

*This opinion is nonprecedential except as provided by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
A22-1585**

State of Minnesota,
Appellant,

vs.

Gary Lee Kies,
Respondent.

**Filed March 20, 2023
Affirmed
Reilly, Judge**

Sherburne County District Court
File No. 71-CR-20-1153

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota; and

Richard W. Leroy, Universal Defense, LLC, Otsego, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Reyes, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

REILLY, Judge

Appellant challenges a district court decision granting respondent a downward dispositional departure from his presumptive prison sentence for second-degree assault.

Because the district court did not abuse its discretion by granting the departure motion, we affirm.

FACTS

In October 2020, respondent Gary Lee Kies argued with his ex-girlfriend's current boyfriend, J.J.W., at the woman's home. J.J.W. left the home on his bicycle. Kies followed J.J.W. in his car. J.J.W. got off his bicycle and stood next to it. Kies then drove up on the sidewalk and hit J.J.W.'s bicycle with his car. Appellant State of Minnesota charged Kies with second-degree assault with a dangerous weapon.

Kies pleaded guilty to second-degree assault. During the factual basis portion of his guilty plea, Kies acknowledged that a car qualifies as a dangerous weapon, that he hit J.J.W.'s bicycle with his car, and that he caused J.J.W. fear. The district court determined that the factual basis was sufficient to establish that Kies committed second-degree assault. The district court accepted Kies's guilty plea and scheduled a sentencing hearing.

Before sentencing, Kies moved for a downward dispositional departure asserting that he was particularly amenable to probation. The state opposed the departure request. At sentencing, the district court analyzed the factors for and against departure and determined that a departure was warranted because Kies was particularly amenable to probation. The district court stayed execution of Kies's presumptive prison sentence and placed him on probation. The state appeals.¹

¹ Kies did not file a brief and we ordered the matter to proceed under Minn. R. Civ. App. P. 142.03 (directing that when a respondent fails to file a brief the matter is to be decided on the merits).

DECISION

The Minnesota Sentencing Guidelines prescribe a sentence or a range for the sentence that is “presumed to be appropriate.” Minn. Sent’g Guidelines 2.D.1 (2020); *see also State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (citing this provision of the guidelines). The district court “must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances” distinguishing the case and overcoming the presumption in favor of the guidelines sentence. *Soto*, 855 N.W.2d at 308 (quotation omitted). Appellate courts afford a district court “great discretion in the imposition of sentences” and reverse only for an abuse of that discretion. *Id.* at 307-08 (quotation omitted). We rarely hold that a district court has abused its discretion in sentencing. *Id.* at 305.

A dispositional departure generally focuses on the characteristics of the offender. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A defendant’s “particular amenability to individualized treatment in a probationary setting” may justify a downward dispositional departure from a presumptive commitment to prison. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Minnesota courts are guided by several factors, known as *Trog* factors, to determine if a defendant is particularly amenable to individualized treatment in a probationary setting. *Id.* These factors include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of [the defendant’s] friends and/or family.” *Id.*

If a defendant requests a departure from the sentencing guidelines, the district court must “deliberately consider[]” the factors presented in support of the motion. *State v.*

Curtiss, 353 N.W.2d 262, 264 (Minn. App. 1984). We are persuaded that the district court satisfied that obligation here. The district court thoughtfully and fully analyzed each of the *Trog* factors and determined that there were substantial and compelling reasons to grant a dispositional departure.

Age. Kies was 59 years old when he entered his plea and 57 years old when he committed the offense. The district court noted that Kies was “old enough to know better” and found that this factor “[did not] necessarily weigh in [Kies’s] favor.”

Prior Record. The district court reviewed Kies’s prior record and the information in the presentence investigation report (the PSI). The PSI reflects that Kies had several previous convictions. But many of these offenses happened a long time ago. The district court determined that, while Kies has a prior criminal record, “most of [Kies’s] history is actually quite old.” The district court reasoned that this factor favored a departure.

Remorse. The district court also determined that Kies’s remorse supported a departure. The district court “is properly tasked with deciding whether a defendant’s actions express genuine remorse and how much weight to give to that remorse.” *Solberg*, 882 N.W.2d at 626. Here, the district court determined that Kies had “taken accountability for [his] actions” and “acknowledged that it was [his] responsibility” to remain law abiding.

Cooperation and Attitude. Similarly, the district court determined that Kies’s level of cooperation and his attitude supported a departure. The district court noted that Kies was “cooperative throughout the process in court” and demonstrated he was “taking these matters seriously.”

Community Support. Lastly, the district court determined that Kies had the support of his family. Kies also had “additional supports” in the community including mental-health services, therapy, and inpatient programming. Kies lives with his mother and his brother in a home they purchased together. He works two jobs and additional “odd jobs” in the community. The district court noted that Kies has not received any new charges since the offense and had been engaging in treatment and programming. The district court determined this factor favored the departure request.

After considering these factors and the circumstances for and against departure, the district court found that Kies was entitled to a downward dispositional departure from the sentencing guidelines because he was particularly amenable to probation. We discern no abuse of discretion in this determination. While the state is dissatisfied with the district court’s decision, we apply the same standard of review in departure cases regardless of which party appeals. Because the record supports the district court’s decision that there were substantial and compelling reasons supporting a dispositional departure, we affirm.

Affirmed.