

*This opinion is nonprecedential except as provided by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
A22-1553**

State of Minnesota,
Respondent,

vs.

Michael Paul Kuklok,
Appellant.

**Filed July 17, 2023
Affirmed in part, reversed in part, and remanded
Frisch, Judge**

Benton County District Court
File No. 05-CR-21-267

Keith Ellison, Attorney General, Ed Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Karl Schmidt, Benton County Attorney, Foley, Minnesota (for respondent)

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

Considered and decided by Wheelock, Presiding Judge; Cochran, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure from the Minnesota Sentencing Guidelines because

he is particularly amenable to probation. He also argues that the district court erred by convicting him of two first-degree driving-while-impaired offenses arising out of the same behavioral incident. We affirm the guidelines prison sentence because the district court acted within its wide sentencing discretion. But because the district court erred by entering multiple convictions for offenses arising out of the same behavioral incident, we reverse and remand to the district court to vacate one of the convictions.

FACTS

Respondent State of Minnesota charged appellant Michael Paul Kuklok with two counts of first-degree driving while impaired (DWI) in violation of Minn. Stat. § 169A.20, subd. 1(1), (5) (2020), for driving under the influence of alcohol and driving with an alcohol concentration over the legal limit. After unsuccessfully moving to suppress evidence obtained during the stop, Kuklok waived his right to a jury trial and agreed to a trial on stipulated evidence pursuant to Minn. R. Crim. P. 26.01, subd. 4. The state submitted evidence that Kuklok had been drinking and driving and that his alcohol concentration was nearly three times the legal limit. The district court found Kuklok guilty of both counts of first-degree DWI.

Kuklok moved for a downward dispositional departure from the presumptive sentence under the Minnesota Sentencing Guidelines. He argued that he was amenable to probation, citing his age, exceptional work record, commitment to recovery and solving his substance-abuse issues, and efforts to find a therapist to help him work through the issues that caused him to drink. He asked the district court to allow him to remain out of prison so he could instead attend treatment. The state opposed the motion, arguing that

Kuklok was unlikely to succeed on probation considering his lengthy history of alcohol-related driving offenses, probation violations, and consistent failure to maintain his sobriety, despite completing out-patient treatment on four prior occasions. The state also argued that the record before the district court showed that Kuklok did not take full responsibility for his actions.

The district court denied the departure motion, noting Kuklok's previous probation violations and that Kuklok minimized responsibility and ownership for his actions. It doubted Kuklok's ability to remain sober even if he attended a treatment program in lieu of prison. The district court entered judgments of conviction for both counts of first-degree DWI and sentenced Kuklok to 48 months' imprisonment for one of those counts. Kuklok appeals.

DECISION

I. The district court did not abuse its discretion by denying Kuklok's motion for a downward dispositional departure from the Minnesota Sentencing Guidelines.

Kuklok argues that the district court abused its discretion by denying his motion for a downward dispositional departure from the presumptive sentence under the Minnesota Sentencing Guidelines. The district court has great discretion when making sentencing decisions, and we will reverse those decisions only when the district court abuses that discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). If presented with "substantial and compelling circumstances," a district court may depart from the presumptive sentence under the Minnesota Sentencing Guidelines. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); *see also* Minn. Sent'g Guidelines 2.D.1 (2020) (stating that

a “court may depart from the presumptive disposition” of a guidelines sentence if “there exist identifiable, substantial, and compelling circumstances to support a departure”). “A dispositional departure typically focuses on characteristics of the defendant.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A district court generally does not abuse its discretion when imposing a sentence within the presumptive sentencing guidelines range. *See State v. Delk*, 781 N.W.2d 426, 428-29 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010).

A district court may focus on the defendant’s “particular amenability to individualized treatment in a probationary setting” when considering whether to grant a dispositional departure from the presumptive sentence. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). “[M]erely being amenable to probation” is insufficient; “requiring a defendant to be *particularly* amenable to probation . . . distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *Soto*, 855 N.W.2d at 308-09 (quotation omitted). The district court may consider the following factors, among others, when deciding to dispositionally depart on this basis: “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.

A district court may choose not to depart without abusing its sentencing discretion even if it determines that factors exist that might support a sentencing departure. *See State v. Walker*, 913 N.W.2d 463, 468-69 (Minn. App. 2018) (concluding that a district court did not abuse its discretion in declining to dispositionally depart despite considering “evidence

of factors that could have supported a departure if they had been substantial or compelling”). “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. *Walker*, 913 N.W.2d at 468 (quoting *Kindem*, 313 N.W.2d at 7).

Kuklok asserts that he presented sufficient evidence to the district court to establish his particular amenability to probation, including his strong community support system, his showing remorse and taking responsibility for his actions, and his demonstrating a motivation to change and get treatment for his alcohol dependency. These factors might establish a defendant’s particular amenability to probation. *Trog*, 323 N.W.2d at 31; *State v. Hennessy*, 328 N.W.2d 442, 443 (Minn. 1983) (affirming downward departure based on a defendant’s particular amenability to probation established by a rehabilitative motive). But the district court in this case did not find the reasons proffered by Kuklok to establish his particular amenability to probation. The district court instead determined that Kuklok was not particularly amenable to probation because of his previous failures on probation and his inability to take ownership of his actions. We also note that a district court does not abuse its discretion by refusing to depart even if the evidence could have supported a departure. *Walker*, 913 N.W.2d at 468-69.

Here, the district court carefully considered the reasons Kuklok provided in support of his departure motion and properly exercised its discretion in rejecting the same and

determining that Kuklok was not particularly amenable to probation. *See Johnson*, 831 N.W.2d at 925.

II. The district court erred by entering judgments of conviction for both counts of first-degree DWI arising out of the same behavioral incident.

Kuklok contends, and the state correctly concedes, that the district court erred by entering convictions for both counts of first-degree DWI.

A district court cannot enter convictions for both an offense and an included offense. Minn. Stat. § 609.04, subd. 1 (2022). The supreme court has held that “section 609.04 bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident.” *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985). Whether a conviction violates Minn. Stat. § 609.04 (2022) is a legal question that we review de novo. *State v. Cox*, 820 N.W.2d 540, 552 (Minn. 2012).

Our caselaw confirms that one of Kuklok’s convictions must be vacated. In *State v. Clark*, the defendant was charged with and convicted of driving under the influence of alcohol and driving with an alcohol concentration over the legal limit. 486 N.W.2d 166, 170 (Minn. App. 1992). Applying *Jackson* and section 609.04, we held that convictions could not be entered for both counts because they arose out of a single behavioral incident. *Id.* at 170-71. In recent nonprecedential opinions, we have held the same. *See State v. Stenbeck*, No. A21-0974, 2022 WL 2913656, at *1, *3 (Minn. App. July 25, 2022) (remanding with instructions to vacate one felony DWI conviction when defendant was charged with and convicted of violations of Minn. Stat. § 169A.20, subd. 1(1), (5) (2018));

State v. Wilson, No. A20-0264, 2021 WL 161963, at *3-4 (Minn. App. Jan. 19, 2021) (same).¹

Like the defendants in *Clark*, *Stenbeck*, and *Wilson*, Kuklok was convicted of both driving while under the influence of alcohol and driving with an alcohol concentration over the legal limit, acts that arose out of the same behavioral incident. Because the district court should have only entered a conviction for one of these counts, we reverse and remand for the district court to vacate one of the convictions. See *State v. LaTourelle*, 343 N.W.2d 277, 284 (Minn. 1984) (stating that “the proper procedure to be followed by the trial court when the defendant is convicted on more than one charge for the same act is for the court to adjudicate formally and impose sentence on one count only” while retaining the guilty verdicts for the remaining charges without formally adjudicating them).

Affirmed in part, reversed in part, and remanded.

¹ These nonprecedential opinions are not binding authority but cited for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).