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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1306**

State of Minnesota,
Appellant,

vs.

Christopher Carl Remley,
Respondent.

**Filed March 5, 2018
Affirmed; motion granted
Bratvold, Judge**

Dakota County District Court
File No. 19HA-CR-16-2914

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

James C. Backstrom, Dakota County Attorney, Cassandra K. Shepherd, Assistant County Attorney, Hastings, Minnesota (for appellant)

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

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

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant State of Minnesota challenges respondent's sentence, which included a downward dispositional departure after respondent pleaded guilty to fifth-degree

controlled substance crime. The state asserts that the district court erred by departing from the Minnesota Sentencing Guidelines without substantial and compelling circumstances in the record. Because the district court did not abuse its discretion, we affirm.

FACTS

On January 25, 2016, agents with the Dakota County Drug Taskforce executed a search warrant at a home in Hastings, Minnesota. The agents discovered “two syringes, one of which was loaded with a crystal substance” and “miscellaneous drug paraphernalia.” The Minnesota Bureau of Criminal Apprehension determined that the syringe contained 0.12 grams of a mixture containing methamphetamine. Respondent Christopher Carl Remley was at the home when the agents executed the warrant. He admitted to using methamphetamine, but denied that the syringe belonged to him. The state charged Remley with two offenses: fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2014), and possession of drug paraphernalia, a petty misdemeanor, in violation of Minn. Stat. § 152.092 (2014).

On March 28, 2017, Remley waived his trial rights and pleaded guilty to the January 25 controlled-substance offense, admitting that the substance was methamphetamine and that it belonged to him. Remley also pleaded guilty to a separate felony charge for counterfeiting that occurred on May 28, 2016. Remley’s plea acknowledged that there was no agreement as to the sentence; his attorney would seek a downward departure and the state would ask for a guidelines sentence. The district court accepted the pleas and ordered a Presentence Investigation (PSI), as well as a psychological and chemical-dependency evaluation. Sentencing was initially scheduled for May 19, but

was continued at Remley's request. The PSI report was filed on June 8, 2017, and indicated that Remley had not completed the chemical-dependency evaluation.

On June 21, the parties appeared for sentencing. The court informed Remley that the information in the PSI was "not necessarily sympathetic towards you, because you need to get a chemical dependency assessment done and you need to get off the meth." But the court also noted that Remley had "gotten [him]self in a more stable situation," ordered a urinalysis, and continued sentencing to allow Remley to complete his chemical-dependency evaluation. On June 29, probation filed the chemical-dependency evaluation, which recommended that Remley complete an outpatient treatment program.

On June 30, the parties appeared for sentencing, and again, the court continued sentencing to see "how [Remley] do[es] in treatment," which was scheduled to begin on July 6. At the same hearing, Remley pleaded guilty to several misdemeanors and related probation violations, one of which occurred while he was awaiting sentencing on the January 25 controlled-substance offense.

The parties appeared again for sentencing on August 15. Both parties commented on materials submitted to the court. The PSI report summarized Remley's personal and criminal history, noted his criminal history score of seven, described Remley's mental-health issues and drug use, and stated that "there is concern about the level of commitment he has to make any changes." The report recommended a presumptive executed guidelines sentence of 21 months.

Remley's psychological evaluation noted that Remley had missed two scheduled appointments, but completed his interview and testing. The evaluation stated that Remley

had the following diagnoses: methamphetamine use disorder, opioid use disorder, antisocial personality disorder, bipolar disorder, and potential post-traumatic stress disorder (PTSD). The report noted that Remley's drug addiction is a "significantly debilitating problem" and recommended a residential program that would incorporate mental health treatment. The psychologist commented that Remley "has serious health problems that suggest that this really is a life or death issue for him." The report recommended that Remley comply with his mental-health treatment plan, but also stated that Remley "has no habit of such compliance."

Remley's probation officer prepared an addendum to the PSI report, which noted that Remley had completed one outpatient treatment session in July, reported drug use on that day, and was then a "no call/no show" for his subsequent sessions. After missing several treatment sessions, Remley called the treatment center, informed them that he was in jail, and stated that he wanted to attend a different treatment program because the first program was faith-based and "he is not Christian." The addendum noted that probation was not able to verify whether Remley had started a different treatment program, that Remley had not maintained contact with his supervising agent, and that he had a new charge pending for check forgery on July 3, 2017.

During the sentencing hearing, Remley's attorney argued for a dispositional departure, based on Remley's particular amenability to probation. Remley's attorney explained that Remley's entry into treatment was delayed because the first program was faith-based and because insurance had delayed its approval of funding for the program. Remley's attorney also stated that, on August 17, Remley had an intake appointment

scheduled with a different treatment program. If Remley were accepted, the program would take ten months and would address both his substance-abuse and mental-health issues. Remley's counsel added that Remley was regularly attending Alcoholics Anonymous, was working with an Adult Rehabilitative Mental Health Services (ARMHS) worker, and was working full time. Remley's attorney stated that Remley had secured stable housing and had recently reconciled with his father. Remley's attorney argued that the changes in Remley's life were a "remarkable turnaround."

Remley also addressed the court. Remley admitted that he struggled with homelessness and drug addiction, but stated that he now had supportive people around him, a good job, and stable housing. Remley stated that he recognized that he had never entered a treatment program before and this opportunity "was a break of a lifetime."

The state opposed any departure, arguing that Remley was not particularly amenable to probation because he failed to comply with court orders, attend required evaluations, and remain law abiding. The state asserted that, since the plea hearing, Remley "ha[d] picked up the following new charges: [t]heft for shoplifting with a date of offense of April 14th, 2017; driving after revocation, with a date of offense of March 14th, 2017; an additional theft by shoplifting, the date of offense of April 14th, 2017; and check forgery, a felony, with a date of offense of July 3rd, 2017." The state argued that, because there was no basis to depart, "the guideline sentence [was] appropriate" and Remley should receive a "middle-of-the-box" sentence of 25 months.

The district court stated that Remley's evaluations indicated that some of his mental-health issues stem from his inability to stop using drugs. The district court expressed

frustration with Remley for failing to begin treatment even though he had “several months to kind of get the ball rolling on that.” The district court stated that, after reading the PSI and psychological evaluation, it had planned to sentence Remley to jail for eight months and require participation in a Dakota County treatment program. But, after hearing arguments at sentencing, the district court decided to grant Remley’s motion, sentence one of the felony charges, and continue sentencing on the other felony charge to determine whether Remley could follow through with treatment.

The district court then sentenced Remley for 21 months, but stayed execution of the sentence for five years on the condition that Remley start treatment on August 17, 2017. The district court also imposed an additional 30 days in jail, but told Remley that he would not serve that time if he started treatment on August 17. The district court also told Remley that this was his chance to “sink or swim.”

The district court expressly found that Remley was particularly amenable to probation, had shown remorse, accepted responsibility for his offense, and that Remley’s compliance with probation would be ensured by the longer supervision period. The district court also stated that Remley’s crime was less onerous than usual. The state appeals.

D E C I S I O N

I. We will not consider materials outside the district court record.

After the state appealed, Remley filed a motion to strike portions of the state’s brief and addendum. Pages A1-A2 of the state’s addendum include an email exchange between the district court judge, Remley’s attorney, the state’s attorney, and a probation officer. Remley argues that this email exchange was not filed with the district court, and therefore

is not part of the record on appeal. “The documents filed in the [district] court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases.” Minn. R. Civ. App. P. 110.01. “An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below.” *Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988). We grant the motion to strike and decline to consider materials that are outside the record.

II. The district court did not abuse its discretion by granting Remley’s motion for a downward dispositional departure.

The Minnesota Sentencing Guidelines provide a sentencing range for many offenses, including the offense of which Remley was convicted, and a sentence within the range is “presumed to be appropriate.” Minn. Sent. Guidelines 2.D.1. (2015). A district court may depart from the presumed sentence only 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); *see also* Minn. Sent. Guidelines cmt. 2.D.103. The reasons for a sentencing departure must be “placed on the record at the time of sentencing.” *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003).

We afford the district court “great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *Soto*, 855 N.W.2d at 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) (2014).

A downward dispositional departure is based on “offender-related” factors and focuses on the defendant as an individual. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998). The sentencing guidelines contain a “nonexclusive list” of mitigating factors that can justify a downward dispositional departure. For example, a dispositional departure may be appropriate when “substantial grounds exist that tend to excuse or mitigate the offender’s culpability,” or when the offender is “particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a (5), (7). Particular amenability to probation by itself can support a downward departure. *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001); *see also Soto*, 855 N.W.2d at 308 (holding “mere” amenability to probation “does not rise to the level of what we have previously held to justify a departure from the guidelines”).

The state argues that the reasons the court provided for its departure are not supported by the record. Specifically, the state objects to the court’s findings that Remley was particularly amenable to probation, that his longer supervision period ensures compliance with probation, and that this crime was less onerous than usual. Because a finding of particular amenability to probation is sufficient to support a downward departure, *Gebeck*, 635 N.W.2d at 389, and we conclude that the district court did not abuse its discretion by making this finding, we address only the state’s first objection.¹

¹ We note that the district court erred in its determination that a dispositional departure was warranted because Remley’s offense was “less onerous than usual.” A dispositional

Determining whether a defendant is particularly amenable to probation allows the district court to consider “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). “These factors are not to be applied mechanically, but must be evaluated within the individual facts of each case.” *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). “[A]menability to probation depends on an offender’s ability to comply with the conditions of probation and benefit from the opportunity for rehabilitation that probation affords.” *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003).

On appeal, the state argues that Remley is not particularly amenable to probation because he failed to cooperate with his chemical-dependency and psychological evaluations, missed meetings with this mental-health caseworker and with probation, and did not begin treatment as scheduled. The state also argues that, after entering his guilty plea, Remley failed to remain law-abiding. Taken together, the state argues, these facts suggest that Remley is not amenable to probation.

The state’s argument on appeal repeats the argument it made at the sentencing hearing. Our review of the record indicates that the district court carefully considered the facts and openly struggled with its sentencing decision. The district court expressed

departure is based on “offender-related” factors and focuses on the defendant as an individual. *Behl*, 573 N.W.2d at 713. A durational departure, on the other hand, may be justified by offense-related reasons, such as the seriousness of the crime. *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017). In light of our analysis of the other reason for departure, the district court’s error was harmless.

frustration with Remley's failure to begin treatment and questioned Remley's ability to comply with the treatment plan. The court acknowledged that Remley has a history of violating probation conditions.

The district court determined, however, that Remley was particularly amenable to probation and granted his motion for a downward dispositional departure. The district court heard arguments about Remley's recent "remarkable turnaround" based on a stable home, job, and relationships. Remley's attorney explained why treatment had been delayed, and the district court appeared to accept this explanation. The district court's comments at sentencing indicate that it weighed the facts, considered the arguments, and concluded that Remley was particularly amenable to probation.

The district court also considered Remley's motivation to finally rehabilitate. In a similar context, this court has recognized that a district court may consider whether a "defendant is amenable to supervision rather than imprisonment," and, if "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). Remley testified that he had never "worked a [treatment] program like this." Although the district court initially had planned to send Remley to jail and require a Dakota County treatment program, it ultimately determined that Remley would benefit from a different treatment program and a longer stayed sentence. The district court addressed public safety concerns by imposing a longer supervision period, which it determined would ensure Remley's compliance with the

probation terms. *Gebeck*, 635 N.W.2d at 390 (“[P]robation thus provides the district court with greater leverage to assure [an offender’s] success and the public’s safety.”).

The district court provided specific incentives for Remley to enter treatment, for example, by continuing sentencing on another felony offense, to which Remley had entered a guilty plea. The district court told Remley that if he violated probation, he would receive a “top end of the box” sentence for that offense. Additionally, the court stayed execution of the controlled-substance sentence on the condition that Remley began treatment on August 17, 2017. The district court also imposed an additional 30 days in jail, but told Remley that he would not have to serve the jail time if he started treatment on August 17. The district court conditioned Remley’s probation on “maintaining [his] sobriety.”

Our review of the record leads us to conclude that the district court considered factors both in favor of and against a dispositional departure, and determined that the presumptive sentence was not the “best for [Remley] and for society.” *See Malinski*, 353 N.W.2d at 210 (citation omitted). We conclude that the district court did not abuse its discretion by finding that Remley was particularly amenable to probation and granting Remley’s motion for a downward dispositional departure.

Affirmed; motion granted.