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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0528**

State of Minnesota,
Respondent,

vs.

Walter John Wessel,
Appellant.

**Filed February 19, 2013
Affirmed
Hooten, Judge**

Stearns County District Court
File No. 73-CR-11-6315

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janelle P. Kendall, Stearns County Attorney, Michael Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Connolly, Judge; and
Hooten, Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this appeal from the district court's order denying his motion for a dispositional departure and imposing the presumptive sentence, appellant argues that substantial and compelling reasons exist for departure. We affirm.

FACTS

On July 14, 2011, a domestic abuse no-contact order (DANCO) was issued against appellant Walter Wessel on behalf of D.L.S., an adult female. On July 20, 2011, appellant asked his boss to call D.L.S. to tell her that her belongings were being placed outside so that she could pick them up. The DANCO not only prohibited contact between appellant and D.L.S., but also prohibited contact through third parties.

Based on appellant's prior convictions for fifth-degree assault and domestic assault, appellant was charged with felony violation of a no-contact order under Minn. Stat. § 629.75, subd. 2(d)(1) (2010). After his arrest, appellant was released from jail on a number of conditions, including that he abstain from using alcohol, that he submit to drug tests, and that he contact his release agent at various appointed times. Despite these conditions, appellant committed violations on August 3, 11, 28, and September 1, 2, 8, and 18, 2011, which included failing to maintain contact with his release agent, refusing a urinalysis test, and using alcohol.

On November 14, 2011, appellant pleaded guilty to the charge, acknowledging that he asked his boss to contact D.L.S. on his behalf “[t]o let her know that [his] family

was putting her items outside.” Appellant agreed that this was a violation of the DANCO and that he had prior qualifying convictions.

Following his plea, appellant underwent a presentence investigation (PSI). The PSI report indicated that appellant had little insight into his own behavior, noting that as part of the investigation, appellant made a number of statements indicating that he did not believe that what he did was wrong. Rather, appellant blamed D.L.S. for his DANCO violation.

Prior to sentencing, appellant moved for a dispositional departure. Appellant argued that he would benefit from programming to address his chemical dependency and behavioral issues, that he was motivated to improve, and that he was remorseful for his offense. On December 20, 2011, just two days prior to sentencing, appellant again violated the conditions of his release by failing to appear for a urinalysis test.

At the sentencing hearing, appellant’s counsel again argued that appellant’s circumstances presented substantial and compelling reasons for a dispositional departure. The prosecutor asked that the victim-impact statement from D.L.S. be read and noted that appellant had previously been given two dispositional departures, one in 2004 and one in 2006, that did not result in long-term sobriety or law-abiding behavior. Moreover, the prosecutor argued that appellant did not show remorse for his crime, that he continued to blame his problems on others, that he had an extensive history of criminal activity and domestic violence, that he continued to abuse substances, and that he would be best served by obtaining programming in a prison setting. In response, appellant indicated that he was ready to accept programming and apologized for his most recent violation.

The district court stated that the argument for a dispositional departure was, at first blush, “pretty convincing.” However, the district court, in denying appellant’s motion for a dispositional departure, explained that appellant’s expressed willingness to accept programming was overshadowed by his statements in the PSI, the repeated violations of release conditions, and the victim-impact statement. As a result, the district court sentenced appellant to the presumptive 30-month commitment to the commissioner of corrections. This appeal follows.

D E C I S I O N

Appellant challenges the district court’s decision to impose the presumptive sentence. The district court must order the presumptive sentence unless “substantial and compelling circumstances” justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); Minn. Sent. Guidelines II.D (Supp. 2011). We apply an abuse-of-discretion standard to review a district court’s decision not to impose a downward dispositional departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only a “rare case” warrants reversal of a district court’s refusal to depart. *Kindem*, 313 N.W.2d at 7.

When considering a downward dispositional departure, a district court focuses “on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Amenability to probation is a sufficient basis for a downward dispositional departure. *State v. Donnay*, 600 N.W.2d 471, 474 (Minn. App. 1999) (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)), *review denied* (Minn. Nov. 17, 1999). “Numerous factors, including the defendant’s age, his prior record, his remorse, his cooperation, his attitude

while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *Trog*, 323 N.W.2d at 31; *see also* Minn. Sent. Guidelines II.D.2. However, the existence of mitigating factors does not compel the district court to impose a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

“Although the trial court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985); *see also State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011) (holding that the district court is not required to discuss all of the *Trog* factors before imposing the presumptive sentence). “The reviewing court may not interfere with the sentencing court’s exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *Van Ruler*, 378 N.W.2d at 80–81.

Appellant argues that he put forth substantial and compelling reasons for a dispositional departure, namely that he is “amenable to probation and to chemical health treatment,” that he “had not had previous domestic violence programming and lacked the insight into his behavior,” that he “is remorseful and had a desire to change his attitude,” and that the violation was not severe. Further, appellant argues that he will not have the incentive to attend or access the kind of programming needed while in prison. But appellant has done little to further his own case for amenability. While released after being charged, appellant committed numerous violations of his release conditions,

including failing to maintain contact with his release agent, using alcohol, and failing to submit to urinalysis testing. Further, appellant made a number of statements during the PSI that indicate he has not accepted responsibility for his actions and that he blames his troubles on the women in his life. The district court stated that it considered these circumstances in imposing the presumptive sentence.

Appellant's failure to take responsibility for his violation is further supported by his pro se brief on appeal, which is largely focused on disputing the facts underlying the DANCO, alleging that the victim was lying for her own benefit and was responsible for his violation. Appellant also blamed his release agent for the violation, claiming that the agent was unduly strict. These excuses do not support appellant's claim that he is remorseful or amenable to probation rather than incarceration.

Based upon appellant's lack of remorsefulness or self-accountability and his behavior while conditionally released, we conclude that there are no substantial or compelling reasons to depart from the presumptive sentence and that the district court did not abuse its discretion in denying appellant's motion for a dispositional departure.¹

Affirmed.

¹ Appellant's pro se supplemental brief generally alleges that D.L.S. is untruthful and that it is unfair to force him to serve 30 months for the felony violation of the DANCO when he was only attempting to return D.L.S.'s property. However, no specific legal arguments or citations are provided, and appellant's arguments are inconsistent with his testimony at the plea hearing, in which he admits that he violated the DANCO by trying to pass a message to D.L.S. through a third person. We find these arguments are without merit and decline to address them further. *See State v. Krosch*, 642 N.W.2d 713, 719 (Minn. 2002).