifying its denial of a departure motion, and the district court is not obligated to depart even if the circumstances would allow it. *Soto*, 855 N.W.2d at 308; *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *rev. denied* (Minn. Mar. 31, 2009). The supreme court accurately anticipated in dicta that it would be a “rare” occasion when an appellate court would reverse the district court’s decision to impose a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This is not one of those cases.

Rodriguez contends that the record shows that he is particularly amenable to probation. A substantial and compelling circumstance exists to support a dispositional departure when the convicted defendant is particularly amenable to probation. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Factors relevant to whether a defendant is particularly amenable to probation include his age, prior criminal record, remorse, cooperation, attitude while in court, and the support of family and friends. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1983). But whatever factors the defendant points to, he must show that he is particularly amenable, not just amenable, to probation. *Soto*, 855 N.W.2d

at 309. Under different circumstances, Rodriguez’s age, lack of criminal history, willingness to participate in sex-offender treatment, and the support of his family and friends might suggest that he is amenable to probation. But he would still need to show further that he is *particularly* amenable to probation. And the record supports the district court’s concern that Rodriguez was neither genuinely remorseful about having the child pornography in his possession nor accepting of his responsibility for doing so. He passed the responsibility onto his roommates, and he even referred to the incriminating photographs as “fake” while insisting on his own moral innocence. Blame-shifting and minimizing one’s culpability does not make one amenable to probation, let alone particularly amenable to it. The record supports the district court’s refusal to grant Rodriguez’s motion for a downward departure.

Rodriguez also argues that the district court was not authorized to impose a ten-year conditional-release term to follow his incarceration. He is correct. Whether a sentence is authorized by statute is a question of law that we review de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). The statute presumes a five-year conditional-release term for a child-pornography conviction, but it requires a ten-year term “[i]f the person has previously been convicted of a violation of this section.” Minn. Stat. § 617.247, subd. 9 (2020). We recently interpreted a different but similar statutory scheme in a manner that favors Rodriguez’s contention. In *State v. Brown*, as here, the defendant was simultaneously convicted on different counts. 937 N.W.2d 146, 155 (Minn. App. 2019). The district court imposed a lifetime conditional-release term under Minnesota Statutes section 609.3455, subdivision 1(g) (2016), reasoning that one of the simultaneous

convictions was a “prior sex offense” based on the timing of the conduct rather than the timing of the convictions. *Id.* at 156. We reversed, reasoning that a “prior sex offense” for sentencing purposes is not an offense adjudicated simultaneously with another. *Id.* at 156–57. The same reasoning applies here to a statute that similarly triggers a longer term based on one conviction following another. If a simultaneous conviction is not a “prior sex offense,” it also is not a “previously” occurring conviction.

We are not persuaded otherwise by the state’s argument that *State v. Overweg*, 922 N.W.2d 179 (Minn. 2019), requires a different outcome. *Overweg* addressed a different issue, which is whether the defendant had a qualifying conviction when he committed the conduct leading to his child-pornography conviction. *Id.* at 182. *Overweg* had argued that he should receive only a five-year rather than ten-year conditional-release term because he “was not convicted of the sex offense at the time he committed the possession of pornographic works involving a minor offense.” *Id.* Unlike the *Overweg* issue of the timing of the related offensive conduct, here our issue is the timing of the related adjudications.

We reverse the district court’s order imposing a ten-year conditional-release term on counts 2 through 6. On remand, the district court should amend the sentence to impose a five-year conditional-release term.

Affirmed in part, reversed in part, and remanded.