STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1591

State of Minnesota,
Respondent,

vs.

Nathan Michael Erlandson,
Appellant.

Filed May 13, 2013
Affirmed
Connolly, Judge

Stearns County District Court
File No. 73-CR-11-9650

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and Stauber, Judge.

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

CONNOLLY, Judge

Appellant challenges his sentence, arguing that the district court abused its discretion by denying his request for a downward dispositional departure. Because we see no abuse of discretion, we affirm.

FACTS

In 2009, appellant Nathan Erlandson was placed on probation for felony third-degree assault and ordered to complete treatment that included Dialectical Behavior Therapy (DBT).[1] He did not begin DBT or the other treatment programs.

In October 2011, while on probation, appellant threatened his girlfriend's parents with a rifle when they came to the residence she shared with appellant. He pointed the rifle at them from a distance of about five feet; they backed away with their hands up. Following a five-hour stand-off, appellant surrendered to the police.

He pleaded guilty to one charge of felony second-degree assault and one charge of felony terroristic threats, agreeing to concurrent guideline sentences and reserving the right to argue for a downward dispositional departure. About this time, he began receiving DBT.

At the sentencing hearing, appellant moved for a downward dispositional departure, arguing that he had been receiving DBT for two months, that he requires DBT to deal with problems caused by his military service before he can benefit from other

[1] DBT is an approach that is helpful for treating individuals who have a combined history of trauma and the subsequent personality factors that make traditional treatment more complicated.

treatment programs, and that he could not receive DBT in prison because it is available only in the community. The district court denied his motion and imposed the executed concurrent sentences to which appellant agreed in the plea bargain.

Appellant argues that the denial was an abuse of discretion.

D E C I S I O N

A district court has broad discretion to depart from the sentencing guidelines, and a reviewing court "generally will not interfere with the exercise of that discretion." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Id.*

The district court explained its decision to deny appellant's motion for a downward dispositional departure:

> [O]pportunities have been given to [appellant] to deal with chemical abuse, to deal with some of the psychological damage that would have occurred [from his military service], and . . . what's been offered hasn't been taken advantage of in the past. . . . If this was his first time in court or first time to have these opportunities available, I would probably grant the departure. But here because of the prior assaults and failure to comply with probation in the past, failure to take advantage of services through the [Department of Veterans Affairs] until recently, I'm not convinced that probation here would work . . and I think there is too much of a risk for the court to take that chance at this point in time.

Appellant's counsel argues quite eloquently that this is that "rare" case where the district court abused its discretion because appellant is "particularly amenable to individualized treatment in a probationary setting." *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (noting that a defendant's particular amenability to probationary treatment

may justify a dispositional departure); *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009) (holding that the district court may but is not required to make a downward dispositional departure where the record supports a finding of particular amenability to probation). Counsel argues that appellant is an Iraq war veteran who was diagnosed with posttraumatic stress disorder (PTSD) as a result of his experiences while in combat and was receiving 100% service-connected disability compensation through the Department of Veterans Affairs. Counsel also argues that appellant needs an effective therapeutic intervention that he has never received. But we note that appellant was ordered to try DBT, the treatment he now claims is appropriate, in 2009, and did not do so until the spring of 2012, shortly before he was sentenced on a subsequent felony conviction.

As the district court observed,

> [I]n 2009, [appellant] was sentenced on a felony assault.
> . . . .
> [T]he sentence required that he abstain from the mood-altering chemicals, submit to random testing, complete programing as recommended by the case manager at the [Department of Veterans Affairs], including but not limited to DBT and individual counseling.
> . . . .
> Here we are back and I got a PSI that said these were recommended again and as of at least January [2012], eight months later, [appellant] still had not started any of those groups. Why should I believe it's going to be any different this time? If I wasn't dealing with something as frightening as this could potentially have been, if it was strictly a drug use without any violence associated, I might be inclined to give somebody a second chance. But he's had those opportunities, . . . and without addressing these issues, [this] seems like kind of an explosive situation.

A district court must consider whether a presumptive sentence would be best not only for the defendant, but also for society. *See State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (stating that, when deciding whether to make a dispositional departure, the district court focuses "on whether the presumptive sentence would be best for [the defendant] and for society"). The district court thoughtfully considered appellant's previous unsuccessful experiences while on probation for two prior felonies, including assault and DWI, as well as the violence of this offense in denying his motion for a downward dispositional departure. While we are indeed sympathetic to appellant's plight and his status as someone who has honorably served his country, we cannot say, based on the record before us, that the district court abused its discretion in imposing the presumptive sentence under the guidelines.

Affirmed.