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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1122**

State of Minnesota,
Respondent,

vs.

Juan Andres Gonzalez, Jr.,
Appellant.

**Filed June 3, 2019
Affirmed
Smith, Tracy M., Judge**

Polk County District Court
File No. 60-CR-16-1442

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Smith, Tracy M., Presiding Judge; Halbrooks, Judge;
and Klaphake, Judge.*

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

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Following his guilty pleas, appellant Juan Andres Gonzalez Jr. was convicted of multiple offenses, including two controlled-substance offenses. The district court denied Gonzalez's motion for a downward dispositional departure from the presumptive executed prison sentences under the Minnesota Sentencing Guidelines. The district court also determined that the two controlled-substance offenses did not arise out of the same behavioral incident and imposed a sentence for each, to run concurrently. Gonzalez challenges both of these decisions. We affirm.

FACTS

In August 2016, the state charged Gonzalez in Polk County with four criminal counts, all in connection with the sale of controlled substances in 2014. Count one was conspiracy to commit first-degree controlled-substance crime—sale (the conspiracy count); count two was first-degree controlled-substance crime—sale (the sale count); count three was failure to affix a tax stamp; and count four was gross-misdemeanor carrying a pistol without a permit.

The complaint described in detail a drug investigation jointly conducted by the Crookston Police Department, the East Grand Forks Police Department, and the Polk County Sheriff's Office. That investigation included a chain of controlled buys and arrests leading up to the arrest of Gonzalez and his brother, Jerardo Gonzalez, on July 7, 2014. The complaint identified individuals who tipped off the police about the next person in the

chain. Jerardo¹ was the last of these informants; he gave the police Gonzalez's name and identified Gonzalez as his drug source. The record suggests that, shortly after his arrest, Gonzalez also acted as a confidential informant with the Grand Forks Narcotics Task Force and conducted two controlled buys.

According to the complaint, Gonzalez admitted to the following facts when he was in police custody:

[Gonzalez] "fronted" (sold on credit) some cocaine to Jerardo Gonzalez at Jerardo Gonzalez's residence . . . [on July 6, 2014]; Jerardo Gonzalez owed him \$600 for the cocaine; he got back from Texas three weeks ago; he brought back two ounces of cocaine from Texas; he also obtained a couple of ounces of cocaine from his supplier in North Dakota two to three weeks ago; he still had up to one ounce of cocaine at his residence . . . ; [and] he sold and/or possessed approximately four ounces of cocaine during the past few weeks

. . . .

[H]e sold Jerardo Gonzalez approximately 1.75 of the two ounces of cocaine he brought back from Texas; he sold cocaine to Jerardo Gonzalez every week; he also sold Jerardo Gonzalez some of the two ounces of cocaine he brought back from North Dakota; he gave Jerardo Gonzalez four "8-balls" of cocaine the previous Sunday . . . ; he only sold cocaine to Jerardo Gonzalez, except for one person he sold cocaine to through Jerardo Gonzalez; and he also used some of the cocaine himself.

The complaint also contains statements made by Jerardo and others who were interviewed, and those statements generally corroborate what Gonzalez admitted to the police.

¹ Because appellant and his brother share the same last name, for clarity's sake we refer to Jerardo Gonzalez by his first name in this opinion.

In May 2017, Gonzalez pleaded guilty to all four counts. At the plea hearing, when the state began questioning Gonzalez to establish the factual bases for his pleas, Gonzalez affirmed that he was guilty of the charged offenses and that the complaint as a whole and his statements to the police contained in the complaint were “fair and accurate.” Upon further questioning by the state, Gonzalez admitted that he gave his brother cocaine, that he admitted to law enforcement that he was fronting cocaine to his brother, that he provided more than ten grams of cocaine to his brother, and that his brother was in turn selling the cocaine to others. Gonzalez then complained that “the words were put in [his] mouth” when he was told he was going to get a deal, but then “this came back a few years later.” The prosecutor told the district court he was “not going to waste [his] time going through a factual basis pulling teeth” from the defendant. After a recess, Gonzalez’s counsel began questioning Gonzalez and Gonzalez admitted that, on or about July 4, 2014, he gave Jerardo over ten grams of cocaine that he had brought from Texas. However, Gonzalez denied that he had a source in North Dakota; that Jerardo was to pay him for the cocaine he brought from Texas; that he was compensated by Jerardo for the cocaine; and that he knew Jerardo was going to sell the cocaine that he provided. The district court accepted the guilty pleas.

A presentence investigation (PSI) report was completed, in which the probation officer recommended concurrent guidelines sentences for all counts. Gonzalez moved for a downward dispositional departure on counts one to three—his drug-related felony counts—arguing that his “age, complete cooperation with the police immediately upon being arrested, post-arrest assistance as an informant, acceptance of responsibility, . . .

strong community character, community support, and post-offense rehabilitation” provide substantial and compelling circumstances for departure. He also argued that his “minor role in the entirety of the drug scheme” served as a mitigating factor and that an executed sentence would be disproportionately severe in light of sentencing statistics.

The district court found that Gonzalez’s role in the offense was not minor. The court declined to consider the remaining factors as a basis for departure, concluding that they related to amenability to probation and that, under Minn. Stat. § 152.152 (2012), amenability to probation was not available as a basis for departure because Gonzalez had not been accepted into a qualified treatment program. The court denied the motion for a downward dispositional departure.

The district court also determined that the conspiracy and sale offenses did not arise out of the same behavioral incident. The district court sentenced Gonzalez to a 56-month prison term on the conspiracy count; a concurrent 73-month prison term on the sale count, a concurrent 39-month sentence on the tax-stamp count; and a concurrent 360 days in jail on the unlawful-carrying-of-a-pistol count. Sentences for the felony counts were all at the low end of the presumptive ranges.

This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying Gonzalez’s motion to depart and imposing guidelines sentences.

Appellate courts “afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v.*

Soto, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). “A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Guzman*, 892 N.W.2d 801, 810 (Minn. 2017). Gonzalez argues that the district court’s denial of his motion to depart was based on an erroneous interpretation of Minn. Stat. § 152.152. “Statutory interpretation presents a question of law, which [appellate courts] review de novo.” *State v. Riggs*, 865 N.W.2d 679, 682 (Minn. 2015).

Section 152.152 places limits on when a district court may depart from the presumptive prison sentence for certain controlled-substance crimes on the basis of the offender’s amenability to probation:

If a person is convicted [of certain controlled-substance crimes] . . . , and the Sentencing Guidelines grid calls for a presumptive prison sentence for the offense, the court may stay imposition or execution of the sentence only as provided in this section. The sentence may be stayed based on amenability to probation only if the offender presents adequate evidence to the court that the offender has been accepted by, and can respond to, a treatment program that has been approved by the commissioner of human services. The court may impose a sentence that is a mitigated dispositional departure on any other ground only if the court includes as a condition of probation incarceration in a local jail or workhouse.

Minn. Stat. § 152.152.

Gonzales does not challenge the district court’s finding that he did not play a minor or passive role in the offenses. Also, he does not dispute that he did not present “adequate evidence to the court that [he] ha[d] been accepted by, and can respond to, a treatment program that has been approved by the commissioner of human services.” *Id.* Gonzalez’s

sole argument is that the district court erred by concluding that the facts he asserted as bases for departure ultimately go to his amenability to probation and therefore could not be considered absent his acceptance in a treatment program. Gonzalez contends that the facts he asserted are separate and independent mitigating factors.

To resolve this case, we must consider what “amenability to probation” under section 152.152 means. Appellate courts “generally interpret words and phrases according to their common and ordinary meaning, but . . . interpret technical words and phrases according to their special, technical meaning.” *State v. Schouweiler*, 887 N.W.2d 22, 25 (Minn. 2016). “To decide whether words in a statute have a technical meaning or an ordinary meaning, [appellate courts] consider the context in which the phrase appears.” *Id.* The phrase “amenability to probation” is a technical term that has a well-developed legal meaning within the realm of sentencing.

Particular amenability to probation was first recognized as a mitigating factor in *State v. Wright*, 310 N.W.2d 461 (Minn. 1981). In *Wright*, the district court, justifying a downward dispositional departure, had “focused more on defendant as an individual and whether the presumptive sentence would be best for him and for society” than on “the degree of the defendant’s culpability” in the offense. 310 N.W.2d at 462. The supreme court affirmed and characterized the district court’s approach as having found the defendant “particularly unamenable to incarceration and particularly amenable to individualized treatment in a probationary setting.” *Id.*

In *State v. Trog*, the supreme court affirmed a downward dispositional departure based, again, on a determination that “a defendant is particularly suitable to individualized

treatment in a probationary setting.” 323 N.W.2d 28, 31 (Minn. 1982). As compared to *Wright*, where the district court specifically relied upon the recommendations of a psychiatrist, 310 N.W.2d at 461, *Trog* cited “[n]umerous factors, including the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family,” in concluding that the district court had not abused its discretion in finding that the appellant was particularly amenable to probation, 323 N.W.2d at 31. These six factors are commonly called the *Trog* factors.

Although courts predominantly use the *Trog* factors as the framework when analyzing whether a defendant is particularly amenable to probation, the supreme court has stated that they “are not the only factors that can bear on a defendant’s amenability to probation, and they may not all be relevant in any given case.” *Soto*, 855 N.W.2d at 310. For instance, a defendant’s motivation to reform is a factor that can inform the particular-amenability-to-probation decision. *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984) (“[A]menability [to probation] may . . . be premised on timely observation of motive to reform.”), *review denied* (Minn. Oct. 16, 1984).

In sum, caselaw suggests that the meaning of particular amenability to probation is expansive. Minnesota courts have not reduced it to a set number of factors, nor have they given it a limiting definition. Therefore, we conclude that the term “amenability to probation” in section 152.152 should also be interpreted broadly to mean information regarding the offender as an individual that goes to “whether the presumptive sentence would be best for him and for society.” See *Wright*, 310 N.W.2d at 462; see also *Wells v. State*, 839 N.W.2d 775, 778 (Minn. App. 2013) (“In weighing whether to grant a downward

dispositional departure from the presumptive sentence, a district court considers the defendant as an individual and focuses on whether the presumptive sentence would be best for him and for society.” (quotation omitted)), *review denied* (Minn. Feb. 18, 2014).

Applying this broad interpretation, we conclude that the facts that Gonzalez asserted as bases for departure are facts about him as an individual that go to whether probation, rather than imprisonment, would be best for him and society. Gonzalez cited his age, cooperation with and assistance to law enforcement, his acceptance of responsibility, community character and support, and post-arrest rehabilitation. All of these asserted facts ultimately go to the contention that Gonzalez, as an individual, is suitable for—in other words, amenable to—probation.

Gonzalez does not expressly propose an alternative interpretation of section 152.152 that would make the facts he asserted for departure separate and independent from amenability to probation. He asserts that, under the statute, even if some of the facts he cited overlap with amenability to probation, they may still exist as independent grounds for departure, and that other facts he cited do not overlap with amenability to probation and are independent grounds for departure. But, as we explain above, our review of the caselaw leads us to conclude that all of the facts he asserted are relevant to determining his individual suitability to probation, and section 152.152 would be stripped of its regulatory effect if its limit on the availability of an amenable-to-probation departure could be avoided by considering each of the relevant subfactors as independent grounds. *See State v. Dendy*, 598 N.W.2d 4, 6 (Minn. App. 1999) (“[A] court must reject a construction that leads to . . .

unreasonable results that utterly depart from the purpose of the statute.”), *review denied* (Minn. Sept. 28, 1999).

We briefly address Gonzalez’s reliance on sentencing statistics from the Sentencing Guidelines Commission. Although sentencing statistics may inform our determination whether a stayed sentence is inappropriate and disproportionate, *see Soto*, 855 N.W.2d at 314, Gonzalez does not cite any cases in which statistics were the basis for reversing the imposition of a presumptive sentence. Even assuming that, in some cases, statistics may prove that a presumptive sentence is inappropriate and disproportionate, the statistics Gonzalez cites prove the opposite in this case. According to the statistics he cites, 46% of the offenders who were purportedly in similar situations received no dispositional departure. Gonzalez’s sentence is not statistically deviant or rare.

Because Gonzalez sought a departure based on amenability to probation and he did not satisfy the condition required by section 152.152 for a departure on that basis, and because the presumptive sentence was not disproportionate, the district court did not abuse its discretion.

II. The district court did not err by pronouncing multiple sentences on the conspiracy count and the sale count.

In general, the law prohibits multiple sentences for two or more crimes that were committed during a single behavioral incident. Minn. Stat. § 609.035 (2012). Gonzalez argues that the district court erred by concluding that the conspiracy count and the sale count were not part of the same behavioral incident. “Whether the offenses were part of a single behavioral incident is a mixed question of law and fact, so [appellate courts] review

the district court's findings of fact for clear error and its application of the law to those facts de novo." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016).

"Whether multiple offenses arose out of a single behavior[al] incident depends on the facts and circumstances of the particular case." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). The state has the burden of demonstrating by a preponderance of the evidence that the defendant's conduct did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000). In determining whether "two intentional crimes are part of a single behavioral incident" for purposes of imposing multiple sentences, courts "consider factors of time and place and whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective." *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted).

In this case, the district court concluded that the conspiracy and sale counts were separate behavioral incidents because the conspiracy was the arrangement of the sale that was distinct from the sale itself. It is undisputed that the sale count related singularly to the July 4 sale that Gonzalez admitted to at the plea hearing. The district court found that Gonzalez's conspiracy to sell cocaine was larger than the July 4 sale. The court explained that the conspiracy involved "multiple contacts with multiple people" based on the complaint and the amount of cocaine at issue. Gonzalez argues that the record does not support the finding that the conspiracy was larger than the sale because he specifically admitted only to the July 4 sale.

The record reasonably supports the district court's finding. Although Gonzalez eventually denied certain portions of the complaint at the plea hearing, he affirmed the

complaint as a whole, and his statements contained within, as being “fair and accurate.” And the defense attorney requested the district court to “adopt the probable cause portion of the complaint into [its] factual findings,” which it did. According to the part of the complaint that was not denied by Gonzalez, Gonzalez brought two ounces of cocaine from Texas; gave approximately 1.75 of the two ounces to Jerardo; sold cocaine to Jerardo every week; and, on one occasion, sold cocaine to a third person through Jerardo. Based on the amount of cocaine involved and the history of transactions between Gonzalez and Jerardo, the district court could reasonably conclude that the conspiracy and the sale were not part of a single behavioral incident. The district court did not clearly err.

Affirmed.