

*This opinion is nonprecedential except as provided by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
A22-1544**

State of Minnesota,
Respondent,

vs.

Nicholas James Bunes,
Appellant.

**Filed September 11, 2023
Affirmed
Ross, Judge**

Itasca County District Court
File No. 31-CR-21-2383

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

Matti R. Adam, Itasca County Attorney, Grand Rapids, Minnesota; and

Jeffrey S. Naglosky, Special Assistant County Attorney, International Falls, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Leah C. Graf, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

ROSS, Judge

Nicholas Bunes pleaded guilty to criminal vehicular homicide after drunkenly crashing his pickup truck head-on into another vehicle, killing its driver. Bunes moved for a downward dispositional departure from the sentencing guidelines, asking that the district

court stay his presumptively executed prison sentence and place him on probation. The district court denied the motion for a departure and imposed a sentence within the presumptive range. Bunes appeals, maintaining that the district court abused its discretion by denying his departure motion. Because the district court properly sentenced Bunes within its discretion, we affirm.

FACTS

After consuming what he considered to be “[a] lot” of beer and hard liquor beginning in the evening and continuing into the next morning in early September 2021, 20-year-old appellant Nicholas Bunes drove his pickup truck down Itasca County Road 70. Very drunk and talking on his cellphone at about 10:30 a.m., Bunes drifted into the oncoming lane of traffic. Daryl Ray Lawrence was approaching in his pickup from the opposite direction. Lawrence tried unsuccessfully to avoid being struck by Bunes, who made no attempt to stop or otherwise avert the impending collision. Bunes’s pickup collided with Lawrence’s. The collision killed Lawrence, who had achieved more than thirty years of sobriety. Bunes’s alcohol concentration was 0.272.

Bunes pleaded guilty to three counts of criminal vehicular homicide and remained on conditional release pending sentencing on district court orders not to consume any alcohol. Bunes nevertheless continued to drink alcohol on release, including during the week immediately preceding his presentence-investigation interview with a corrections agent. He told the agent, “I like to have a beer every now and then . . . I don’t feel it’s a big deal to have one beer . . . ; [I]t won’t get me drunk.” Bunes said that he tried to enter chemical-dependency treatment after the crash but that the facility never got back to him.

He did not need chemical-dependency treatment, he told the agent, asserting that his use of alcohol had never been a problem. In addition to facing sentencing for criminal vehicular homicide, at the time he made that statement, Bunes had also previously been charged in Minnesota and North Dakota with consuming alcohol under the lawful age of consumption.

The corrections agent strongly recommended that the district court impose a top-of-the-box presumptive sentence under the guidelines and gave her reasons, including the following:

The defendant appeared to demonstrate zero insight into his use of alcohol and how it has contributed to problems in his life. In fact, it appeared to this agent that the defendant displayed a sense of entitlement regarding his right to consume alcohol. More concerning, was that the defendant's abuse of alcohol directly contributed to the death of another person and despite that, he still chooses to not abstain from using it.

The agent expressed concerns that, if Bunes were placed on probation, he would pose a public-safety risk. She informed the district court that Lawrence's family believed that Bunes "would not take the consequences very seriously and he would continue to put himself and the community at risk."

Bunes moved for a downward dispositional departure from the presumptive guidelines range of an executed prison term from 41 to 57 months, with a presumptive term of 48 months. He based his motion on his alleged particular amenability to probation. The district court denied the motion and sentenced Bunes to serve 51 months in prison. Bunes appeals his sentence.

DECISION

Bunes contends that the district court wrongly denied his motion for a downward dispositional departure from the presumptive sentence under the sentencing guidelines. The state failed to file a brief, a motion for an extension of time to file a brief, or correspondence disclosing its intent not to file a brief. We base our decision on the record and our standard of review despite the state's lack of participation in the appeal. We afford substantial deference to the district court's decision not to depart from the presumptive guidelines sentence, and we will only reverse a sentence when the district court abuses its discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014). The district court did not abuse its discretion here.

The Minnesota Sentencing Guidelines exist to foster uniformity in sentencing so that offenders convicted of similar crimes are given similar sentences. *See* Minn. Sent'g Guidelines 1.A (2020). The guidelines permit a sentencing court to depart from a presumptive sentence, but only if identifiable, substantial, and compelling circumstances justify the departure. Minn. Sent'g Guidelines 2.D.1 (2020). A defendant's "*particular* amenability to individualized treatment in a probationary setting" can be a substantial and compelling reason to depart. *Soto*, 855 N.W.2d at 308 (quoting *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). To determine whether a defendant is particularly amenable to probation, the district court can look to "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends . . . or family." *Trog*, 323 N.W.2d at 31. Bunes maintains that each of these factors compelled the conclusion that he was particularly amenable to probation. Bunes is incorrect.

The district court expressly rejected Bunes's claim that he is particularly amenable to probation in a treatment setting:

[T]here's statements in the presentence investigation that suggest you think that you don't have an alcohol problem. And . . . the presentence investigation is also an interview at one point in time and maybe there's been some evolution there, but I'm not clear that you're open to treatment and I think that's evidenced by the minimization of your actions, your inability to follow the release conditions and court order and your statements that you don't need treatment. Without a realization that you might need this treatment or individualized treatment, the odds of making lasting change with treatment are not as -- as high as they could be or should be, and then I don't think I can find that you're particularly amenable to probation, including an individualized treatment in a probationary setting.

The record fully supports the district court's basis for rejecting Bunes's claim that he is particularly amenable to probation. But even if this were not so and there were grounds to justify a departure, the district court is not required to depart, and we will rarely interfere with its decision to impose a presumptive sentence. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Our interference would be especially unwarranted here.

We are not persuaded to a different result by Bunes's interpretation of the district court's statement as finding that he had accepted responsibility for his actions and expressed remorse. We do not share this interpretation. Although Bunes pleaded guilty to all three counts, the district court questioned whether Bunes accepted responsibility and took accountability for his actions. The court wondered whether Bunes was treating Daryl Lawrence's homicide merely as an "unfortunate incident." The district court did not find that Bunes in fact accepted responsibility for his actions, and our review of the record informs us that such a finding would have been dubious. Indeed, the district court reached

a different and well-supported conclusion about Bunes's alleged remorse. It acknowledged Bunes's statements at the hearing claiming that he was sorry, but it expressed doubt, observing that it had "no way of knowing how remorseful" Bunes was in light of some of Bunes's actions and attitudes, which "added to the pain of this situation." There is no finding, and no evidence, of genuine, conduct-changing remorse.

We also reject as groundless and contrary to the record Bunes's assertion that the district court erroneously concluded that he was required to show particular amenability to chemical-dependency treatment. The district court correctly stated and applied *Soto*'s directive that only a defendant's particular amenability, rather than mere amenability, to individualized treatment in a probationary setting can serve as the basis for a departure. *See Soto*, 855 N.W.2d at 308–09. The district court was simply unconvinced that Bunes met the standard.

Affirmed.