STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0712

State of Minnesota,
Respondent,

vs.

Timothy Joseph Hebert,
Appellant.

Filed January 27, 2014
Affirmed
Halbrooks, Judge

Steele County District Court
File No. 74-CR-11-560

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

Daniel A. McIntosh, Steele County Attorney, Christy M. Hormann, Assistant County Attorney, Owatonna, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Following his conviction of one count of second-degree criminal sexual conduct, appellant argues that the district court abused its discretion by denying his motion for a

downward dispositional departure when there were substantial and compelling circumstances warranting probation. We affirm.

FACTS

Appellant Timothy Joseph Hebert was charged with one count of first-degree criminal sexual conduct, one count of contributing to the delinquency or petty-offender status of a child, one count of underage consumption of alcohol, and one count of a social-host underage-alcohol violation arising from a social gathering. The complaint alleges that during a social gathering in his garage, Hebert encouraged a 16-year-old guest to drink alcohol. When she went inside the house to use the bathroom, Hebert sexually assaulted her despite her efforts to call for help and her pleas for him to stop.

Under the terms of a plea agreement, Hebert pleaded guilty to an amended count of second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(e)(i) (2010), and the other counts were dismissed. The state agreed to recommend the guidelines sentence. The district court accepted Hebert's plea and ordered a presentence investigation (PSI) and sexual-offender assessment.

At sentencing, the district court acknowledged that it had received and reviewed the PSI and accompanying sexual-offender assessment, a separate psychological evaluation submitted by the defense, Hebert's dispositional-departure recommendation, and a victim-impact statement. Hebert and his mother addressed the court. Both attorneys made arguments about sentencing.

The district court discussed the content of various submissions, including both psychological evaluations and the victim-impact statement. The court then reviewed and

applied the factors from *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982), as it understood it was "constrained" to do. The district court denied Hebert's departure motion and imposed the presumptive sentence of 90 months' imprisonment. The district court noted that the standard for departure is "substantial and compelling . . . [and] I just don't see in this situation that you've gotten over the bar." This appeal follows.

D E C I S I O N

Hebert argues that the district court abused its discretion by imposing the presumptive sentence of 90 months' imprisonment when there were substantial and compelling mitigating factors warranting probation. Hebert asserts that the district court (1) failed to exercise its discretion by deliberately considering the factors for and against departure and (2) abused its discretion by imposing the presumptive sentence.

Only in a rare case will a reviewing court reverse a district court's imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). "The reviewing court may not interfere with the district court's exercise of discretion, as long as the record shows the district court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985).

District Court's Exercise of Discretion

Hebert argues that the district court abused its discretion by failing to deliberately compare the factors for departure and nondeparture side by side. He cites *State v. Mendoza*, 638 N.W.2d 480 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002), and *State v. Curtiss*, 353 N.W.2d 262 (Minn. App. 1984), in support of this argument. We

disagree. The district court noted the submissions that it had reviewed, highlighting the content supporting and contradicting Hebert's claim of amenability to probation. The district court then concluded that there were no "substantial and compelling" circumstances that warranted a departure from the guidelines sentence. Thus, the record demonstrates that the district court exercised its discretion.

Imposition of the Presumptive Sentence

Hebert also argues that the district court abused its discretion by imposing the presumptive sentence when there were substantial and compelling circumstances warranting a downward dispositional departure. In support of this argument, Hebert relies on cases in which the district court's *departure* from the presumptive sentence was affirmed on appeal. *See State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983); *State v. Hennessey*, 328 N.W.2d 442, 443 (Minn. 1983); *Trog*, 323 N.W.2d at 31; *State v. Wright*, 310 N.W.2d 461, 463 (Minn. 1981); *State v. Garcia*, 302 N.W.2d 643, 647 (Minn. 1981), *overruled on other grounds by State v. Givens*, 544 N.W.2d 774, 777 n.4 (Minn. 1996); *State v. Bendzula*, 675 N.W.2d 920, 924 (Minn. App. 2004); *State v. Hickman*, 666 N.W.2d 729 (Minn. App. 2003); *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984). But in this case, the district court chose not to depart and imposed the presumptive sentence. As a result, these cases are inapposite.

Hebert specifically argues that the district court's analysis of the *Trog* factors was inadequate. In *Trog*, the Minnesota Supreme Court held 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 relevant factors to consider before granting a dispositional

departure. 323 N.W.2d at 31. But a district court need not address the *Trog* factors before imposing a presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). To be clear,[1] the *Trog* factors are relevant to the district court's exercise of discretion in *granting* a downward dispositional departure, not its decision to *deny* such a request and impose the presumptive sentence. *See* 323 N.W.2d at 31; *Pegel*, 795 N.W.2d at 253-54.

Here, Hebert's sentence of 90 months' imprisonment is the presumptive sentence for second-degree criminal sexual conduct by an offender with a criminal-history score of zero. Because the district court imposed the presumptive sentence, no discussion of the *Trog* factors is required. *Pegel*, 795 N.W.2d at 253; *Van Ruler*, 378 N.W.2d at 80. Therefore, any purported deficiency in the district court's analysis of the *Trog* factors cannot be grounds for reversal. *See Pegel*, 795 N.W.2d at 253-54.

"[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.'" *Id.* (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)). Because the district court considered the evidence and arguments presented at sentencing and acted within its discretion when it imposed the presumptive sentence, we will not disturb Hebert's sentence. *See Van Ruler*, 378 N.W.2d at 80-81.

Affirmed.

[1] We reiterate this point because of the frequency with which we are called upon to address the argument that the factors outlined in *Trog* apply to the imposition of a presumptive sentence, despite our clear conclusion to the contrary in *Pegel*.