

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0740**

State of Minnesota,
Respondent,

vs.

Chad Allen Pryatel,
Appellant.

**Filed March 9, 2020
Affirmed
Rodenberg, Judge**

St. Louis County District Court
File No. 69DU-CR-18-2409

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

Mark S. Rubin, St. Louis County Attorney, Nathaniel T. Stumme, Assistant County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Chief Judge; and Jesson, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

In this direct appeal after he was convicted of third-degree drug possession, appellant Chad Pryatel argues that the district court improperly computed his criminal

history score and that the district court abused its discretion when it denied his motion for a downward dispositional departure from the sentencing guidelines. Appellant also argues in a pro se supplemental brief that his prior fifth-degree controlled substance conviction should be considered a gross misdemeanor for criminal-history-score purposes because of the Drug Sentencing Reform Act of 2016 (DSRA). We affirm.

FACTS

On July 24, 2018, Hermantown police stopped a car driven by appellant, who was then on felony probation for a 2017 Minnesota conviction for possession of methamphetamine. When appellant was unable to provide a valid driver's license or proof of insurance, police decided to tow the car. While conducting an inventory search of the car incident to the tow, police discovered 20.1 grams of methamphetamine and a digital scale that contained methamphetamine residue.

On July 25, 2018, the state charged appellant with first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1) (2016); third-degree possession of a controlled substance in violation of Minn. Stat. § 152.023, subd. 2(a)(1) (2016); driving without a valid license in violation of Minn. Stat. § 171.02, subd. 1(a) (2016); and driving without proof of insurance in violation of Minn. Stat. § 169.791, subd. 2(a) (2016).

Appellant pleaded guilty to third-degree possession of a controlled substance. The other charges were dismissed pursuant to a plea agreement.

The district court ordered a presentence investigation report (PSI) and sentencing worksheet, which indicated that appellant's criminal history score was six, consisting of

five felony points and one custody-status point. Appellant's five felony points were based on the following convictions:

Title	Disposition	State	Points
Fourth-Degree Assault	01/28/2009	Minnesota	.5
Throw/Expel Bodily Substances	06/03/2010	Wisconsin	.5
Manufacture/Delivery of Methamphetamine	08/08/2011	Wisconsin	1.5
Manufacture/Delivery of Methamphetamine	08/08/2011	Wisconsin	1.5
Possession of Methamphetamine	11/19/2015	Wisconsin	.5
Fifth-Degree Possession of Methamphetamine	03/08/2017	Minnesota	.5

The PSI reported that the Wisconsin manufacturing-and-delivering-methamphetamine convictions, which arose from criminal acts on two different dates, were equivalent to a felony third-degree controlled substance sale in Minnesota and assigned one-and-one-half criminal history points to each.¹ One-half point each was assigned to the Wisconsin throwing-of-bodily-substances conviction and to the Wisconsin possession-of-methamphetamine conviction. The PSI recommended that appellant receive a presumptive 57-month sentence under the Minnesota Sentencing Guidelines using the computed criminal history score.

At sentencing, appellant argued that the 2011 Wisconsin convictions should not be treated as felonies because appellant was sentenced to no more than 365 days imprisonment

¹ Appellant argues only that these convictions were not sentenced as felonies, and he makes no argument on appeal that these offenses were otherwise weighted improperly.

on either of those two convictions. He argued that the 2011 Wisconsin sentences are therefore equivalent to gross-misdemeanor sentences in Minnesota. Appellant did not address at sentencing—and the state accordingly did not offer any documentation or evidence concerning—the one-half points assigned for the throwing-bodily-substances conviction and the possession-of-methamphetamine conviction.

Appellant also moved the district court for a downward dispositional departure from the sentencing guidelines. Appellant indicated to the district court that he suffers from a mental illness and self-medicates with controlled substances. He argued that he has support from his family, is motivated to turn his life around, and is remorseful for his actions.

The district court concluded that appellant's criminal history score was six, denied appellant's motion for a downward dispositional departure, and sentenced appellant to 57 months in prison on the third-degree possession-of-a-controlled-substance conviction.

This appeal followed.

DECISION

The district court did not err in computing appellant's criminal history score to include three felony points for the 2011 Wisconsin convictions for manufacturing and delivering methamphetamine.

Appellant argues that his 12-month concurrent sentences in Wisconsin for manufacturing and delivering methamphetamine should not have been treated as felonies because, in each of those cases, appellant was sentenced to serve 12 months in state prison and 24 months of extended supervision.

We will not reverse a district court's calculation of a defendant's criminal history score absent an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App.

2006). But the interpretation of the sentencing guidelines is a legal question that appellate courts review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

Convictions from other jurisdictions must be considered when calculating a defendant's Minnesota criminal history score. Minn. Sent. Guidelines 2.B.5.a & cmt. 2.B.502 (Supp. 2017). When classifying out-of-state prior offenses, "[a]n offense may be counted as a felony only if it would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." *Scovel*, 916 N.W.2d at 555 (quotation omitted). The state bears the burden of establishing that a prior out-of-state conviction would constitute a felony in Minnesota. *Maley*, 714 N.W.2d at 711.

Appellant does not dispute that the two Wisconsin convictions for manufacturing or possessing methamphetamine would be defined as felonies had they been committed in Minnesota. He argues that, because each sentence included only 365 days of incarceration, his Wisconsin sentences were not felony-level sentences under Minnesota law.

In Minnesota, a felony offense is one "for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2 (2016). A crime is considered a gross misdemeanor so long as it "is not a felony or misdemeanor." Minn. Stat. § 609.02, subd. 4 (2016).

When sentencing a defendant on a Minnesota felony, "the court may pronounce a stay of execution." Minn. Sent. Guidelines 3.A.1 (2017). "A 'stay of execution' occurs when the court accepts and records a finding or plea of guilty, and a prison sentence is pronounced, but is not executed." Minn. Sent. Guidelines 1.B.19.b (Supp. 2017). "If the

offender successfully completes the stay, the case is discharged, but the offender continues to have a record of a felony conviction, which is included in criminal history under section 2.B.” *Id.* A stay of execution of a sentence of more than one year in prison is a felony sentence. *See generally State v. Watson*, 925 N.W.2d 658, 660 (Minn. App. 2019), *review denied* (Minn. May 28, 2019).

Wisconsin employs bifurcated felony sentences. Wis. Stat. § 973.01(1) (2016). “A bifurcated sentence is a sentence that consists of a term of confinement in prison followed by a term of extended supervision” Wis. Stat. § 973.01(2) (2016). Like a stay of execution in Minnesota, where the court retains the ability to execute a defendant’s stayed sentence if conditions imposed by the court are violated, a Wisconsin court may revoke a defendant’s extended supervision and return the defendant to prison if the defendant is found to have violated the terms of extended supervision. Wis. Stat. § 302.113(9)(am) (2016).

The district court here assigned appellant a criminal history score of six, which included three felony points for appellant’s Wisconsin convictions of manufacturing and delivering methamphetamine. While it is true that appellant only served 365 days in prison on those two Wisconsin convictions, the Wisconsin court also imposed two years of extended release as part of each of appellant’s sentences. The Wisconsin sentences were not simply that appellant serve 365 days in jail. Under Wisconsin law, appellant could have served as much as three years in prison had he violated his extended release conditions. *See id.* (providing that “[i]f a person released to extended supervision under this section violates a condition of extended supervision, the reviewing authority may

revoke the extended supervision of the person . . . [and] order the person to be returned to prison”); *State v. Brown*, 2006 WI 131, ¶ 44, 298 Wis. 2d 37, 61, 725 N.W.2d 262, 273 (explaining that “extended supervision and reconfinement are . . . substitutes for the parole system”).

Properly understood, and regardless of whether he actually served more than one year in prison on the Wisconsin convictions, appellant faced the possibility of serving more than one year in prison if he violated extended-release conditions. *See Watson*, 925 N.W.2d at 660. Therefore, appellant’s Wisconsin sentences had the same effects as a Minnesota sentence of an imposed sentence of 36 months in prison, with 24 months stayed on condition that appellant serve 12 months in jail, followed by probation for an additional 24 months on conditions. We conclude that appellant’s Wisconsin sentences were sufficiently similar to a Minnesota stay of execution to be the equivalent of a stay of execution of a felony sentence for criminal-history-score purposes.

We decline to address appellant’s argument that the district court erred by including two one-half points for Wisconsin convictions in calculating appellant’s criminal history score.

Appellant also argues on appeal that the PSI and sentencing worksheet are insufficient to support the district court’s decision to assign one-half-point each to his Wisconsin convictions for throwing bodily substances and possession of methamphetamine.

Appellate courts may decline to address an argument on appeal if the record is insufficient for appellate review. *See State v. Gustafson*, 610 N.W.2d 314, 321 (Minn.

2000) (concluding that the record was insufficient for proper appellate review of appellant's pro se arguments).

Our review of the record reveals that it is insufficiently developed to address whether the district court erred by assigning one additional criminal history point for these two half-point convictions.

Appellant filed several documents with the district court that briefly mention this issue. Appellant's first submission to the district court on this topic was a difficult-to-understand handwritten letter to the district court judge received on December 31, 2018. The letter seems to concern itself primarily with informing the judge of appellant's mental-health issues. The letter also makes references to the computation of appellant's criminal history score and the DSRA, discussed below. The letter mentions a difficult-to-discern Fourth Amendment concern that appellant had (despite the letter having been sent *after* appellant's guilty plea). The primary purpose of the letter appears to have been to express appellant's preference that he be admitted to a mental-health court. This handwritten letter does not appear to have been served on the prosecutor, and is not styled as a motion at all.

The district court received a much-more-orderly "motion for correction of sentence" written in appellant's own hand on January 10, 2019. That submission does not appear to have been accompanied by any affidavit of service showing that the state was served with this purported motion.

Appellant's trial counsel *served and filed* a motion concerning sentencing issues on January 28, 2019. From the record, it appears that counsel and the district court treated

this last pleading as the operative motion at sentencing, and this document said nothing at all about these criminal history one-half points from Wisconsin convictions.

The record does not reflect that appellant's trial counsel presented any argument to the district court concerning these two one-half points. Nor does the record reflect that this issue was considered by the district court. For these reasons, we decline to reach the merits of appellant's argument that he was improperly assigned one criminal history point for these convictions. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (providing that appellant courts do not address questions not presented to and considered by the district court).

Because we do not reach the merits of this argument, appellant may raise this issue in a petition for postconviction relief, should he elect to file one. The state would thereby have the opportunity to address the argument and the district court could consider the evidence concerning it.

We decline to address appellant's pro se argument that the district court erred by not reducing appellant's criminal history score because of the DSRA.

Appellant argues in a pro se supplemental brief that his 2017 felony drug conviction for fifth-degree possession of methamphetamine should be considered a gross misdemeanor for criminal-history-score purposes because of the DSRA and that his criminal history score must be recalculated accordingly. *See* 2016 Minn. Laws ch. 160, §§ 1-22, at 576-92; *State v. Otto*, 899 N.W.2d 501, 503 (Minn. 2017) (discussing the DSRA).

In 2016, the DSRA decreased the severity of some first-time drug-possession violations from a felony-level to a gross-misdemeanor-level. See Minn. Stat. 152.025, subd. 4(a) (2016) (providing that “a person . . . who has not been previously convicted of a violation of this chapter . . . is guilty of a gross misdemeanor”). Discussing the application of the DSRA, the supreme court held in *State v. Kirby* that “[t]he amelioration doctrine applies to cases that are *not yet final* when the change in law takes effect.” 899 N.W.2d 485, 488 (Minn. 2017) (emphasis in original); see *Otto*, 899 N.W.2d at 503.

Appellant was charged with fifth-degree possession of methamphetamine in 2014, but was not convicted until 2017. On appeal, appellant claims entitlement “to the amelioration benefits” of the DSRA, but cites no authority for the argument that his now-final conviction should be re-evaluated for criminal-history-score purposes. The record does not reveal whether appellant requested or that the district court applied the amelioration doctrine to this felony sentence when it was announced in 2017.

As with the Wisconsin one-half points, the district court does not appear to have considered this argument, apparently because appellant’s counsel’s served-and-filed motion was treated as the operative pleading by the district court. As noted above, we decline to address an argument on appeal if the record is insufficient for appellate review. *Gustafson*, 610 N.W.2d at 321. We therefore decline to reach the merits of appellant’s DSRA argument based on the insufficiency of the record on appeal. This issue may be raised by petition for postconviction relief, which would afford the district court the opportunity to resolve the issue based on a complete record.

The district court acted within its discretion when it denied appellant’s motion for a downward dispositional departure.

Appellant contends that the district court abused its discretion by denying his motion for a downward dispositional departure from the sentencing guidelines “because there were substantial and compelling circumstances to warrant the departure.”

Reviewing 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 may depart from the Minnesota Sentencing Guidelines only for substantial and compelling reasons. *Id.* at 308. To maintain uniformity and proportionality in sentencing, departing from the sentencing guidelines is generally discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017).

In deciding whether to grant a request for a downward dispositional departure, a district court is required to consider whether mitigating circumstances exist. *Soto*, 855 N.W.2d at 308. If the district court determines such circumstances are present, it must then consider whether they “provide a substantial and compelling reason not to impose a guidelines sentence.” *Id.* (quotation omitted). The mere existence of a mitigating factor does not require that the district court depart from the presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 253-54 (Minn. App. 2011). A district court is required to provide reasons for departure, but “an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Therefore, this court will not ordinarily interfere when the

district court imposes a sentence “fall[ing] within the presumptive sentence range, . . . even if there are grounds that would justify departure.” *State v. Abeyta*, 336 N.W.2d 264, 265 (Minn. 1983).

A district court’s primary focus when determining whether to grant a dispositional departure should be on “the defendant as an individual and on whether the presumptive sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A district court should take into account several relevant factors when deciding whether a defendant is particularly amenable to probation. *State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). These factors, sometimes colloquially called the *Trog* factors, include the defendant’s “age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family.” *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). These factors, however, “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.

Here, appellant cites to several *Trog* factors in support of his argument that he is particularly amenable to probation. Appellant argues that he is remorseful for his actions, that he is motivated to remain sober, that he has the support of friends and family, and that he wants to participate in a mental-health court. Appellant further indicates that he was successful on probation for 14 months before this offense.

The district court considered appellant’s departure argument and the evidence supporting it. It determined that the factors weighing in favor of a probationary sentence were not “sufficient to support a departure from the guideline sentence.”

We see no abuse of the district court's discretion. The record contains evidence supporting the district court's determination, including evidence of appellant's prior repeated probation violations, failed treatment attempts, and rules violations while in custody. The district court acted within its sentencing discretion.

Affirmed.