

*This opinion is nonprecedential except as provided by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
A25-0868**

State of Minnesota,
Respondent,

vs.

Donald Arthur Zawchenuk,
Appellant.

**Filed April 13, 2026
Affirmed in part, reversed in part, and remanded
Bratvold, Judge**

Crow Wing County District Court
File No. 18-CR-24-758

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

Kelsey A. Hopps, Crow Wing County Attorney, Lindsey S. Lindstrom, Assistant County Attorney, Brainerd, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Bratvold, Judge; and Florey,
Judge.*

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

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

In this direct appeal from a judgment of conviction for first-degree controlled-substance possession and other crimes, appellant argues that the district court abused its discretion in denying his motion for a downward dispositional departure from the Minnesota Sentencing Guidelines. He also argues that the district court erred in sentencing him based on a criminal-history score that was not supported by the record. We conclude that the district court did not abuse its discretion in denying appellant's motion for a departure. But we conclude that the district court erred by relying on the criminal-history score in appellant's sentencing worksheet. Thus, we affirm in part, reverse in part, and remand for resentencing so that the state can develop the sentencing record.

FACTS

These facts derive from plea-hearing testimony as well as the procedural history relevant to the issues on appeal.

On March 2, 2024, a law enforcement officer stopped and arrested appellant Donald Arthur Zawchenuk in Crow Wing County. At the time of the stop, Zawchenuk was driving a motor vehicle while impaired by methamphetamine. On further investigation, law enforcement learned that Zawchenuk had methamphetamine in the vehicle and that his license was canceled as inimical to public safety.

Respondent State of Minnesota charged Zawchenuk with three offenses: first-degree possession of a controlled substance under Minnesota Statutes section 152.021, subdivision 2(a)(1) (Supp. 2023), driving while impaired (DWI) by a

controlled substance under Minnesota Statutes section 169A.20, subdivision 1(2) (Supp. 2023), and driving after cancellation as inimical to public safety under Minnesota Statutes section 171.24, subdivision 5 (2022). The state amended the complaint to add a fourth charge—DWI with any amount of a schedule I or II controlled substance or its metabolite in the body under Minnesota Statutes section 169A.20, subdivision 1(7) (Supp. 2023).

At his August 2024 plea hearing, Zawchenuk entered a straight plea to all four counts.¹ Zawchenuk testified and confirmed that he would seek a sentencing departure based on the Veteran’s Restorative Justice Act (VRJA), Minn. Stat. § 609.1056, subd. 4 (2022), as well as a downward dispositional departure “under the regular means.” The district court accepted Zawchenuk’s guilty pleas on all four counts and entered convictions on three counts: first-degree controlled-substance possession, DWI by a controlled substance, and driving after cancellation inimical to public safety. The district court also scheduled a sentencing hearing and ordered a presentence investigation (PSI).

Zawchenuk’s PSI was completed in October 2024, and the report was filed with the district court in December 2024. The sentencing worksheet filed with the PSI assigned Zawchenuk seven criminal-history points, listed the offense of first-degree controlled-substance possession as severity-level eight, and stated that the presumptive sentence was 125 months in prison.

¹ A “straight plea” occurs when a defendant pleads guilty to a crime without any agreement with the state about sentencing. *Mason v. State*, 16 N.W.3d 828, 831 n.2 (Minn. App. 2025), *rev. denied* (Minn. Apr. 23, 2025).

Zawchenuk filed a motion and memorandum in support of a downward dispositional departure under the VRJA. Zawchenuk also filed letters from both his primary psychiatric physician and case manager/social worker at the Veterans Affairs (V.A.) Medical Center in St. Cloud.

At the sentencing hearing in February 2025, the district court noted the documents submitted by Zawchenuk and heard arguments from both parties about sentencing. Zawchenuk's attorney argued that the district court had discretion to grant a sentencing departure under subdivision 4 of the VRJA and alternatively asked for a downward dispositional departure on the ground that he was particularly amenable to probation.

Zawchenuk's attorney emphasized that Zawchenuk had consistently participated in voluntary inpatient and outpatient chemical-dependency treatment since shortly after the offense. Zawchenuk had a relapse after he completed inpatient treatment but returned to inpatient treatment in January 2025. He was expected to complete inpatient treatment around the time of the sentencing hearing, and he had a "plan in place." Zawchenuk arranged sober housing so that he could complete the outpatient phase of his treatment program.

Zawchenuk's attorney argued that housing was important—Zawchenuk had struggled to find housing in the past and, without housing, sobriety was "difficult to concentrate on." Zawchenuk's attorney acknowledged that "four formal violations of his probation" all involved Zawchenuk's failure to maintain sobriety, but maintained that sending Zawchenuk to prison would "not force sobriety."

The prosecuting attorney argued that the VRJA did not apply to Zawchenuk and that “no substantial and compelling circumstances” justified a downward dispositional departure. The prosecuting attorney cited Zawchenuk’s 12 prior felony convictions, his probation violations, and his failure to demonstrate a period of sobriety by completing court-ordered drug testing. In his allocution, Zawchenuk stated that he was approved for sober housing, he was “trying to be productive and carry on with [his] life,” and he “owned” his crimes and pleaded guilty. The district court took the sentencing issue under advisement and continued the hearing.

Twelve days later, the parties appeared for a second sentencing hearing. The district court asked for updates. Zawchenuk’s attorney stated that Zawchenuk had completed inpatient treatment and was accepted into an aftercare program. Zawchenuk addressed the district court and explained that he had been accepted into a 90-day aftercare program and, after that, he was “set up” for “sober living” through the V.A. He concluded that he was “just trying to do things right” and that he was “sick of this life.” The prosecuting attorney responded that the state had nothing to add to its earlier argument that the district court should impose the presumptive executed guidelines sentence of 125 months in prison.

The district court denied Zawchenuk’s motion for a sentencing departure under the VRJA and for a downward dispositional departure under the guidelines. The district court sentenced Zawchenuk to 125 months in prison for first-degree controlled-substance possession. The district court also filed findings of fact, conclusions of law, and order in which it concluded that, while Zawchenuk “has shown remorse for his actions and taken accountability,” his “prior record [was] extensive and varied” and his “cooperation while

on supervised release was minimal at best.” The district court considered Zawchenuk’s age, “support from members of his treatment team,” “letters from his psychiatric physician and the V.A., the PSI,” the amended complaint, and the arguments made by both parties. The district court commended Zawchenuk “for his accountability and his efforts to achieve sobriety” but did not find that Zawchenuk had a “particular amenability to probation, or that there [were] substantial and compelling reasons for a departure.”

Zawchenuk appeals.

DECISION

I. The district court did not abuse its discretion when it denied Zawchenuk’s motion for a downward dispositional departure.

On appeal, Zawchenuk argues that the district court abused its discretion because the record established compelling circumstances for a dispositional departure, pointing to his age, veteran status, chemical dependency, mental-health needs, remorse, accountability, cooperation, and “strong commitment to change his life.” Zawchenuk contends that the record shows he was particularly amenable to probation, had succeeded in chemical-dependency and mental-health treatment, and had housing and “sobriety supports” in place. Zawchenuk also maintains that the 125-month prison sentence is “unreasonable and inappropriate” for his controlled-substance-possession offense. He emphasizes that sentencing should be “the least restrictive necessary to achieve the purposes of the sentence,” citing Minnesota Sentencing Guidelines 1.A.5 (Supp. 2023).

“The Minnesota Sentencing Guidelines were created to assure uniformity, proportionality, rationality, and predictability in sentencing.” *State v. Adell*, 755 N.W.2d

767, 770 (Minn. App. 2008) (quotation omitted), *rev. denied* (Minn. Nov. 25, 2008). “Their purpose is to establish rational and consistent sentencing standards which reduce sentencing disparity and ensure that sanctions following conviction of a felony are proportional to the severity of the offense of conviction and the extent of the offender’s criminal history.” *Id.* (quotation omitted). “Consequently, departures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Under the guidelines, “when substantial and compelling circumstances are present, the judge ‘may’ depart.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellate courts review a district court’s sentencing decision for an abuse of discretion and will reverse a district court’s sentencing decision only in a “rare case.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). “A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *State v. Glover*, 4 N.W.3d 124, 134 (Minn. 2024) (quotation omitted).

A sentencing departure occurs when a district court imposes a sentence other than that recommended by the guidelines. Minn. Sent’g Guidelines 1.B.5 (Supp. 2023). A downward dispositional departure occurs when the guidelines recommend a prison sentence but the district court stays the sentence and imposes probation. Minn. Sent’g Guidelines 1.B.5.a. A district court may justify a downward dispositional departure on the ground that the defendant is “particularly amenable to probation.” *Soto*, 855 N.W.2d at 308-09. “By requiring a defendant to be *particularly* amenable to probation,” appellate courts can “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.” *Id.* at 309 (quotation omitted). Factors that may indicate a defendant’s particular amenability to probation include age, remorse, prior record, cooperation, attitude while in court, and support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (*Trog* factors).

Zawchenuk’s argument that he is particularly amenable to probation echoes the *Trog* factors. He contends that, while he “committed many offenses, they primarily involved possessing controlled substances or acts committed while using them,” indicating that his criminal conduct stemmed from his addiction to controlled substances. After committing the current offenses, and before his guilty plea or sentencing, Zawchenuk voluntarily participated in treatment for his controlled-substance addiction—it was not a condition of his pretrial release. Zawchenuk argues that his recent successes in community-based treatment contrast with “his past failure at maintaining sobriety after participating in treatment while in prison.” He emphasizes that he “immediately and consistently accepted responsibility and showed remorse for his conduct.”

But district courts need not grant a downward dispositional departure, even if a defendant is particularly amenable to probation. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). Appellate courts will affirm the denial of a motion for sentencing departure “as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985).

This record shows that the district court “carefully evaluated” all the evidence presented before denying Zawchenuk’s motion for a downward departure. *Id.* The district court’s sentencing order specifically noted that it “carefully considered the arguments made by counsel for [Zawchenuk], as well as the State, and has weighed the reasons for and against a departure in this matter.” The district court found that (1) Zawchenuk completed an inpatient treatment program in May 2024; (2) Zawchenuk had a relapse while participating in outpatient treatment, at which point he reached out to the V.A. and restarted inpatient treatment; (3) Zawchenuk was participating in an inpatient treatment program at the time of the sentencing hearing; (4) Zawchenuk’s psychiatric physician wrote to the district court that outpatient treatment in sober housing would be better for Zawchenuk than prison; and (5) Zawchenuk argued that he is particularly amenable to probation because he voluntarily participated in treatment and had a plan “for completing inpatient programming, obtaining sober housing, and engaging in outpatient treatment.”

But the district court concluded that a downward dispositional departure was not justified based on Zawchenuk’s prior record, which was “extensive and varied,” and his “minimal at best” cooperation while on pretrial release. The district court found that Zawchenuk failed to meet testing requirements while on pretrial release.² The district court commended Zawchenuk’s “accountability and his efforts to achieve sobriety” and

² On appeal, Zawchenuk states that, at sentencing, he challenged the PSI report’s statement that he had not complied with testing. Specifically, Zawchenuk argued that he had been testing while doing inpatient treatment programs through the V.A. The prosecuting attorney responded that, although Zawchenuk eventually provided documentation that he entered treatment on January 9, the record shows he still failed to appear for five tests between December 11 and January 6.

acknowledged that Zawchenuk “has shown remorse for his actions and taken accountability.” But the district court ultimately concluded that a departure was not appropriate after determining that Zawchenuk was not “particularly amenable to probation” and that there were no “substantial and compelling reasons for a departure.”

Zawchenuk relies on caselaw in which appellate courts have affirmed district court decisions granting downward dispositional departures despite a defendant’s long criminal history. For example, an appellate court affirmed a downward dispositional departure where the record showed the defendant “finally was motivated to try to rehabilitate himself and had found the right program to help him do it.” *State v. Hennessy*, 328 N.W.2d 442, 442-43 (Minn. 1983); *see also State v. Malinski*, 353 N.W.2d 207, 210-11 (Minn. App. 1984) (affirming a downward departure despite the defendant’s lengthy criminal history based on the district court’s finding “that the defendant has reached a very critical stage in his life, and that if the defendant is ever to change his life around so as to be free of criminal conduct, now is the time”), *rev. denied* (Minn. Oct. 16, 1984).

But we distinguish the issues in *Malinski* and *Hennessy* from the issue before this court. The district court in those cases *granted* a downward durational departure based on substantial and compelling circumstances, and we affirmed the district court’s exercise of discretion after the state appealed. *Hennessy*, 328 N.W.2d at 443; *Malinski*, 353 N.W.2d at 208-10. Zawchenuk asks us to reverse the district court’s *denial* of a downward dispositional departure, even though it was based on a determination that he was not particularly amenable to probation.

Zawchenuk’s primary position on appeal is that the record supports “a probationary sentence with a long prison term hanging over his head.” But he also urges this court to consider imposing a shorter prison sentence. Zawchenuk reasons that the 125-month prison term was not “the least restrictive necessary to achieve the purposes of the sentence,” relying on Minnesota Sentencing Guidelines 1.A.5.

We are not persuaded. While Zawchenuk accurately quotes the guidelines, he fails to consider that the very next paragraph says that “presumptive sentences are deemed *appropriate* for the felonies covered by them” and that departures from those presumptive sentences “should be made only when substantial and compelling circumstances can be identified and articulated.” Minn. Sent’g Guidelines 1.A.6 (Supp. 2023) (emphasis added). The supreme court has stated that, “[g]enerally, the purposes of the sentencing guidelines will not be served unless the district court applies the presumptive sentences.” *State v. Murphy*, 545 N.W.2d 909, 916-17 (Minn. 1996). Based on this record and the district court’s determinations, the presumptive sentence is the “least restrictive necessary to achieve the purposes of the sentence.” Minn. Sent’g Guidelines 1.A.5. In short, this is not the “rare case” in which we will reverse the district court’s denial of a downward departure. *Soto*, 855 N.W.2d at 305.

II. The district court erred in assigning Zawchenuk a criminal-history score of seven.

On appeal, Zawchenuk argues that the state failed to provide a record to support his assigned criminal-history score. The state concedes that the matter should be remanded for it to develop the record as to Zawchenuk’s criminal-history score. This court reviews

determinations of a defendant's criminal-history score for abuse of discretion. *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018).

During the sentencing hearing, Zawchenuk did not object to the calculation of his criminal-history score as seven. "Ordinarily, failure to object . . . at trial waives the issue on appeal." *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008). "But because a sentence based on an incorrect criminal history score is an illegal sentence, a defendant may not waive review of his criminal history score." *Id.* at 355-56 (quotation omitted).

"[T]he classification of prior offenses for the purpose of calculating a defendant's criminal history score is based on . . . Minnesota offense definitions and sentencing policies in effect when the defendant committed the current crime." *State v. Scovel*, 916 N.W.2d 550, 559 (Minn. 2018) (*Scovel* rule). "The State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). If the state has failed to prove the defendant's criminal-history score, but the defendant did not object at sentencing, the appellate court will reverse and remand for resentencing. *See Outlaw*, 748 N.W.2d at 356 (reversing and remanding for resentencing because appellant's criminal-history score lacked record support). And on remand, the state "is permitted to further develop the sentencing record so that the district court can appropriately make its determination." *Id.*

In *State v. Strobel*, the supreme court applied the *Scovel* rule. 932 N.W.2d 303, 305-09 (Minn. 2019). Strobel committed controlled-substance offenses in 2012 and 2016. *Id.* at 305. In 2016, Minnesota’s controlled-substance laws changed so that some conduct that previously would have constituted a felony controlled-substance crime was a gross misdemeanor under the new law. *Id.* The district court sentenced Strobel for his 2016 offense based on a criminal-history score that included one-half of a felony point for his 2012 conviction. *Id.*

On appeal, Strobel challenged the district court’s calculation of his criminal-history score, arguing that he should not have been assigned one-half of a felony point for his 2012 conviction absent evidence that his conduct in 2012 would have been a felony at the time of his 2016 offense. *Id.* at 306. The court of appeals agreed with Strobel and reversed and remanded to the district court for resentencing so that the district could consider the conduct underlying the 2012 offense and whether that conduct would constitute a felony or gross misdemeanor at the time of the 2016 offense. *Id.*

Zawchenuk claims that an error like the one in *Strobel* happened here. According to the sentencing worksheet on which the district court relied, Zawchenuk had four prior convictions for fifth-degree controlled-substance possession—two gross misdemeanors and two felonies. He committed those offenses before 2023. Legislative changes to the controlled-substance-crime statutes took effect in 2023, decriminalizing both possession of cannabis in certain situations, 2023 Minn. Laws ch. 63, art. 4, § 18, subd. 2(1), at 2831,³

³ We acknowledge that possession of cannabis in certain other situations is still a crime. See Minn. Stat. § 152.0263 (2024) (describing “cannabis possession crimes”).

and possession of “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.

Under *Scovel*, to include any points from Zawchenuk’s pre-2023 offenses in his criminal-history score for his 2024 controlled-substance conviction, the state was required to prove that the conduct underlying the pre-2023 offenses would have constituted felonies at the time of the current offense. *Scovel*, 916 N.W.2d at 559. In other words, the state had to prove that the pre-2023 offenses were not based on possession of cannabis in certain situations or of controlled-substance residue contained in drug paraphernalia, because that conduct was no longer a crime when Zawchenuk committed the current offense. *See id.* (stating that criminal-history scores must be calculated based on “offense definitions and sentencing policies in effect when the defendant committed the current crime”). The state and the district court, however, relied solely on the sentencing worksheet, which did not include the record necessary to calculate Zawchenuk’s criminal-history score.

Because the sentencing worksheet did not provide an adequate record on which to calculate Zawchenuk’s criminal-history score for sentencing purposes, we reverse and remand for resentencing so that the state can further develop the sentencing record.

Affirmed in part, reversed in part, and remanded.