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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-602**

State of Minnesota,
Respondent,

vs.

William Glen Kilpela,
Appellant.

**Filed April 2, 2012
Affirmed
Randall, Judge***

Stearns County District Court
File No. 73-CR-09-10242

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

Janelle Prokopec Kendall, Stearns County Attorney, Carl Ole Tvedten, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sean Michael McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Bjorkman, Judge; and
Randall, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

RANDALL , Judge

Appellant William Glen Kilpela challenges the district court's imposition of a 48-month presumptive guidelines sentence for his conviction of first-degree driving while impaired (DWI). Appellant argues that the district court abused its discretion by denying his motion for a dispositional departure because: (1) he demonstrated a particular amenability to probation; and (2) the district court did not give deliberate consideration to the factors supporting departure. We conclude the district court did not abuse its discretion by denying appellant's dispositional-departure motion.

FACTS

Appellant pleaded guilty to first-degree DWI and driving in violation of a license restriction arising out of a September 16, 2009, offense. *See* Minn. Stat. §§ 169A.20, subd. 2 (2008); .24, subd. 1 (2008); 171.09, subd. 1(d)(1) (2008). During a traffic stop, he admitted to consuming alcohol before driving, and after a preliminary breath test indicated that his alcohol concentration was .166, he refused to submit to further tests. Prior to the plea hearing, the district court granted appellant's request for a furlough to Minnesota Teen Challenge, a chemical-dependency treatment center.

Appellant filed a motion for a dispositional departure, contending that he was particularly amenable to probation because he was successfully addressing his chemical dependency at the treatment center. The probation office filed a presentence investigation report indicating that appellant had four prior DWI convictions. The

prosecutor recommended the presumptive prison sentence because, despite appellant's participation in chemical-dependency treatment after the previous offenses, he continued to commit alcohol-related driving offenses.

At the December 2, 2010, sentencing hearing, appellant proffered testimony from an employee of the treatment center who testified that appellant had a positive attitude and opined that appellant was likely to be successful in the program. Appellant argued that he would be rehabilitated and public safety would be better served if he was sentenced to probation and permitted to remain in treatment. The state argued that appellant's substantial history of alcohol-related driving offenses and public-safety concerns warranted the presumptive prison sentence. The district court denied appellant's motion and sentenced appellant to the presumptive 48-month prison sentence.

D E C I S I O N

I.

This court reviews a sentence imposed by a district court to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, or unwarranted by the findings of fact. Minn. Stat. § 244.11, subd. 2(b) (2010). The sentencing guidelines are presumed to set forth appropriate sentences for the crimes to which they apply. Minn. Sent. Guidelines II.D. (2011). A district court has discretion to depart from the presumptive sentence only if "substantial and compelling circumstances" exist. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). If substantial and compelling circumstances do not exist, the district court has no discretion

in deciding whether to depart from the presumptive sentence. *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989). When evaluating a district court's decision not to depart from the guidelines, a "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." *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted). Only in a "rare case" will this court reverse a district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant asserts that the district court abused its discretion by refusing to depart because the record establishes that he is particularly amenable to probation. A defendant's amenability to probation is a valid reason for a dispositional departure. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). But even if the district court determines that appellant is amenable to probation, the presence of mitigating factors does not *require* departure from the presumptive sentence. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006); *see also State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009) (stating that a downward dispositional departure is not required even where there is evidence that the defendant would be amenable to probation). The district court acknowledged appellant's amenability to chemical-dependency treatment but nonetheless concluded that public safety and the serious nature of the offense warranted the presumptive sentence. We conclude that this is not the "rare case" in which the district court abused its discretion by electing not to depart from the guidelines. *See Kindem*, 313 N.W.2d at 7.

Appellant also argues that the district court did not properly exercise its discretion because it failed to weigh his proffered reasons for departure against the state's reasons against departure. When considering a dispositional departure, the district court "may focus on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and society." *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). Relevant factors include the defendant's amenability to probation, as well as the defendant's age, prior record, remorse, cooperation, attitude while in court, and the support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court must weigh the reasons for and against departure and make a deliberate decision. *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). If factors justifying departure are present, and the district court fails to consider them, remand may be appropriate. *State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984).

Appellant argues that the district court did not deliberately consider his amenability to probation, and contends that none of the *Trog* factors were weighed. But the district court need not consider every *Trog* factor, and when the district court considers reasons for a dispositional departure and chooses not to depart, it need not otherwise explain its decision. *Pegel*, 795 N.W.2d at 254. The record indicates that the district court considered *Trog* factors weighing in appellant's favor, including amenability to probation, remorse, cooperation, and support from family and friends. The district court noted that it read the reports and letters from appellant's family members and treatment personnel, reflected on appellant's family support and

demonstrated remorse, and acknowledged that appellant was making progress at the treatment center. However, the district court also considered countervailing factors, including appellant's criminal history, the importance of public safety, the seriousness of the offense, and appellant's need to learn from his repeated mistakes. There is evidence in the record demonstrating that the district court considered appellant as an individual, weighed the reasons for departure against the reasons for non-departure, and appropriately exercised its discretion.

II.

In a pro se supplemental brief, appellant appears to contend that he did not participate in sentencing negotiations and therefore the 48-month sentence is improper. His argument may be construed as an ineffective-assistance-of-counsel claim on the ground that his counsel did not communicate the state's 42-month offer, which was made at a settlement hearing, to appellant. Appellant pleaded guilty as part of a plea agreement that did not contain an agreement on sentencing.

When counsel fails to communicate a plea offer to his client, the standard ineffective-assistance-of-counsel analysis is applicable. *Leake v. State*, 737 N.W.2d 531, 540-41 (Minn. 2007). A two-part test applies to determine whether an appellant is entitled to "a new trial on the ground of ineffective assistance of counsel." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987). Appellant must affirmatively prove, first, that his counsel's representation "fell below an objective standard of reasonableness" and, second, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* (quoting *Strickland*

v. Washington, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)). In order to demonstrate prejudice, appellant must show that there is a “reasonable likelihood [that] the plea bargain would have been accepted had [he] been properly advised.” *Leake*, 737 N.W.2d at 540. Appellant “must present some credible, non-conclusory evidence that he would have pled guilty [under the offered agreement] had he been properly advised.” *Engelen v. United States*, 68 F.3d 238, 241 (8th Cir. 1995).

Appellant presents no evidence that meets the *Engelen* standard. The state’s 42-month settlement offer was made verbally in court when appellant was present. The record establishes that, throughout the proceedings, appellant intended to seek a dispositional departure so that he could remain at the treatment center. Appellant pleaded guilty without a sentencing agreement based on the “understanding that [his] attorney [was] going to make a motion for some kind of a departure.” Appellant did not present credible, non-conclusory evidence that he would have pled guilty as part of the offered agreement that included an agreement on sentencing. He did not demonstrate prejudice.

Affirmed.