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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2223**

State of Minnesota,
Respondent,

vs.

Ernest Duane Clark, Jr.,
Appellant.

**Filed October 7, 2013
Affirmed
Connolly, Judge**

Becker County District Court
File No. 03-CR-11-2459

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

Michael Fritz, Becker County Attorney, Gretchen D. Thilmony, Assistant County Attorney, Detroit Lakes, Minnesota (for respondent)

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

Considered and decided by Cleary, Presiding Judge; Connolly, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his sentence, arguing that the district court abused its discretion when it denied his motion for a downward dispositional departure. Because we see no abuse of discretion, we affirm.

FACTS

In November 2011, appellant Ernest Duane Clark Jr. was charged by complaint with three counts of criminal sexual conduct in the first degree in violation of Minn. Stat. § 609.342, subd. 1(c)-(e) (2010); kidnapping in violation of Minn. Stat. § 609.25, subds. 1, 2(1) (2010); and assault in the second degree in violation of Minn. Stat. § 609.222, subd. 1 (2010).

On October 31, 2011, appellant spent the evening with K.M. at a casino. Appellant and K.M. had previously been in a romantic relationship and have a young child together. Appellant had been drinking alcohol and taking vicodin and methadone earlier that day. After leaving the casino, K.M. drove appellant back to his parents' home. Appellant did not want K.M. to leave, and the two began to argue. During the argument, appellant grabbed K.M. by the throat, punched her, and hit her in the face with a glass bottle. Appellant dragged K.M. to a nearby baseball field and forced her to perform oral sex on him while holding her at knifepoint. Appellant then forcibly raped K.M. vaginally and anally. At the time of the offense, K.M. was 20 years old.

When appellant finished assaulting K.M., they walked back to his parents' house, where he assisted her in reporting the crime. When law enforcement officers arrived,

they observed K.M. bleeding from her nose and mouth. She had dried blood on her face and numerous lacerations and bruises all over her body. Her clothes were covered in blood and dirt.

Appellant maintained that he did not have any memory of the incident due to his alcohol and drug use. He entered a plea to one count of criminal sexual conduct in the first degree pursuant to *Norgaard v. Tahash*, 261 Minn. 106, 111-12, 110 N.W.2d 867, 871 (1961). In exchange for his *Norgaard* plea, the state agreed to dismiss all other charges. The district court accepted appellant's guilty plea and ordered a presentence investigation (PSI) and sex-offender assessment. The guideline sentence range for this severity-level-A offense with appellant's criminal-history score of zero was 144-173 months' imprisonment. Minn. Sent. Guidelines 4 (Supp. 2011). The state recommended that appellant be sentenced to 144 months in prison, along with ten years of conditional release.

Appellant moved for a downward dispositional departure based on his amenability to probation. Appellant based his amenability to probation on the following factors: (1) he was only 21 years old at the time of sentencing, (2) he had no prior history of violence, (3) he cooperated with the investigation and assisted the victim in reporting the incident, (4) he showed remorse for his actions, and (5) he had the support of his family. The state opposed a sentencing departure, citing the brutal nature of the rape, the relationship between appellant and K.M., and the risk to public safety based on appellant's drug use.

The district court denied appellant's motion and imposed the presumptive guidelines sentence of 144 months' imprisonment. This appeal follows.

DECISION

Appellant challenges his prison sentence. The district court may depart from a presumptive sentence under the sentencing guidelines only if "substantial and compelling" circumstances are present. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Substantial and compelling circumstances include "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). The decision to depart from the sentencing guidelines is within the district court's discretion and will not be reversed absent an abuse of discretion. *State v. Misquadace*, 644 N.W.2d 65, 68 (Minn. 2002). Only in a rare case will we reverse a district court's imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

"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." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). The district court is not required to set forth an explanation when it considers reasons for a departure but imposes a presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Provided that the sentencing court "carefully evaluated all the testimony and information presented before making a [sentencing] determination," we will not interfere with the district court's exercise of discretion. *Id.* at 81.

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure without considering or weighing the mitigating factors set forth in *State v. Trog*, 323 N.W.2d 28 (Minn. 1982). Specifically, appellant contends that he is particularly amenable to probation based on five mitigating factors: his young age, his lack of prior history of violence, his cooperation with the investigation, his remorse, and his family support. *See Trog*, 323 N.W.2d at 31 (stating that numerous factors may support a defendant’s amenability to probation and warrant a dispositional departure including the defendant’s age, his prior record, his remorse, his cooperation, and the support of his family). However, “[t]he fact that a mitigating factor was clearly present [does] not obligate the court to . . . impose a shorter term than the presumptive term.” *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

First, appellant claims that because he was only 21 years old at the time of sentencing he is particularly amenable to probation. The district court did not agree that appellant’s age was a substantial and compelling circumstance warranting departure. The court considered the factor but stated, “[t]he fact that you are a younger person than we typically see here doesn’t make [the crime] ok. It’s not a substantial [and] compelling reason to not impose the sentence that our legislature says that we’re suppose[d] to impose.” Furthermore, a district court does not abuse its discretion by refusing to depart “from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation.” *State v. Olson*, 765 N.W.2d 662, 663 (Minn. App. 2009).

Appellant next argues that the court abused its discretion in imposing the presumptive sentence because he has no history of committing violent crimes. However, “a defendant’s clean record does not by itself justify mitigation of sentence because that factor, in the form of defendant’s criminal history score, has already been taken into account by the Sentencing Guidelines in establishing the presumptive sentence.” *Trog*, 323 N.W.2d at 31.

As to appellant’s cooperation with the investigation, appellant received the benefit of his cooperation through his plea bargain with the state. By pleading guilty, appellant received a bottom-of-the-box guidelines sentence for his crime, which could have resulted in a top-of-the-box guidelines sentence or an upward durational departure had defendant gone to trial and been convicted. *See State v. Adell*, 755 N.W.2d 767, 774 (Minn. App. 2008), *review denied* (Minn. Nov. 25, 2008) (“The fact that a defendant has subjected a victim to multiple forms of penetration is a valid aggravating factor in first-degree criminal sexual conduct cases.”)

Likewise, appellant argues that his remorse justified a downward dispositional departure. The court recognized appellant’s remorse by stating, “[i]f you can go back to the day before that happened and do things differently, you would, and I am not going to sit here and suggest that if I don’t follow the guidelines that you would do it again.” Nevertheless, the district court did not find appellant’s remorse to be a substantial and compelling ground for departure. “[W]hen this sort of conduct occurs . . . we talk about the consequences, this is about, most substantially, punishment. . . . This is about punishment for conduct that will for the rest of the life of your victim change her life.”

Even though the court recognized appellant's remorse, the mere existence of mitigating factors does not obligate the court to depart from the presumptive sentence. *Wall*, 343 N.W.2d at 25.

Lastly, appellant argues that the district court abused its discretion by failing to consider appellant's family support before imposing the presumptive sentence. The record indicates that the court heard testimony from appellant's mother and two of his sisters regarding their family support. The district court noted that appellant's family will be supportive of him while he is in prison, and that family support is not a substantial and compelling reason to depart from the presumptive guidelines sentence in this particular case.

The record shows that the district court did not abuse its discretion in sentencing appellant. The district court explained on the record that it reviewed the file, relevant motions, photographs, testimony, and the PSI. The district court did not find substantial and compelling reasons warranting a downward dispositional departure. The district court explained its decision to impose the presumptive sentence by weighing the mitigating factors against the extremely brutal and invasive nature of appellant's crime,

I'm not sure I have seen pictures like that in any case other than perhaps the murders that I was involved in. So it's not just an assault, this is a brutal beating followed by probably the most invasive conduct a man can ever commit on a woman.

The record reflects that the district court carefully evaluated and weighed the circumstances of appellant's case before sentencing him to 144 months in prison.

Because the district court did not find substantial and compelling circumstances to justify a departure, it did not abuse its discretion.

Affirmed.