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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1086**

State of Minnesota,
Respondent,

vs.

Allan Kingsley Kerr,
Appellant.

**Filed July 15, 2024
Affirmed in part, reversed in part, and remanded
Ede, Judge**

Ramsey County District Court
File No. 62-CR-21-7242

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

John Choi, Ramsey County Attorney, Alexandra Meyer, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

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

NONPRECEDENTIAL OPINION

EDE, Judge

In this direct appeal challenging his 24-month prison sentence and ten-year conditional-release term for failing to register as a predatory offender, appellant argues (1) that the district court abused its discretion in denying his motion for a downward

dispositional departure and (2) that the imposition of the ten-year conditional-release term was impermissible and should be vacated. Because we conclude that the district court did not abuse its discretion in denying appellant's motion for a downward dispositional departure, we affirm in part. But because we conclude that the imposition of the ten-year conditional-release term was not authorized by law, we reverse in part and remand for the district court to vacate appellant's term of conditional release.

FACTS

Because he has two qualifying convictions, appellant Allan Kingsley Kerr is required to register as a predatory offender with the Minnesota Bureau of Criminal Apprehension (BCA). Kerr is a risk-level-III predatory offender.¹

As part of his registration requirement, Kerr must disclose all changes to his primary address to the BCA at least five days before moving. And if Kerr loses his housing, he must report to the BCA within 24 hours after leaving his primary address and must complete weekly check-ins. Kerr must also complete, sign, and return all verification forms to the BCA within ten days of receipt.

In October 2021, the BCA determined that Kerr was noncompliant for failing to return a verification letter. The next month, a law enforcement officer conducted an address

¹ See *In re Risk Level Determination of S.S.*, 726 N.W.2d 121, 124 (Minn. App. 2007) (explaining that Minnesota Statutes section 244.052 “establishes a five-person end-of-confinement review committee within the department of corrections to assess, on a case-by-case basis, the public risk posed by predatory offenders who will soon be released from confinement”) (citing Minn. Stat. § 244.052, subd. 3(a)–(b) (2004)), *rev. denied* (Minn. Mar. 28, 2007). “The committee must assign one of three risk levels to an offender according to the offender’s risk-assessment score.” *Id.*

check at Kerr's primary registered address and learned that Kerr had recently been evicted. After his eviction, Kerr failed to register a new primary address or complete weekly check-ins as required.

Respondent State of Minnesota later charged Kerr with failing to register as a predatory offender, in violation of Minnesota Statutes section 243.166, subdivision 5(a)(1) (2020).

In January 2023, Kerr pleaded guilty to the charged offense under a plea agreement. In exchange for Kerr's guilty plea, the parties agreed to a downward dispositional departure from a presumptive commitment to prison to a term of probation including no more than 90 days of jail, along with programming as directed by the district court and the probation department. This agreement depended on Kerr remaining law abiding, cooperating with the completion of a presentence investigation report (PSI), and appearing for sentencing. The written plea agreement specified that the maximum penalty that the district court could impose for the charged offense was imprisonment for five years. There was no indication in the written agreement that the prosecutor was seeking an aggravated sentence.

During the plea hearing, defense counsel explained to Kerr that the plea agreement hinged on Kerr remaining law abiding and completing a PSI with probation. When the state questioned Kerr to establish a factual basis for the charged offense, the state did not ask Kerr what risk level he was assigned, nor did the state ask whether Kerr knew that he would be subject to a ten-year conditional-release term if his sentence was executed.

The district court found that Kerr made an accurate, voluntary, and intelligent admission and reiterated the terms of the parties' plea agreement. The district court told

Kerr: “So if you don’t do the PSI or you don’t remain law abiding[,] or you don’t come back for sentencing[,] I could sentence you much more harshly than this agreement calls for.” Kerr responded: “That won’t happen.” The district court scheduled Kerr’s sentencing hearing for March 2023.

In February 2023, the probation agent who was assigned to complete the PSI informed the district court that, because Kerr had not contacted probation, the PSI was incomplete. In addition to his failure to cooperate with the completion of the PSI, Kerr did not appear for his March sentencing hearing.

In April 2023, a probation agent completed a PSI. The agent noted in the PSI that Minnesota law required a ten-year conditional-release period following Kerr’s prison term. The agent also stated in the PSI that probation did not support the terms of the plea agreement and instead recommended that the district court impose a presumptive prison sentence of 24 months.

At the sentencing hearing, defense counsel requested that the district court sentence Kerr in accordance with the plea agreement and grant him a downward dispositional departure. Defense counsel acknowledged that Kerr did not cooperate in the completion of the PSI or return for sentencing as originally scheduled but nonetheless offered context for Kerr’s behavior. For example, defense counsel told the district court that Kerr had been dealing with “chronic homelessness[,]” that Kerr had expressed “a significant amount of remorse” when he pleaded guilty, that Kerr had remained law abiding, and that Kerr had significant mental health concerns. Defense counsel also stressed that, in the interest of public safety, it would likely be best for Kerr to enter mental-health treatment or chemical-

dependency treatment. On these and other bases, defense counsel moved the district court “to find that there [were] substantial and compelling reasons that [Kerr was] amenable to probation and treatment and [to] place [Kerr] on probation[.]”

The state opposed the defense motion and instead recommended that the district court sentence Kerr to 24 months in prison because Kerr had violated the plea agreement by failing to cooperate with the PSI and by failing to appear at his sentencing hearing in March 2023. The state also asserted that, because Kerr is a risk-level-III offender, the district court needed to impose a ten-year conditional-release term.

In sentencing Kerr, the district court observed that, based on the PSI, it did not appear that Kerr had finished sex-offender treatment. Moreover, the district court noted that Kerr had a registration requirement that he was not maintaining. The district court explained that Kerr had received “a chance to . . . demonstrate an amenability to supervision in the interim between January [2023] and [the sentencing hearing,] and that didn’t go very well.” And the district court reasoned that it was left without “much ability to find substantial and compelling reasons to depart.”

Acknowledging Kerr’s allocution, the district court expressed its understanding that Kerr had a lot going on in his life. But the district court also pointed out that, since being charged with the offense, it had issued at least five warrants because of Kerr’s failure to comply with court orders. The district court reiterated that it did not have any substantial or compelling reasons to find that Kerr was amenable to probation and sentenced Kerr to 24 months in prison. And the district court ruled that, upon his return to the community, Kerr would be subject to conditional release for ten years.

This appeal follows.

DECISION

Kerr challenges his sentence, asserting (1) that the district court abused its discretion by denying his motion for a downward dispositional departure and (2) that we should vacate his ten-year conditional-release term as unlawfully imposed. As explained below, although we are not persuaded by Kerr’s first argument, we conclude that his second contention has merit.

I. The district court did not abuse its discretion by denying Kerr’s downward dispositional departure motion.

Kerr maintains that the district court abused its discretion in declining to grant him a downward dispositional departure based on his claim that “[s]ubstantial and compelling reasons support[ed] a probationary sentence.” Specifically, Kerr posits that four of the *Trog*² factors establish that he is amenable to probation. We are unconvinced.

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation omitted). “The Minnesota Sentencing Guidelines, however, limit the sentencing court’s discretion by prescribing a sentence or range of sentences that is ‘presumed to be appropriate.’” *Id.* (quoting Minn. Sent’g Guidelines 2.D.1). The district court “‘must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances’ that distinguish a case and overcome the presumption in favor of the guidelines sentence.”

² *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Id. (quoting Minn. Sent’g Guidelines 2.D.1). Accordingly, the district court “has broad discretion to depart *only if* aggravating or mitigating circumstances are present.” *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989).

“For a downward dispositional departure, a district court may consider both offender- and offense-related factors.” *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). For instance, the Minnesota Sentencing Guidelines permit the district court to consider whether a person “is particularly amenable to probation” when deciding the sentence to impose. Minn. Sent’g Guidelines 2.D.3(a)(7). “This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.” *Id.*

A district court may determine particular amenability to probation by considering such factors as the defendant’s age, prior record, remorse, cooperation, attitude while in court, and the support of friends and family. *Trog*, 323 N.W.2d at 31. But a district court need not depart from the guidelines even if mitigating factors are present. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). And an appellate court cannot interfere with the district court’s exercise of discretion in sentencing when the record shows that the district court “carefully evaluated all the testimony and information presented before making a determination.” *State v. Van Ruler*, 378 N.W.2d 77, 80–81 (Minn. App. 1985).

In support of his argument that the district court abused its discretion in failing to grant him a downward dispositional departure, Kerr contends that he had not acquired any additional criminal convictions between 2002 and 2021, when the state charged him in this matter. He asserts that he was remorseful and cooperative because he had completed

“supervision for his registrable offenses[,]” two years of sex-offender treatment, and proper registration until his eviction during the COVID-19 pandemic. Pointing to the pandemic and housing instability, Kerr attributes several warrants that he accumulated during this case to his homelessness and the wide-ranging socioeconomic impact of COVID-19. Kerr also notes his acknowledgment before the district court that he needs chemical-dependency treatment. Finally, Kerr maintains that his family ties, evidenced by his contact with his two sisters, supported the departure he requested. The state counters that the district court did not abuse its discretion by denying Kerr’s departure motion because it “plainly reviewed [Kerr’s] situation and gave it careful consideration” before imposing a presumptive sentence.

Based on our careful review of the record, we conclude that the district court did not abuse its discretion in determining that Kerr was not particularly amenable to probation. Kerr violated his plea agreement by failing to cooperate with the PSI and to appear for his sentencing hearing. He failed to appear for court three times before his January 2023 plea hearing, each of which resulted in a warrant for his arrest. Although Kerr argues that he completed two years of sex-offender treatment and is therefore amenable to treatment, the PSI reveals that Kerr’s prior supervised release agent did *not* believe Kerr completed his sex-offender treatment program.

To the extent that Kerr’s breach of the plea agreement informed the district court’s imposition of a presumptive guidelines sentence, our decision in *State v. Montez*, 899 N.W.2d 200, 204 (Minn. App. 2017), is instructive. There, “having failed to comply with the conditions of his plea agreement and [having] been sentenced without regard to the plea

agreement,” the appellant “argue[d] that his sentence violate[d] the plea agreement and entitle[d] him to withdraw his plea.” 899 N.W.2d at 202. We rejected that argument, explaining that it was “clear from the record that [the] appellant understood the direct consequences of his plea, including the fact that a reduced sentence was contingent” upon his remaining law abiding and not being charged with any new crimes. *Id.* at 204 (quotations omitted). And “[b]ecause appellant’s plea agreement included conditions [that] he did not comply with[,]” we concluded that “the district court had no obligation to impose the sentence in the plea agreement and did not violate the plea agreement by imposing a different sentence[.]” *Id.*

Here, Kerr argues neither that his sentence violates the plea agreement nor that he is entitled to withdraw his guilty plea. Kerr’s plea negotiation for a stipulated departure motion turned on his compliance with the law, appearance at the sentencing hearing, and cooperation with the PSI. The plea-hearing transcript confirms that Kerr was aware of those obligations. Applying our reasoning in *Montez*, the district court here had no obligation to grant Kerr a downward dispositional departure because Kerr did not comply with the conditions set forth in his plea agreement. *See id.*

The record reflects that the district court analyzed and evaluated all available information available before sentencing Kerr by reviewing the case before the hearing, by studying the PSI, and by listening to the parties’ arguments before denying Kerr’s motion. *See Van Ruler*, 378 N.W.2d at 80–81. Moreover, even when factors may support a downward dispositional departure, a district court need not depart, so long as it carefully considered the parties’ sentencing presentations, as the district court did here. *See State v.*

Olson, 765 N.W.2d 662, 664–65 (Minn. App. 2009); *see also Van Ruler*, 378 N.W.2d at 80–81. We therefore conclude that the district court did not abuse its discretion by denying Kerr’s motion for a downward dispositional departure.

II. The district court unlawfully imposed a ten-year conditional-release term.

Kerr asserts that the ten-year conditional-release term imposed by the district court was contrary to law because a jury did not find that he was a risk-level-III offender when he failed to register and he did not admit as much during these proceedings. On that basis, Kerr requests that we vacate his conditional-release term, and the state concedes that such a disposition is appropriate. We agree.

Under Minnesota law, when a risk-level-III offender is convicted for violating the predatory-offender registration requirement and, “at the time of the violation, the person was assigned to risk level III . . . the court shall provide that after the person has been released from prison, the commissioner shall place the person on conditional release for ten years.” Minn. Stat. § 243.166, subd. 5a (2020). Yet “[t]he imposition of a [ten-year] conditional-release term without a jury’s finding or a defendant’s admission that he was a risk-level-III offender at the time of the offense is a sentence that is not authorized by law.” *Reynolds v. State*, 888 N.W.2d 125, 130 (Minn. 2016). And the Minnesota Supreme Court has determined that, under *Blakely v. Washington*, 542 U.S. 296, 296 (2004), a district “court simply lacks authority . . . to impose a [ten]-year term of conditional release on a defendant convicted of failing to register as a predatory offender without the required jury finding or admission by the defendant that the defendant is a risk-level-III offender.” *Id.* (citing *State v. Her*, 862 N.W.2d 692, 695 (Minn. 2015)).

Here, the record confirms that a jury did not find that, at the time of the violation, Kerr was a risk-level-III offender. And Kerr did not waive his right to such a jury finding and make an admission that, when he failed to register, he was a risk-level-III offender. Thus, “[b]ecause the Sixth Amendment requires a jury finding or an admission by [Kerr] before a court may impose a [ten]-year conditional-release term, and neither occurred here,” we conclude that Kerr’s ten-year conditional-release term was unauthorized by law. *Reynolds*, 888 N.W.2d at 130 (citing *Her*, 862 N.W.2d at 695).

Kerr contends that, to prevent a violation of the constitutional prohibition against double jeopardy, we should vacate his ten-year conditional-release term. Kerr’s argument is persuasive.

In *Hankerson v. State*, 723 N.W.2d 232, 238–39 (Minn. 2006), the supreme court observed that double jeopardy may preclude consideration of an aggravating sentencing factor on resentencing when the state neither sought an aggravated sentence nor presented sufficient evidence to support such a sentence in the underlying proceedings. Although *Hankerson* concerned the state’s failure to seek an aggravated sentence and to present sufficient facts when a defendant proceeded to trial rather than—as here—when a defendant pleaded guilty, we recently relied on *Hankerson* in a nonprecedential but persuasive opinion presenting analogous guilty-plea circumstances. *See State v. Henry*, No. A23-0827, 2024 WL 1613911, at *1–2 (Minn. App. Apr. 15, 2024).³ In *Henry*, we

³ See Minn. R. Civ. App. P. 136.01, subd. 1(c) (“Nonprecedential opinions . . . are not binding authority . . . , but nonprecedential opinions may be cited as persuasive authority.”).

acknowledged that “the failure to present sufficient facts . . . occurred at the plea hearing rather than at trial,” but rejected the state’s attempt to distinguish *Hankerson* on that ground because—as here—the state had “offer[ed] no authority or argument supporting its position that the same principles do not apply.” *Id.* at *2. We therefore concluded that the district court could not consider an aggravating factor in resentencing the defendant following remand. *Id.*

Consistent with the foregoing, we reverse Kerr’s sentence and remand to the district court with instructions to vacate the ten-year conditional-release term.

Affirmed in part, reversed in part, and remanded.