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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0336**

State of Minnesota,
Respondent,

vs.

Michael Robert Adkins,
Appellant.

**Filed June 18, 2018
Affirmed
Hooten, Judge**

Anoka County District Court
File No. 02-CR-16-6003

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County
Attorney, Anoka, Minnesota (for respondent)

Jill A. Brisbois, Minneapolis, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and Hooten,
Judge.

U N P U B L I S H E D O P I N I O N

HOOTEN, Judge

Appellant challenges his sentence for a domestic assault conviction. He argues that the district court failed to exercise its discretion because it did not consider factors in favor of a downward dispositional departure. We affirm.

FACTS

In September 2016, police officers were called to an apartment in Blaine. On the scene, the officers spoke with the female resident of the apartment who “was bleeding from a gash on her forehead that appeared swollen and egg shaped.” She explained to the officers that her boyfriend, appellant Michael Adkins, had punched her in the face, causing her to lose consciousness. As a result, Adkins was charged with felony domestic assault under Minn. Stat. § 609.2242, subd. 4 (2016) and third-degree assault under Minn. Stat. § 609.223, subd. 1 (2016).

Adkins pleaded guilty to felony domestic assault in October 2017. Because of his criminal history, the presumptive sentence for Adkins is 33 months with a range of 29 to 39 months. The pre-sentence investigation report recommended that the district court sentence Adkins to 29 months in prison. The probation officer who performed the pre-sentence investigation reasoned that Adkins is not amenable to community supervision because of his criminal history and the fact that his last four felony offenses were committed while under supervision in the community. The prosecutor also recommended a 29-month sentence. She argued that a downward dispositional departure would not be appropriate because Adkins is not amenable to probation and there is a risk that he will revert to alcohol use—a recurring theme in his criminal history—and harm another person. She also contended that Adkins’s age and criminal history cut in favor of a presumptive sentence rather than a dispositional departure.

Adkins’s trial counsel asked the district court to place Adkins on probation. His argument was supplemented by a memorandum prepared by Amy B. Butler, a dispositional

advisor and mitigation specialist. The memorandum details Adkins's difficult life and recent efforts toward self-improvement, including attending therapy and maintaining sobriety since December 31, 2016. It concludes that Adkins is "particularly amenable to both treatment and probation" and that it would not be in society's best interests to incarcerate him.

The district court sentenced Adkins to 29 months in prison. This appeal follows.

D E C I S I O N

Adkins argues on appeal that the district court failed to exercise its discretion because it did not consider the factors that favor a downward dispositional departure in his case. Our caselaw is clear that a district court may not depart from a presumptive sentence unless there are substantial and compelling circumstances justifying such a departure. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011). And the decision to depart from the sentencing guidelines rests within the district court's discretion. *Id.* But if there are "compelling circumstances for departure," then they "should be deliberately considered." *State v. Curtiss*, 353 N.W.2d 262, 263, 264 (Minn. App. 1984). In fact, a district court errs if it "put[s] aside arguments for departure rather than considering them alongside 'valid reasons' for non-departure." *Id.* at 264 (citation omitted). That is because such "[c]onsideration of compelling circumstances is central to the scheme of the sentencing guidelines, and the practice will avoid sentencing that is either mechanical or callous." *Id.*

Adkins asserts that substantial and compelling circumstances are present in his case because he is particularly amenable to probation. It is true that particular amenability to probation is considered a substantial and compelling circumstance. *See State v. Cameron*,

370 N.W.2d 486, 487 (Minn. App. 1985). So it follows that if a criminal defendant demonstrates particular amenability to probation, a district court must consider that amenability when deciding whether to depart from the sentencing guidelines.

The question thus becomes: did the district court consider whether Adkins is particularly amenable to probation? Minnesota courts look to several factors in deciding whether a defendant is particularly amenable to probation, including: age, prior record, remorse, cooperation, attitude in court, and support of friends or family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Adkins specifically argues that the “remorse” and “support of family and friends” factors are present in his case. With respect to remorse, he points to the fact that he took responsibility for the crime at the plea hearing, that he did not minimize his role in the offense during the pre-sentence investigation, and that he expressed remorse both in his letter to the court and in his allocution at sentencing. With regard to the support factor, he cites to a number of letters of support from family members, a friend, his employer, his therapists, and his daughter’s guardian ad litem. Adkins also more generally argues that he is particularly suitable to individualized treatment in a probation setting because he has already “made remarkable strides towards addressing the issues that underlie his violent behavior” by attending counseling, maintaining sobriety, and being employed. We must determine whether the district court considered these factors.

To do so, we look to the district court’s comments at sentencing. And we note that a district court is not required to discuss every *Trog* factor in order to properly exercise its discretion; it need only carefully consider circumstances for and against departure. *Pegel*, 795 N.W.2d at 252, 254–55. The district court acknowledged that “[t]here are factors I am

required by the law to look at in choosing whether to grant a departure.” And it told Adkins, “You fulfill none of those factors. You have not shown an amenability to probation.” It explicitly discussed the age factor, noting that Adkins is “still a young man.” It also implicitly recognized that Adkins had made efforts to address his issues with alcohol and that he has the support of family and friends. But the district court expressed some concern, saying “I don’t think there’s anyone in this courtroom, including you . . . that can really guarantee me that drunken Mike won’t come back. And based on the history I have, when drunken Mike comes back, people get hurt and people hurt seriously, and at some point I have an obligation to society.” The district court did not discuss the Butler memorandum or the remorse factor, but it received the memorandum, heard arguments from Adkins’s trial counsel, received Adkins’s letter, and heard his allocution. Crucially, in finding that Adkins is not amenable to probation the district court explained that it was making its decision “based on the information that I have in front of me.” In other words, it was considering what had been presented to it, which necessarily means that it considered Adkins’s arguments why he is amenable to probation. This comment, as well as the arguments that the district court heard at sentencing and its mention of the factors that it is required to look at, satisfies us that the district court properly considered whether Adkins is particularly amenable to probation.

We also note that the standard for particular amenability to probation is demanding. The Minnesota Supreme Court explained in *State v. Soto* that the word “particular” is deliberately included in the amenability-to-probation standard to “ensure that the defendant’s amenability to probation distinguishes the defendant from most others” and

really provides the substantial and compelling circumstantial circumstances required to justify a departure from the sentencing guidelines. 855 N.W.2d 303, 309 (Minn. 2014). Moreover, the supreme court noted that while diagnostic assessments “can contain useful information for determining whether a defendant is particularly amenable to probation,” the “mere fact” that such a report recommends that a defendant is particularly amenable to probation does not mean that a departure from the guidelines is necessarily justified. *Id.* While Adkins received a favorable assessment in the Butler memorandum, there were factors that cut against a downward dispositional departure, including, most notably, his repeated prior failures on probation. Were the issue raised on appeal, we would conclude that the district court did not abuse its discretion in finding that Adkins is not *particularly* amenable to probation.

The district court also addressed what would be best for Adkins and for society. *State v. Heywood* explains that a district court “can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society” when justifying a dispositional departure. 338 N.W.2d 243, 244 (Minn. 1983). Both the Butler memorandum and Adkins’s trial counsel argued that it would be best for Adkins and society that he be put on probation so that he could continue to make progress in therapy. The district court responded to this argument by saying:

Undoubtedly it would be good for you and your family if I didn’t send you to prison. The question is, would it be good for society? And based on your criminal history, based on your repeated assaults while on probation, based on your previous actions, knowing full well those actions would result in a prison commit . . . I cannot find you amenable to probation or amenable to treatment. History simply doesn’t support you.

It is clear to us that the district court was also deliberate in its consideration of what is best for Adkins and what is best for society.

Because we are satisfied that it deliberately considered the factors in favor of a downward dispositional departure “alongside ‘valid reasons’ for non-departure,” *see Curtiss*, 353 N.W.2d at 264, we conclude that the district court did not abuse its discretion in denying Adkins’s request for a disposition departure.

Affirmed.