

*This opinion is nonprecedential except as provided by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
A24-0458**

State of Minnesota,
Appellant,

vs.

Robert Allen Bennett,
Respondent.

**Filed September 16, 2024
Affirmed
Kirk, Judge***

Sherburne County District Court
File No. 71-CR-22-1350

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

Kathleen A. Heaney, Sherburne County Attorney, George R. Kennedy, Assistant County Attorney, Elk River, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Laura G. Heinrich, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Slieter, Judge; and Kirk, Judge.

NONPRECEDENTIAL OPINION

KIRK, Judge

Appellant State of Minnesota challenges respondent Robert Allen Bennett's probationary sentence, arguing that the district court abused its discretion when it granted

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

a downward dispositional departure because Bennett is not particularly amenable to probation and the record does not support the district court's decision to depart. We affirm.

FACTS

Bennett pleaded guilty to second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2022), and fleeing a peace officer in a motor vehicle in violation of Minn. Stat. § 609.487, subd. 3 (2022), based on the following facts. On an evening in October 2022, Bennett consumed alcohol before driving. A sheriff's deputy stopped Bennett for an equipment violation. Bennett told the deputy that he had a gun in the vehicle, and the deputy instructed him not to touch it. Bennett refused to submit to a field-sobriety test, and instead reached for the gun against the deputy's continued instructions. He pointed the gun directly up at the roof of his vehicle and did not point it at the deputy or at himself. The deputy feared that Bennett was going to shoot him, so the deputy pulled his firearm, retreated from the vehicle, and instructed Bennett to put his hands outside his window and not reach for the gun. When the deputy returned to his squad car, Bennett started the vehicle and slowly drove away.

The deputy followed Bennett to his home. Bennett exited his vehicle with the gun in his hand, and the deputy exited his squad car and instructed Bennett to stop and drop the gun. Bennett pointed his gun in the air, pointed it at the deputy, then pointed it back in the air. Bennett then entered his garage and closed the door.

Bennett eventually exited his home after an hour and a half of telephone conversations with other officers, and the officers placed him under arrest. At the plea hearing, and in an affidavit he submitted before sentencing, Bennett acknowledged that his

actions scared the deputy but explained that he had planned to use the gun to kill himself and never meant to hurt anyone else.

Throughout the criminal proceedings, Bennett remained sober and complied with the district court's order to use a daily alcohol monitor. He also voluntarily completed an intensive outpatient chemical-dependency treatment program, began seeing an individual therapist, and attended Alcoholics Anonymous (AA) meetings. The district court granted his motion for a downward dispositional departure and placed him on probation. As relevant to this appeal, the district court conditioned Bennett's probation on continued sobriety, participation in individual therapy, and participation in AA.

The state appeals.

DECISION

The Minnesota Sentencing Guidelines establish presumptive sentences for felony offenses. Minn. Stat. § 244.09, subd. 5 (2022). A district court must impose the presumptive sentence provided in the sentencing guidelines unless “identifiable, substantial, and compelling circumstances” justify a departure from the guidelines. Minn. Sent’g Guidelines 2.D.1 (2022). The sentencing guidelines establish a “nonexclusive list of factors that may be used as reasons for departure.” Minn. Sent’g Guidelines 2.D.3 (2022). One factor is the defendant’s particular amenability to probation, which “may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.” Minn. Sent’g Guidelines 2.D.a(7) (2022). “[A]menability to probation depends on an offender’s ability to comply with the conditions of probation and benefit from the opportunity for rehabilitation that

probation affords.” *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003). Mere amenability to probation is insufficient; the defendant must be *particularly* amenable in a way that “distinguishes the defendant from most others and truly presents the substantial and compelling circumstances that are necessary to justify a departure.” *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014) (quotation omitted).

Several factors bear on the determination whether a defendant is particularly amenable to probation, and they 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). The *Trog* factors “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. In addition to the *Trog* factors, a district court should also consider whether placing the defendant on probation would pose a threat to public safety. *Id.* at 313. When considering particular amenability to probation that involves chemical-dependency treatment, a “defendant’s apparent willingness to succeed in treatment is a ground for a dispositional departure.” *State v. Nelson*, 329 N.W.2d 827, 829 (Minn. 1983); *see also State v. Hennessy*, 328 N.W.2d 442, 443 (Minn. 1983).

“We review a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). A departure constitutes an abuse of discretion if “no reasons for the departure are stated on the record” or, if reasons were stated, “the reasons given are improper or inadequate and there is insufficient evidence of record to justify the departure.” *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002) (quotation omitted). “This court will generally not interfere

with a district court's decision to depart downward" unless we have "a strong feeling that the departure is inappropriate." *Hickman*, 666 N.W.2d at 731 (quotation omitted).

The state argues that the district court abused its discretion by granting Bennett a downward dispositional departure because the record does not support the district court's application of the *Trog* factors; rather, the record shows that Bennett is only an average candidate for probation and therefore not particularly amenable. We address each factor in turn.

A. Age

The district court first determined that Bennett's age at the time of the offense, 56, did not weigh in his favor. *See Soto*, 855 N.W.2d at 310 (rejecting a finding that age weighed in favor of probation when the defendant was 37 years old). The state does not dispute the district court's finding on this factor, and it is supported by the record.

B. Criminal Record

The district court next considered Bennett's criminal record, which consisted of two prior DWI convictions. The district court acknowledged the prior convictions but determined that Bennett's recent efforts to address his alcohol use and mental health mitigated the effect of the convictions because, like the current conviction, they arose out of Bennett's substance-use disorder. The state argues that the district court should have reached the opposite conclusion because, in committing a third offense related to alcohol shortly after he was discharged from probation for the most recent DWI, Bennett has demonstrated a pattern of being unable to control his alcohol use.

Prior failed attempts at probationary treatment may weigh against amenability to probation in the sense that amenability “depends on an offender’s ability to . . . benefit from the opportunity for rehabilitation.” *Hickman*, 666 N.W.2d at 732. “[A] finding of amenability is commonly premised on patterns of behavior. One who is observably yielding, easily managed, is amenable to probation. However, amenability may also be premised on timely observation of motive to reform.” *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984), *rev. denied* (Minn. Oct. 16, 1984). Bennett’s probation for his prior DWI convictions did not include treatment, and the record contains ample evidence that Bennett was successful in voluntary treatment during the current proceedings. In addition, as part of Bennett’s probation for the current offenses, the district court ordered him to continue attending AA meetings, obtain a sponsor, and participate in individual therapy. Therefore, the district court’s determination that Bennett’s criminal record did not weigh heavily against him is supported by the record.

C. Remorse

The district court next considered remorse, and it determined that Bennett was remorseful. “The presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation.” *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *rev. denied* (Minn. Apr. 21, 1994). The state acknowledges that we defer to the district court’s finding of remorse, *see Solberg*, 882 N.W.2d at 626, but argues that a defendant must demonstrate a level of remorse that distinguishes him from other similarly situated defendants. But a district court may grant a dispositional departure even if certain factors—including remorse—do not distinguish a

defendant from others. *See Hickman*, 666 N.W.2d at 732 (affirming a downward dispositional departure and stating that “[a]lthough [the defendant’s] minimization of his offense indicates he was less than fully remorseful, remorse is only one of the *Trog* factors”). The record includes evidence that Bennett apologized to the deputy on the night of the offense, that he feels regret and embarrassment for the trouble he caused, that he thinks about how his actions affected the deputy and his family and friends every day. We therefore reject the state’s argument that Bennett’s remorse was legally insufficient for this factor to weigh in his favor.

D. Attitude In Court And Cooperation

The district court determined that Bennett’s attitude and cooperation weighed in his favor because he had been respectful in court and had complied with the court’s conditions, including the court’s order to use an alcohol monitor. The state asserts that Bennett’s respectful attitude and compliance with court-imposed conditions constitutes “baseline conduct expected from a criminal defendant” and argues that meeting baseline expectations is insufficient to distinguish Bennett from other similarly situated defendants. The district court acknowledged this argument at sentencing but explained that “[t]he Court sees many individuals who are not able to or [are] unwilling to comply with [the pretrial monitor] condition, but [Bennett’s] compliance with that demonstrates [his] commitment to [his] sobriety, not just commitment to abide by the Court’s conditions.”

The state also argues that the district court erred by not considering Bennett’s refusal to cooperate with police on the evening of the offense. The state did not make this argument at sentencing. Moreover, Bennett’s refusal to cooperate with police is inherent

in his convictions of assault and fleeing, and the state cites no authority holding that a defendant convicted of these offenses is ineligible for a dispositional departure. Therefore, the district court's reliance on Bennett's appropriate conduct in court and compliance with the alcohol-monitor condition, despite his refusal to cooperate during the offense, is legally permissible and supported by the record.

E. Support Of Friends And/Or Family

Finally, the district court determined that Bennett's support system in the chemical-dependency treatment community weighed in his favor because the people he met there would hold him accountable to continue treatment and remain sober. The state argues that the district court's finding is not supported by the record because Bennett's support system has not changed from what it was before he committed the current offense. Specifically, the state asserts that Bennett's support from family and friends has not increased since he committed the current offense and, because he has participated in treatment before, his current support in treatment is "not new." Premised on that assertion, the state argues that if Bennett's support system did not prevent him from committing the current offense, the same support system will not prevent him from committing future offenses.

The record does not support the state's interpretation of the evidence. The district court emphasized Bennett's recent success in treatment and the evidence that he had gone "above and beyond" by completing courses to support his peers in recovery. There is no evidence that Bennett had a similar level of support or made similar efforts in his prior treatment programs. In the affidavit he submitted at sentencing, Bennett described his

treatment counselor and individual therapist as “instrumental” in changing his mindset and stated that “[i]t would have been nice to have this thought system a long time ago, but then I can’t think like that and that is one of the *new* tools I use.” (Emphasis added.) The evidence supports the district court’s finding that Bennett’s support in treatment weighed in his favor and does not support the state’s assertion that his support in treatment is “not new.”

The state also argues that because the district court acknowledged that Bennett will still “stumble” in his efforts toward sustained sobriety, the district court should have found that Bennett will not be successful on probation and that Bennett’s support system will not “prevent him from making more mistakes.” This appears to be an argument that the district court should not place a defendant on probation if there is a risk that the defendant will recidivate. But considering whether probation is appropriate requires a district court to balance the factors that weigh in favor of probation against the potential risk to public safety. *See Hennessy*, 328 N.W.2d at 443 (affirming a downward dispositional departure when the district court “was satisfied that the risk of placing defendant on probation was significantly outweighed by the evidence that defendant finally was motivated to try to rehabilitate himself”). In addition, a district court may consider whether probation would be more effective than a prison sentence and tailor probation conditions to help the defendant succeed. *See Malinski*, 353 N.W.2d at 210. The district court did so here when it found that Bennett was not a threat to public safety and that a prison sentence would “do nothing but upend” his progress. Therefore, the district court’s statement that Bennett will still “stumble” in his efforts toward sustained sobriety does not militate against probation.

Finally, the state argues that Bennett is not amenable to probation because Bennett told the presentence-investigation writer that he did not plan on continuing individual therapy after sentencing because he did not feel he had much more to work on. The district court ordered Bennett to continue therapy as recommended by his therapist, and in doing so, ensured that Bennett would not have a choice. Moreover, Bennett did not refuse to continue therapy, and the record is replete with evidence that Bennett enjoys therapy and recognizes the benefits. Therefore, the district court's determination that Bennett's support system weighed in favor of probation is legally permissible and supported by the record.

In sum, because the district court's reasons for finding that Bennett is particularly amenable to probation are proper, adequate, and supported by the record, we will not reverse the district court's exercise of discretion in granting Bennett's motion for a downward dispositional departure.

Affirmed.