STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0684

Xanth Tyler Wilkins, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 3, 2023
Affirmed
Bratvold, Judge

Olmsted County District Court
File No. 55-CR-19-3682

Cathryn Middlebrook, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

Mark A. Ostrem, Olmsted County Attorney, James E. Haase, Assistant County Attorney, Rochester, Minnesota (for respondent)

Considered and decided by Bratvold, Presiding Judge; Gaïtas, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this appeal from the district court's order denying postconviction relief from a criminal-sexual-conduct conviction, appellant challenges his sentence. Appellant argues that the district court abused its discretion by denying his motion for a downward

dispositional departure and relying on "offense-based characteristics" instead of "the offender-based *Trog* criteria." Because the district court did not abuse its discretion when it (a) imposed a guidelines sentence after considering the parties' submissions and arguments and (b) denied postconviction relief after reviewing the sentencing record, we affirm.

FACTS

On May 21, 2019, appellant Xanth Tyler Wilkins met a woman, K.C., at a bar. Wilkins and K.C. then went to Wilkins's residence in Rochester and began consensual sexual contact that changed abruptly. Wilkins, without obtaining K.C.'s consent, choked her to the point she could not breathe. K.C. tried to kick Wilkins away but could not. Wilkins then penetrated K.C.'s vagina and anus until he ejaculated. K.C. later told an investigating police officer she thought that "if she lost consciousness, she would not make it out of Wilkins's house alive."

From her own apartment, K.C. called police. Responding officers brought her to a hospital, where she had a sexual-assault exam. K.C. was scratched and bruised on her legs, arms, and vaginal area. A police investigator interviewed Wilkins, who admitted to having sexual contact with K.C. and to choking K.C. during penetration. Wilkins told the investigator that K.C. never said that "she was okay with [choking], but also didn't say that she was not." Wilkins also acknowledged that K.C. could not speak while he choked her.

Police arrested Wilkins, and respondent State of Minnesota charged him with first-degree criminal sexual conduct under Minn. Stat. § 609.342, subd. 1 (2018). Count one alleged penetration with reasonable fear of imminent bodily harm; count two alleged

penetration using force or coercion. *Id.*, subd. 1(c), (e)(1). Wilkins completed a psychosexual evaluation with Riverside Psychological Services and a psychosexual assessment with Skipped Parts LLC.

Wilkins pleaded guilty to count one in exchange for the state's agreement to dismiss count two and a separate complaint alleging Wilkins's criminal sexual conduct with an ex-girlfriend. After testifying about his decision to plead guilty, Wilkins agreed he enjoys sex in which he is dominating or physically controlling his partner. Wilkins agreed that, without obtaining K.C.'s consent, he "chok[ed] her for up to a minute and she became very scared," and he had "nonconsensual penetration." Wilkins also agreed "there were multiple bruises on [K.C.'s] neck and her body." The district court accepted Wilkins's guilty plea, ordered a presentence investigation (PSI), and set a sentencing hearing.

Wilkins moved for a downward departure from the presumptive sentence disposition and duration. His motion included several letters and emails supporting his character along with excerpts from Wilkins's police interview. Wilkins argued that his employment, lack of criminal history, military service, and relationship with his daughter demonstrated that there were "more effective endeavors" than prison. He also filed a sentencing memorandum by a dispositional advisor.

At the November 13, 2019 sentencing hearing, the district court identified each item it reviewed, including Wilkins's motion submissions, the letters and emails supporting him, the reports from Skipped Parts and Riverside Psychological Services, and the PSI report. The district court asked if there was anything else to review, both parties said no, and the court stated that the PSI report recommended a presumptive commitment to the

commissioner of 144 months with a guidelines range of 144 to 172 months. When asked, neither party noted any error in the PSI report.

The district court asked for dispositional arguments first and heard from Wilkins's attorney and the prosecuting attorney; it also received a victim-impact statement from K.C. and photos of K.C.'s injuries. After a brief rebuttal from Wilkins's attorney, the district court took a 45-minute recess to consider the dispositional motion. Upon reconvening, the district court heard from Wilkins, who said he wanted to tell K.C. "how sorry I am for what I've done. . . . I violated her and hurt her physically in ways that nobody deserves to be treated." The district court denied Wilkins's motion for a stayed sentence, heard argument on the durational-departure motion, and sentenced Wilkins to 144 months in prison.

On November 10, 2021, Wilkins petitioned for postconviction relief and did not ask for an evidentiary hearing. He challenged his sentence, arguing the district court abused its discretion by disregarding "offender-specific grounds for a dispositional departure." Wilkins contended that he should be granted "a new sentencing hearing focused on whether the *Trog* factors support a motion for a downward dispositional departure." He did not challenge the denial of a durational departure. In a March 17, 2022 order, the district court denied Wilkins's petition for postconviction relief. After a detailed review of the sentencing proceedings and applicable caselaw, the district court determined that the evidence and the "applicable case law conclusively show that [Wilkins] is entitled to no relief." Wilkins appeals.

DECISION

The district court has "great discretion in the imposition of sentences and [appellate courts] reverse sentencing decisions only for an abuse of that discretion." *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). A district court may depart from the presumptive sentence in the Minnesota Sentencing Guidelines "when substantial and compelling circumstances are present." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *accord* Minn. Sent'g Guidelines 2.D.1 (2018). "The Minnesota Sentencing Guidelines define two types of sentencing departures: dispositional and durational. A dispositional departure places the offender in a different setting than that called for by the presumptive guidelines sentence . . . [and] typically focuses on characteristics of the defendant." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (citations omitted).

Among other things, a downward dispositional departure may be based on a defendant's "particular amenability to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But "merely being amenable to probation" is insufficient; "requiring a defendant to be *particularly* amenable to probation . . . distinguishes the defendant from most others and . . . presents the substantial and compelling circumstances that are necessary to justify a departure." *Soto*, 855 N.W.2d at 308-09 (quotation omitted). Factors to examine when considering a defendant's "particular amenability" to probation include "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." *Trog*, 323 N.W.2d at 31 (*Trog* factors).

If the "record suggests factors for departure," those factors "should be deliberately considered." *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). When the district court fails to exercise its discretion in denying a motion to depart, we will remand for resentencing. *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002) (remanding for resentencing where "we cannot conclude from the record that the district court made a deliberate decision to impose presumptive sentences by weighing reasons for and against departure"), *rev. denied* (Minn. Apr. 16, 2002); *Curtiss*, 353 N.W.2d at 264.

But even if a district court finds that a defendant is particularly amenable to probation, the district court need not depart. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). "We will affirm the imposition of a presumptive guidelines sentence when the record shows that the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Sept. 17, 2013). We reverse a district court's refusal to depart only in "rare" cases. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) (quoting *Kindem*, 313 N.W.2d at 7).

Wilkins argues that the district court (1) ignored the "appropriate factors in determining whether the defendant was particularly amenable to treatment in a probationary setting" when it denied Wilkins's sentencing motion and (2) erred by denying postconviction relief. We address these arguments in turn. [1]

[1] The state did not file a brief on appeal, so this case is submitted for decision under Minn. R. Civ. App. P. 142.03 and is "determined on the merits."

A. The district court considered Wilkins's motion for a downward dispositional departure and did not abuse its discretion.

Wilkins argues that, at the sentencing hearing, the district court erred by "only rel[ying] on offense-based characteristics," and the district court's analysis "excluded" evidence of the *Trog* factors. Wilkins, however, does not fairly summarize the district court's reasons for denying his motion for a downward dispositional departure.

At the sentencing hearing, the district court received and reviewed the psychosexual assessment by Skipped Parts, the psychosexual evaluation by Riverside Psychological Services, the PSI report, excerpts from Wilkins's police interview, letters and emails supporting Wilkins's motion, the victim-impact statement, photographs of K.C.'s injuries, and Wilkins's allocution. Wilkins's attorney agreed there were no other materials the district court needed to consider. The district court took a 45-minute recess to consider the evidence before reconvening and hearing from Wilkins.

Wilkins's attorney's argument during the sentencing hearing acknowledged that the evidence supported both prison and community treatment. Wilkins's attorney asked the district court for a stay of imposition, arguing that the PSI evaluator noted Wilkins "is amenable to treatment." Wilkins's attorney said the issue was, "where does that treatment need to occur," and recognized that the PSI evaluator recommended prison "because of Mr. Wilkins's propensity toward violence and impulsive behavior." Wilkins's attorney asked the district court to determine otherwise because Wilkins "acknowledged that what he did was wrong" and should receive treatment. Wilkins's attorney reasoned that Wilkins

is "truly remorseful" and "[n]ormally would get consent before he had rough sex with a partner. Intoxicated this time, didn't do it."

In denying Wilkins's motion, the district court explained its reasoning in some detail, which runs over four pages of transcript. Wilkins is correct that the district court addressed offense-based characteristics as part of its reasoning. As Wilkins points out, the district court stated that "when we are sentencing person-offenses like this, where profound harm has been done to another human being, the sentence is about punishment, about making clear through the seriousness of that punishment, that this conduct will not and cannot be tolerated."

The district court, however, also discussed offender-based characteristics. The district court weighed Wilkins's "admirable qualities," including his loving relationship with his "little girl," his other family and friends, and his seven years of "serv[ice to] his country in the Navy." The district court commented, "Wilkins, like all of us, is the sum of many parts, good and bad. I do not doubt the sincerity of the remorse that he expresses for what he did. But it is clear that something very bad, very cruel, took over on the night of this encounter." Thus, the district court did not "only rely on offense-based characteristics," because the district court also considered offender-based criteria.

The district court imposed a guidelines sentence, which is presumptive absent "substantial and compelling" circumstances. *Kindem*, 313 N.W.2d at 7. To provide a substantial and compelling circumstance for departure, Wilkins must be *particularly* amenable to treatment, not just amenable to treatment—as the Skipped Parts assessment described him. *See Soto*, 855 N.W.2d at 309. The district court explicitly considered the

Skipped Parts assessment, which, the district court observed, stated that Wilkins had "an inaccurate understanding of consent" and failed to "effective[ly]" communicate with "sexual partners." But the district court determined "this offense was not a mere failure to communicate. . . . This was a choking and a beating administered to a woman who flailed with her body, tried to kick the defendant off of her, and felt she was fighting for her life."

Because the record shows the district court reviewed the parties' arguments and submitted materials as well as statements by the victim and Wilkins, we conclude that the district court "deliberately considered" Wilkins's motion for a dispositional departure and the relevant evidence. Simply stated, the district court considered the factors for and against dispositional departure, unlike the district courts in *Curtiss*, 353 N.W.2d at 264, and *Mendoza*, 638 N.W.2d at 484. The district court, thus, did not abuse its discretion by denying Wilkins's motion for a downward dispositional departure.

B. The district court did not abuse its discretion by denying postconviction relief.

Wilkins argues the district court erred in denying postconviction relief because it determined that when a district court "declines to depart dispositionally downward, it is not required to provide [a *Trog*-factor] analysis." The district court relied on *State v. Pegel,* in which this court reviewed a sentencing decision that, as here, reflected "the district court did not discuss all of the *Trog* factors before it imposed the presumptive sentence." 795 N.W.2d 251, 254 (Minn. App. 2011). We concluded that "there is no requirement that the district court must do so." *Id.* The district court's postconviction memorandum also cited two nonprecedential opinions that reiterated the holding in *Pegel*. Based on the

caselaw, the district court denied postconviction relief partly because the "failure here to specifically address each *Trog* factor on the record was not improper."

Wilkins contends first that the district court erred by relying on nonprecedential caselaw. Wilkins correctly notes that nonprecedential opinions from this court are not binding authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). Nonprecedential opinions may, however, be considered for their persuasive value. *Id.*; *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 800 (Minn. App. 1993). Thus, no error occurs when a district court considers a nonprecedential opinion for its persuasive value.

Wilkins contends second that postconviction relief is warranted for Wilkins because the district court failed to exercise its discretion when it did not "consider factors the Supreme Court deemed relevant to the question of whether a district court should order a downward dispositional departure." We are not persuaded. Wilkins admits that, under applicable caselaw, "the district court need not articulate its rationale if denying a request for a dispositional departure." We agree that this is the central holding in *Pegel*, 795 N.W.2d at 254. Rather, the district court must "carefully evaluate[] all the testimony and information presented before making a determination." *Johnson*, 831 N.W.2d at 925 (quotation omitted).

As was recognized during the postconviction proceedings, the district court at sentencing "did not specifically enumerate each *Trog* factor in its explanation for the denial," but it "did address some factors on the record." We specifically reject Wilkins's assertion that the postconviction analysis "validates" the need for relief because it finds "most" of the *Trog* factors "supported a probationary sentence." To the contrary, the district

court's postconviction analysis stated that the offender-related factors "were a mixed-bag," and "no factors—or combination thereof—made a compelling case" for why Wilkins was "particularly amendable" to probation.

In conclusion, because the district court's decision to deny postconviction relief is supported by applicable law and the sentencing record in this case, the district court did not abuse its discretion by denying Wilkins's postconviction petition.

Affirmed.