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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1745**

State of Minnesota,
Appellant,

vs.

Tevon Keenan Scott,
Respondent.

**Filed March 25, 2019
Affirmed
Smith, Tracy M., Judge**

Sherburne County District Court
File No. 71-CR-17-1162

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, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant State of Minnesota challenges the district court's grant of respondent Tevon Keenan Scott's motion for a downward dispositional departure in sentencing,

arguing that Scott is not particularly amenable to probation. Because the district court did not abuse its discretion when it stayed execution of Scott's sentence, we affirm.

FACTS

One morning in August 2017, the police responded to a report of a home invasion. The victim-homeowner had a bloody nose and lip and a scratch on his face. He told the responding officer that someone, later identified as Scott, approached the front door asking for assistance with a vehicle. As the victim prepared to help, Scott disappeared. Soon thereafter, the victim found three men, including Scott, in the home behind a closed bedroom door. One of Scott's accomplices hit the victim with the victim's own rifle which had been in the house, and the victim fought back. After a scuffle, the three men ran out of the house, taking various coins and rings. The burglars drove away from the neighborhood, abandoned the vehicle, and started to flee on foot. The police swiftly located the abandoned vehicle and apprehended Scott and his accomplices. Scott was placed in jail, where he voluntarily spoke to an investigating officer. He told the officer that, although he knew his accomplices' plan to burglarize the house and acted as a decoy, he did not attack the victim.

The state charged Scott with multiple counts of burglary and robbery. In April 2018, Scott pleaded guilty to first-degree burglary while committing assault, in exchange for the dismissal of other counts. He admitted that one of his accomplices had hit the victim with a rifle. Before the sentencing hearing, the district court received and reviewed a Presentence Investigation (PSI). At the sentencing hearing, the district court heard testimony from Staci McGuire, the Sherburne County Release Advance Planning Coordinator, who recommended a treatment program for Scott. In accordance with the

PSI's recommendation, the district court departed from the sentencing guidelines and stayed execution of Scott's 78-month sentence, finding Scott particularly amenable to probation.

The state appealed.

D E C I S I O N

Appellate 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). “The Minnesota Sentencing Guidelines, however, limit the sentencing court’s discretion by prescribing a sentence or range of sentences that is presumed to be appropriate.” *Id.* at 308 (quotation omitted). A district court must impose a guidelines sentence “unless there exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” *Id.* (quotation omitted). Substantial and compelling circumstances justifying a downward dispositional departure include that “[t]he offender is particularly amenable to probation.” Minn. Sent. Guidelines 2.D.3.a.(7) (Supp. 2017). Factors relevant to determining if a defendant is particularly amenable to probation 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).

A district court abuses its discretion in granting a downward departure “when the reasons given are improper or inadequate and the record contains insufficient evidence to justify the departure.” *State v. Rund*, 896 N.W.2d 527, 533 (Minn. 2017). If the district

court's reasons for a departure "are legally permissible and factually supported in the record, the departure will be affirmed." *State v. Hicks*, 864 N.W.2d 153, 156 (Minn. 2015) (quotation omitted).

The district court decided that Scott was particularly amenable to probation based on a number of factors, which we address in turn.¹

A. Motivation to reform

The district court "focus[ed] most expressly on" the fact that, during his 358 days of pretrial detention, Scott took "every opportunity to access programming, to deal with issues, to seek out treatment, [and] to be productive." Of course, mere profession by a defendant of his willingness to "work on [the] issues" that prompted the offense cannot by itself justify a downward dispositional departure. *State v. Johnson*, 831 N.W.2d 917, 926 (Minn. App. 2013) (alteration in original), *review denied* (Minn. Sept. 17, 2013). But particular amenability to probation may "be premised on timely observation of motive to reform." *State v. Malinski*, 353 N.W.2d 207, 210 (Minn. App. 1984) (citing *State v. Hennessy*, 328 N.W.2d 442 (Minn. 1983)), *review denied* (Minn. Oct. 16, 1984).

The PSI notes that Scott had "attended several AA meetings, parenting classes, and adult basic education classes while incarcerated." He was also "hired as an inmate worker but had to be removed due to his frequent transport." The record provides factual support

¹ The state argues that the district court "gave considerable weight to the treatment recommendation from McGuire." Although the district court did eventually order Scott to complete the treatment program recommended by McGuire, it did not rely upon McGuire's recommendation in finding Scott particularly amenable to probation. Therefore, the state's argument on this issue is irrelevant.

for a “timely observation of motive to reform.” *Malinski*, 353 N.W.2d at 210. The state does not dispute that Scott, based on the record, is motivated to rehabilitate himself, but it argues that the invigorated motivation works against a probationary sentence. According to the state, Scott must continue to be incarcerated because his “only success in any course of treatment had been while he remained in custody.”

The district court found otherwise, and the record supports the finding. The record does not include evidence of failed treatment pre-incarceration; the PSI simply reports that Scott “has never seen a therapist [and] imagines he would ‘shut down’” if he would see one. Moreover, Scott ultimately expressed to the probation officer “a desire to remain sober from illicit substances and decrease his alcohol consumption” and stated that “he is willing to try individual therapy to address his mental health issues which cause his drinking.” As the PSI notes, “the fact that [Scott] has not had the opportunity to address his substance abuse or attend individual therapy in the community in the past” reasonably supports a stay of his prison sentence, now that he has demonstrated a desire to make use of resources available to him. The district court’s reliance on motivation to reform is legally permissible and factually supported.

B. Remorse

The district court also found that Scott was remorseful, based on his statements in the PSI and in court. Scott indicated to the probation officer that “he regrets the instant offense” and that “he wishes he could do it all over again and make different choices.” In court, Scott stated as follows:

Though I cannot go back in time to change my wrongdoings, I am deeply apologetic for the pain, suffering and fear that I have caused to my victim and the trauma he had, to struggle through life and . . . remembering of that day. I acted selfishly and in total disregard for another human being. There are not enough words to erase what I have done to him and to his family and friends. I am very sorry.

The state makes two objections. First, it argues that the district court improperly considered the fact that the victim was a stranger to Scott. The state argues that the relationship between defendant and victim is an offense characteristic and an offense characteristic is not a permissible basis for a dispositional departure. *But see State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (“A dispositional departure *typically* focuses on characteristics of the defendant [A] durational departure must be based on . . . the seriousness of the *offense.*” (first emphasis added)). But the district court discussed the relationship of the victim to Scott (and his accomplices) only in the context of determining whether Scott was “truly remorseful.” And remorse is a permissible offender-related factor to consider in granting a dispositional departure. *Id.*

Second, the state argues the district court did not address the fact that, during the PSI interview, “[Scott] did not reflect on how the burglary affected the victim.” The PSI does not say that Scott was *not* sorry for what happened to the victim. What the state is pointing out is that the PSI does not say he was sorry, either. However, the PSI’s silence on how Scott felt about the victim does not negate his explicit statements of apology at the sentencing hearing. The district court found Scott’s apology demonstrative of sincere remorse, and a “trial judge is in the best position to evaluate” such a question. *State v.*

Hough, 585 N.W.2d 393, 397 (Minn. 1998). The district court’s reliance on remorse is legally permissible and factually supported.

C. Cooperation

The district court found that Scott was cooperative because he ultimately made a statement to the police in furtherance of the investigation. The court also gave him credit for pleading guilty. The state challenges this finding, arguing that it is contrary to the record.

The state points out that “[Scott] and the codefendants fled from the scene after the burglary and attempted to evade law enforcement who were responding to the burglary” and contends that Scott cooperated only “after he realized that the game was up.” But the state cites no authority holding that a defendant’s cooperation cannot be considered in sentencing unless it occurred before apprehension. And the record provides factual support for finding that Scott cooperated. An investigating officer interviewed Scott in the jail on the date of the offense. At the time, Scott was “fully aware he was not required to speak to the officer and could request an attorney.” Scott nonetheless chose to tell the officer what happened earlier that day, because he thought “he was not ‘gonna get blamed for this [alone]’ [and] ‘this is not something I do.’” Scott spoke with the officer for over 30 minutes, and none of his statements from the interview are being challenged to be untruthful. The district court’s reliance on cooperation is legally permissible and factually supported.

D. Appropriateness in court

Lastly, the district court found that Scott acted appropriately in court. The state does not argue that this finding lacks factual support or that reliance on it is legally

impermissible. Because a “trial judge is in the best position to evaluate the offender’s conduct,” *id.*, and nothing in the record suggests that the district court’s evaluation was erroneous, this factor weighs in favor of probation.

E. Minn. Stat. § 152.152

On the departure report, one of the boxes that the district court checked to indicate its reasons for departure stated: “Convicted of controlled substance offense, is particularly amenable to probation based on adequate evidence that offender is chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minn. Stat. § 152.152.” The state correctly notes, and Scott agrees, that checking of the box was erroneous because Scott was not convicted of a controlled-substance offense. The mistake, however, is immaterial. “When the district court gives improper or inadequate reasons for a *downward* departure, [appellate courts] may independently examine the record to determine whether alternative grounds support the departure.” *Rund*, 896 N.W.2d at 532-33. As discussed above, alternative grounds support the departure.

The state’s overarching argument is that the district court gave too much weight to the factors supporting departure and not enough weight to other relevant factors—in other words, even if the district court’s reasons are legally permissible and factually supported, they provide insufficient support for a downward dispositional departure. The state relies on *Soto*. In *Soto*, the district court stayed the defendant’s guidelines 12-year prison sentence for first-degree criminal sexual conduct because it found the defendant particularly amenable to probation. 855 N.W.2d at 305, 307. The record supported “a few of the factors that . . . have [been] recognized as potentially relevant” in determining a defendant’s

particular amenability to probation. *Id.* at 312. However, the supreme court decided that those factors, “individually and collectively,” did not sufficiently show Soto’s particular amenability to probation relative to other defendants. *Id.* Based on that determination and the brutality of Soto’s crime, the supreme court held that the district court abused its discretion by imposing an “inappropriate and disproportionate” sentence. *Id.* at 313-14.

We are not persuaded that *Soto* compels reversal here. As the supreme court recognized, *Soto* is an “exceptional case” in which the district court abused its broad discretion. *Id.* at 314. The district court departed from a guidelines sentence of 12 years and gave probation to a defendant who “committed a forcible and violent assault against an intoxicated and thus particularly vulnerable person.” *Id.* at 313. “The assault lasted approximately [two] hours and the victim was repeatedly subjected to multiple penetrations by two men. Soto slapped the victim’s face, choked her, and caused several injuries.” *Id.* Here, the stayed sentence was for 78 months. Although Scott’s accomplice hit the victim with a rifle before they ran away, Scott did not personally commit acts of violence against anyone. Most importantly, unlike Soto, Scott demonstrated strong motivation to reform.

Based on our “collective, collegial experience in reviewing a large number of criminal appeals from all the judicial districts,” *State v. Spain*, 590 N.W.2d 85, 89 (Minn. 1999) (quotation omitted), we conclude that the district court’s reasons are sufficient to support the downward dispositional departure.

Affirmed.