

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1562**

State of Minnesota,
Respondent,

vs.

Anthony Kayne Johnston,
Appellant.

**Filed August 12, 2024
Affirmed in part, reversed in part, and remanded
Harris, Judge**

Polk County District Court
File No. 60-CR-23-781

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

Greg Widseth, Polk County Attorney, Tanner D. Hermanson, Assistant County Attorney,
Crookston, Minnesota (for respondent)

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

Considered and decided by Harris, Presiding Judge; Worke, Judge; and Schmidt,
Judge.

NONPRECEDENTIAL OPINION

HARRIS, Judge

On direct appeal from the final judgment of conviction for fifth-degree possession of a controlled substance, appellant challenges the district court's denial of his motion for a downward durational or dispositional departure. We discern no abuse of discretion in

the district court’s denial of a downward dispositional departure. We conclude, however, that the district court erred in failing to exercise its discretion when denying a downward durational departure, and thus we affirm in part, reverse in part, and remand.

FACTS

In May 2023, respondent State of Minnesota charged appellant Anthony Kayne Johnston with one count of fifth-degree possession of a controlled substance, in violation of Minnesota Statutes section 152.025, subdivision 2(1) (2022). The complaint alleged that law enforcement responded to a report of a man causing a “disturbance” at a convenience store and found a man, identified as Johnston, behaving erratically. Johnston agreed to go to the hospital to be treated with Narcan. At the hospital Johnston informed law enforcement he was on supervision with the Minnesota Department of Corrections. Law enforcement contacted Johnston’s supervising agent and conducted a search of Johnston’s motel room where they found multiple syringes and a plastic bag with white residue. The white residue tested positive for methamphetamine. In July 2023, Johnston pleaded guilty to fifth-degree possession and admitted to having drug paraphernalia “with residue in it that [he] used with methamphetamine.”

Johnston moved for a downward durational departure based on an amendment to the fifth-degree possession statute, which would go into effect on August 1, 2023, that excluded the possession of a residual controlled substance in drug paraphernalia. Minn. Stat. § 152.025, subd. 2(1) (Supp. 2023) (criminalizing the possession of one or more mixtures containing a controlled substance . . . except . . . a residual amount of one or more mixtures of controlled substances contained in drug paraphernalia”); 2023 Minn. Laws

ch. 52, art. 15, § 13, at 1051. Johnston argued that “[n]ot only are the circumstances of the offense less serious than that of the typical event, but in fact the conduct in question will no longer be considered a crime on August 1, 2023.” In the alternative, Johnston moved for a downward dispositional departure based on the change in law.

At the July 27, 2023 sentencing hearing, the state opposed Johnston’s departure motions and argued for the presumptive guidelines sentence of 24 months in prison. That presumptive sentence was based on Johnston’s criminal-history score of 13, including one-half of a criminal-history point for committing this offense while on supervised release for a prior fifth-degree possession offense. The state contended that the district court should reject Johnston’s argument about the “upcoming change in law” because the legislature did not make that change retrospective. The state also argued that, although Johnston was charged with fifth-degree possession “based upon a baggie with residue,” he was also admitting to consuming methamphetamine during his guilty plea.

After hearing the state’s and Johnston’s arguments, the district court denied Johnston’s departure motions. With respect to the dispositional departure, the district court explained that “[t]he Court does not believe there’s any true factual support for [a dispositional departure] under the case law.” With respect to the durational departure, the district court explained that the case fell “within the timeframe under the older law” and thus it did not “believe the Court could properly go forward with a durational departure in this case.” The district court then sentenced Johnston to 21 months in prison, the bottom of the presumptive range.

Johnston appeals.

DECISION

The Minnesota Sentencing Guidelines limit a district court's discretion by providing sentences that are "presumed to be appropriate." Minn. Sent'g Guidelines 2.D.1 (2022). "A 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 a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quoting Minn. Sent'g Guidelines 2.D.1). "If the district court has discretion to depart from a presumptive sentence, it must exercise that discretion by deliberately considering circumstances for and against departure." *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *rev. denied* (Minn. Apr. 16, 2002).

We review a district court's sentencing decision for an abuse of discretion. *See Soto*, 855 N.W.2d at 308. And an appellate court "will not ordinarily interfere with a sentence falling within the presumptive sentence range, either dispositionally or durationally, even if there are grounds that would justify departure." *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). But "[w]hen the record contains evidence of factors supporting departure, which could have been, but were not, considered by the district court, we may remand for consideration of those factors." *State v. Johnson*, 831 N.W.2d 917, 925-26 (Minn. App. 2013), *rev. denied* (Minn. Sept. 17, 2013). We address in turn Johnston's challenge to the denials of a downward durational departure and a downward dispositional departure.

I. The district court erred in its determination that it lacked the discretion to grant Johnston’s durational departure based on the substantial and compelling circumstances of the amendment to the fifth-degree drug possession statute that decriminalized Johnston’s offense when the effective date of that statutory change occurred five days after the sentencing date.

Johnston challenges the denial of his motion for a downward durational departure.

“A downward durational departure is justified only if the defendant’s conduct was significantly less serious than that typically involved in the commission of the offense.” *State v. Solberg*, 882 N.W.2d 618, 624 (Minn. 2016) (quotation omitted). Thus, “[d]urational departures may be justified by offense-related reasons only.” *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017); *see also* Minn. Sent’g Guidelines 2.D.3 (2022) (providing a “nonexclusive list of factors” that a district court may use to depart).

Johnston argues, consistent with his departure motion, that “[t]he legislative act is a clear indicator that this offense is less serious than the typical felony fifth-degree drug offense because, five days after sentencing here, it was no longer an offense at all.” He contends that the district court abused its discretion because, although “Johnston may still have been guilty despite the decriminalization of this offense shortly thereafter, the statutory change provided substantial and compelling reasons to depart downward at sentencing.” The state concedes that Johnston “is correct in his analysis of the effect of the new legislation . . . regarding whether his conduct would be a criminal offense in this state if it were to occur after the date the bill went into effect.” The state argues, however, that the district court did not abuse its discretion by declining to depart on that basis. We agree with Johnston.

When denying Johnston’s departure motion, the district court stated, “Again, we do fall within the timeframe under the older law. I don’t believe the Court properly could go forward with a durational departure in this case. And so, this Court is going to deny that request.” And the district court did not otherwise address the seriousness of Johnston’s conduct. Thus, the record establishes that, rather than exercising its discretion in denying the departure motion, the district court determined it *could not* depart because the amendment was not yet in effect. In fact, the district court noted that it would impose the minimum presumptive sentence “to again recognize the unique circumstances of the case.” Accordingly, whether the district court erred turns on whether the amendment’s effective date meant it could not impose a downward durational departure. *See State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (“The court erred in putting aside arguments for departure rather than considering them alongside ‘valid reasons’ for non-departure.”); *see also State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011) (“When the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue.”).

A district court may impose a downward durational departure when a defendant’s conduct is “significantly less serious” than a typical offense. *Solberg*, 882 N.W.2d at 624. At the time of Johnston’s offense, the fifth-degree possession statute criminalized a broad range of conduct: the possession of any Schedule I, II, III, or IV controlled substance, except a small amount of marijuana, regardless of the amount possessed or the manner of possession. Minn. Stat. § 152.025, subd. 2(1). The legislature’s decision to exempt a subset of that conduct—regardless of whether that amendment had taken effect—supports

that this conduct is less serious than other conduct covered by the fifth-degree possession statute. *Cf. State v. Bauerly*, 520 N.W.2d 760, 763 (Minn. App. 1994) (affirming district court’s imposition of a downward departure and concluding that the defendant’s offense, “a theft which is more than \$500 below the mid-range for a Severity Level III theft, is ‘significantly’ less serious than the typical offense”), *rev. denied* (Minn. Oct. 27, 1994). Thus, although Johnston is guilty of fifth-degree possession,¹ the amendment is still relevant to show that possession of residual controlled substance in drug paraphernalia is less serious than a typical fifth-degree offense. As a result, the district court erred by determining that it could not depart because the amendment was not yet in effect. *See Curtis*, 353 N.W.2d at 264 (“The court erred in putting aside arguments for departure rather than considering them alongside ‘valid reasons’ for non-departure.”).

II. The district court did not abuse its discretion by denying Johnston’s downward dispositional departure under the sentencing guidelines.

Johnston also argues that the district court abused its discretion by denying his motion for a downward dispositional departure. “A dispositional departure typically focuses on characteristics of the defendant that show whether the defendant is particularly

¹ Under the amelioration doctrine, a criminal defendant may benefit from a change in law, even before the effective date, by showing that “(1) there is no statement by the Legislature that clearly establishes its intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered when the amendment takes effect.” *State v. Loveless*, 987 N.W.2d 224, 238 (Minn. 2023). Here, there is no dispute that the amelioration doctrine does not apply and thus Johnston’s conviction may not be reversed because the legislature limited the amendment to “crimes committed on or after” its effective date. 2023 Minn. Laws ch. 52, art. 15, § 13, at 1051; *see State v. Otto*, 899 N.W.2d 501, 503 (Minn. 2017) (holding that the legislature abrogated the amelioration doctrine when it specified that certain sections of the Drug Sentencing Reform Act “became ‘effective August 1, 2016, and appl[y] to crimes committed on or after that date’”).

suitable for individualized treatment in a probationary setting.” *Solberg*, 882 N.W.2d at 623 (quotation omitted). Such a departure is generally justified by offender-related factors demonstrating “if a defendant is particularly amenable to probation, 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.” *Soto*, 855 N.W.2d at 310 (quotation omitted).

On appeal, Johnston asserts that his age, community support, attitude, and motivation for treatment support his amenability to probation and thus a departure. But in district court, Johnston did not argue that these factors or his amenability to probation support a dispositional departure. Instead, he relied on the not yet effective legislative amendment. As a result, Johnston has forfeited his argument that his particular amenability to probation justifies a departure. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (“This court generally will not decide issues which were not raised before the district court . . .”).

Finally, even if mitigating factors were present, a district court is not obligated to place a defendant on probation or otherwise depart from the presumptive sentence. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). The record reflects that the district court carefully considered and evaluated all the information presented and decided to impose a presumptive sentence. This is not the “rare case” in which the district court acted outside of its discretion by imposing such a sentence. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (noting that only in a “rare case” will a reviewing court overturn a presumptive sentence). Given this record, we discern no abuse of discretion in the district court’s determination that the record lacked “factual support” for a dispositional departure.

In sum, we discern no abuse of discretion in the district court's denial of a downward dispositional departure. We conclude, however, that the district court erred by determining that it lacked discretion to depart based on the amendment's effective date. As a result, because "the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue." *Pegel*, 795 N.W.2d at 253. We therefore remand for the district court to reconsider Johnston's motion for a downward durational departure in light of our opinion.

Affirmed in part, reversed in part, and remanded.