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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1255**

State of Minnesota,
Respondent,

vs.

Duncan Nyanaro Osoro,
Appellant.

**Filed May 31, 2022
Affirmed
Worke, Judge**

Carver County District Court
File No. 10-CR-21-35

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

Mark Metz, Carver County Attorney, Kevin A. Hill, Assistant County Attorney, Chaska, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by denying his motion for a sentencing departure. We affirm.

FACTS

On January 12, 2021, officers responded to a call of a vehicle in a ditch. Officers arrested the driver, appellant Duncan Nyanaro Osoro, after he admitted to consuming alcoholic beverages and showed signs of impairment. Osoro submitted to a breath test. The result was 0.30 alcohol content (AC). Osoro was charged with two counts of felony driving while impaired (DWI) and driving after cancellation—inimical to public safety. He pleaded guilty to one count of DWI. He admitted that he drove a vehicle into a ditch, and he did not dispute that his AC was 0.30.

Osoro moved for a dispositional departure, or alternatively, for a downward durational departure. A sentencing worksheet showed that, with six criminal-history points, Osoro's presumptive sentence was 72 months in prison (range between 62 and 84 months).

At Osoro's sentencing hearing, the prosecutor requested the presumptive prison sentence because Osoro has six DWI-related convictions, including three felonies, and the present offense was not a "run of the mill DWI" but was "yet another instance in which [Osoro] was so intoxicated that he crashed his own vehicle into a ditch." Osoro acknowledged that his criminal history was concerning and indicative of his lifetime struggle with alcohol. He also acknowledged that after three months of treatment he was not a zero risk. But he argued that he changed every aspect of his life. He entered treatment six days after the offense, he has stable housing after being homeless and in and out of prison for seven years, he has a full-time job, he volunteers, he established friendships to further his commitment to a sober lifestyle, he attends AA, and he is remorseful.

The district court noted that it reviewed the record, which supported Osoro's progress, and stated that it was impressed with Osoro's accomplishments. The district court stated: "[S]ince January, you really have tried absolutely to do everything right. And it sounds like you were really able to flip the switch." The district court stated that Osoro showed that he changed his life and has "done all the right things." But the district court stated:

[I]f it wasn't for the public safety factor, I would be much more inclined to do a departure in this case. But when you're driving at .30, and you get into an accident, and you've done it six times prior, not necessarily the accident, not necessarily a .30, but you've had six priors, and this is your 7th, I just have to consider public safety.

The district court sentenced Osoro to 62 months in prison, emphasizing that it did so because of the implications for public safety but recognizing "the tremendous progress [Osoro] made." This appeal followed.

DECISION

Osoro argues that the district court abused its discretion by denying his motion for a sentencing departure.

The district court imposed a presumptive sentence. A sentence prescribed by the sentencing guidelines is presumed appropriate. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court may depart from a presumptive sentence only if "identifiable, substantial, and compelling circumstances" warrant a departure. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different

from a typical case.” *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse . . . only for an abuse of that discretion.” *Soto*, 855 N.W.2d at 307-08 (quotation omitted). “[I]t would be a rare case which would warrant reversal of the refusal to depart.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Dispositional departure

Osoro first argues that the district court should have granted him a dispositional departure because substantial and compelling circumstances show that he is particularly amenable to probation.

In considering a dispositional departure, a district court focuses on the defendant and whether he is particularly amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (stating that in assessing whether a defendant is particularly amenable to probation, a district court may consider age, prior record, remorse, cooperation, attitude in court, and support of family and friends). The district court may also weigh offense-related factors in considering a departure request. *See State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). Even if a defendant is amenable to probation, a district court may deny a dispositional departure. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

Osoro argues that he is 37 years old, placing him in an age group wherein less arrests occur. He argues that he completed treatment, he has an AA sponsor, his criminal-history score indicates his lifetime struggle with alcohol, he made all court appearances, he cooperated, he complied with his release conditions, and he has community support.

These assertions are supported by the record and were acknowledged by the district court. The district court stated that Osoro was “able to flip the switch” and has “done all the right things.” Doing all the right things makes this case atypical and may show that Osoro is amenable to probation. The district court stated: “[I]f it wasn’t for the public safety factor, I would be much more inclined to do a departure in this case.”

After considering the *Trog* factors, the offense, and the need to protect the public, the district court denied the departure request. *See State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (stating that in determining whether to grant a dispositional departure a district court considers what is best for the defendant and society). And the district court appropriately exercised its discretion in doing so. *See State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (stating that this court will not reverse the district court’s denial of a departure request when the record shows that the district court “carefully evaluated all the testimony and information presented before making a determination”).

Durational departure

Osoro argues that even if a probationary sentence was not warranted, he should have received a downward durational departure because his conduct in committing the offense was less serious than a typical DWI because he immediately showed remorse and cooperated.

Unlike a dispositional departure that focuses mainly on the defendant, a durational departure is based on factors that reflect the seriousness of the offense. *Solberg*, 882 N.W.2d at 623. “[A] downward durational departure is justified if the defendant’s conduct

is significantly less serious than that typically involved in the commission of the offense.”
State v. Mattson, 376 N.W.2d 413, 415 (Minn. 1985).

While the facts here show that Osoro has made, as the district court described, “tremendous progress,” which would support a dispositional departure, the same facts do not support a durational departure. Osoro’s conduct cannot be considered significantly less serious than that typically involved in the commission of the offense. As the prosecutor stated, this was not a “run of the mill DWI.” The district court noted that Osoro’s AC was 0.30 and that this was his seventh DWI offense. In fact, the conduct involved in the offense—driving while impaired—was the reason that the district court denied a departure because it implicated public safety.

Thus, the record does not support a durational departure, and the district court did not abuse its discretion by denying the departure request.

Affirmed.