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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-2028**

State of Minnesota,
Appellant,

vs.

Severo Perez-Nava,
Respondent

**Filed July 23, 2018
Reversed and remanded
Bjorkman, Judge**

Dakota County District Court
File No. 19HA-CR-17-811

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

James C. Backstrom, Dakota County Attorney, Deanna N. Natoli, Assistant County Attorney, Hastings, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Larkin, Judge; and Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

The state challenges respondent's stayed sentence for first-degree criminal sexual conduct, arguing that the record does not support the downward dispositional departure

and the district court erred by considering the fact of respondent's imminent deportation. We reverse and remand.

FACTS

Respondent Severo Perez-Nava was charged with six counts of criminal sexual conduct involving his ten-year-old stepdaughter, S.G.M. Perez-Nava is a Mexican citizen and had permanent-resident status in the United States at the time of the offenses. When Perez-Nava was released on bail, he was immediately detained by the Department of Homeland Security Immigration and Customs Enforcement (ICE) in a pending immigration matter. Perez-Nava was allowed to appear for a bail-modification hearing in this case, and the district court reinstated the original restrictive bail conditions and ordered him held in Dakota County Jail pending trial.

Perez-Nava petitioned to enter an *Alford*¹ plea to one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(h)(iii) (2016) (penetration with complainant under age 16 in significant relationship with the actor and multiple acts over extended time period), in exchange for dismissal of the other charges. At his October 9, 2017 plea hearing, Perez-Nava agreed that the state would offer evidence that he perpetrated prohibited sex acts on S.G.M., including various types of sexual penetration, on multiple occasions from October 1, 2016, to January 31, 2017, while they resided in the same house. He verified admissions he made concerning the nature and frequency of his

¹ An *Alford* plea permits a defendant to enter a guilty plea while maintaining innocence after conceding that the record includes sufficient evidence to support a conviction. *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977); see *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S. Ct. 160, 168 (1970).

abusive acts, and admitted that “S.G.M. would not be lying about what she told the police had occurred.”

After accepting Perez-Nava’s plea and convicting him, the district court proceeded immediately to sentencing; Perez-Nava waived a presentence investigation.² The presumptive sentence for first-degree criminal sexual conduct committed by an offender with no criminal history is an executed sentence of 144-172 months. Minn. Sent. Guidelines 4.B (2016). Defense counsel orally moved for a downward dispositional departure, arguing that Perez-Nava was particularly amenable to probation due to his 15-year history of steady employment, negligible criminal history (a 2002 misdemeanor-level domestic-assault conviction), and expression of remorse. Counsel asserted that S.G.M. had recanted her allegations and her mother had “expressed doubt” about the allegations and wished to “prevent trauma to the victim.” And defense counsel argued that Perez-Nava would not be a risk to the public because he was “going to be deported.”³

Although the prosecutor acknowledged that Perez-Nava was respectful in court, she argued that he lacked family and community support, failed to take full responsibility for

² A district court must order “independent professional assessment of [a sex] offender’s need for sex offender treatment . . . before sentencing. The court may waive the assessment if: (1) the Sentencing Guidelines provide a presumptive prison sentence for the offender, or (2) an adequate assessment was conducted prior to the conviction.” Minn. Stat. § 609.3457, subd. 1 (2016). If the court does not sentence the offender to prison, it must require the offender to undergo treatment “[i]f the assessment indicates that the offender is in need of and amenable to sex offender treatment.” *Id.*, subd. 3 (2016).

³ Federal immigration law provides that a noncitizen who is convicted of “an aggravated felony” after entering the United States “is deportable.” 8 U.S.C.A. § 1227(a)(2)(A)(iii) (2017). Sexual abuse of a minor meets the definition of an aggravated felony. 8 U.S.C.A. § 1101(a)(43)(A) (2017).

the offense by entering an *Alford* plea, and was not amenable to treatment in a probationary setting due to his imminent deportation. As to the likelihood of Perez-Nava's deportation, the prosecutor informed the district court that she

was able to speak with Chief Counsel for Immigration and Customs Enforcement in . . . [the] Minneapolis-St. Paul Division . . . and he confirmed what we already knew in that once the defendant returns to ICE custody he goes before an immigration judge who will order that he be removed from the country, and that that will be an expeditious process. He also indicated that this defendant, in the file there was a notation that he didn't intend to fight removal from the United States.

The prosecutor also reported that the victim was reluctant but nevertheless willing to testify. In his statement to the court, Perez-Nava said:

Your honor . . . I would repent. I'm honest person. I'm hard working person. All I ask you is to give mercy on me. I plead guilty because I don't want any harm on [S.G.M.]. I care about them. And I believe if I get removed from this country they will be safe and they don't have to worry about me around.

After first noting that Perez-Nava's deportation was imminent "regardless of the outcome" of this case, the district court imposed the presumptive 172-month sentence but stayed execution. The court expressly adopted defense counsel's proposed departure grounds, stating:

The reasons for the departure will be those reasons set forth by your attorney, with respect to amenability to probation, the fact that you plead[ed] guilty, accepting responsibility, we'll insure compliance here for a longer period of time, you'll be supervised for a longer period of time.

I'm particularly concerned about the trauma that this trial would have caused the witness, the victim. And I'm also—the indications—the family, hoping to avoid the trial, further proceedings. So for those reasons and others

mentioned by defense counsel I'm going to depart from an execution of the sentence.

The district court gave Perez-Nava credit for time served and directed his release from custody. His probation conditions include completing a psychological-sexual evaluation and following its treatment recommendations. Perez-Nava was deported from the United States about two weeks later. The state appeals.

DECISION

A district court must impose the presumptive sentence unless a departure is warranted by “identifiable, substantial, and compelling circumstances.” Minn. Sent. Guidelines 2.D.1 (2016); *see State v. Solberg*, 882 N.W.2d 618, 625 (Minn. 2016) (“Because the [sentencing] guidelines’ goal is to create uniformity in sentencing, departures are justified only in exceptional cases.”). A court departs dispositionally if it “orders a disposition other than that recommended in the Guidelines.” Minn. Sent. Guidelines 1.B.5.a (2016). An offender’s particular amenability to probation may support a dispositional departure. Minn. Sent. Guidelines 2.D.3.a(7) (2016). This departure factor focuses on the defendant’s individual characteristics, typically as they relate to his ability to be successful on probation. *Solberg*, 882 N.W.2d at 623.

We afford the district court “great discretion in the imposition of sentences” and we review “decisions to depart from the sentencing guidelines only for an abuse of discretion.” *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotations omitted). This standard, “while deferential, is not a limitless grant of power to the [district] court.” *State v. Soto*, 855 N.W.2d 303, 312 (Minn. 2014) (quotation omitted). A district court abuses its

discretion when its reasons for departure lack support in the record or are not legally valid. *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009).

I. The record does not support the district court’s valid departure grounds.

A defendant’s particular amenability to probation is demonstrated by such factors as “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. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quoting *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); further referenced as the “*Trog* factors”).

In *Soto*, the supreme court reversed a stayed sentence for first-degree criminal sexual conduct because the record did not establish that Soto was *particularly* amenable to probation. 855 N.W.2d at 314. Before sentencing, Soto underwent a diagnostic assessment that showed he was an “appropriate candidate” for outpatient sex-offender treatment. *Id.* at 307. The district court relied heavily on this assessment when imposing a probationary sentence. In reversing, our supreme court distinguished “amenability” from “particular amenability” to probation, ruling that a departure is warranted only when the defendant’s “amenability to probation distinguishes [him] from most others.” *Id.* at 309. Absent evidence that Soto would benefit from particular treatment in a probationary setting, the supreme court held that the diagnostic assessment was inadequate to establish Soto’s particular amenability to probation. *Id.* at 309-10. After independently assessing the other *Trog* factors, the supreme court concluded that they did not show that Soto was particularly amenable to probation. *Id.* at 310-14.

The sentencing transcript and departure report indicate the district court relied on the following departure grounds: Perez-Nava's 15-year employment history, cooperation throughout the proceedings, acceptance of responsibility, lack of criminal history, and expression of remorse. The court also noted the victim's reluctance to testify and that public-safety concerns would be alleviated by Perez-Nava's imminent deportation. Perez-Nava contends that the record supports these valid departure grounds. We are not persuaded.

As in *Soto*, the district court did not make the requisite finding of particular amenability to probation. And our independent review of the record does not support such a finding or otherwise convince us that Perez-Nava is the atypical sexual offender who should receive a stayed sentence. *See State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (requiring independent appellate review of the district court record to determine the sufficiency of the district court's reasons for departure). Perez-Nava was 41 years old at the time of sentencing, is estranged from his family, and offers no evidence of his employers' continued support following this conviction. *See Soto*, 855 N.W.2d at 310 (rejecting the age of the 37-year-old defendant as a ground for finding him particularly amenable to probation, noting that to do so would apply the ground to all "except the most elderly or infirm"). By entering an *Alford* plea, Perez-Nava neither took personal responsibility for nor expressed remorse for his actions. His statement of "apology" at sentencing included no expression of self-reproach for his repeated criminal acts. And Perez-Nava's attitude and cooperation during the court proceedings may have been commendable, but we are not convinced that these singular facts set him apart from the

typical first-degree criminal-sexual-conduct offender, demonstrate his particularly suitability for probation, or outweigh the state's interest in punishing him for the serious crime he committed on a child victim. *See State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008) (stating that “the presence of factors supporting [a dispositional] departure does not require departure”), *review denied* (Minn. Mar. 31, 2009); *State v. Law*, 620 N.W.2d 562, 565 (Minn. App. 2000) (reversing a stayed sentence for attempted murder that included both an upward durational departure and a downward dispositional departure, based on this court's collective experience that “the severity of [the defendant's] violent act dictate[d] a different result”), *review denied* (Minn. Dec. 20, 2000); *see also* Minn. Sent. Guidelines 1.A. (2016) (expressing sentencing guidelines' purposes to “reduce sentencing disparity” and promote “[e]quity in sentencing”).

Moreover, the record contains no evidence demonstrating Perez-Nava has the potential to be rehabilitated if given a probationary sentence. “The purpose of probation is rehabilitation” *State v. Austin*, 295 N.W.2d 246, 250 (Minn. 1980). Perez-Nava waived a presentence investigation and did not complete a psychological-sexual evaluation or any other type of diagnostic assessment that would show that he is “*particularly* amenable to individualized treatment in a probationary setting.” *Soto*, 855 N.W.2d at 310 (quoting *Trog*, 323 N.W.2d at 31). Absent such evidence, any basis for treating Perez-Nava differently than others convicted of the same offense who received executed sentences is tenuous at best. The record does not support the district court's determination that valid departure grounds exist.

II. Deportation is not a legally valid departure ground.

The parties agree that the possibility of a defendant's deportation is not a proper sentencing consideration. See *State v. Sanchez Mendoza*, 638 N.W.2d 480, 482 (Minn. App. 2002) (stating that "[s]entencing a defendant on the basis of alienage is unconstitutional"), review denied (Minn. Apr. 16, 2002). Yet, Perez-Nava's imminent deportation permeated these proceedings from the time bail was set until his sentence was pronounced. Both parties discussed Perez-Nava's deportation as a factor for the district court's consideration at sentencing. And the district court specifically mentioned deportation before stating its decision to depart from the presumptive executed sentence. Because immigration status and anticipated deportation are not valid departure grounds, any reliance by the district court on these grounds would be an abuse of discretion.

Finally, Perez-Nava's counsel argues that his client's deportation renders this appeal "moot because effective relief cannot be granted due to [his] right to be present at sentencing." See Minn. R. Crim. P. 26.03, subd. 1(1)(h) (requiring the defendant to "be present . . . for every stage of the trial including . . . sentencing"). Appellate courts consider "only live controversies" and will dismiss an appeal as moot if "unable to grant effectual relief." *State ex rel. Humphrey v. Philip Morris Inc.*, 606 N.W.2d 676, 690 (Minn. App. 2000) (quotations omitted), review denied (Minn. Apr. 25, 2000). The state disagrees, citing Perez-Nava's return to this country in violation of the immigration laws following his 1996 voluntary deportation. Because it is conceivable that Perez-Nava will once again re-enter this country, and the state has a strong interest in advocating for a guidelines sentence, we reject Perez-Nava's mootness argument.

In sum, we conclude that the district court abused its discretion by granting Perez-Nava a dispositional departure. Accordingly, we reverse and remand for imposition of a sentence within the presumptive guidelines range. We leave to the district court the decision whether further fact-finding is necessary. *See Soto*, 855 N.W.2d at 315 (stating that on remand “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.