

NOT DESIGNATED FOR PUBLICATION

No. 125,980

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

STATE OF KANSAS,  
*Appellee,*

v.

STEVEN EARL PFAFF,  
*Appellant.*

MEMORANDUM OPINION

Appeal from Ness District Court; BRUCE T. GATTERMAN, judge. Submitted without oral argument. Opinion filed December 8, 2023. Affirmed.

*Grace E. Tran*, of Kansas Appellate Defender Office, for appellant.

*Jacob T. Gayer*, county attorney, and *Kris W. Kobach*, attorney general, for appellee.

Before ATCHESON, P.J., ISHERWOOD and HURST, JJ.

PER CURIAM: Steven Earl Pfaff appeals the district court's denial of his motion for a downward dispositional departure. He claims the court's refusal to grant probation was unreasonable and, therefore, an abuse of discretion because he presented substantial and compelling reasons to support the more lenient disposition. Pfaff specifically highlights the fact that he took accountability for his actions, proactively sought treatment for his substance abuse issues, and was the primary caregiver for his elderly father. But Pfaff's extensive history with drug-related incidents and previously unsuccessful efforts with outpatient treatment seemingly carried greater weight with the court. Thus, the district court imposed a prison term under the theory that the disposition which prevented Pfaff

from accessing drugs as easily offered the best recourse for tackling his addiction. We do not detect an abuse of discretion in that decision and affirm the sentence imposed.

#### FACTUAL AND PROCEDURAL BACKGROUND

Pfaff pled guilty to one count of possession of methamphetamine and in exchange, the State agreed to dismiss the remaining charges. There was no agreed upon sentencing recommendation between the parties.

Before sentencing, Pfaff moved for a downward dispositional departure to probation. He argued such a sentence was more appropriate because he had taken steps toward tackling his addiction by enrolling in substance abuse treatment, he cared for his ailing elderly father, and accepted responsibility for his behavior by entering a plea.

At sentencing, the State requested that the court follow the presumption for prison given Pfaff's B level criminal history score. Counsel for Pfaff recounted the points set out in the departure motion but candidly acknowledged that Pfaff had previously struggled to fully commit to the obligations of outpatient treatment and already missed a few meetings with his current program due to distance, money, and responsibilities in caring for his father. Nevertheless, counsel maintained that the factors relied upon rose to the level of substantial and compelling reasons to justify probation.

The district court ultimately denied Pfaff's request and explained that it could not ignore the fact that previous attempts to overcome his addiction through outpatient treatment while on probation were unsuccessful. Therefore, the judge believed the only way for Pfaff to truly overcome his addiction was to endeavor to limit his ease of access to drugs. The court did, *sua sponte*, grant Pfaff a durational departure to 24 months from the standard term of 34 months.

Pfaff now brings the matter before us for a determination of whether the district court's denial of his departure request was unreasonable.

#### LEGAL ANALYSIS

*The district court did not abuse its discretion in denying Pfaff's motion for a downward dispositional departure.*

Pfaff argues the district court's decision was unreasonable because he was participating in outpatient treatment, and thus, probation would allow him to continue seeking help for his addiction while also caring for his father.

In those instances where the district court adheres to the statutory presumption of imprisonment yet grants a downward durational departure, an appellate court has jurisdiction to consider a defendant's complaint that the district court "did not depart enough." *State v. Looney*, 299 Kan. 903, 908, 327 P.3d 425 (2014). Because Pfaff's complaint is essentially that more was warranted in his case than a simple durational departure, we may consider the merits of his appeal. 299 Kan. at 909.

We review the district court's denial of Pfaff's motion for an abuse of discretion. Such abuse occurs when a court's decision arises out of a legal or factual error or involves a view taken by the district court that no reasonable person would similarly take. *State v. Grable*, 314 Kan. 337, 341, 498 P.3d 737 (2021).

District courts must impose the presumptive sentence provided by the sentencing guidelines "unless the judge finds substantial and compelling reasons" to depart from that requirement. K.S.A. 2022 Supp. 21-6815(a). In arriving at its conclusion, the district court may look to the nonexclusive list of mitigating factors set forth in K.S.A. 2022 Supp. 21-6815(c)(1), but may also consider "other, nonstatutory factors" as long as there

is evidence in the record to support such factors and their use would be consistent with the intent and purposes of the sentencing guidelines. *State v. Hines*, 296 Kan. 608, 616, 294 P.3d 270 (2013).

To rise to the level of "substantial" a proffered mitigating factor must be real, not imagined, and of substance, not ephemeral. To qualify as "compelling," it must be one which forces the court, by the facts of the case, to abandon the status quo. *Hines*, 296 Kan. at 616. Pfaff does not argue that the district court's decision was based on an error of law or lacks sufficient evidence. He simply contends that no reasonable person would have denied his departure motion given his proffered mitigating factors. Pfaff reiterates that he accepted responsibility for his actions when he entered a guilty plea, took affirmative steps toward addressing his addiction, and asserts he is motivated to overcome his dependency on illicit substances so that he can provide better care for his father.

Although the district court agreed these factors rose to the level of substantial and compelling reasons to depart durationally, its view did not extend to dispositional leniency and the judge thoroughly explained his rationale to Pfaff. See *State v. Ballard*, 289 Kan. 1000, 1009, 218 P.3d 432 (2009) (finding the same set of mitigating factors may lead the district court to grant a durational departure without also granting a dispositional departure). The district court highlighted Pfaff's extensive history of drug-related offenses, and that he was unsuccessful in his previous attempt at outpatient treatment while on probation. From its perspective, the best, and perhaps only way for Pfaff to overcome his addiction was to remove him entirely from the seemingly easy access he had to drugs.

The district court's reasoning did not constitute an abuse of discretion given Pfaff's particular circumstances, and we have no hesitancy in concluding other district courts

would have agreed that a departure to probation was not warranted in this matter. The court properly exercised its discretion when it denied Pfaff's departure request.

Affirmed.