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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0180**

State of Minnesota,
Appellant,

vs.

Anthony Charles Resemius,
Respondent.

**Filed September 24, 2018
Reversed and remanded
Smith, John, Judge***

Pine County District Court
File No. 58-CR-17-464

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

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Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant
Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Schellhas, Presiding Judge; Larkin, 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UNPUBLISHED OPINION

SMITH, JOHN, Judge

We reverse respondent's sentence because the district court erroneously relied on offender-related factors to impose a downward durational departure and the record discloses no other valid ground for departure. We remand to the district court for resentencing within the presumptive guidelines range.

FACTS

During a traffic stop on May 11, 2017, a state trooper pat-searched respondent Anthony Charles Resemius and discovered over 170 grams of methamphetamine on his person. Resemius was charged with a first-degree controlled-substance offense (possession) and giving false information to a peace officer, a gross misdemeanor.

Consistent with a plea agreement, Resemius pleaded guilty to the controlled substance offense in exchange for dismissal of the other charge and the right to argue for a downward durational departure to the mandatory minimum sentence of 48 months. The presumptive sentencing range for Resemius, who has a criminal history score of four, was 90-126 months. Minn. Sent. Guidelines 4.C (2016). The corrections agent who prepared the presentence investigation report noted Resemius's difficult family life and troubled youth, but also noted that he was placed "on probation many times in the past," and had violated probation after he received a downward dispositional departure on another first-degree controlled substance conviction. Ultimately, the agent recommended that Resemius receive a 48-month prison sentence.

At Resemius’s sentencing hearing, the state argued that the offense was more serious than the typical offense because of the substantial amount of methamphetamine found in his possession and that Resemius improperly relied on his own characteristics, rather than the seriousness of the offense, in seeking a durational departure. Defense counsel elicited testimony about Resemius’s positive progress in treatment and argued that he demonstrated remorse through treatment participation. Before being sentenced, Resemius apologized for his conduct, stating that he “had a problem with drugs and alcohol my entire life” and admitting that in the past he had sold drugs to support his “habit,” but that his current treatment was “probably the greatest thing that ever happened to me aside from my children.” The district court imposed a 48-month executed sentence, a downward durational departure, taking into account how quickly Resemius took responsibility for the offense and pleaded guilty, adhered to his release conditions, and remained law-abiding. The district court concluded that those factors “reduce[d] the severe nature of the original offense and justify the departure.”

D E C I S I O N

A district court’s decision to depart from the presumptive guidelines sentence is discretionary. *State v. Stempfley*, 900 N.W.2d 412, 417-18 (Minn. 2017). A dispositional departure “places the offender in a different setting than that called for by the presumptive guidelines sentence,” and is based on offender-related factors that show whether the defendant is particularly suited to probation, which, in turn, is shown by a “defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court,” and other relevant factors. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted).

A durational departure alters the length of a sentence and “must be based on factors that reflect the seriousness of the offense, not the characteristics of the offender.” *Id.* (emphasis omitted). Generally, remorse is not a proper factor to consider in deciding whether to depart durationally, unless it “relate[s] back and [provides] evidence of remediation that makes the conduct significantly less serious than the typical conduct underlying the offense of conviction.” *Id.* at 625-26. Even a single factor such as remorse may provide adequate evidence of a substantial and compelling reason to depart from a presumptive sentence. *Id.* at 627.

In *Solberg*, the defendant expressed remorse for committing third-degree criminal sexual conduct, but the supreme court rejected the defendant’s argument that remorse “made his conduct significantly less serious than the typical conduct underlying the offense of conviction.” *Id.* at 626. Instead, the supreme court stated that “Solberg’s statements of regret during the investigation and the district court proceedings” did not justify a downward durational departure, holding “that remorse is not relevant to a downward durational departure unless the remorse somehow diminishes the seriousness of the offense.” *Id.* at 627.

Here, Resemius apologized for his crime, but like *Solberg*, that remorse did not make his crime any less serious than the typical first-degree controlled-substance offense. Resemius was convicted of two prior controlled-substance crimes in the two years preceding the current offense, violated probation for failure to complete chemical-dependency treatment for one of those offenses, and was on probation for one of the offenses when he committed the current offense. When stopped by the state patrol, he lied

about his identity and about the contents of the baggies found on his person that contained methamphetamine. He took a new tack only at sentencing, apologizing to the district court, explaining his unfortunate childhood circumstances, disclosing his current participation in chemical-dependency treatment, and admitting that he had been selling and using controlled substances at the time of the current offense. This is not a district court record that differs significantly from *Solberg* or suggests that Resemius's crime was less serious than the typical offense. Rather, these facts are more like *State v. Rund*, 896 N.W.2d 527, 535 (Minn. 2017), where the supreme court ruled that the defendant's expression of remorse was inadequate to lessen the seriousness of his conduct, discounting the defendant's confession that "was made after he was already in custody."

Resemius also argues that the totality of circumstances otherwise supports the departure, particularly because "[t]his case is . . . a 'situational offense' unlikely to reoccur." See *State v. Heath*, 685 N.W.2d 48, 65 (Minn. App. 2004) (establishing that if stated reasons for sentencing departure are inadequate, the appellate "court must examine the record to determine whether there is sufficient evidence to affirm the district court's departure"), review denied (Minn. Nov. 16, 2004); *State v. Bendzula*, 675 N.W.2d 920, 924 (Minn. App. 2004) (affirming a downward durational departure on a controlled substance offense when the defendant was "prompted" to sell drugs by police even though the defendant refused to become an informant, which the district court found mitigated the defendant's conduct). We disagree. Given his significant criminal history of similar offenses, Resemius cannot effectively argue that his current offense was "situational," and the record does not disclose any other offense-related factor that would support a durational

departure. *See State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003) (quotation omitted) (stating that when “the reasons given [for a departure] are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed”).

Reversed and remanded.