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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0637**

State of Minnesota,
Respondent,

vs.

Bruce Virgil Zierden,
Appellant.

**Filed January 28, 2013
Affirmed
Stoneburner, Judge**

Stearns County District Court
File No. 73-CR-10-7503

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, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Chief Judge Johnson, Presiding Judge; Stoneburner,
Judge; and Toussaint, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellant challenges the district court's denial of his motion for a downward dispositional sentencing departure in his sentence for first-degree criminal sexual conduct, arguing that the district court denied the motion without properly considering the mitigating factors in this case. We affirm.

FACTS

Appellant Bruce Virgil Zierden was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct for digitally penetrating and sexually touching the 14-year old daughter of the woman he was living with at the time. He pleaded guilty to first-degree criminal sexual conduct, admitting digital penetration. At his plea hearing, Zierden stated that he would be moving for a downward departure. Because the parties disagreed on the appropriate guidelines sentence, the district court requested briefs addressing the appropriate guidelines sentence as well as the departure issue.

Before sentencing, Zierden completed a psychosexual evaluation and cooperated with a presentence investigation. Both the PSI and the psychosexual evaluation report concluded that Zierden is amenable to treatment and appropriate for community supervision. The psychosexual report noted that Zierden held a "somewhat immature view of his criminal sexual behavior" and feels "justified in his actions," but nonetheless found him amenable to treatment where he would likely gain insight into his behaviors and develop strategies to avoid reoffending.

Zierden's sentencing brief relied on these recommendations to support his argument that he is amenable to probation and is at a low risk to reoffend. The state's sentencing brief opposed a downward departure, arguing that Zierden had minimized the harm done to his victim, blamed the victim's mother for his predicament, and felt justified in his actions, which he characterized as "educating" the victim about sexuality and "preparing" her for dating. The state also highlighted the seriousness of the crime from the victim's perspective.

At the sentencing hearing, the district court stated on the record that it had received the briefs on the departure motion. In argument before the district court, Zierden reiterated his position that a downward departure is appropriate due to the recommendations in the PSI and psychosexual evaluation. Victim impact statements from the victim and her mother were read into the record, and the state argued against a downward departure, asserting lack of remorse, lack of motivation for treatment, the seriousness of the crime, and the impact on the victim. Zierden personally addressed the district court, apologizing for his actions and stating that he will do whatever is necessary to get better. The district court then stated:

The law in Minnesota requires that in order for the Court to do a downward dispositional departure that the Court finds substantial and compelling circumstances in order to issue that dispositional departure. The Court does not see substantial and compelling circumstances in this case that warrant a downward departure, and therefore I hereby adjudicate you guilty [of first-degree criminal sexual conduct]. . . . [I]t is the sentence of this Court that as punishment therefore you shall be committed . . . for a period of 144 months.

Zierden now appeals, asking this court to reverse the district court's denial of his motion for a sentencing departure and remand to the district court with instructions to properly consider the mitigating factors in this case.

D E C I S I O N

This court applies an abuse-of-discretion standard of review to a district court's decision not to impose a downward dispositional departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). 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). But even if substantial and compelling circumstances are present, the district court has discretion whether to depart, and this court will ordinarily not interfere with that exercise of discretion. *Id.* Only a "rare case" warrants reversal of a district court's refusal to depart. *Id.*

Valid factors for the district court to consider in making a departure decision include whether the defendant is amenable to probation and what would be best for both the defendant and society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). Other valid factors include the so-called "Trog factors." *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (identifying as appropriate factors the defendant's age, prior record, remorse, cooperation, attitude while in court, and support of friends and family). But because the decision to depart is discretionary, the existence of valid mitigating factors does not compel the district court to impose a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984); *see also State v. Evenson*, 554 N.W.2d 409, 412 (Minn.

App. 1996) (“Even assuming [the appellant] is exceptionally amenable to treatment, his amenability does not dictate the result.”), *review denied* (Minn. Oct. 29, 1996).

When a district court elects to impose the presumptive sentence, no written explanation is required. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985); *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984) (citing Minn. Sent. Guidelines II.D.; Minn. R. Crim. P. 27.03(4)(c)). “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. But a district court errs when it “put[s] aside arguments for departure rather than considering them alongside valid reasons for non-departure,” constituting a case where the exercise of discretion has not occurred. *Curtiss*, 353 N.W.2d at 264 (quotations omitted); *see also State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002) (“If the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure.”).

Zierden argues that the record in this case does not indicate that the district court deliberately considered any of the valid departure factors he presented. We disagree. The district court stated on the record at the plea hearing that it set the briefing deadline on the departure issue one week prior to sentencing to give it “sufficient time to review the material submitted by both sides prior to sentencing.” At the sentencing hearing, the district court acknowledged that it had received the briefs before it heard arguments from both sides on the departure issue and listened to the victim impact statements and

Zierden's allocution. Although the district court stated only that it "does not see substantial and compelling circumstances in this case that warrant a downward departure" before imposing the guidelines sentence, we conclude that the record as a whole supports the conclusion that the district court deliberately considered the circumstances for and against departure before pronouncing sentence, which is all that is required. *Van Ruler*, 378 N.W.2d at 80-81 (we will not interfere with the district 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").

Affirmed.