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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0936**

State of Minnesota,
Appellant,

vs.

Chad Michael Gibson,
Respondent.

**Filed April 8, 2019
Reversed and remanded
Hooten, Judge**

Rice County District Court
File No. 66-CR-17-475

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

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Faribault, Minnesota (for appellant)

Chad Michael Gibson, St. Paul, Minnesota (pro se respondent)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Cochran,
Judge.

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

HOOTEN, Judge

In this appeal from the district court's grant of a downward dispositional sentencing departure for criminal vehicular homicide, the state argues that the district court misapplied the law in its consideration of whether respondent's conduct was less egregious than that

of the typical offender and abused its discretion by finding that respondent was particularly amenable to probation, was remorseful, and cooperated with law enforcement. Because the district court erred in its application of the law and by finding that respondent was particularly amenable to probation, we reverse and remand for resentencing.

FACTS

In mid-August of 2016, respondent Chad Michael Gibson was driving south on I-35 going 78 miles per hour when he, without braking or slowing down, crashed his truck into a line of stopped vehicles in a construction zone. A married couple was in the car that respondent hit directly. Following the impact, both vehicles burst into flames and the couple was trapped in their car. After some time being trapped in the burning car, both were freed and were airlifted to a hospital for treatment. The husband died shortly thereafter from his injuries. The wife also suffered significant injuries from the crash, including multiple bone fractures, but survived, albeit with a long recovery period. Multiple other cars were hit indirectly, and multiple other people were injured.

The cars were stopped because of a delay due to a construction project. Before the crash, as Gibson was driving south, he passed a portable reader-board sign about five miles north of the scene of the crash that flashed alternating messages: “BE PREPARED TO STOP” and “ROAD WORK 6 MILES AHEAD.” There were two signs about three miles north of the scene of the crash that read: “ROAD WORK AHEAD.” And there were signs at two miles, one mile, and just north of the scene of the crash that warned: “USE BOTH LANES DURING BACKUPS.” Just before the crash, Gibson was looking around his car for his drink instead of paying attention to the road, and had his cruise control on.

In January of 2018, Gibson pleaded guilty to Criminal Vehicular Homicide in violation of Minn. Stat. § 609.2112, subd. 1(a)(1) (2016) and Criminal Vehicular Operation–Great Bodily Harm in violation of Minn. Stat. § 609.2113, subd. 1 (2016). That May, at a sentencing hearing, Gibson moved for a downward dispositional departure from the presumptive guidelines sentences. The injured wife and her daughter read victim impact statements at the hearing. Gibson also read a statement in which he purported to take responsibility for his actions. Gibson stated:

This accident has affected many lives. [The] husband died because of the way I was driving. This tragic accident has change many lives in its wake. I've killed someone with my disregard for warning signs and always trying to do too much. *I want the victims and the family of the victims to know that their family is not the only one affected by this incident. It's always on my mind.* Not just because of the felony charges, the Court, lawyer costs, et. cetera, it's the car on fire in my thoughts. And the way it would not go out. *All I could hear is the screams from the car when I see this. I hope you know that not just your family has lost someone, but also mine. I'm not never there. Even when I'm there, I'm not there. This has made my fiancée along with her two girls resent me and at times hate me. I'm sure that Scott and his wife had a lot of plans and good times coming before that day. Well, my fiancée and I, we had big plans also. Now we can barely get along.* I'm very sorry for what has happened. I'll never be the same as I was before the accident. *I punish myself every day for what I have done. I have to live with the fact that I've killed someone, even though it was not on purpose or intentional, I still feel like a horrible person. My driver's license has been revoked for 10 years. My chance of running the company I work for has been cut off. Um, I have to walk a thin line for possibly the rest of my life. And forget about the wedding we could have had.* What I'm trying to say is I am so sorry for your loss and I want you to know that it was not intentional. It was just a bad accident and I had lost focus, and I was in a strange place, and I should have been paying more attention.

After taking the motion under advisement, the district court called the parties back for another sentencing hearing roughly one month later.

The state requested that Gibson be sentenced to the guidelines sentence of 88 months for criminal vehicular homicide and 37 months for criminal vehicle operation, noting that the district court could impose consecutive sentences for the two convictions.¹ Gibson argued for a downward dispositional departure, claiming that because he was not using alcohol or drugs at the time of the crash, he was not a typical offender and that he was particularly amenable to probation.

The district court granted Gibson a downward dispositional departure and imposed stayed concurrent sentences of 105 months and 43 months for the offenses. The district court based its ruling on findings that: Gibson's crime was "less egregious than in the typical case"; he "cooperated with law enforcement"; respondent "show[ed] remorse for his actions"; and, he "maintained a cooperative and respectful attitude" and "made all [court] appearances." The district court also found that Gibson was "particularly amenable to probation" because he "established a history of cooperating with probation." The court also stated, "I find it's important to note that [Gibson's] LS/CMI risk score was stated as nominal."

The state appeals the downward dispositional departure.

¹ According to the Minnesota Sentencing Guidelines, a criminal vehicular homicide is a severity level eight offense. Gibson's presumptive sentence was for a period of 88 months, with a presumptive range of 75 to 105 months. As to the criminal-vehicular-operation charge, a level five offense, there was a presumptive sentence of 43 months, with a presumptive range of 37 to 51 months.

DECISION

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). But this discretion is limited by the Minnesota Sentencing Guidelines which prescribe a range of sentences and dispositions that are “presumed to be appropriate.” Minn. Sent. Guidelines 2.D.1 (2016). A sentencing court “must pronounce a sentence . . . within the applicable range unless there exist identifiable, substantial, and compelling circumstances” that distinguish a case and overcome the presumption in favor of a guidelines sentence. *Id.* A district court also abuses its discretion if it errs in its application of the law or makes findings of fact that are clearly erroneous. *State v. Leonard*, 923 N.W.2d 52, 55 (Minn. App. 2019). “The clearly erroneous standard requires that we be left with the definite and firm conviction that a mistake has been made.” *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008).

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] sentencing court can exercise its discretion to depart from the guidelines *only* if aggravating or mitigating circumstances are present, and those circumstances provide a substantial[] and compelling reason not to impose a guidelines sentence.” *Id.* at 308 (quotations omitted). A district court abuses its discretion “if the court’s reasons are improper or insufficient and there is insufficient evidence of record to justify the departure.” *Id.* (quotations omitted).

Dispositional departures are typically based on offender-related factors, such as particular amenability or unamenability to probation. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (listing factors courts may consider when determining if a defendant is particularly amenable to probation, including defendant’s age, prior record, remorse, cooperation, attitude in court, and support of family and friends); *see also State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (stating that in considering a dispositional departure, the court’s focus is on the defendant as an individual and whether the presumptive sentence is best for him and for society). But they may, in some circumstances, also be based on offense-related factors. *See, e.g., State v. Stempfley*, 900 N.W.2d 412, 418 (Minn. 2017) (upholding a district court’s grant of a downward dispositional departure because the defendant played a “minor” or “passive” role in the offense).

Offense severity

The district court found that Gibson’s actions were less egregious than those of a defendant in a typical case because respondent was not drinking or using drugs, and was not texting or using his phone immediately before the crash. This was an abuse of discretion because it involved a legally irrelevant comparison that did not establish a substantial or compelling reason for departure.

The record does not support the district court’s conclusion that Gibson’s actions were less egregious than those of a typical offender. First, Gibson was not convicted of criminal vehicular homicide caused by impaired driving. That is a separate crime covered by a different subsection of the statute. *Compare* Minn. Stat. § 609.2112, subd. 1(a)(1)

(causing the death of another while driving in a *grossly* negligent manner), with Minn. Stat. § 609.2112, subd. 1(a)(2) (2016) (causing the death of another while driving in a *negligent* manner while under the influence of alcohol or drugs).²

This determination that Gibson’s behavior was less serious than the typical case, based on a comparison of Gibson’s behavior to behavior criminalized in a different part of the statute, is exactly the type of comparison the Minnesota Supreme Court rejected in *State v. Solberg*. 882 N.W.2d 618, 626–27 (Minn. 2016). In relevant part, Solberg argued that his conviction for third-degree criminal sexual conduct was less serious than the typical case because he used coercion, not violence, to achieve sexual penetration. *Id.* The court rejected his argument because penetration using coercion and penetration using force or violence are both criminalized in the same statute. *Id.* The court reasoned that the use of coercion rather than force fit “squarely within the statute’s prohibition.” *Id.* at 627.

As in *Solberg*, Gibson’s grossly negligent conduct fits squarely within the behavior the statute prohibits under subdivision 1(a)(1). Simply because there are other ways of violating the same statute does not mean that one method of violating the statute is the typical way and another is exceptional. In fact, this is an even clearer case of the crimes not being comparable because in *Solberg* the relevant criminal language was not divided by subsections within the statute, *id.* at 626–27, while here the language the district court compared was in different subsections, Minn. Stat. § 609.2112, subds. 1(a)(1), 1(a)(2). The district court therefore abused its discretion when it compared Gibson’s grossly negligent

² While the two crimes are set at the same severity level, they are distinct offenses. See Minn. Sent. Guidelines 5.B. (August 1, 2016).

driving conduct to another situation where a defendant violates the statute by driving negligently while intoxicated.

The district court also found that Gibson's conduct was less egregious than the typical offender's behavior because Gibson was not talking on the phone or texting while driving. The district court stated on the record, "Your gross negligence was that of not paying attention to the flow of traffic." But this was clearly erroneous. Gibson was not grossly negligent simply because he was momentarily distracted; he was grossly negligent because he made the decision to search around for his drink instead of paying attention to the road while driving with his cruise control on at an excessive speed in a marked construction zone.

The district court's determination that there was no grossly negligent "volitional act" is also clearly erroneous. Gibson made conscious decisions to: ignore signs warning of road construction for over five miles prior to the crash, leave his cruise control at an excessive speed of 78 miles per hour as he drove through the construction zone, and notwithstanding the hazards, look for his drink, rather than pay attention to the road, as he plowed into the victims' car without applying his brakes.

We therefore hold that the district court's determination that respondent's behavior was less egregious than that of a typical offender was an abuse of discretion because it involved a legally irrelevant comparison of behavior criminalized under a different subsection of the statute and was predicated on clearly erroneous factual findings.

Particular amenability to probation

In support of its conclusion that Gibson was particularly amenable to probation, the district court analyzed some of the *Trog* factors, but failed to consider other factors.

Criminal history

The district court did not consider respondent's criminal history on the record when analyzing whether he was particularly amenable to probation. The state argues that respondent's criminal record weighed heavily against the district court's finding that he was particularly amenable to probation. We agree. A defendant's criminal record is one of the *Trog* factors that may be used to determine particular amenability to probation. 323 N.W.2d at 31; *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) ("Factors a court can consider when determining whether to grant such a stay include 'the defendant's . . . prior record . . .'" (quoting *Trog*, 323 N.W.2d at 31)). Gibson has an extensive criminal history consisting of five prior felonies, nine prior gross misdemeanors or misdemeanors, 15 traffic citations, and eight probation violations. This weighs heavily against the district court's finding that respondent was particularly amenable to probation.

Cooperation

In its consideration of offender-based factors, the district court credited Gibson by finding that he cooperated with law enforcement and that he made it to all of his court appearances, noting specifically that he had allowed law enforcement to analyze his phone and car without a warrant. There does not seem to be anything in the record on appeal that either supports or contradicts Gibson's cooperation at the scene of the crash, so we cannot say that finding was clearly erroneous. But the district court's finding that Gibson had

made it to all of his court appearances was clearly erroneous because Gibson failed to make his court-ordered first appearance, necessitating the issuance of a warrant for his arrest.

Remorse

The district court credited Gibson's expression of remorse in court and during the presentence investigation as factors justifying a downward dispositional departure. But in January 2017, just months after causing this accident that resulted in the death of one person and serious injuries to several others as a result of his inattentiveness and excessive speed in a construction zone, Gibson was cited for driving over the speed limit. The state also complains that Gibson's statement at his sentencing, which focused primarily upon how the crash impacted his life and the lives of his family—rather than how the accident affected the victims—does not appear to support the district court's conclusion that he was remorseful.

The state also references Gibson's minimization of his role in causing the crash, indicating only that he was a “contributing factor” to the crash, and that there is no indication in the presentence investigation report (PSI) that he expressed remorse for the crash. The closest that the PSI comes to indicating any remorse on Gibson's part is where the report reads that Gibson is “willing to accept sanctions imposed by the courts.” But even this willingness is conditioned because the report noted that Gibson did not believe that the presumptive sentence was “appropriate.” Notwithstanding the concerns raised by the state as to his sincerity, the district court found that Gibson was remorseful.

In *Soto*, the Supreme Court noted that Soto's expression of remorse was questionable due to his continued insistence that the victim was lying and that he was

innocent. 855 N.W.2d at 311. However, it determined that “whether Soto’s apology was genuine or should be given much weight were matters for the district court to decide.” *Id.*

Here, like in *Soto*, respondent’s expression of remorse in court was questionable due to his almost exclusive focus on how he was harmed by the crash with little regard for the victims of his gross negligence, and because of the speeding citation he received after the crash. But, as noted in *Soto*, whether that expression of remorse was genuine and how much weight it deserved were matters for the district court to decide.

Past cooperation with probation and risk

Finally, the district court found that Gibson was particularly amenable to probation because in the five years prior to sentencing, he “established a history of cooperating with probation.” The court noted the Level of Service/Case Management Inventory (LS/CMI) risk score of “nominal” listed on the PSI report as an important factor in this determination as well. The state argues that the district court’s conclusion was an abuse of discretion.

In *Soto*, the Minnesota 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 concluded he was an “appropriate candidate” for outpatient sex-offender treatment. *Id.* at 307. The district court relied heavily on this assessment when it granted a downward dispositional departure. *Id.* In reversing, the supreme court focused on the requirement of “particular amenability” to probation as opposed to a defendant simply being amenable to probation, ruling that a departure is warranted only when the defendant’s “amenability to probation distinguishes [him] from most others.” *Id.* at 309.

“By requiring a defendant to be *particularly* amenable to probation, therefore, we ensure 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.” *Id.* (quotation omitted).

Here, the district court found that in the past five years Gibson had developed a history of cooperating with probation. Gibson supposedly “developed” this history because he was on probation for burglary when he caused the crash. But as the state points out, it is incredible that the district court found that Gibson cooperated with his probation when he was convicted of the two instant felonies while on said probation. Further, Gibson failed to comply with traffic laws while on his most recent probation for burglary because, even after causing the instant crash that resulted in the death of one person and injuring others, Gibson was charged with speeding while driving in January of 2017.

The state cites to *State v. Booher* to support its argument that being convicted of two felonies while on probation cuts against a finding of particular amenability to probation. No. A12-0951, 2013 WL 216031, at *2 (Minn. App. Jan. 22, 2013) (“Respondent committed this offense and several others while he was on probation for a prior offense, demonstrating that he is not amenable to probation.”). While this case is unpublished and therefore not binding, we agree with its reasoning. We hold that Gibson’s failures to comply with probation noted above render the district court’s determination that Gibson cooperated with probation clearly erroneous.

Further, while Gibson may not have had any criminal convictions or probation violations in the three years prior to the fatal crash, he has spent much of his adult life on

probation.³ During that time, he violated his past probationary sentences eight times, in addition to violating his current probation by committing the two felonies at issue in this appeal. And as the state points out, prior probation violations suggest that a defendant is not particularly amenable to probation. *See State v. Plank*, No. C5-93-1435, 1993 WL 536112, at *2 (Minn. App. Dec. 28, 1993) (noting that a past “violation of probation indicates [Plank] has not been amenable to probation”), *review denied* (Minn. Feb. 24, 1994).⁴

The other finding that the district court relied on to support its conclusion that Gibson is particularly amenable to probation was that the PSI labeled him with a LS/CMI risk score of “nominal.” The LS/CMI score is a risk-assessment scale that allows mental-health and case workers to categorize individuals based on the risk and case-management needs they present. But as noted in *Soto*, “the mere fact that the person who prepared a report for the district court reached a certain conclusion does not necessarily justify departing from the presumptive disposition under the guidelines.” 855 N.W.2d at 309 (quotation omitted). The district court judge in that case relied on an assessment that *Soto* could be an appropriate candidate for outpatient treatment. *Id.* But the court in *Soto* found

³ We note that while some of these violations are not recent, the purpose of probation is to rehabilitate the probationer, and Gibson has continued to commit new crimes after his numerous probationary sentences and probation violations.

⁴ In addition to this recent troubling history of failing to comply with traffic-safety laws, respondent has ten citations for either driving after his driver’s license was revoked, or driving without a license. While these occurred between 2002 and 2010, the sheer number of these citations is unsettling. This is especially so because part of respondent’s plea for a lenient sentence was that he will lose his license for ten years and would therefore not be a threat to society if placed on probation.

that a finding of suitability for an outpatient program did not establish that an individual was “*particularly amenable*” to a probationary sentence. *Id.* at 310 (quotation omitted). While the LS/CMI score is valuable in assessing the amount of supervision needed for probation for a specific crime, it is not determinative as to the question of whether a particular defendant is particularly amenable to probation.

Based upon this record, we conclude that the district court abused its discretion in determining that Gibson was particularly amenable to probation given his extensive criminal history and multiple probation violations. We take special note of the fact that these current offenses occurred while respondent was on probation for a burglary conviction.

Independent review

“When a court gives improper reasons for a downward departure, we may independently examine the record to determine whether alternative grounds support the departure.” *Rund*, 896 N.W.2d at 534. Our review of the record does not yield independent justification for the district court’s decision to grant a downward dispositional departure.

Conclusion

The district court misapplied the law in determining that Gibson’s conduct was less egregious than that of a typical offender because it applied a legally impermissible comparison and based its conclusion on clearly erroneous factual findings. Given Gibson’s prior criminal and probationary history and his failure to make all court appearances, the district court’s finding that he was particularly amenable to probation was also clearly erroneous. Because the record does not support that there are “substantial and compelling

circumstances” that would justify a downward dispositional departure from a presumptive guidelines sentence, we reverse the district court’s grant of Gibson’s motion for a downward dispositional departure and remand for resentencing of his offenses in accordance with this opinion.

Reversed and remanded.