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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1874**

State of Minnesota,
Respondent,

vs.

Rick William Olsen,
Appellant.

**Filed February 19, 2019
Affirmed
Schellhas, Judge**

Dakota County District Court
File No. 19HA-CR-15-3088

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Keith Ellison, Attorney General, St. Paul, Minnesota; and

James C. Backstrom, Dakota County Attorney, Dain Olson, Assistant County Attorney, Hastings, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Schellhas, Judge; and Smith,
John, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant argues that he is entitled to withdraw his guilty plea under the manifest-injustice standard because his plea was involuntary. Alternatively, appellant argues that he is entitled to be resentenced because the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

In August 2015, appellant Rick Olsen robbed Premier Bank with a black airsoft gun that closely resembled a real gun. He demanded money from two tellers and took \$2,145 from the bank. Respondent State of Minnesota charged Olsen with first-degree aggravated robbery in violation of Minn. Stat. § 609.245, subd. 1 (2014). At a plea hearing on October 17, 2016, the district court noted that it would consider a downward dispositional departure at sentencing. The court emphasized that its willingness to consider a downward dispositional departure did not mean that it would not impose “a guideline sentence, but it does mean [that the court] will consider something other than a guideline sentence.” The court also stated that it “would like to get a better read on [Olsen] rather than having to make a snap decision today or a month from now,” and the court set sentencing for six to twelve months later.

Olsen pleaded guilty, and the court released him from custody with the requirements that he attend treatment, meet with his sponsors from Narcotics Anonymous (NA), and remain law-abiding. The district court set a review hearing for April 14, 2017. At the review hearing, the court stated that it received “a good report on everything [Olsen was] doing”

and told Olsen to “keep doing it, for all the right reasons, and make sure it never happens again. But as I told your attorney, you have still got to deal with what happened on [August 7, 2015].”

The district court ordered a presentence investigation report (PSI), which revealed that Olsen completed a chemical-dependency assessment and was in remission from his drug addiction. He periodically attended NA meetings, although he did not provide verification of how often he attended. At Olsen’s sentencing hearing on August 25, 2017, the court heard testimony from Olsen’s daughter regarding his progress in the past year. Olsen’s therapist submitted a letter to the court, stating that Olsen had attended 23 individual sessions regarding his depression and anxiety and attended family therapy with his daughter. Addressing Olsen, the court stated:

First of all, I can tell you, you stand before me changed from what happened at the time you robbed the bank. No doubt about it.

. . . .

And I want to tell you you’ve worked really hard and you’ve done a lot of good things since you’ve been charged.

. . . .

Comes down to, though, punishment. The thing that people forget sometimes in the system is sentencing deals not only with the ability to rehabilitate but to punish. And when you had a gun in somebody’s face at a bank, it’s a prison sentence. You’re going to come out of this okay. You’ve got your family behind you, and every day will be long, but you’ll get out of this, and you’ll be the man that you have become. But you can’t put a gun, stick in somebody’s face, ask for money and not think that you’re going to prison for that. To me that’s prison

and society thinks that. There are certain things that can't be tolerated regardless of rehabilitation.

The court then sentenced Olsen to a guidelines sentence of 48 months in prison.

This appeal follows.

DECISION

Guilty Plea

Olsen argues that he must be permitted to withdraw his plea because his plea was involuntary. Alternatively, he argues that this court should vacate his sentence and remand to the district court for resentencing on the basis that he is particularly amenable to probation.

“At any time the court must allow a defendant to withdraw a guilty plea upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice.” Minn. R. Crim. P. 15.05, subd. 1. “A manifest injustice exists if a guilty plea is not valid.” *State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010). “To be valid, a guilty plea must be accurate, voluntary, and intelligent.” *Id.* Whether a plea is valid is a legal question we review de novo. *Id.*

“To be voluntary, a guilty plea may not be based on any improper pressures or inducements.” *State v. Dikken*, 896 N.W.2d 873, 876–77 (Minn. 2017) (quotation omitted). “[A] plea is involuntary when it is induced by coercive or deceptive action.” *Id.* at 877. A plea also is involuntary when it “rests in any significant degree on a promise or agreement” that goes unfulfilled. *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005). If a promise within a plea agreement is not fulfilled, “the voluntariness of the plea is drawn into

question.” *State v. Wukawitz*, 662 N.W.2d 517, 526 (Minn. 2003). “Whether a plea is voluntary is determined by considering all relevant circumstances.” *Raleigh*, 778 N.W.2d at 96.

Olsen argues that his guilty plea was “induced by the unfulfilled and illusory promise that the district court would consider a dispositional departure,” because the court never considered a downward departure. But under the plea agreement, the court approved a “slow sentencing” and set a review hearing for six to twelve months later. The court stated that it would consider a downward departure after getting “a better read on [Olsen] rather than having to make a snap decision.” The court conducted a review hearing on April 14, 2017, to review Olsen’s progress.

At the sentencing hearing on August 25, 2017, the district court recognized Olsen’s progress in the community through his involvement in treatment and counseling but found that his progress did not mitigate the seriousness of his offense. The record shows that the court considered Olsen’s motion for a downward departure. We conclude that Olsen’s plea was voluntary and valid and not induced by an unfulfilled promise.

Downward Dispositional Departure

“District courts are most often in the best position to evaluate whether a sentencing departure is appropriate based on their unique perspective on all stages of a case.” *State v. Stempfley*, 900 N.W.2d 412, 420 (Minn. 2017) (quotation omitted). “[Appellate courts] afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014) (quotation and footnote omitted). “The Minnesota Sentencing

Guidelines, however, limit the sentencing court’s discretion by prescribing a sentence or range of sentences that is presumed to be appropriate.” *Id.* at 308 (citing Minn. Sent. Guidelines 2.D.1.) (quotation marks omitted). “A sentencing court must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *Id.* (quotation omitted). “Accordingly, a sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present.” *Id.* (quotation omitted). The aggravating or mitigating circumstances must provide a substantial and compelling reason not to impose a guidelines sentence. *Id.* “[Appellate courts] have express statutory authority to review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” *Id.* at 312 (citing Minn. Stat. § 244.11, subd. 2(b) (2012)) (quotation marks omitted).

The district court departs dispositionally if it “orders a disposition other than that recommended in the Guidelines.” Minn. Sent. Guidelines 1.B.5.a. (2017). “[A] defendant’s *particular* amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence.” *Soto*, 855 N.W.2d at 308 (quotation omitted). But a district court is not required to depart from the guidelines even when it finds that a defendant is particularly amenable to probation. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (noting that even when substantial and compelling circumstances exist, the district court “may” depart); *State v. Olson*, 765

N.W.2d 662, 664–65 (Minn. App. 2009) (stating that “the district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation, but it is not required to do so”).

Olsen argues that the district court abused its discretion by failing to find that Olsen’s particular amenability to probation warranted departure, and by failing to consider circumstances for and against departure.

Particular Amenability to Probation

When determining if a defendant is particularly amenable to probation, relevant factors to consider include “the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Soto*, 855 N.W.2d at 310 (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)) (quotation marks omitted). Olsen argues that he is particularly amenable to probation. He argues that his bank robbery was his first felony offense; he had not been revoked on probation in the past; he “took accountability by acknowledging at the plea hearing that he entered the bank, brandished an article that resembled a dangerous weapon at the tellers, and took the money”; he cooperated by pleading guilty; his “attitude in court would favor a dispositional departure”; he had significant familial support; and he successfully completed treatment before sentencing.

But Olsen’s PSI reported that he continues to avoid responsibility for his offense and may be attempting to manipulate the system to delay sentencing. Additionally, while a chemical-dependency assessment in November of 2016 indicated that Olsen attended NA three to four times a week, Olsen provided no verification of his NA attendance, and a

collateral report stated that he attended NA only one to two times a week. Aside from a letter from Olsen's therapist describing his participation in NA and his therapy sessions, Olsen submitted no further substantiation of his NA attendance, treatment progress, recovery plans, or community programming.

At Olsen's review and sentencing hearings, the district court acknowledged Olsen's progress in the community. *See Jackson v. State*, 329 N.W.2d 66, 67 (Minn. 1983) (considering the defendant's experience with treatment when reviewing a dispositional departure). But "the mere fact that a mitigating factor is present in a particular case does not obligate the court to place defendant on probation or impose a shorter term than the presumptive term." *State v. Pegel*, 795 N.W.2d 251, 253–54 (Minn. App. 2011) (quotation omitted); *see also Kindem*, 313 N.W.2d at 7 ("[T]he Guidelines state that when substantial and compelling circumstances are present, the judge may depart. This means that the [district] court has broad discretion and that we generally will not interfere with the exercise of that discretion." (quotation omitted)). Here, the court ultimately found at sentencing that Olsen's progress and success in therapy were not enough to overcome the need for punishment. The court stated that although Olsen had made progress, "sentencing deals not only with the ability to rehabilitate but to punish." Based on the record, we conclude that the district court did not abuse its discretion when it denied Olsen's motion for a downward dispositional departure.

Circumstances For and Against Departure

"If the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against

departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). By considering these factors, a district court “will avoid sentencing that is either mechanical or callous.” *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984).

Olsen argues that the district court did not properly consider all the factors for and against departure in connection with his departure motion. We disagree. A district court is not required to consider all of the *Trog* factors before imposing a presumptive sentence. *Pegel*, 795 N.W.2d at 254. Here, the record reflects that the district court properly considered reasons for and against departure. We therefore conclude that the district court did not abuse its broad discretion when it denied Olsen’s request for a downward departure.

Affirmed.