STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1048

State of Minnesota,
Appellant,

vs.

Michael John Hill,
Respondent.

Filed November 26, 2018
Affirmed
Kalitowski, Judge[*]

Ramsey County District Court
File No. 62-CR-17-5031

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for appellant)

Charles F. Clippert, Clippert Law Firm, P.L.L.C., St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and Kalitowski, Judge.

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

KALITOWSKI, Judge

In this sentencing appeal, the state argues that the district court abused its discretion when it granted respondent a downward dispositional departure to probation for his conviction of first-degree criminal sexual conduct. We affirm.

D E C I S I O N

"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 Minnesota Sentencing Guidelines prescribe a range of sentences, and the "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 the guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted); s*ee* Minn. Sent. Guidelines 2.D.1. (2016). The district court departs dispositionally if it "orders a disposition other than that recommended in the Guidelines." Minn. Sent. Guidelines 1.B.5.a (2016). This court reviews "the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2016).

I. Respondent's particular amenability to probation

The state argues that the district court abused its discretion when it found respondent was particularly amenable to probation. We disagree.

A defendant's particular amenability to probation may support a downward dispositional departure at sentencing. Minn. Sent. Guidelines 2.D.3.a(7) (2016). "By requiring a defendant to be *particularly* amenable to probation, . . . we ensure that the defendant's amenability to probation distinguished 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 (quotations omitted). 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 gave several reasons to support its finding that respondent was particularly amenable to probation. We review these reasons in turn, and will find that the district court abused its discretion only if the "reasons are improper or insufficient and there is insufficient evidence of record to justify the departure." *Soto*, 855 N.W.2d at 308 (quotations omitted).

First, the district court considered that respondent had no criminal record prior to this offense. While a "defendant's clean record does not by itself justify mitigation of sentence," the court may use this as part of its analysis. *Trog*, 323 N.W.2d at 31. The record supports that respondent had no previous criminal convictions, which weighs in favor of particular amenability.

Second, the district court considered that respondent accepted responsibility early on in this process. When respondent was first arrested, he admitted to having a sexual

relationship with A.L. While it was reported in the presentence investigation that respondent "portrayed the victim as the aggressor" and stated "she was the one who initiated the sexual contact and he 'went along with it,'" the district court relied on the fact that respondent admitted guilt when he was first arrested. We cannot say the district court erred in determining that respondent's cooperation with the investigation by accepting responsibility weighs in favor of particular amenability.

Third, the district court considered that respondent expressed remorse about the offense. Expressions of remorse at the sentencing hearing can support finding a defendant particularly amenable to probation. *Soto*, 855 N.W.2d at 311. At the hearing, respondent apologized and said, "I am very sorry for everything I did. I don't know how it ever came across that I wasn't." The district court's finding that respondent expressed remorse at the sentencing hearing is supported by the record and weighs in favor of particular amenability.

Fourth, the district court considered that respondent took it upon himself to begin a sex offender treatment program. The court stated that respondent's "willingness to engage in a rigorous sex offender program at the end of the day not only is beneficial for him but for his family members and for the rest of us in society." Respondent's cooperation and experience with treatment can be a factor that is considered by the district court. *See State v. Case*, 350 N.W.2d 473, 475 (Minn. App. 1984) (noting that the "court may consider a defendant's prior failures at treatment" when assessing particular amenability). Respondent attended at least three group counseling sessions and underwent an additional psychosexual evaluation. Respondent's initiation of sex offender treatment weighs in favor of particular amenability.

Fifth, the district court considered respondent's familial support at the sentencing hearing. The district court may assess familial support when evaluating amenability to probation and the court found that respondent's family may help him "get to a place where he will never allow himself to engage in this type of behavior again." The record indicates that overall, respondent had familial support during this process, which weighs in favor of particular amenability.

We conclude that the district court appropriately considered the *Trog* factors when it found respondent particularly amenable to probation. Although we may not have reached the same conclusion as the district court, our standard of review compels us to find that the district court did not abuse its discretion.

II. The severity of the offense and punishment

The state argues that sentencing respondent to probation does not adequately reflect the severity of the offense. When a departure from the sentencing guidelines "resulted in a sentence that was disproportional to the severity of the offense of conviction," appellate courts have found an abuse of discretion. *Soto*, 855 N.W.2d at 313 (quotation omitted). This court can "modify a departure if it has a 'strong feeling' the sentence is inappropriate." *State v. Law*, 620 N.W.2d 562, 565 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000).

Soto considered both the defendant's particular amenability to probation and the severity of the crime when ultimately determining whether the district court abused its discretion. *See* 855 N.W.2d at 313 ("Given the brutality of the crime and the absence in the record of any 'substantial and compelling' circumstances that distinguish Soto from other

defendants, a sentence of supervised probation was not proportional to the severity of his offense."). Here, although respondent had an extensive sexual relationship with A.L., we cannot say the sentence was inappropriate or disproportionate to the severity of the offense.

In conclusion, in deference to the district court's broad discretion in sentencing, we affirm the downward dispositional departure.

Affirmed.