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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0973**

State of Minnesota,
Appellant,

vs.

Yusef Abdi Ali,
Respondent.

**Filed January 16, 2018
Affirmed
Bratvold, Judge**

Ramsey County District Court
File No. 62-CR-16-8495

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant Ramsey County Attorney, St. Paul, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Lauermann, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

The state appeals from respondent's sentence, which included a downward dispositional departure imposed by the district court after respondent pleaded guilty to first-

degree burglary. The state asserts that the district court erred by staying execution of respondent's sentence without making the necessary findings. Because the district court did not abuse its discretion, we affirm.

FACTS

Around 11:30 a.m. on November 30, 2016, the police responded to a call from a couple who returned home and discovered two men in their upstairs bedroom, one of whom was respondent Yusef Abdi Ali. The men apparently entered the home after throwing a rock through a sliding glass door; they turned over furniture, broke keepsakes, scattered broken items around the house, and poured soup on the floor. After the couple interrupted them, the men fled with various items, some of which they dropped as they ran. A neighbor followed Ali into a nearby park and found him in a pond. The police arrested Ali, who had a pedicure set from the home in his pocket. When asked about the incident, Ali said he had been drinking for the past three days and that he could not recall what happened.

Ali submitted a “straight *Norgaard* plea”¹ to first-degree burglary under Minn. Stat. § 609.582, subd. 1(a) (2016). There was no agreement on sentencing. Ali informed the court that he would seek a downward dispositional departure at sentencing. The state indicated that it would ask for a guidelines sentence; the presumptive sentence was a range from 39 to 54 months in prison. *See* Minn. Sent. Guidelines 4.A (2016).

¹ A defendant may enter a *Norgaard* plea when he “is unable to remember the specific facts of the offense” due to intoxication or amnesia, but has reviewed the state’s evidence against him and believes that he “is likely to be convicted of the crime charged.” *State v. Solberg*, 882 N.W.2d 618, 621 n.1 (Minn. 2016); *see also State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 110 N.W.2d 867 (1961).

Ali's motion asked the district court to durationally depart by imposing a gross misdemeanor sentence of 364 days, plus probation with treatment for alcohol abuse. He explained that his traumatic childhood in war-torn Somalia and physical abuse in a foster home resulted in a diagnosis of post-traumatic stress disorder (PTSD). Ali argued that when his difficult personal circumstances are considered, along with his feelings of remorse and willingness to seek treatment, he is particularly amenable to probation. At the sentencing hearing, Ali sought either a durational or dispositional departure, and he reiterated earlier arguments. His attorney also stated that Ali struggles with attention deficit hyperactivity disorder (ADHD), as well as traumatic brain injury, and concluded by saying, "[h]e drinks. That's his way of getting away from what his background is."

The state opposed any departure. It argued, first, that Ali is not particularly amenable to probation because he has "had a drinking problem for years." Second, the state contended that this offense is "simply one in a long series of continuing criminal acts committed by" Ali. The state requested that the district court impose the guidelines sentence, which is consistent with probation's recommendation in the Presentence Investigation (PSI) report. In the PSI, the probation department found no "mitigating factors that would warrant a departure from the sentencing guidelines," and recommended the court impose an executed sentence of 45 months.

At the end of the hearing, the district court denied Ali's motion for downward durational departure and granted his motion for downward dispositional departure. The district court considered the evidence in the record, including Ali's testimony at the omnibus hearing, briefing oral argument, and the PSI report. The district court sentenced

Ali “to the high end of the box. That’s 54 months.” While the district court did not specifically state during the sentencing hearing that Ali is particularly amenable to probation, the court stayed execution of the sentence for ten years, imposed a jail sentence of 365 days, credited Ali for 118 days, and required Ali to pay \$1,000 in restitution. The district court specified probation conditions, including mental health counseling for grief and trauma, a chemical health evaluation with no use of alcohol or mood-altering substances, and random testing. The district court specifically ordered that Ali follow all recommendations from his chemical evaluation and mentioned residential treatment. The district court also required Ali to return for a review hearing.²

The day after the sentencing hearing, the district court issued a written order denying Ali’s motion for downward durational departure and granting his motion for downward dispositional departure because of Ali’s “particular amenability to probation services, specifically to address childhood trauma and alcoholism.” The state appeals.

D E C I S I O N

The Minnesota Sentencing Guidelines provide a prescribed sentencing range that is “presumed to be appropriate.” Minn. Sent. Guidelines 2.D.1. (2016). A downward durational or dispositional departure is permitted when there “exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). The reasons for departure must be “placed on the record at the time of

² The hearing was originally scheduled for October 23, 2017, but has been rescheduled to January 22, 2018.

sentencing.” *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). In the absence of stated reasons, we must remand to the district court for imposition of the presumptive guidelines sentence. *See id.*

When a district court provides its reasons for departure on the record, we review its decision for an abuse of discretion. *Soto*, 855 N.W.2d 307-08. A district court may abuse its discretion when it does not “deliberately consider[] circumstances for and against departure,” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011), or when a sentence is “inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court,” Minn. Stat. § 244.11, subd. 2(b) (2016). “When the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue.” *Pegel*, 795 N.W.2d at 253.

The sentencing guidelines contain a “nonexclusive list” of mitigating circumstances that can justify a downward departure. *Soto*, 855 N.W.2d at 308. A downward dispositional departure must be based on offender-related characteristics. *Solberg*, 882 N.W.2d at 623. For example, a downward dispositional departure may be appropriate when the offender is “particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a(7) (2016); *see Soto*, 855 N.W.2d at 308 (concluding that mere amenability to probation, without a finding of particularity, “does not rise to the level of what” has previously justified a departure from the guidelines). Other offender characteristics that a court may consider include, but are not limited to, “the defendant’s age, his prior record, his remorse, his cooperation, his

attitude while in court, and the support of friends and/or family.” *Id.* at 310 (quoting *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Here, the district court’s written order included the finding that Ali is particularly amenable to probation. At the sentencing hearing, the district court did not explicitly state that Ali is “particularly amenable to probation,” but instead considered factors for and against a dispositional departure.³ For example, the district court recognized that Ali had shown genuine remorse for what he had done, but it also stated that “I don’t think that in this case ‘sorry’ really cuts it.” The district court explained, “From what I read [in your motion], you know what it’s like to feel scared in someone else’s home and you know what it’s like to have things feel completely out of control. And that’s what you did to this family.”

Further, the district court credited Ali’s testimony that he had no memory of what happened because he “woke up in a puddle of water.” But the district court cautioned that having no memory “doesn’t mean you’re not responsible; it just means that you have sort

³ The state cites to *State v. Geller*, 665 N.W.2d at 516, and argues that because the district court failed to make the “particular amenability” determination at the sentencing hearing, the sentence must be reversed. The preferred practice is for the district court to state its factual findings and provide reasoning on the record at the sentencing hearing. *See* Minn. R. Crim. P. 27.03, subd. 4(C) (requiring a court when pronouncing sentence to make findings of fact supporting departure); *see also State v. Stempfley*, 900 N.W.2d 412, 415-19 (Minn. 2017) (affirming district court’s decision imposing a downward dispositional departure because record of hearing included sufficient findings). But it is immaterial that the district court’s explicit finding of Ali’s particular amenability first appeared in the district court’s written order issued after the sentencing hearing. The order is part of the sentencing record. *See* Minn. R. Crim. P. 27.03, subd. 1(B)(7) (providing that findings of fact may be made for felony sentences either on the record or in writing within 20 days of the hearing).

of hidden yourself from . . . owning some of this.” Nonetheless, the district court believed Ali’s testimony that “when you’re not drinking you’re a better person” and was persuaded that there is “something in you when you’re sober that makes it worthwhile.” The district court also suggested that Ali’s chemical dependency was complicated by childhood trauma, abuse, and grief. By identifying these offender characteristics, the district court indicated the reasons why it ultimately made the written finding that Ali is particularly amenable to probation.

In a similar context, this court has recognized that a district court may consider whether “the defendant is amenable to supervision rather than imprisonment” and determine whether “the risk of placing him on probation [is] significantly outweighed by evidence that he [is] finally motivated to try to rehabilitate himself.” *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984) (applying reasoning from *State v. Hennessy*, 328 N.W.2d 442 (Minn. 1983)). In *Malinski*, we affirmed the district court’s decision to stay execution of a presumptive executed sentence, noting in part that the district court gave the 27-year-old respondent “an opportunity to prove himself” while at the same time setting review hearings during the five-year probationary period and “choosing to involve [the district court] in continuing personal contacts” with the respondent. *Id.* at 210-11. In sum, the district court in *Malinski* and in this case concluded that the presumptive executed sentence is not the “best for him and for society.” *See id.* at 210 (quotation omitted).

The state contends that the district court abused its discretion because Ali has a lengthy history of criminal activity, a pervasive alcohol problem, and has previously tried

treatment and failed. Record evidence shows that Ali was 26 years old at the time of the first-degree burglary conviction and his criminal history includes convictions for a total of 11 misdemeanors and gross misdemeanors, three felonies, primarily property offenses, and three DWIs. The record also reflects that Ali has a history of violating probation conditions. In fact, Ali was “under supervision” at the time he committed the underlying offense. Moreover, Ali told the district court at sentencing that he started treatment in a halfway house but left because he was “scared.” The district court’s comments indicate that it reviewed and weighed the record evidence and nonetheless found that Ali is particularly amenable to probation.

Here, the district court imposed a “high end of the box” sentence, but stayed execution for ten years with probation supervision and the condition that Ali not use alcohol or other mood-altering chemicals. By doing so, the district court took steps to protect public safety. Further, by requiring that Ali participate in mental health counseling and complete a chemical health evaluation and follow all recommendations, the district court gave Ali the opportunity to demonstrate his motivation to rehabilitate. The district court explained at sentencing that Ali “can decide that you don’t want to participate, but that decision is you actually telling me you want to go to prison.” Finally, the district court set a review hearing with Ali following his release from jail to discuss his status.

We conclude the district court did not abuse its discretion by granting Ali’s motion for a downward dispositional departure because the district court provided its reasons at

the sentencing hearing, expressly found Ali particularly amenable to probation in its posthearing order, and the record supports the district court's findings.⁴

Affirmed.

⁴ Ali alternatively argues that if we were to reverse and remand the district court's finding, then he should have the opportunity on remand to withdraw his plea. But Ali failed to file a notice of related appeal so the issue is not properly before us and we do not consider it. *See 301 Clifton Place L.L.C. v. 301 Clifton Place Condo. Ass'n*, 783 N.W.2d 551, 561 n.2 (Minn. App. 2010) (refusing to address issue raised by respondent who did not file notice of related appeal).