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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1282**

State of Minnesota,
Respondent,

vs.

Gregory Lamont Johnson,
Appellant.

**Filed May 7, 2012
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-CR-10-41909

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County
Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Jodie Lee Carlson, Assistant
Public Defender, St. Paul, Minnesota; and

Joseph A. Herriges, Special Assistant Public Defender, Faegre & Benson LLP,
Minneapolis, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges the district court's denial of his motion for a downward dispositional departure on his sentence for his conviction of first-degree driving while impaired. We affirm.

FACTS

Late on the evening of June 30, 2010, Minneapolis police officers Angela Hayden and Sarah Frisk responded to a "slumper" call. According to an officer's testimony at trial, a "slumper" is "someone who is passed out or asleep inside a vehicle and for unknown reasons." When Officers Hayden and Frisk arrived at the location, they observed a vehicle parked off Olson Memorial Highway on the sidewalk. The officers approached the vehicle and observed that it was running. A male, who appeared to be sleeping, was in the driver's seat. The man wore a seat belt and had his feet on the brake pedal, and the vehicle was in drive. Officer Hayden woke the man up and detected a "[s]trong smell of alcoholic beverage." The man appeared "very groggy," "disoriented," and "incoherent"; he stumbled and swayed; his physical coordination was poor; and his speech was slurred. The officers identified the man as appellant Gregory Johnson and placed him under arrest for driving under the influence of alcohol. At no point did Johnson say that anyone else drove the vehicle. Johnson provided a urine sample that revealed an alcohol concentration of .26.

Respondent State of Minnesota charged Johnson with first-degree driving while impaired (DWI). During the jury trial, the state's case-in-chief included testimony by Officers Hayden and Frisk. Johnson did not testify or offer witness testimony. The jury found Johnson guilty of DWI.

Johnson's criminal history includes four misdemeanor convictions for DWI that occurred between 2000 and 2003 and one felony conviction for DWI in 2004. The presumptive sentence for Johnson's conviction is 42 months' imprisonment. Johnson moved for a downward dispositional departure requesting probation with inpatient chemical-dependency treatment, asserting that substantial and compelling circumstances warranted departure. He argued that he is amenable to probation because his last DWI conviction was nearly seven years ago, which corroborates his story that he was sober for several years but relapsed just before the incident, and he wants to participate in treatment and was accepted into two inpatient programs.

During the presentence investigation (PSI), despite having been found guilty of the charged offense by a jury, Johnson denied driving his vehicle on the date of the charged offense. He relayed the following version of facts to his probation officer: he was drinking at home when he agreed to let a friend borrow his car; his friend took the car and soon called him to report that the car had broken down; another friend transported Johnson to his car, and he discovered that the transmission had gone out and that the car was inoperable; he called a friend to come with a tow truck; and he fell asleep in his car while waiting for the tow truck to arrive. The probation officer concluded that Johnson's version of the offense was farfetched, that he is a risk to public safety, and that no

mitigating reasons support a departure from the sentencing guidelines. The probation officer recommended that Johnson be sentenced to the presumptive sentence.

Johnson sought a downward dispositional departure, which the state opposed. The district court denied Johnson's request and imposed the presumptive sentence of 42 months' imprisonment. This appeal follows.

D E C I S I O N

The district court must order the presumptive sentence unless "substantial and compelling circumstances" justify departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). A district court has broad discretion in determining whether to depart, and only in a "rare case" will an appellate court reverse a district court's imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "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. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotations omitted). If factors justifying departure are present in the record, and the district court fails to consider them, remand may be appropriate. *State v. Curtiss*, 353 N.W.2d 262, 263–64 (Minn. App. 1984).

Johnson argues that this court should reverse and remand his case for resentencing because the district court abused its discretion by "not engag[ing] in the requisite deliberation upon Mr. Johnson's motion for a dispositional departure" because it "fail[ed] to adequately take into account Mr. Johnson's nearly seven-year avoidance of problems with alcohol and driving, and his demonstrated willingness to look at and gain acceptance into two inpatient treatment programs." We disagree. The record reflects that the district

court deliberately considered the circumstances for and against departure. In fact, in his brief, Johnson quotes the court's response to his counsel's recitation of mitigating reasons for departure. The court said that it did not "believe [Johnson's] version and [his] failures on probation, basically by getting new DWIs all the time indicate to [the court] that [Johnson's] not a good risk." "[T]he mere fact that a mitigating factor is present in a particular case does 'not obligate the court to place defendant on probation or impose a shorter term than the presumptive term.'" *Pegel*, 795 N.W.2d at 253–54 (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)).

Here, Johnson's mitigating factors included that, although he had four misdemeanor DWIs from 2000 to 2003 and a felony DWI in 2004, his last DWI was nearly seven years before the DWI in this case. And he claimed that he "did not have any issues with drinking and driving" during those seven years, his DWI in this case occurred because he suffered a relapse, and he needs treatment. Johnson contends that the district court failed to weigh factors for and against departure. Johnson complains that the district court did not discuss two of his alleged mitigating circumstances that showed his amenability to probation: (1) his last DWI conviction was nearly seven years earlier, which he claims corroborates his statement to probation that he was sober for nearly seven years but suffered a relapse shortly before the charged offense; and (2) he recognizes that he needs chemical-dependency treatment, is willing to undergo inpatient treatment, and gained acceptance into two programs. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (recognizing that sentencing court may depart from presumptive guidelines sentence by imposing probation instead of executed sentence when defendant

is amenable to probation). But the district court is not required to discuss all of the *Trog* factors before imposing the presumptive sentence. *Pegel*, 795 N.W.2d at 254.

Johnson likens his case to *Curtiss*, in which this court determined that the district court denied a motion for a sentencing departure without exercising discretion because the record did not demonstrate that the district court considered the several mitigating factors present in the record. 353 N.W.2d at 263–64. His argument is not persuasive.

The record demonstrates that the district court reviewed the PSI; heard Johnson’s counsel’s argument for departure; heard Johnson’s statement at the sentencing hearing; and heard the state’s objections to departure. The court contemplated Johnson’s prior convictions while on probation, his lack of remorse about his new conviction, and his denial of wrongdoing, and the court determined that probation and treatment would not be effective. *See Trog*, 323 N.W.2d at 31 (identifying defendant’s prior record, remorse, cooperation, and attitude while in court as factors relevant to downward dispositional departure); *see also State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994) (“The presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation.”), *review denied* (Minn. Apr. 21, 1994).

We are persuaded that the sentencing court carefully considered the circumstances for and against departure and deliberately exercised its discretion. This is not the “rare case” that demands reversal of the court’s imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7. We therefore will not interfere with the sentencing court’s exercise of discretion, and we affirm.

Affirmed.