STATE OF MINNESOTA
IN COURT OF APPEALS
A23-0531

State of Minnesota,
Respondent,

vs.

Kevin Anthony Sollitto,
Appellant.

Filed February 5, 2024
Affirmed in part, reversed in part, and remanded
Gaïtas, Judge

St. Louis County District Court
File Nos. 69DU-CR-22-2554, 69DU-CR-22-1405,
69DU-CR-22-1498, 69DU-CR-22-2382

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

Kimberly J. Maki, St. Louis County Attorney, Michael D. Hagley, Assistant County Attorney, Duluth, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Smith, Tracy M., Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Following his entry of a guilty plea pursuant to an agreement with respondent State of Minnesota, appellant Kevin Anthony Sollitto challenges his sentences for four stalking

convictions. Sollitto argues that the district court abused its discretion by denying his request for a downward dispositional departure as to one of the convictions. He also contends that the district court erred as a matter of law by sentencing the convictions in the wrong order and by issuing domestic abuse no-contact orders (DANCOs) in cases where he received executed prison sentences. We affirm the district court's denial of Sollitto's downward-departure motion. But because the district court erred by sentencing the convictions in the wrong order and by issuing DANCOs in connection with executed sentences, we reverse in part and remand for resentencing.

FACTS

Between May and September 2022, the state charged Sollitto with four counts of stalking, three counts of violating an order for protection, two counts of violating a DANCO, and fifth-degree controlled substance possession. Pursuant to a plea agreement, Sollitto pleaded guilty to four counts of stalking and the state dismissed the remaining charges and agreed not to charge an unrelated drug offense.

The presumptive sentences for the stalking convictions—based on the chronological order in which the offenses were committed—were, respectively, a stayed 18-month prison term in case number 69DU-CR-22-1405 (offense date between May 1 and 19, 2022), a stayed 23-month prison term in case number 69DU-CR-22-1498 (offense date between May 1 and 27, 2022), a stayed 28-month prison term in case number 69DU-CR-22-2382 (offense date between May 1 and August 20, 2022), and an executed prison sentence within a range of 29 to 39 months in case number 69DU-CR-22-2554 (offense date between May 1 and September 7, 2022). At sentencing, Sollitto moved for a downward

dispositional departure as to the fourth conviction (case number 69DU-CR-22-2554), for which the presumptive sentence was an executed prison term.

Regarding the departure motion, Sollitto's attorney noted his client's "very minimal criminal history" and his poor mental health due to methamphetamine use.[1] The attorney acknowledged that Sollitto did not "handle [his divorce] appropriately" and "had issues dealing with" the order for protection. He advised the district court that Sollitto intended to participate in drug treatment, noting that Sollitto had been accepted into an inpatient treatment program. Sollitto's attorney argued there were ways to both "protect the victim in this matter" while also giving Sollitto "the opportunity to address the two major issues that played a role." Finally, the attorney noted that Sollitto's "number one goal is to work through some of these things and try and reestablish a relationship with his son."

The prosecutor opposed a departure, arguing that the law did not support Sollitto's request. According to the prosecutor, Sollitto was "old enough to know better." Although the prosecutor acknowledged Sollitto's minimal criminal history, the prosecutor noted that Sollitto was facing "a presumptive commit within a year of the first charged offense," which showed "extreme escalation" of Sollitto's behavior. According to the prosecutor, Sollitto had not demonstrated any remorse, did not have the support of family or friends, was "extremely dangerous," had a propensity to violate orders for protection immediately after they were issued, and had caused "terror" and "ripple effects." Finally, the prosecutor

[1] Sollitto's therapist sent a letter to the district court indicating he had been "an active participant in individual psychotherapy . . . since February 2021."

argued that Sollitto had shown no response to therapy because he had been engaged in therapy before and during the conduct that led to the convictions.

The victim of Sollitto's stalking offenses provided a long and detailed victim-impact statement to the district court. She described a lengthy history of extreme violence during her marriage to Sollitto and Sollitto's drastic measures to keep her in the abusive relationship.

Sollitto personally addressed the district court, stating that his actions were "incredibly disrespectful," "selfish," and "rude." He told the district court that he had "reflect[ed] on [his] past as well as la[id] out the framework for a sober and law-abiding future" and that he was "tak[ing] all responsibility for [him]self."

Before imposing its sentences, the district court remarked that it had taken "into account the arguments here today, the Victim Impact Statement, [Sollitto]'s own words, arguments of counsel, as well as the presentence investigation report." The district court then sentenced Sollitto to 36 months in prison for the fourth stalking conviction (69DU-CR-22-2554), 18 months in prison for the first stalking conviction (69DU-CR-22-1405), 23 months in prison for the second stalking conviction (69DU-CR-22-1498), and 28 months in prison for the third stalking conviction (69DU-CR-22-2382).

Following the district court's imposition of the four prison sentences, the prosecutor requested a DANCO on behalf of the victim. The district court issued DANCOs in each of Sollitto's four cases, effective "until January 9, 2025 or further order or modification."

Sollitto appeals.

DECISION

I. The district court did not abuse its discretion by denying Sollitto's request for a downward dispositional sentencing departure.

Sollitto argues that because substantial and compelling circumstances supported his motion for a downward dispositional sentencing departure, the district court abused its discretion in denying his departure motion. We disagree.

The Minnesota Sentencing Guidelines aim to foster "uniformity, proportionality, rationality, and predictability in sentencing." *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002). Sentences prescribed by the sentencing guidelines—or presumptive sentences—are "presumed to be appropriate" in every case. Minn. Sent'g Guidelines 2.D.1 (2020); *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court must impose the presumptive sentence or a sentence within the presumptive range unless there are "identifiable, substantial, and compelling circumstances" that support a departure from the guidelines. Minn. Sent'g Guidelines 2.D.1; *Soto*, 855 N.W.2d at 308.

Here, the district court imposed what it believed to be the presumptive sentence for the fourth stalking conviction in file number 69DU-CR-22-2554—36 months in prison. But Sollitto argues that substantial and compelling circumstances warranted a downward dispositional departure to probation.[2]

[2] We conclude in section II that the district court erred in sentencing Sollitto's four convictions out of order, and we reverse the sentences on this basis and remand for resentencing. The district court's sentence for the fourth stalking conviction at issue here—in section I—would have been within the presumptive range if the district court had properly sentenced the offenses in chronological order. *See* Minn. Sent'g Guidelines 4.A (2020) (providing that a severity level five offense results in a presumptive commitment of 29-39 months for a criminal history score of three). Therefore, our discussion of the district

A district court has broad discretion in sentencing. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). As an appellate court, we must give significant deference to the district court's sentencing decision. *Id.* We will reverse a district court's refusal to depart from the sentencing guidelines only in a rare case. *See id.* If the record shows that the district court carefully evaluated all of the information presented before sentencing, we will not disturb the district court's decision. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011).

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). The *Trog* decision enumerates factors to guide the district court's evaluation of whether a defendant is particularly amenable to probation. *Id.* These factors are the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends or family. *Id.* A defendant need not show that all these factors are satisfied to justify a dispositional departure. *State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016) ("[A] single mitigating factor may support a downward sentencing departure."); *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003) (affirming dispositional departure despite defendant's lack of remorse). However, "the presence of mitigating factors does not obligate the court to place a defendant on

---

court's decision not to depart from the guidelines in this section is premised on the assumption that the district court considered the correct presumptive sentence for the fourth stalking conviction but ultimately imposed that sentence in the wrong order—first rather than last.

probation or impose a shorter term than the presumptive term." *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013) (quotation omitted), *rev. denied* (Minn. Feb. 18, 2014).

Sollitto argues that, although "the district court acknowledged having reviewed the documents submitted and hearing the arguments, it did not analyze the *Trog* factors or expressly deny the departure motion." The state agrees, noting that the district court erred by failing to exercise its discretion and by imposing the presumptive sentence "without making any findings as to whether . . . Sollitto had presented substantial and compelling circumstances in support of his motion for a downward dispositional sentencing departure."

Notwithstanding the state's concession, the law does not support Sollitto's argument that the district court abused its discretion by not expressly analyzing the *Trog* factors or by not addressing the departure motion on the record. Although the district court is required to give reasons for granting a departure, it is not required to explain a decision to deny a departure request and impose the presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Moreover, a district court is not required to address the *Trog* factors before imposing a presumptive sentence. *Pegel*, 795 N.W.2d at 254. Based on the record before us, we are satisfied that the district court considered the information that Sollitto presented and exercised its discretion in denying Sollitto's departure motion.

Sollitto also argues that the district court abused its discretion by denying his departure motion because he demonstrated that he is particularly amenable to probation. Specifically, he argues his age (50), lack of prior criminal history, cooperation with the court, community support, and remorse make him particularly amenable to probation.

We are not convinced that this is a rare case where a departure was warranted. *Walker*, 913 N.W.2d at 468. Although we commend Sollitto's acceptance of responsibility and desire to participate in treatment, we discern no abuse of discretion in the district court's determination that substantial and compelling circumstances did not justify a downward dispositional departure.

II. The district court erred as a matter of law by sentencing Sollitto's convictions in the wrong order.

Sollitto argues—and the state agrees—that the district court erred by sentencing Sollitto's offenses out of chronological order, which in turn, rendered the actual sentences that Sollitto received unlawful. We also agree.

An appellate court reviews a district court's sentence "to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2020). Whether a sentence conforms to the requirements of a statute or the sentencing guidelines is a question of law reviewed de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

When the court imposes multiple sentences in the same proceeding, the court must sentence in the order in which the offenses were committed. *Id.* at 522; Minn. Sent'g Guidelines 2.B.1.e (2020). A district court errs by sentencing offenses in nonchronological order. *Carey v. State*, 765 N.W.2d 396, 401 (Minn. App. 2009), *rev. denied* (Minn. Aug. 11, 2009). Here, the district court erred as a matter of law by first sentencing the offense in case number 69DU-CR-22-2554, which occurred last in time.

The district court further erred by imposing a prison sentence for that offense because the presumptive sentence, if properly calculated using Sollitto's existing criminal history score of zero, was a stayed 18-month sentence. *See* Minn. Sent'g Guidelines 5.A (providing that a stalking offense under Minnesota Statutes section 609.749, subdivision 5 (2020), is ranked at a severity level five), 4.A (providing that the presumptive sentence for a severity level five offense when the defendant has no criminal history score is 18 months stayed). By first sentencing Sollitto in case number 69DU-CR-22-2554 to a 36-month prison sentence, the district court imposed upward durational and dispositional departures. Because the district court did not provide substantial and compelling reasons for the departures on the record, the sentence was unlawful. Minn. Sent'g Guidelines 2.D (2020) (requiring substantial and compelling reasons for a departure); *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) (requiring a district court to state its reasons for an upward departure on the record, and holding that absent such a record, no upward departure will be allowed); *State v. Rannow*, 703 N.W.2d 575, 579 (Minn. App. 2005) (requiring a district court to identify its departure reasons on the record).

Moreover, the district court's unauthorized upward departures violated Sollitto's constitutional right to have a jury determine the existence of facts justifying a departure beyond a reasonable doubt. *See State v. Bradley*, 906 N.W.2d 856, 858 (Minn. App. 2017) ("[A]ny facts supporting a departure above the maximum guidelines sentence requires either a jury to find those facts beyond a reasonable doubt or the defendant to admit to those facts."), *rev. denied* (Minn. Feb. 28, 2018).

The district court's unlawful sentence in case number 69DU-CR-22-2554 caused a cascade of additional unlawful sentences for each of Sollitto's remaining convictions. If the remaining three offenses had been sentenced in the proper order, the presumptive sentences for each offense would have been stayed prison terms rather than the prison terms that the district court ultimately imposed. *See* Minn. Sent'g Guidelines 4.A (providing that a severity level five offense results in a presumptive stayed sentence of 18 months for a criminal history of zero, a presumptive stayed sentence of 23 months for a criminal history score of one, and a presumptive stayed sentence of 28 months for a criminal history score of two).

Because the district court's decision to sentence the offenses out of order was unlawful, and this practice resulted in unlawful sentences for each of Sollitto's four stalking convictions, the district court erred. We therefore reverse and remand for the district court to resentence Sollitto for all four offenses in chronological order.

III. The district court erred by imposing probationary DANCOs after sentencing Sollitto to executed prison terms.

Sollitto argues—and the state again agrees—that the district court erred by issuing DANCOs in each of Sollitto's four cases after sentencing him to four executed prison terms. He contends that a district court cannot impose a DANCO when an individual has been given an executed sentence absent express statutory authorization. And, he argues, because the district court did not have statutory authority to impose the DANCOs here, they must be reversed. We agree.

Minnesota courts "do not have inherent authority to impose terms or conditions of sentences for criminal acts and must act within the limits of their statutory authority when imposing sentences." *State v. Pugh*, 753 N.W.2d 308, 311 (Minn. App. 2008) (citing *State v. Olson*, 325 N.W.2d 13, 17 (Minn. 1982)), *rev. denied* (Minn. Sept. 23, 2008). Although the legislature has authorized courts to impose terms of probation, Minn. Stat. § 609.135, subd. 1(a)(1)-(2) (2022), a sentencing court does not have authority to set the terms of a prisoner's incarceration, *State v. Cook*, 617 N.W.2d 417, 421 (Minn. App. 2000), *rev. denied* (Minn. Nov. 21, 2000). Accordingly, a district court may not impose a no-contact order as part of an executed prison sentence unless the order is expressly authorized by statute. *Pugh*, 753 N.W.2d at 311. We noted in *Pugh* that the general definition of a felony under Minnesota law does not authorize a court to prohibit a defendant from having contact with the victim of a crime. *Id.* (citing Minn. Stat. § 609.10 (2000), which sets forth the sentences available for a felony offense). To determine whether there is statutory authority for a no-contact order, *Pugh* directs courts to review the specific statute defining the offense of conviction. *Id.*

Sollitto pleaded guilty to four counts of stalking in violation of Minnesota Statutes section 609.749 (2020). This statute does not authorize a no-contact order as part of an executed sentence. *See* Minn. Stat. § 609.749, subd. 5 (providing sentences for stalking).

The statute governing DANCOs, Minnesota Statutes section 629.75 (2020), does authorize a no-contact order for stalking offenses under section 609.749 that are committed against a family or household member. Minn. Stat. § 629.75, subd. 1(a)(2). However, this section makes clear that, when ordered following a conviction, a DANCO is a

"probationary order." *Id.*, subd. 1(b). Section 629.75 does not explicitly authorize a DANCO for an individual serving an executed sentence.

Because the district court did not have statutory authority to impose DANCOs in each of Sollitto's cases after sentencing him to prison, the DANCOs are unlawful. We therefore reverse the DANCOs.

Affirmed in part, reversed in part, and remanded.