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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1116**

State of Minnesota,
Appellant,

vs.

Michael Brian Lee,
Respondent.

**Filed January 29, 2018
Reversed and remanded
Hooten, Judge**

Anoka County District Court
File No. 02-CR-16-6591

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

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Considered and decided by Smith T., Presiding Judge; Larkin, Judge; and Hooten,
Judge.

UNPUBLISHED OPINION

HOOTEN, Judge

In this sentencing appeal, the state argues that the district court abused its discretion
by granting respondent a downward dispositional departure. The state contends that the

district court's reasons for the departure are improper and that the evidence in the record is insufficient to justify the departure. We reverse and remand for resentencing.

FACTS

On the evening of October 6, 2016, respondent Michael Brian Lee was involved in a car accident in Ramsey, Minnesota. Later that night, law enforcement arrived at Lee's home. Lee admitted to drinking earlier in the evening and that he had been driving. After he failed field sobriety tests, he agreed to submit to a breath test. The breath test revealed an alcohol concentration of 0.18.

The state charged Lee with first-degree driving while impaired—under the influence of alcohol with a prior felony substance-related conviction—in violation of Minn. Stat. § 169A.20, subd. 1(1) (2016). Lee pleaded guilty to the offense in January 2017. The district court deferred acceptance of the plea until sentencing and ordered a presentence investigation (PSI) report.

The PSI's sentencing worksheet indicated that the offense had a severity level of seven and that Lee had a criminal history score of zero. The presumptive sentence under the Minnesota Sentencing Guidelines indicated a committed sentence of 36 months, with a range of 31 to 43 months. The PSI report noted that Lee committed criminal vehicular operation, a felony-level offense, in 1994, for which he obtained a stay of imposition and was placed on probation. Although Lee successfully finished probation and was discharged in 2000, the report appears to note that it was being used to enhance his presumptive sentence as a prior felony conviction for the first-degree driving while

impaired charge. The PSI report ultimately recommended that the district court commit Lee in accordance with the presumptive sentence.

The district court held a sentencing hearing in April 2017. Lee moved for a downward dispositional departure. He argued that the criminal vehicular operation offense from 1994 turned a presumptive stay of sentence into an automatic presumptive commit due to it being a prior felony DWI-related offense, but that this previous offense should be construed as a misdemeanor on his record because it was a stay of imposition that he successfully completed. Lee also alleged that several mitigating factors were present, which would demonstrate that he was amenable to probation. The state opposed Lee's motion and requested that the district court impose the presumptive sentence under the guidelines.

The district court accepted Lee's guilty plea and sentenced him to 36 months in prison but stayed execution of the sentence, placing Lee on supervised probation for seven years. The district court based the dispositional departure on the conclusion that Lee "may be amenable" to treatment and probation. The state appealed.

D E C I S I O N

The state contends that the district court's reasons for the dispositional departure are improper and that the record is insufficient to support the departure. The district court imposes a dispositional departure when the sentencing guidelines recommend a committed prison term but the district court instead stays a prison sentence and orders probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court has broad discretion in making sentencing decisions, and we will not reverse a sentencing decision unless the district court

abused that discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014). But the district court may only depart from the sentencing guidelines if substantial and compelling reasons exist to support the departure. Minn. Sent. Guidelines 2.D (2016). To avoid abusing its discretion in departing from a presumptive sentence, the district court “must exercise that discretion by *deliberately considering* circumstances for and against departure.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (emphasis added) (quotation omitted). This consideration is often guided by a number of different factors, commonly referred to as the *Trog* factors. See *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (citing *Trog*, 323 N.W.2d at 31). One of these factors is whether the defendant has a “particular amenability to individualized treatment in a probationary setting.” *Trog*, 323 N.W.2d at 31; see also *Soto*, 855 N.W.2d at 308 (“[W]e have never said that merely being amenable to probation—as opposed to being *particularly* amenable to probation—can justify staying a presumptively executed sentence.”).

Here, the district court provided the following rationale for granting Lee’s request for a dispositional departure:

I was willing to give you a dispositional departure because it looks like you may be amenable to treatment and may be amenable to probation. But Mr. Lee, I don’t want you to leave out of here misled: If you come back to me on a subsequent violation, can’t say what I’m going to do definitively, but there is a fairly good chance that you’re going to do a substantial amount of prison time. Just so you know what the stakes are going forward.

The state argues that the district court’s finding that Lee “may be amenable to treatment and may be amenable to probation” fails to satisfy the particularity requirement.

In determining whether a defendant is particularly amenable to probation to justify a downward dispositional departure, the district court may take into account “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.* Lee contends that he presented many of these factors, including his age, his criminal history score, his remorsefulness, his behavior in court, and his cooperation with the PSI process to the district court. But based on the district court’s reasoning on the record, we conclude that the district court failed to adequately consider the *Trog* factors in deciding to impose a downward dispositional departure.

Lee urges this court to affirm the district court’s sentencing decision, arguing that he explained to the district court that his successful completion of probation reduced his felony-level criminal vehicular operation to a misdemeanor and that he was therefore unaware that any future DWI-related offense would be charged as a felony. But, while he explained this reason to the district court, the district court’s rationale on the record does not reveal that it considered this reason in making its decision to impose the departure. Therefore, this argument cannot be deemed as a “substantial and compelling” reason supporting the departure. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981); Minn. Sent. Guidelines 2.D (2016). Moreover, the prior conviction is likely construed as an offense-related factor whereas “[a] dispositional departure typically focuses on characteristics of the defendant.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016); *see also Heywood*, 338 N.W.2d at 244 (stating that when justifying dispositional departure, district court may focus “more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society”)

Because the district court's reason for imposing the dispositional departure is inadequate, we conclude that the district court abused its discretion. We therefore reverse and remand the case for resentencing consistent with this opinion. *See Soto*, 855 N.W.2d at 315 ("The district court may, in its discretion, conduct additional fact-finding on whether a dispositional departure is justified or execute the presumptive sentence under the Sentencing Guidelines.").

Reversed and remanded.