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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0849**

State of Minnesota,
Appellant,

vs.

Frank Quintero,
Respondent.

**Filed April 8, 2019
Affirmed
Florey, Judge**

Nobles County District Court
File No. 53-CR-17-312

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

Kathleen A. Kusz, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant Nobles County Attorney, Slayton, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Bjorkman, Judge; and
Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

In this sentencing appeal, the state argues that, because the record does not support a determination that respondent is particularly amenable to probation, the district court abused its discretion by dispositionally departing. The state further argues that the district court erred by finding the offense less serious than usual and by considering that finding in its departure determination. We affirm.

FACTS

In April 2017, police executed a search warrant at “Lot 37” and “Lot 38” in Worthington, Minnesota. Respondent Frank Quintero, a woman, a young child, and methamphetamine paraphernalia were found inside a trailer at Lot 38. A man, R.R., was found in a shed adjacent to Lot 38, as was methamphetamine, drug paraphernalia, and a shotgun shell. Respondent admitted to possessing the shotgun shell and stated that he put it in the shed around two months earlier. Several children who routinely resided at Lot 38 were placed under protective custody, including respondent’s 11-year-old son.

The state charged respondent with four counts: possession of ammunition by a person convicted of a crime of violence, a violation of Minn. Stat. § 624.713, subd. 1(2) (2016); fifth-degree methamphetamine possession; storing methamphetamine paraphernalia in the presence of a child; and petty-misdemeanor possession of drug paraphernalia. The state later dismissed the petty-misdemeanor charge. Respondent pleaded guilty to the remaining charges with the intent of seeking a dispositional departure.

The district court deferred acceptance of the pleas pending a presentence investigation (PSI) and chemical-use assessment.

The PSI report noted six prior felonies: a 2016 conviction for marijuana possession, a 1999 conviction for unauthorized use of a motor vehicle, 1996 and 1994 convictions for driving after suspension or revocation, a 1990 conviction for first-degree burglary, and a 1990 conviction for unauthorized use of a motor vehicle. The report noted five misdemeanor or gross-misdemeanor offenses, including 2006 and 2002 convictions for fourth-degree assault. At the time of the PSI report, respondent was on probation for the felony marijuana-possession offense. Although the presumptive sentence for the possession-of-ammunition charge was a 60-month executed sentence, the PSI report recommended that execution of the sentence be stayed. *See* Minn. Stat. § 609.11, subd. 5(b) (2016) (requiring imprisonment “for not less than five years”).

Respondent moved for a dispositional departure, arguing, in part, that he was particularly amenable to probation. The state opposed a dispositional departure, but was not opposed to a durational departure, and conceded that the possession of one shotgun shell is “less serious than the typical offense.” The district court granted a dispositional departure. The court acknowledged that respondent has a “significant” criminal and chemical-use history, but found that there were substantial and compelling reasons to depart because of respondent’s particular amenability to probation, as demonstrated by his behavior and attitude since his arrest. The court found that respondent had not violated any release conditions, he had approximately four months of clean drug tests, and his son was returned to him because he completed child-in-need-of-protection-or-services

(CHIPS) programming. The court also discussed respondent's offense and stated that possession of "one shotgun shell, is a basis for a departure here."

On the charge of unlawful possession of ammunition, the district court stayed execution of the 60-month sentence. The district court imposed a presumptive 15-month stayed sentence for the fifth-degree possession charge, and a presumptive 17-month stayed sentence for the charge of storing methamphetamine paraphernalia in the presence of a child.

The district court filed a departure report indicating that the crime was less onerous than usual, respondent was particularly amenable to probation, respondent showed remorse and/or accepted responsibility, and the departure was recommended by court services. The court noted that respondent "worked his case plan" in the CHIPS case, he "tested negative for drugs upon admission to jail and has not had one positive drug test administered by probation or social services," and he "has demonstrated that [he] is particularly amenable to probation in the community given his response to services and programming offered to him and due to his cooperative attitude throughout both of his cases." This appeal followed.

DECISION

Although possessing ammunition in violation of Minnesota Statutes section 624.713, subdivision 1(2), normally carries a mandatory minimum prison term of five years, a district court may depart from the mandatory minimum sentence if it finds a substantial and compelling reason to do so. *See* Minn. Stat. § 609.11, subs. 5(b), 8(a) (2016). "A district court has broad discretion to depart from the sentencing guidelines, and

[this court] review[s] its decision to depart for an abuse of discretion.” *State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013).

The state raises two primary challenges to the sentencing departure. First, the state argues that the record does not support a determination that respondent is particularly amenable to probation. Second, the state asserts that the district court erred by finding the offense less serious than usual and by considering that finding in its departure determination. We address each of these arguments in turn.

I. The record supports the district court’s determination that respondent is particularly amenable to probation.

“A defendant’s particular amenability to probation justifies a district court’s decision to stay the execution of a presumptively executed sentence.” *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). A “defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family, are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982).

The district court noted that, at the time of sentencing, respondent was 47 years of age, most of his “serious” criminal history was “older,” he showed remorse, he was cooperative, he complied with his CHIPS-related conditions and programming, he maintained his sobriety, and he had not violated any release conditions. In addition, the PSI report recommended a stayed sentence. We will find that the district court abused its discretion by dispositionally departing only if the “reasons are improper or insufficient and there is insufficient evidence of record to justify the departure.” *State v. Soto*, 855 N.W.2d

303, 308 (Minn. 2014) (quotations omitted). Here, the district court's reason for the departure, particular amenability to probation, was proper and sufficiently supported by the record.

The state repeatedly argues that respondent was not particularly amenable to probation because he committed a felony while on felony probation. The district court was cognizant of respondent's criminal history, but concluded that respondent's substantial compliance with his criminal case and CHIPS case indicated a particular amenability to probation. The district court did not abuse its discretion. "Even if we might have come to a different conclusion had we been weighing the evidence ourselves, that is not the applicable standard upon appellate review." *State v. Stempfley*, 900 N.W.2d 412, 419 (Minn. 2017).

The state challenges the district court's consideration of respondent's CHIPS case as a basis for concluding that respondent was particularly amenable to probation. The state argues that the district court never took judicial notice of the case or "otherwise incorporate[d] its facts by reference." However, at the sentencing hearing, respondent's counsel asked the district court to take judicial notice of the CHIPS case. Although the state opposed a dispositional departure and argued that "the fact that [respondent] complied with a CHIPS plan is not a sufficient basis for a departure," the state did not challenge the district court's consideration of the CHIPS case. The district court did not err by considering the CHIPS case. *See In re Zemple*, 489 N.W.2d 818, 820 (Minn. App. 1992) (concluding that a district court did not abuse its discretion by taking judicial notice of findings made in a separate proceeding).

II. The district court did not err by relying on the seriousness of respondent's offense.

The state next argues that the record does not support a determination that respondent's offense was less serious than usual, and to the degree that the district court relied upon the seriousness of respondent's offense in granting a dispositional departure, the district court erred.

Regarding the offense being less serious than usual, at the sentencing hearing, respondent explained the circumstances under which he came to possess the shell, stating that he took it from a boy who wanted to throw it into a fire, and he placed it into the shed. The state then conceded the offense was less serious than usual. The district court ultimately agreed, noting that "possession of one shotgun shell is a far cry from possessing a weapon and . . . committing a crime with the weapon, or even possessing a weapon for that matter." "[W]e are bound to uphold the district court's evaluation of the facts and its discretionary sentencing decision unless our review of the record reveals an abuse of that discretion." *Stempfley*, 900 N.W.2d at 419. On these facts, we cannot conclude that the district court abused its discretion by determining that constructive possession of one shotgun shell was less serious than usual.

As to the district court's consideration of the seriousness of the offense, the state is correct that dispositional departures focus on the characteristics of the offender and durational departures focus on the offense. *See State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). However, the supreme court has indicated that it is not an abuse of discretion for a district court to consider offense-related factors when deciding whether to

dispositionally depart. In *Stempfley*, a district court granted a dispositional departure based upon the defendant's minor or passive role in the offense. 900 N.W.2d at 413, 416. Although the state did not challenge the basis for the departure and only challenged whether the basis was supported by the record, the supreme court ultimately "conclude[d] that the district court acted within its broad discretion." *Id.* at 413, 419.

In *State v. Chaklos*, the supreme court noted that offense-related factors may be used to support dispositional departures and ultimately concluded that an upward dispositional departure was justified because the defendant's conduct was "significantly more serious than that typically involved in the commission of the offense in question." 528 N.W.2d 225, 228 (Minn. 1995).

The state acknowledges that "offense-based aggravating factors may . . . form the basis for an aggravated dispositional departure," but argues that analyzing offense-based mitigating factors infringes on the powers of the legislative branch. We disagree. *See State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018) ("For a downward dispositional departure, a district court may consider both offender- and offense-related factors."). The legislature has expressly permitted departures from the mandatory minimum sentence at issue. *See* Minn. Stat. § 609.11, subd. 8(a). The district court did not abuse its discretion by considering the seriousness of the offense, and even if the district court did err, there are additional grounds for the departure, namely, respondent's particular amenability to probation.

Affirmed.