STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1440

State of Minnesota,
Respondent,

vs.

Scott Andrew Bradley,
Appellant.

Filed April 28, 2014
Affirmed
Bjorkman, Judge

Ramsey County District Court
File No. 62-CR-12-2717

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

John J. Choi, Ramsey County Attorney, Kaarin Long, Assistant County Attorney, Amy Edwall (certified student attorney), St. Paul, Minnesota (for respondent)

Jeremy J. Kaschinske, Halberg Criminal Defense, Bloomington, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Ross, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Appellant challenges his sentences for possessing child pornography, arguing that (1) he was denied his right of allocution and (2) the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

Appellant Scott Bradley was charged with 16 counts of possessing child pornography. In September 2012, he pleaded guilty to five of the counts in exchange for the state's agreement to dismiss the remaining charges. Bradley moved for a downward dispositional departure from the presumptive prison sentence. The state opposed the motion, and the probation officer who completed the presentence investigation report (PSI) recommended the presumptive sentence. In November, after hearing extensive argument from the parties on the departure motion, the district court granted Bradley's request to defer ruling on the motion and continue the sentencing hearing to give Bradley an opportunity to attend sex-offender treatment. The district court imposed numerous release conditions and placed Bradley under the supervision of Project Remand.

The district court considered the sentencing issue again in May 2013. The district court reviewed the PSI, the psychosexual evaluation, and victim impact statements. The district court also considered an updated PSI, which continued to recommend the presumptive sentence, and a letter from Project Remand about Bradley's participation in treatment. And the district court once again heard arguments on Bradley's departure motion, though it did not solicit comments from Bradley and he did not personally

address the court. The district court denied the departure motion and imposed the presumptive sentence of 39 months' imprisonment.[1] This appeal follows.

D E C I S I O N

I. The district court's error in not affording Bradley his right of allocution is harmless because he had ample opportunity to present his sentencing arguments to the court.

A criminal defendant has a right to allocution before the district court imposes sentence. Minn. R. Crim. P. 27.03, subd. 3 (2008); *see also State v. Young*, 610 N.W.2d 361, 363 (Minn. App. 2000), *review denied* (Minn. July 25, 2000). This right is not discretionary with the district court or waived by a defendant's failure to request it. *State v. Hanson*, 304 Minn. 415, 416, 231 N.W.2d 104, 105 (1975).

The record establishes that Bradley was not afforded an opportunity to personally address the district court at sentencing, and the state concedes that this was error. The state contends, however, that such error is reversible only if the defendant demonstrates prejudice and Bradley has failed to do so. We agree.

Our supreme court has long tied the right of allocution to the defendant's right to present evidence of mitigating circumstances. *See State ex rel. Searles v. Tahash*, 271 Minn. 304, 307-10, 136 N.W.2d 70, 73-74 (1965) (reversing and remanding for resentencing because "there was no presentence hearing to permit favorable consideration of [the defendant]'s background, [the defendant] was given no opportunity to be heard,

[1] The district court imposed concurrent sentences for the five convictions, with the fifth a presumptive prison term of 39 months pursuant to *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981). At Bradley's request, the district court executed the presumptively stayed sentences on the first through fourth convictions.

and counsel failed to speak on his behalf"). Accordingly, the supreme court has consistently held that when the defendant was afforded an opportunity to present potential mitigating circumstances, including his version of the relevant events, reversal is not warranted merely because the defendant did not personally address the court at sentencing. *See State ex rel. Thunstrom v. Tahash*, 283 Minn. 239, 244-45, 167 N.W.2d 139, 144 (1969) (holding denial of allocution not prejudicial when a PSI was available, defense counsel spoke at sentencing, and defendant testified at hearing on motion to set aside verdict); *State ex. rel. Krahn v. Tahash*, 274 Minn. 567, 567-68, 144 N.W.2d 262, 262-63 (1966) (holding denial of allocution not prejudicial because PSI provided "adequate assurance" that the court considered the defendant's version of events and other potential mitigating facts). While the supreme court has not substantively addressed the allocution issue in several decades, it has never deviated from this harmless-error standard.

We also observe that the supreme court recently amended rule 27.03 to eliminate the requirement that the district court solicit a personal statement from the defendant. *Compare* Minn. R. Crim. P. 27.03 (2008) (requiring district court to "address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf") *with* Minn. R. Crim. P. 27.03 (2012) (requiring district court to "allow statements from . . . the defendant, personally"). While the amended version of the rule is not controlling here, we believe it is consistent with the long-standing harmless-error rule. We therefore conclude that reversal is warranted only if Bradley demonstrates prejudice.

Bradley contends that the denial of his right of allocution was prejudicial because his personal statement might have affected the district court's decision on his departure motion. We disagree. In deciding Bradley's departure motion, the district court twice heard arguments from counsel on the presence and significance of possible mitigating factors. The court also considered the original and updated PSI and the psychosexual evaluation, which thoroughly detailed possible mitigating factors and recited Bradley's version of the events underlying the offenses. Nor are we persuaded that Bradley's statement to the probation officer that he hoped to address the district court demonstrates prejudice. First, the statement follows a lengthy recitation of Bradley's version and his explanation that he "had nothing else to state about his version of the offense." Second, after telling the probation officer that he wanted to make a statement in court, he personally asked the court to continue the sentencing hearing so he could attend treatment. Bradley did not request an opportunity to address the court when he returned six months later. Nor has he identified any information that he would have presented to the district court had he spoken.

In short, Bradley was entitled to an opportunity to personally address the district court regarding sentencing. But given the extensive information presented at multiple sentencing hearings, it is implausible that the district court would have imposed a different sentence had Bradley been permitted to allocute. Accordingly, we conclude Bradley is not entitled to relief on this basis.

II. The district court did not abuse its discretion by imposing the presumptive sentence.

The district court must order the presumptive sentence unless "identifiable, substantial, and compelling circumstances" justify a downward departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013). We review a district court's decision to grant or deny a departure from the presumptive sentence for abuse of discretion, *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003), and will reverse a presumptive sentence only in rare cases, *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

The appropriateness of a dispositional departure depends on the defendant as an individual, "on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983); *see also State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (discussing factors that may support departure). A district court must "deliberately consider[] circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). But it is not obligated to depart even if mitigating factors are present, *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984), and it need not exhaustively address the *Trog* factors or otherwise explain its reasons before imposing the presumptive sentence, *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011).

Bradley argues that the district court abused its discretion by denying his departure motion because "several factors existed favoring departure," including his lack of prior criminal history, his family support, his expressions of remorse, and his participation in

sex-offender treatment during the sentencing continuance. We are not persuaded. The district court thoroughly considered these factors and ultimately determined that the uncertainty of the timeline for Bradley's treatment, the public safety concern presented by the escalating nature of Bradley's conduct, and the need to punish Bradley's serious criminal conduct warranted imposition of the presumptive prison sentence. This determination was well within the district court's discretion.

Bradley also contends that the district court improperly considered a separate, uncharged incident in which Bradley illicitly filmed a coworker's 16-year-old daughter. We disagree. Bradley admitted to the incident, and acknowledged his behavior was inappropriate. This is relevant background information that is properly included in a PSI. *See* Minn. Stat. § 609.115, subd. 1(a) (2008) (providing that PSI must address "the defendant's individual characteristics, circumstances, needs, potentialities, criminal record and social history"). Bradley did not object to the state's argument at the first sentencing hearing that the incident represents an escalation of his behavior. And while a district court may not consider unproven facts or improper admissions in imposing an upward departure, *see State v. Dettman*, 719 N.W.2d 644, 655 (Minn. 2006), Bradley has not identified any authority indicating that his admission to other improper conduct cannot be a basis for denying a downward departure. On this record, we conclude the district court did not abuse its discretion in denying his departure motion based, in part, on the uncharged incident.

Affirmed.