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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0471**

State of Minnesota,
Respondent,

vs.

Scott Allen Lipe,
Appellant.

**Filed April 6, 2020
Affirmed
Cochran, Judge**

Otter Tail County District Court
File No. 56-CR-16-3236

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

Michelle M. Eldien, Otter Tail County Attorney, Benjamin G. A. Olson, Assistant County
Attorney, Fergus Falls, Minnesota (for respondent)

Brian R. Geis, Fergus Falls, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Segal, Judge; and
Peterson, Judge.*

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

UNPUBLISHED OPINION

COCHRAN, Judge

In this sentencing appeal, appellant Scott Allen Lipe challenges the district court's imposition of the presumptive sentence under the guidelines upon the state's motion for resentencing. Because the district court did not abuse its discretion by imposing the presumptive sentence under the guidelines, we affirm.

FACTS

In October 2016, the state charged appellant Scott Allen Lipe with two counts of driving while impaired (DWI) under Minn. Stat. § 169A.20, subd. 1 (2016), and one count of obstruction of legal process under Minn. Stat. § 609.50, subd. 1 (2016). Lipe entered into a plea negotiation with the state that called for Lipe to plead guilty to one DWI count, and in exchange, the state agreed to dismiss the other two counts. There was no agreement as to the sentence that Lipe would receive, but the parties were aware that the state would request a guidelines sentence and Lipe would request a downward departure.

Sentencing was held in April 2018. Based in part on mental-health evaluations conducted in a separate pending criminal proceeding against Lipe, the district court found that Lipe was in need of mental-health treatment. Moreover, the district court found that, in a correctional facility, Lipe would “be repeatedly exposed to negative stimuli . . . [that] would be highly likely to result in an impulsive, aggressive, and violent response on [Lipe's] part that would create difficulty for the staff at the facility, as well as the potential for harm to [himself] or others.” Relying heavily on the psychiatrist's evaluation of Lipe from the other proceeding, the district court determined that it would be inappropriate to

sentence Lipe to a correctional facility, and that it was appropriate to order Lipe to inpatient mental-health treatment. The district court also determined that Lipe was “particularly unamenable” to commitment to the department of corrections and that it was appropriate to dispositionally depart from the presumptive guidelines sentence of 60 months’ imprisonment. The district court stayed the 60-month prison sentence for seven years and placed Lipe on probation.

Because of the danger that Lipe posed if unsupervised, the district court ordered, as a term of probation, that Lipe “be remanded to the custody of the Otter Tail County Sheriff to be confined until [he] may be transferred directly to a treatment facility, and that if necessary, within the next week, a referral be made to the Otter Tail County Human Services for initiation of an inpatient mental illness commitment by petition filed with the court.” The district court ordered that “[t]he stay of execution of the jail time is conditioned upon [Lipe’s] entry into an inpatient treatment program. And if [Lipe is] found, for any reason, unamenable to inpatient treatment by the court—another judge of this court or for other reasons, this Court finds that there is then no alternative but to execute prison sentence.”

Lipe did not enter treatment. The Otter Tail County Department of Human Services screened Lipe for a possible civil commitment, but determined that Lipe did not meet the criteria for civil commitment because he agreed to and wanted to enter treatment. Lipe was unable to facilitate a transfer directly from the Otter Tail County Jail to any private inpatient treatment program. He remained in the Otter Tail County Jail.

In June 2018, the state filed a motion to correct sentence under Minn. R. Crim. P. 27.03, subd. 9. Although the state did not appeal the sentence, it argued that the district court's sentence was unauthorized by law because the district court's findings did not support a downward dispositional departure. The district court judge who imposed the original sentence had retired, so a successor judge heard the state's motion.

Following a hearing, the district court vacated Lipe's original sentence and set the matter on for resentencing. It did not address the state's argument that the original sentencing judge's findings did not support a dispositional departure. Instead, the district court found that the original sentence was ambiguous because the sentence did not specify how the condition that Lipe "be transferred directly to a treatment facility" would be met. The district court found that the original sentence left Lipe in "limbo" where he was unable to enter treatment and unable to be released from the Otter Tail County Jail. Because the original sentence was ambiguous, the district court concluded that the original sentence must be vacated as unauthorized by law.

At a December 2018 resentencing hearing, the district court considered sentencing arguments by both parties. Lipe requested that the resentencing court again impose a downward departure based on his mental-health needs. The state requested a top-of-the-box guidelines sentence. The district court considered Lipe's mental-health needs, but ultimately concluded that given Lipe's inability to secure inpatient treatment, no substantial and compelling reasons existed to depart. It imposed the presumptive guidelines sentence of 60 months in prison.

Lipe appeals.

DECISION

Lipe's appellate brief focuses on the original sentence and the only arguments that he presents relate to whether the original sentence was supported by a valid basis for departure. Lipe makes no argument regarding whether the district court erred by vacating the original sentence under Rule 27.03, subd. 9, based on an ambiguity in the sentence. Consequently, we construe Lipe's appeal as a challenge to the district court's imposition of a guidelines sentence instead of a downward departure as requested by Lipe at resentencing. *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) (an issue that is not argued in a brief is deemed waived on appeal). We do not address or comment on the merits of the district court's decision to vacate the sentence as unauthorized by law.

We review the district court's sentencing decision for an abuse of discretion. *State v. Law*, 620 N.W.2d 562, 564-65 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000). The district court has "great discretion" in sentencing and "we cannot simply substitute our judgment for that of the [district] court." *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). But "[a]ppellate courts may vacate or modify a sentence on many grounds, including that the sentence is unreasonable or inappropriate, or that such a result is in the interest of fairness and uniformity." *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quotation and citation omitted).

The sentences provided by the Minnesota Sentencing Guidelines are presumed to be appropriate. *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). It is only in "rare" cases that an appellate court will reverse the district court's refusal to depart because, even when substantial and compelling circumstances are present, the Minnesota

Sentencing Guidelines provide only that the district court *may* depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). If a defendant requests a downward dispositional departure, the district court must consider the circumstances for and against departing. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002).

A downward dispositional departure from a prison sentence to probation may be justified if the defendant is particularly amenable to probation or if probation would be best for the defendant and for society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983); *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *State v. Wright*, 310 N.W.2d 461, 462-63 (Minn. 1981). Factors that courts may consider in determining whether a defendant is particularly amenable to probation include his “age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *Trog*, 323 N.W.2d at 31.

The district court considered the mental-health issues that were the basis of the departure in the original sentence and that were raised again by Lipe at resentencing, but concluded that those issues were not a substantial and compelling reason to depart from the presumptive sentence. The district court recognized that the original sentencing judge informed Lipe that if mental-health treatment was not available, the only option would be to execute the prison sentence. Because no treatment option had been identified at the time of resentencing and because Lipe posed a public safety risk if released without treatment, the district court determined that Lipe was not amenable to probation. Under our highly deferential standard of review, we cannot conclude that the district court abused its

discretion by denying Lipe's departure request and sentencing Lipe to a presumptive guidelines sentence. Consequently, we affirm the district court's sentence.¹

Affirmed.

¹ On appeal, Lipe relies in part on Minn. Stat. § 609.1055 (2016) to argue that a departure was appropriate. That statute gives a sentencing court the discretion, when consistent with public safety, to place an offender with a serious and persistent mental illness on probation when he would otherwise be committed to the commissioner. But the decision to place the offender on probation is discretionary, and because the resentencing court considered Lipe's mental-health problems before denying Lipe's request to be placed on probation, the district court did not violate Minn. Stat. § 609.1055 by imposing a prison sentence.