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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0840**

State of Minnesota,
Respondent,

vs.

Johnny Clifton Johnson,
Appellant.

**Filed March 30, 2020
Affirmed
Ross, Judge**

Waseca County District Court
File No. 81-CR-18-723

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

Rachel Cornelius, Waseca County Attorney, Waseca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Gina Schulz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Cochran, Judge; and Segal,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

Johnny Johnson pleaded guilty to selling heroin, and the district court sentenced him to 39 months' imprisonment—the shortest term in the presumptive-sentence range. Johnson appeals his sentence, arguing that the district court abused its discretion by

denying his request for a dispositional departure. We affirm because Johnson failed to demonstrate that he is particularly amenable to probation.

FACTS

The state charged Johnny Johnson with two counts of third-degree sale of a controlled substance. *See* Minn. Stat. 152.023, subd. 1(1) (2016). Johnson and the state reached a plea agreement in which the state would dismiss one charge and recommend the shortest presumptive prison sentence, leaving Johnson free to seek a downward dispositional departure. Johnson pleaded guilty, admitting that he sold 0.2 grams of heroin. The district court dismissed one count and ordered a presentence investigation (PSI). The PSI report detailed Johnson's challenging upbringing: his father was absent since he was 10, his mother drank excessively, he began using drugs in his youth, and he participated in gang activity as an adolescent. It also detailed his efforts to achieve and maintain sobriety and the importance of family in his life.

Johnson moved for a downward dispositional sentencing departure, seeking probation rather than prison. He emphasized his mental-health challenges, claimed that prison might exacerbate his criminal behavior, complained that the criminal-justice system impacts certain ethnic groups more severely than others, and predicted that a prison term would not address his chemical dependency. His attorney informed the district court that Johnson had enrolled in a new drug-treatment program. Johnson opined that he was "on the right track," that his family was involved in his life, and that he wanted to spend time with his children.

The district court commended Johnson’s commitment to sobriety but also noted its public-safety concerns and Johnson’s criminal-history score. The district court denied Johnson’s departure motion and sentenced him to 39 months in prison, which reflects the shortest in the presumptive range under the sentencing guidelines. Johnson appeals the sentence.

D E C I S I O N

Johnson argues that the district court erroneously denied his departure motion. The district court has broad discretion in sentencing, *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014), and we see no abuse of discretion here. The district court must impose a sentence within the presumptive range for a conviction as established in the Minnesota Sentencing Guidelines, “unless there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (Supp. 2017). The guidelines present a nonexclusive list of mitigating factors that “may” justify a departure. Minn. Sent. Guidelines 2.D.3.a (Supp. 2017). Johnson argues that the district court should have imposed a probationary sentence because he is particularly amenable to probation under two listed factors. Johnson’s arguments are unconvincing.

Particular Amenability to Probation

A defendant’s particular amenability to probation is a mitigating factor that “may . . . be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.” Minn. Sent. Guidelines 2.D.3.a.(7) (Supp. 2017). Factors relevant to determining whether a defendant is suited to treatment in a probationary setting 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). Applying these factors does not establish that Johnson is amenable to probation, let alone *particularly* amenable. See *Soto*, 855 N.W.2d at 309 (“By requiring a defendant to be *particularly* amenable to probation . . . 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.” (quotation omitted)).

The record here fails to support Johnson’s arguments on the *Trog* factors. He concedes that he has a “lengthy prior [criminal] record,” but he argues that the frequency of his offenses has tapered off with his age. This circumstance does not favor his position. Johnson also argues that he demonstrated remorse and was willing to accept responsibility, but his guilty plea came in a bargain that eliminated one of the charges against him. The district court also made no finding about any claim of remorse, and we are in no position to make the finding on appeal. Regarding whether Johnson has “the support of friends [or] family,” *Trog*, 323 N.W.2d at 31, he points to nothing in the record showing that friends or family would support his efforts to maintain sobriety. And the PSI report instead indicated that family members were involved in the illegal use or sale of drugs. The record does not inform us about his demeanor, and the PSI report’s description of him as “cooperative” says little. Johnson stresses that he has shown his desire to seek help for his drug use, and “amenability may . . . be premised on timely observation of motive to reform.” *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984). But in rejecting Johnson’s motion, the district court emphasized

the risk that Johnson posed to public safety. Nothing presented by Johnson suggests that the district court abused its discretion by refusing to depart dispositionally from the presumptive sentence.

Acceptance into Treatment Program

“In the case of a controlled substance offense conviction,” the district court may find an offender to be particularly amenable to probation “based on adequate evidence that the offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minn. Stat. § 152.152.” Minn. Sent. Guidelines 2.D.3.a.(8) (Supp. 2017). The record contains no evidence that Johnson was “accepted by, and [could] respond to” a commissioner-approved treatment program. Johnson cites his trial counsel’s oral representation that Johnson had “just enrolled” in a new program, but this representation is not *evidence* demonstrating either that Johnson had been accepted in the program or that he could respond favorably to the treatment program.

We conclude by observing that we generally affirm the district court’s imposition of a presumptive sentence so long as it carefully evaluated the information before it. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013). The district court did so here, additionally citing its public-safety concerns in denying Johnson’s motion. We also observe that imposing a presumptive sentence is generally not an abuse of discretion even assuming that mitigating circumstances exist. *See State v. Olson*, 765 N.W.2d 662, 664–65 (Minn. App. 2009). The district court did not abuse its discretion by imposing a presumptive sentence.

Affirmed.