STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1191

State of Minnesota,
Respondent,

vs.

Jesse Allen Gongoll,
Appellant.

Filed May 28, 2013
Affirmed
Schellhas, Judge

Carver County District Court
File No. 10-CR-10-433

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

Mark Metz, Carver County Attorney, Colin Haley, Assistant County Attorney, Chaska, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges his presumptive guidelines sentence. We affirm.

FACTS

Police arrested appellant Jesse Gongoll for refusal to submit to a chemical test for intoxication on July 4, 2010, at which time Gongoll had five prior driving-while-impaired convictions. Respondent State of Minnesota charged appellant Jesse Gongoll with felony second-degree driving-while-impaired refusal to submit to a chemical test with the presence of an aggravating factor in violation of Minn. Stat. §§ 169A.20, subd. 2, .25, subd. 2 (2008). The aggravating factor consisted of Gongoll's two prior driving-while-impaired convictions within ten years prior to the offense on July 4. Gongoll was on probation for a 2007 driving-while-impaired conviction at the time of his offense on July 4. The state also charged Gongoll with driving in violation of the restrictions imposed on a restricted driver's license in violation of Minn. Stat. § 171.09, subd. 1 (d)(1) (2008). On March 25, 2011, the state charged Gongoll with driving after cancellation of his license, inimical to public safety, in violation of Minn. Stat. § 171.24, subd. 5 (2010).

Gongoll pleaded guilty to second-degree driving-while-impaired refusal to submit to a chemical test, and the state dismissed the remaining charges. The district court ordered a presentence investigation (PSI). Before sentencing, Gongoll moved for a downward dispositional departure and, alternatively, a downward durational departure. The district court heard testimony from the probation officer, who prepared the PSI; considered the parties' arguments; and sentenced Gongoll to the presumptive guidelines sentence of 48 months in prison.

This appeal follows.

D E C I S I O N

Gongoll argues that the district court abused its discretion by denying his motion for a downward dispositional departure but makes no argument regarding the court's denial of his motion for a downward durational departure.

On appeal, this 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) (2008). The district court must order the presumptive sentence provided by the sentencing guidelines "unless there exist identifiable, substantial, and compelling circumstances" that warrant a departure. Minn. Sent. Guidelines II.D (2008). Appellate courts apply the abuse-of-discretion standard to a sentencing court's decision to deny a motion for a downward dispositional sentencing departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). Only a rare case warrants reversal of a district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Moreover, the "presence of factors supporting departure does not require departure." *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

Gongoll argues that the district court abused its discretion by imposing the presumptive sentence of 48 months because the court "did not complete a full examination of the *Trog* factors when it ruled on [his] motion for a downward

dispositional departure" and that consideration of the *Trog* factors "reveals that . . . Gongoll was an excellent candidate for probation." Gongoll's argument is unpersuasive. In *State v. Trog*, the supreme court stated that 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 some of the factors relevant to a determination of whether a defendant is amenable to treatment in a probationary setting. 323 N.W.2d 28, 31 (Minn. 1982). But the district court is not required to discuss all of the *Trog* factors before it imposes the presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). The district court does not abuse its discretion as long as the "record demonstrates that the district court carefully considered circumstances for and against departure and deliberately exercised its discretion." *Id.* at 255.

Here, the record reflects that the district court carefully considered circumstances for and against departure before it sentenced Gongoll. The district court ordered a PSI, heard testimony from its author, and heard arguments from both parties. The court heard Gongoll's expression of remorse, questioned him about his treatment history, heard him say that he was motivated to rehabilitate himself through chemical dependency treatment, heard the corrections officer testify that Gongoll was not susceptible to treatment or amenable to probation, and considered Gongoll's history of alcohol-related driving offenses. At the close of the proceeding, the district court stated:

> [T]his is not an easy decision for me. I do note . . . the fact that you were not charged with a driving under the influence charge between 2001 and 2006 and then again between 2006 and 2010, and so I think that does raise some question about whether you are amenable to probation and the fact that

> you've been able to stay out of custody for that period of time, but I am going to adopt the recommendations in this case. I do so because in looking at your record, I'm not just looking at the last ten years, but I'm also looking back to 1992 . . . [and] [w]e're looking at a 20-year period of difficulty with alcohol or other controlled substances, and I'm left with the, I think, uncontroverted conclusion that this problem with alcohol has gone on for decades and the fact that [if] I send you [to] another treatment program, particularly based on what [the corrections officer] said, is not going to ensure the safety of the public.

The district court discussed Gongoll's prior record of convictions and treatment, his unamenability to treatment, the danger Gongoll presented to the community, and his amenability to probation, all of which can be pertinent circumstances when a district court is deciding whether to depart from the presumptive sentence. *See State v. Carpenter*, 459 N.W.2d 121, 128 (Minn. 1990) ("In determining whether to depart dispositionally, the trial court may consider the defendant's . . . dangerousness to the community."); *Abrahamson*, 758 N.W.2d at 337 (noting that factors relevant to dispositional departures include amenability to probation and defendant's prior record); *State v. Hopkins*, 486 N.W.2d 809, 812–13 (Minn. App. 1992) (stating that district court properly considered that appellant was a "'marginal treatment candidate'" when "declining to grant a dispositional departure"). The court was not required to discuss every *Trog* factor. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). And, even if the court had explicitly discussed all of the factors for and against departure that Gongoll argues it should have, this case is not one of the "rare case[s] which would warrant reversal of the refusal to depart." *Kindem*, 313 N.W.2d at 7.

Citing *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002), Gongoll argues that the district court abused its discretion because it did not deliberately compare the factors for and against a departure side-by-side. But nothing in *Mendoza* requires that the district court compare the factors for and against departure "side-by-side." Rather, the *Mendoza* court stated that, "[i]f the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure." *Id.*

The record shows that, before the district court imposed Gongoll's sentence, it carefully considered the circumstances for and against a downward dispositional departure. We conclude that the court did not abuse its discretion. *See Pegel*, 795 N.W.2d at 255 ("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." (quotation omitted)).

Affirmed.