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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0605**

State of Minnesota,
Respondent,

vs.

Tracy Lynn Bailey,
Appellant.

**Filed March 25, 2019
Affirmed
Johnson, Judge**

Cass County District Court
File No. 11-CR-17-201

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

Benjamin T. Lindstrom, Cass County Attorney, Walker, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina D. Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

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

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

JOHNSON, Judge

Tracy Lynn Bailey pleaded guilty to first-degree driving while impaired (DWI).
Before the sentencing hearing, she moved for a downward dispositional departure on the
ground that she is particularly amenable to probation. The district court denied the motion

and imposed a sentence within the presumptive range prescribed by the sentencing guidelines. We conclude that the district court did not err by denying Bailey's motion and, therefore, affirm.

FACTS

On February 2, 2017, at approximately 9:37 p.m., the Leech Lake tribal police department received a report that a woman driving a silver Chevrolet Impala on U.S. Highway 2 may be intoxicated. Cass County Deputy Sheriff Diaz heard the report and saw a car matching the description. Deputy Diaz followed the car, saw it weave, and pulled it over. Deputy Diaz observed that the driver, Bailey, "had bloodshot, watery eyes, poor balance and slurred speech." Bailey failed three field sobriety tests and declined to take a preliminary breath test. Diaz arrested Bailey and transported her to the county jail. He did not read her the implied-consent advisory but, rather, sought and obtained a search warrant authorizing the taking of a sample of her blood. The blood test revealed that Bailey had an alcohol concentration of 0.251. On the day of her arrest, Bailey had four prior DWI convictions since 2000 and was on supervised release from imprisonment for a 2009 felony DWI conviction.

The state charged Bailey with first-degree DWI for operating a motor vehicle while under the influence of alcohol, in violation of Minn. Stat. § 169A.20, subd. 1(1) (2016), and first-degree DWI for operating a motor vehicle with an alcohol concentration of 0.08 or more within two hours, in violation of Minn. Stat. § 169A.20, subd. 1(5).

In November 2017, Bailey and the state entered into a plea agreement in which Bailey agreed to plead guilty to count 1 and the state agreed to dismiss count 2. The state

also agreed to not request a sentence more severe than an executed sentence of 41 months of imprisonment, which is the shortest sentence within the presumptive range specified by the sentencing guidelines.

Before sentencing, Bailey moved for a downward dispositional departure, requesting a stayed sentence and probation. The district court held a sentencing hearing in February 2018. Bailey's attorney argued that Bailey's conduct during the one-year period between the offense and the sentencing hearing demonstrates that she is particularly amenable to probation. Bailey's attorney stated that Bailey's efforts to manage her mental health and her sobriety "make her distinctive . . . from the average probationer."

Bailey testified that she is seeing a psychiatrist, is participating in individual therapy, and is involved in Alcoholics Anonymous (A.A.). She testified that being diagnosed with and treated for bipolar disorder has given her a positive outlook, and she expressed remorse about the offense. Bailey also read a prepared statement about the changes she had made in her life during the previous year. She stated that it was "the first year of my adult life that I feel I've had a chance to grow, to learn about who I am, and to accept the challenges that I need to [accept]." Bailey submitted several documents in support of her motion, including a mental-health assessment, a chemical-use assessment, A.A. attendance logs, an individual mental-health treatment plan, records of her psychiatric treatment, and a letter from her therapist.

Bailey also called three witnesses in support of her motion. Her probation officer, Tabatha Schact, testified that Bailey had fully complied with the terms of her house arrest since the date of the offense, had maintained contact with her, had taken the initiative to

follow through on the conditions and recommendations concerning her mental health and chemical dependency, and had remained sober, as evidenced by daily alcohol testing. Bailey's daughter, Amber Hill, testified that she has noticed positive changes in her mother since the offense, including a greater commitment to sobriety, increased time spent with family, and a "determin[ation] to take care of herself . . . her family and . . . her life." Bailey's A.A. sponsor, Jennifer Martineau, testified that Bailey attends an average of two meetings per week and has taken on leadership roles in her A.A. groups. Martineau testified that she has noticed improvements in Bailey's mental health based on her ability to "differentiate between the bipolar and the alcoholism" and that Bailey has maintained her commitments in spite of "numerous very traumatic losses" in the past year. Martineau stated that "this time there's a whole different approach to [Bailey's] sobriety."

The state opposed Bailey's motion and requested an executed sentence of 41 months of imprisonment. The prosecutor stated that Bailey is polite and cordial but has a record of prior DWI convictions and has not been successful on probation in the past. The prosecutor argued that there was no assurance that the house-arrest and alcohol-monitoring procedures that "worked for the interim period here would be available for the longer period of time." The corrections officer who authored the pre-sentence investigation report recommended an executed sentence of 48 months of imprisonment, which is the mid-point of the presumptive range.

At the conclusion of the sentencing hearing, the district court denied Bailey's motion and imposed an executed sentence of 41 months of imprisonment. Bailey appeals.

DECISION

Bailey argues that the district court erred by denying her motion for a downward dispositional departure.

The Minnesota Sentencing Guidelines generally provide for presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2016). For any particular offense, the presumptive sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent. Guidelines 1.B.13 (2016). Accordingly, a district court “must pronounce a sentence . . . within the applicable [presumptive] range unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2016). The sentencing guidelines provide non-exclusive lists of mitigating and aggravating factors that constitute identifiable, substantial, and compelling circumstances and, thus, may justify a departure if such circumstances are found to exist. See Minn. Sent. Guidelines 2.D.3 (2016).

If a defendant requests a downward dispositional departure, a district court first must determine whether “‘mitigating circumstances are present’” and, if so, whether “those circumstances provide a ‘substantial[] and compelling’ reason not to impose a guidelines sentence.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting *State v. Best*, 449 N.W.2d 426, 427 (Minn. 1989), and Minn. Sent. Guidelines 2.D.1). If so, the district court has discretion to order a downward dispositional departure. *Id.*; *Best*, 449 N.W.2d at 427. In exercising its discretion, the district court must “deliberately consider[] circumstances for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002),

review denied (Minn. Apr. 16, 2002). “[T]he mere fact that a mitigating factor is present . . . does not obligate the court to place defendant on probation.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (quotation omitted). If a district court orders a departure from the presumptive sentence, the district court must state the reason or reasons for the departure. Minn. Sent. Guidelines 2.D.1.c (2016). If the district court does *not* order a departure, the district court is *not* required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

This court generally applies an abuse-of-discretion standard of review to a district court’s denial of a motion for a downward dispositional departure. *Soto*, 855 N.W.2d at 307-08. But a district court has discretion to depart from the presumptive range “only if aggravating or mitigating circumstances are present; if aggravating or mitigating circumstances are not present, the trial court has no discretion to depart.” *Best*, 449 N.W.2d at 427 (emphasis omitted). A district court abuses its discretion if “its decision is based on an erroneous view of the law.” *Soto*, 855 N.W.2d at 308 n.1 (quoting *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011)). Thus, to the extent that the determination whether aggravating or mitigating circumstances are present “turns on a question of law,” we apply a *de novo* standard of review. *See id.* And to the extent that a district court has discretion to depart from the presumptive range, we defer to the district court’s decision and reverse only if there is “insufficient evidence of record to justify the departure.” *See id.* at 308 (quoting *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002)).

Bailey's motion for a downward dispositional departure is based on the seventh mitigating factor in the sentencing guidelines: particular amenability to probation. See Minn. Sent. Guidelines 2.D.3.a.7 (2016). The requirement that a defendant be "particularly" amenable to probation "ensure[s] that the defendant's amenability to probation distinguishes the defendant from most others and truly presents the 'substantial and compelling circumstances' that are necessary to justify a departure." *Soto*, 855 N.W.2d at 309; see also Minn. Sent. Guidelines. cmt. 2.D.303 (2016). In determining whether a defendant is particularly amenable to probation so as to justify a downward dispositional departure, a district court may consider, among other things, "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). A district court need not discuss all of the *Trog* factors if the district court denies a motion for a downward dispositional departure. *Pegel*, 795 N.W.2d at 254.

In this case, the district court acknowledged Bailey's evidence and found her testimony and that of her witnesses to be credible. But the district court noted Bailey's history of multiple DWI convictions and the fact that, at the time of her offense, she was on supervised release from imprisonment for a prior felony-level DWI, which followed a probation violation and the execution of a stayed sentence. The district court expressed concern that Bailey's mental-health and chemical-dependency issues would be challenging and stated that she has "a very consistent life-long record of . . . falling off the wagon." The district court addressed Bailey by stating: "The work that you've done changes your life and those of the people that love you and that are around you and hopefully the general

public at some point too. But I don't agree that it meets the legal standard of particular amenability to probation." These and other parts of the record indicate that the district court fully considered Bailey's arguments and evidence and stated reasons that are more than adequate for its decision to deny the motion for a downward dispositional departure.

Bailey nonetheless argues that the *Trog* factors and applicable caselaw demonstrate that the district court erred by concluding that she is not particularly amenable to probation. Bailey contends that the evidence in the record shows that she is, in fact, particularly amenable to probation, "as demonstrated by her acceptance of responsibility and remorse for the crime, the support of her family and community, her demonstrated compliance with supervision, the significant efforts she has made to maintain her sobriety and, most importantly, the work she has done to address her newly diagnosed mental illness—the symptoms of which played a significant role in her history of alcohol use." She contends that the district court relied exclusively on her prior record in denying her departure motion.

The district court did not err by determining that Bailey is not particularly amenable to probation. To be sure, the evidentiary record includes some evidence indicating that Bailey is somewhat amenable to probation. The record indicates that she has made progress since receiving a new mental-health diagnosis, and the district court complimented her on the positive changes she had made. But the evidentiary record includes at least as much evidence indicating that Bailey is not amenable to probation. She has been unsuccessful on probation in the past and has a history of multiple DWI offenses. The district court is not required to ignore or minimize Bailey's prior criminal history. See *Pegel*, 795 N.W.2d at 253-54. The existence of conflicting evidence makes it difficult for

Bailey to establish that she is *particularly* amenable as a matter of law, which requires her to show that the “circumstances provide a substantial and compelling reason not to impose a guidelines sentence” and that there is sufficient “evidence of record to justify the departure.” *See Soto*, 855 N.W.2d at 308 (quotations omitted).

In sum, the district court did not err by denying Bailey’s motion for a downward dispositional departure.

Affirmed.