

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0588**

State of Minnesota,
Respondent,

vs.

Michael Walter Crego,
Appellant.

**Filed December 17, 2012
Affirmed
Cleary, Judge**

Ramsey County District Court
File No. 62-CR-11-1192

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

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Y. Middlebrook,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and
Cleary, Judge.

UNPUBLISHED OPINION

CLEARY, Judge

Appellant challenges the district court's refusal to grant a dispositional departure
from the Minnesota Sentencing Guidelines (sentencing guidelines) when sentencing him

on six counts of possession of child pornography. Appellant argues that the court failed to focus on him as an individual when it imposed the presumptive sentence under the sentencing guidelines and that he is amenable to treatment and probation. Because the district court did not abuse its discretion when it imposed the presumptive sentence, we affirm.

FACTS

Following an undercover police investigation involving online chatting, appellant Michael Walter Crego's home computers were seized. Forensic examination of the computers revealed multiple images and videos that were identified as pornography containing child victims. Appellant was charged with 11 counts of possession of child pornography, in violation of Minn. Stat. § 617.247, subd. 4(a) (2010). Appellant pleaded guilty to six counts of possession of child pornography, and the remaining five counts were dismissed. At the plea hearing, appellant and the state agreed that appellant would be sentenced to 39 months, which would be a presumptive commitment under the sentencing guidelines, but that he could argue for a dispositional departure during sentencing.

At the sentencing hearing, appellant requested that the district court dispositionally depart from the sentencing guidelines and sentence him to treatment, probation, and a stayed prison sentence. Appellant stated that he was 61 years old, did not have a criminal history, had fully cooperated with the investigation, had admitted that his actions were wrong, was ashamed and remorseful, and wanted to change and seek treatment. He

argued that he is amenable to treatment and probation and noted that he had been receiving support from his church to help him with his problem.

The district court judge stated that she had carefully considered the case and that it was “more egregious” than other cases with similar charges that she had seen recently because the images and videos on appellant’s computer were “troubling” and “very, very graphic” and because “very young children were terribly violated.” The court discredited appellant’s assertion that he was remorseful and had taken responsibility for his actions, noting that appellant had claimed before the sentencing hearing that he was “suffering more than anybody,” had admitted that he “had not thought about how [his] behavior affected the demand and production of child pornography,” and had “completely depersonalized these children as mere objects and not as [the] live and functioning human beings that they are.” The court also stated:

Outpatient treatment, as far as I’m concerned, is not going to do it for you. You’re going to have too many opportunities to get caught up in your very strong denial system, and for all of those reasons, I just can’t find it within me nor under the law to dispositionally depart from the sentencing guidelines.

I’ve given people chances with these types of offenses to be treated in the community, but they weren’t the level of offending that you perpetrated, and I have thought long and hard about it given your age and the fact that you don’t have a prior criminal history and the fact that you were a productive member of our community at one time and were working and were doing well in the community, but there [are] just too many red flags here and concerns.

The district court denied appellant’s request for a dispositional departure and sentenced him to 15-month, 20-month, 25-month, and 30-month commitments for the

first four counts of possession respectively, staying those sentences, and to concurrent 39-month commitments for each of the remaining two counts. The court then granted appellant's request that the sentences for the first four counts be executed to run concurrently with the sentences for counts five and six. This appeal followed.

DECISION

An appellate court may review a sentence to “determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b) (2010). A district court has broad discretion to determine whether to depart from a presumptive sentence under the sentencing guidelines. *State v. Gassler*, 505 N.W.2d 62, 69 (Minn. 1993). Such a determination is reviewed for an abuse of that discretion, and review is “extremely deferential” to the district court's decision. *Dillon v. State*, 781 N.W.2d 588, 595–96 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). Only in a “rare case” should an appellate court reverse a district court's refusal to depart and imposition of the presumptive sentence, even if there are grounds that would justify departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

A district court may depart from a presumptive sentence under the sentencing guidelines only if it finds substantial and compelling circumstances that justify departure. Minn. Sent. Guidelines II.D. (2010). “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). Although a district court is required

to give reasons for a 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).

“The question presented to the [district] court when considering a departure is whether the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002). When determining whether to grant a dispositional departure, the court can also focus “on the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). “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 [of] whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

Appellant argues that the district court relied almost entirely on his offenses and culpability, while failing to consider him as an individual and what would be best for him and society. Appellant claims that the court failed to apply the factors articulated in *Trog* and that those factors show that a dispositional departure is warranted in his case. However, in addition to discussing the nature of appellant’s crimes, the court did mention factors relating to appellant as an individual. The court stated that it had considered appellant’s age, the fact that he did not have a prior criminal history, and the fact that he had once been a productive member of the community, but had determined that

imprisonment was warranted despite these factors. The court also brought up appellant's level of remorse, stating that appellant had claimed that he was "suffering more than anybody," had admitted that he had not thought about how his behavior affected the demand and production of child pornography, and had "completely depersonalized" the child victims as mere objects rather than human beings. This led the court to conclude that outpatient treatment in a probationary setting would not be sufficient for appellant and to deny the durational departure.

Appellant apparently believes that the district court did not adequately explain how each *Trog* factor applies in his case or why the factors, taken together, did not lead the court to conclude that appellant is amenable to probation. However, as previously stated, a district court is not required to give an explanation when it "considers reasons for departure but elects to impose the presumptive sentence." *Van Ruler*, 378 N.W.2d at 80; *see also State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011) (stating that there is no requirement that a district court discuss all of the *Trog* factors before imposing a presumptive sentence). We conclude that this is not one of the rare cases in which a district court's refusal to durationally depart from the presumptive sentence warrants reversal.

Affirmed.