

*This opinion is nonprecedential except as provided by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
A22-1209**

State of Minnesota,
Respondent,

vs.

Andrew Paul Anderson,
Appellant.

**Filed March 27, 2023
Affirmed
Johnson, Judge**

Dakota County District Court
File No. 19HA-CR-20-3007

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

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

Ryan J. Grove, Rogosheske, Rogosheske & Atkins, P.L.L.C., South St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Bryan, Judge.

NONPRECEDENTIAL OPINION

JOHNSON, Judge

Andrew Paul Anderson pleaded guilty to one count of first-degree driving while impaired. At sentencing, he requested a downward dispositional departure from the presumptive sentencing range on the ground that he is particularly amenable to probation.

The district court imposed a prison sentence within the presumptive range. We conclude that the district court did not err by imposing a presumptive sentence. Therefore, we affirm.

FACTS

In December 2020, a state trooper stopped a vehicle driven by Anderson after receiving a report of erratic driving. The trooper observed bloodshot and watery eyes and smelled alcohol on Anderson's breath. The trooper arrested Anderson after conducting field sobriety tests. Anderson submitted to a breath test, which indicated an alcohol concentration of 0.19.

The state charged Anderson with one count of first-degree driving while impaired (DWI), in violation of Minn. Stat. § 169A.20, subd. 1(1) (2020), based on the allegation that he was under the influence of alcohol, and one count of first-degree DWI, in violation of Minn. Stat. § 169A.20, subd. 1(5), based on the allegation that his alcohol concentration was more than 0.08. The state charged Anderson with felony offenses because he had been convicted of a felony-level DWI offense in 2006. *See* Minn. Stat. § 169A.24, subds. 1(2), 2 (2020).

Sixteen months later, in April 2022, the state and Anderson entered into a plea agreement by which Anderson agreed to plead guilty to count 1 and the state agreed to dismiss count 2. The district court ordered a pre-sentence investigation (PSI). The probation officer who authored the PSI report recommended that the district court impose a prison sentence of 54 months (the fixed sentence duration within the applicable sentencing range of 46 to 64 months), stay execution of the sentence, place Anderson on

probation, and order him to serve one year in jail. *See* Minn. Sent'g Guidelines 2.C.1 (2020).

The district court conducted a sentencing hearing in June 2022. The state requested that the district court impose an executed prison sentence of 48 months. The prosecutor noted that Anderson has five prior DWI convictions and two prior felony convictions, that Anderson's alcohol concentration was more than twice the 0.08 threshold at the time of the offense, that he was driving in heavy traffic, and that his offense occurred only six months after he was charged with another felony DWI offense in Washington County. The prosecutor acknowledged that Anderson had remained sober while charges were pending but attributed his sobriety to the fact that he was subject to random testing.

Anderson's attorney requested a downward dispositional departure on the ground that Anderson is particularly amenable to probation. Based on the information in the PSI report, Anderson's attorney argued that Anderson had been sober for many years between his 2006 DWI conviction and his mid-2020 arrest for DWI in Washington County and had maintained sobriety again since being charged there. The attorney explained that, at the time of the offense in this case, Anderson was unemployed and had lost his home but that he since had regained employment and housing and was attending Alcoholics Anonymous (AA) meetings three times per week. The attorney introduced four letters of support written by persons who have attended AA meetings with Anderson.

When given an opportunity to speak in allocution, Anderson stated that he was sober for 12 years while attending AA meetings but then stopped attending them. He stated that he relapsed after experiencing a divorce and the disruptions arising from the COVID-19

pandemic. He stated that he has recommitted to attending AA meetings and maintaining sobriety.

The district court stated that it had read the letters of support and had “spent a lot of time looking at this and thinking about it.” The district court commended Anderson for doing well on probation for the Washington County offense. But the district court emphasized the fact that this is Anderson’s third felony DWI conviction. The district court noted its concern for public safety and stated that, in committing the current offense, Anderson had endangered others. The district court concluded by finding that Anderson is not particularly amenable to probation and that there are no substantial and compelling mitigating circumstances. Accordingly, the district court denied Anderson’s request for a downward dispositional departure and imposed an executed sentence of 48 months of imprisonment. Anderson appeals.

DECISION

Anderson argues that the district court erred by denying his request for a downward dispositional departure.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent’g Guidelines 2.C (2020). 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’g Guidelines 1.B.13 (2020). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range . . . unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent’g Guidelines 2.D.1 (2020).

The sentencing guidelines provide non-exclusive lists of mitigating and aggravating factors that may justify a departure. *See* Minn. Sent’g Guidelines 2.D.3 (2020). One of the listed mitigating factors is “particular amenability to probation.” Minn. Sent’g Guidelines 2.D.3.a(7). In determining whether a defendant is particularly amenable to probation, a district court may consider, among other factors, “the defendant’s . . . 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).

If a defendant requests a downward dispositional departure, a district court first 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.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989), and Minn. Sent’g Guidelines 2.D.1 (2012)). In making that determination, a district court “must exercise . . . discretion by deliberately considering circumstances for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002). But a district court need not expressly mention all the factors mentioned by a defendant, and “the mere fact that a mitigating factor is present . . . does not obligate the court to place [a] defendant on probation.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted).

If substantial and compelling mitigating factors are present, a district court has discretion to order a downward dispositional departure. *Id.*; *Best*, 449 N.W.2d at 427. This court generally applies an abuse-of-discretion standard of review to a district court’s denial of a motion for a downward dispositional departure. *Soto*, 855 N.W.2d at 307-08. But a

district court has discretion to depart from the presumptive range “only if aggravating or mitigating circumstances are present; if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart.” *Best*, 449 N.W.2d at 427 (emphasis omitted). A district court abuses its discretion if “its decision is based on an erroneous view of the law.” *Soto*, 855 N.W.2d at 308 n.1 (quoting *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011)).

Anderson’s argument has two parts. First, he contends that the district court erred by not exercising discretion in denying his request for a downward dispositional departure. He contends that the district court did not consider the mitigating facts contained in the PSI report and, instead, focused on the fact that this offense is Anderson’s third felony DWI conviction. He relies on this court’s opinion in *State v. Curtiss*, 353 N.W.2d 262 (Minn. App. 1984), in which we remanded for reconsideration after concluding that the district court had not considered all relevant mitigating factors. *Id.* at 263-64.

This case is meaningfully different from *Curtiss*. In that case, the district court stated that there was “no justifiable reason” to depart from the presumptive sentence. *Id.* at 263. We determined that the district court had “abandoned” the possibility of a downward dispositional departure without “comparing reasons for and against.” *Id.* In this case, in contrast, the district court expressly mentioned the facts that Anderson’s attorney had cited in his argument for a departure, such as Anderson’s renewed sobriety, his success on probation in the Washington County case, and the letters of support submitted on his behalf. The record shows that the district court *did* consider the mitigating factors that might support a departure but determined that they did not outweigh other

factors and did not allow a finding of substantial and compelling reasons for a departure. The district court did not abuse its discretion in doing so.

Second, Anderson contends that the district court erred by basing its decision on the incorrect premise that a departure was not permissible because of Anderson's criminal history. He contends that the district court was excessively focused on the fact that this offense is his third felony DWI conviction. He compares this case to *Soto*, in which the supreme court concluded that this court erred by treating a single *Trog* factor as a necessary condition of a downward departure. *See Soto*, 855 N.W.2d at 311.

The state contends in response that the district court properly understood that it had discretion in considering Anderson's arguments concerning mitigating factors. We agree. The district court referred to the legal requirement of substantial and compelling circumstances and complimented Anderson on doing well on probation but stated that he had not "distinguish[ed]" himself "from all the other people that appear before the court." Anderson is correct that the district court mentioned several times that Anderson was being sentenced for his third felony DWI conviction. We interpret the district court's repeated reference to that fact to indicate that it was a significant concern of the district court, not that the district court felt constrained by the law to such an extent that it did not have any discretion to find substantial and compelling circumstances. The district court's statements are consistent with *Soto*, in which the supreme court stated that a district court must "ensure that the defendant's amenability to probation 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 in original) (quoting Minn. Sent'g Guidelines

2.D.1 (2012)). The district court did not abuse its discretion by the manner in which it considered the fact that this offense is Anderson's third felony DWI conviction.

Thus, the district court did not err by determining that Anderson is not particularly amenable to probation and did not err by imposing a presumptive sentence.

Affirmed.