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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A10-2066**

State of Minnesota,  
Respondent,

vs.

Robert Howard Swanson,  
Appellant.

**Filed November 21, 2011  
Affirmed  
Hudson, Judge**

Isanti County District Court  
File No. 30-CR-10-15

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

Jeffrey R. Edblad, Isanti County Attorney, Amy J. Reed-Hall, Assistant County Attorney,  
Cambridge, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Suzanne M. Senecal-Hill,  
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Hudson, Judge; and Worke,  
Judge.

## **UNPUBLISHED OPINION**

**HUDSON**, Judge

On appeal from his conviction of first-degree sexual assault, appellant challenges the district court's imposition of the presumptive sentence. Because the district court did not abuse its discretion by sentencing appellant to the presumptive sentence, we affirm.

### **FACTS**

Appellant Robert Swanson pleaded guilty to first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2008). At his plea hearing, appellant acknowledged that he was alone with a 12-year-old relative, M.A.S., watching a movie, and he placed a crushed anti-anxiety tablet in her soft drink. After the movie ended, appellant asked M.A.S. to remove her underwear. Appellant acknowledged that he removed his underwear and took M.A.S. to a bedroom and had sexual intercourse with her.

Appellant moved for a downward dispositional departure based on his remorse, testimony and a psychosexual evaluation from a psychologist, and a letter and intake assessment from a sex-offender treatment center. That information stated that he would be an acceptable candidate for in-patient sex-offender treatment in a probationary setting. In sentencing appellant, the district court stated that it took into account the sentencing worksheet, the presentence investigation (PSI), the psychosexual evaluation by psychologist Paul Reitman, two letters submitted by sex-offender treatment center Alpha House, the victim statements, Reitman's testimony, the seriousness of appellant's actions, and its in-court observation of appellant. The district court also stated that it believed that

the appellant was attempting to minimize the sexual assault when he testified at his plea hearing regarding his Klinefelter syndrome. Additionally, the district court noted that Reitman's report provided troubling insight into appellant's preoccupation with sex and potential difficulty in treatment due to his justification and rationalization of his behavior and a lifelong feeling of being a victim. The district court also noted that appellant scored high on molester and rapist comparison scales, that his crime violated a position of trust, and that he treated M.A.S. in a cruel and premeditated manner. The district court imposed the presumptive 173-month sentence. This appeal follows.

## **DECISION**

A district court is required to order the presumptive sentence of the Minnesota Sentencing Guidelines unless substantial and compelling circumstances warrant a departure. *State v. Cameron*, 370 N.W.2d 486, 487 (Minn. App. 1985), *review denied* (Minn. Aug. 29, 1985); Minn. Sent. Guidelines II.D. (2008). The district court has broad discretion in determining whether to depart from the presumptive sentence and will not be reversed absent an abuse of that discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). When considering a downward dispositional departure, whether the defendant is amenable to treatment may be part of the district court's analysis in determining if "the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). That a mitigating circumstance exists does not obligate the district court to impose a shorter prison term. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Only the

rare case warrants reversal of the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant argues that the district court abused its discretion in denying his motion for a downward dispositional departure by mischaracterizing the record regarding appellant's remorse and amenability to sex-offender treatment, as well as appellant's testimony regarding his Klinefelter syndrome and Reitman's psychosexual evaluation and subsequent testimony. A significant consideration in determining whether to grant a dispositional departure is a defendant's amenability to probation. *State v. Wright*, 310 N.W.2d 461, 462–63 (Minn. 1981). A defendant's amenability to probation can depend on numerous factors, including the defendant's age, prior record, cooperation, remorse, attitude while in court, and the support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "The presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation." *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). Because the district court observes the defendant at sentencing, "a reviewing court must defer to the district court's assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision." *Id.*

We agree with appellant that the district court may have misinterpreted his plea hearing testimony regarding his Klinefelter syndrome. The record reveals an exchange between appellant and his attorney regarding appellant's Klinefelter-syndrome diagnosis, a description of the syndrome, and his daily testosterone treatment. Appellant's attorney also asked about counseling received by appellant, his diagnoses of anxiety and ADHD,

medications taken by appellant, and whether the absence of the medications affected his ability to understand the proceedings. Appellant's accounting of his Klinefelter syndrome supports his argument that the testimony was intended to establish that his guilty plea was voluntary, intelligent, and not made under the influence of medicine taken to treat the syndrome. The record does not suggest that appellant was attempting to minimize his involvement in the sexual assault by connecting his Klinefelter syndrome to his conduct.

Nonetheless, we conclude that the record otherwise supports the district court's determination that appellant lacked remorse. First, Reitman's psychosexual evaluation revealed that appellant minimized his conduct in sexually assaulting the victim. Second, the district court stated that it believed that any remorse on appellant's part "is related more to the fact that he's facing a significant prison sentence than actual remorse," basing this determination, in part, on the PSI.

Additionally, the district court noted that it had twice observed appellant in court before determining whether appellant was remorseful. We defer to the district court's assessment of a defendant's sincerity and depth of remorse because the district court observes defendants first hand. *Id.* The district court acted well within its discretion in relying on the PSI and its observations of appellant in determining that appellant's remorse was related more to potential imprisonment than his conduct in committing the offense.

Appellant argues that Reitman's psychosexual evaluation and testimony showed that he was remorseful. Reitman recommended appellant for supervised in-patient sex-

offender treatment and testified that appellant did not malingering during his interview, told the truth, and had heartfelt remorse for his crime. But the district court noted that Reitman also wrote in his psychosexual evaluation that appellant minimizes the sexual assault of the victim and that appellant is highly preoccupied with sex and may be unable to control his sexual impulses. Therefore, Reitman's report, taken as a whole, supports the district court's determination that appellant lacked remorse.

Appellant also argues that the district court's determination that appellant was not amenable to treatment was impermissibly based on its subjective assessment, citing *State v. Christopherson*, 500 N.W.2d 794 (Minn. App. 1993). In *Christopherson*, we concluded that a district court must not determine a defendant is unamenable to treatment based on a subjective determination without "any evidence on the record supporting the [district] court's determination." *Id.* at 797. But here, the district court's imposition of the presumptive sentence was based on ample evidence in the record.

The district court stated its belief that, based on the record, appellant is "a very high public safety risk." The district court also noted that Reitman, in making his recommendation to the district court that appellant undergo in-patient treatment, lacked the benefit of the admissions appellant made to Alpha House regarding the previous sexual assault of a minor. Additionally, the district court noted that appellant had treated M.A.S. cruelly, particularly in the premeditated drugging of a 12-year-old girl with no regard to the effect of the drug on her. Finally, the district court determined it was significant that Reitman, who had recommended that appellant receive in-patient treatment, also had concerns about appellant's amenability to treatment based on

appellant's justifications, rationalizations, and his lifelong feeling of being a victim. The district court did not abuse its discretion in imposing the presumptive sentence.

**Affirmed.**