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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0091**

State of Minnesota,
Appellant,

vs,

Tyler Paul Wetzel,
Respondent.

**Filed September 16, 2019
Affirmed
Hooten, Judge**

Blue Earth County District Court
File No. 07-CR-18-2937

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Klaphake,
Judge.*

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

UNPUBLISHED OPINION

HOOTEN, Judge

In an appeal by the state of Minnesota, the state argues that the district court abused its discretion by granting a downward dispositional departure to a nineteen-year-old respondent for his first-degree burglary conviction. We affirm.

FACTS

In February 2018, respondent Tyler Wetzel kicked in the back door to his grandparents' garage and stole a 9-millimeter pistol from a vehicle inside. He was 19 years old at the time. Wetzel's grandparents, who suspected that Wetzel committed the burglary, reported the incident to the police. Police spoke with Wetzel two days later, and he admitted to taking the pistol from the vehicle, claiming he needed it for protection. As a result, the state charged Wetzel with first-degree burglary, theft of a firearm, carrying or possessing a pistol without a permit, and fourth-degree intentional damage to property.

In late October 2018, Wetzel pleaded guilty to first-degree burglary under Minn. Stat. § 609.582, subd. 1(b) (2016) and theft of a firearm under Minn. Stat. § 609.52, subd. 2(a)(1) (2016), both felony-level offenses. He also pleaded guilty to fifth-degree possession of marijuana under Minn. Stat. § 152.025, subd. 2(1) (2016), a gross misdemeanor, in a separate file. In exchange for his guilty plea, the state dismissed two other files. A pre-sentence investigation (PSI) indicated that while Wetzel had prior involvement with the criminal justice system, he had no criminal-history points. Despite the lack of criminal-history points, the presumptive sentence for the burglary was 48 months in prison. It was the opinion of the PSI evaluator that based upon Wetzel's prior

probationary history, he was not particularly amenable to probation and ultimately recommended that the district court not depart from the Minnesota Sentencing Guidelines when sentencing him.

Wetzel moved for a downward dispositional departure. In his sentencing memorandum, he argued that all the *Trog* factors support a downward dispositional departure in his case. He pointed to his youth—19 years of age at the time of the offense—and argued that his brain and maturity were still developing. He asserted that his prior record supported his request because it “does not establish that he is a threat to public safety,” the offenses at issue in the current case were his first felony-level offenses, and his criminal-history score was zero. Wetzel claimed that he has demonstrated true remorse and has been working to rebuild the trust of his grandparents. He argued that his cooperation—including admitting to the crime, giving an honest statement to police, and helping police in another investigation which resulted in him being labeled a “snitch” and retaliated against in jail—supported a departure. Wetzel asserted that he was forthcoming and respectful when appearing in court.

Finally, Wetzel argued that his family and social support favored a downward dispositional departure because he has a strong family support network to help him. The memorandum focused on his substance-abuse issues and how they have been the cause of his legal issues. And Wetzel argued that his family support network was helping him to deal with these issues. In the sentencing memorandum, Wetzel claimed that he had been sober for eight months, thanks in large part to his decision to seek treatment and then move to North Carolina to live with his mother and stepfather where he was able to work two

jobs, attend sober support groups (which he continued to do in jail), receive mental health counseling, and submit to drug testing at his parents' request.¹ Wetzel claimed that his father—a drug-court graduate—would be willing to house him until his probation could be transferred to North Carolina where he could go back to living with his mother. He also pointed out that the victims—his grandparents—did not want criminal charges filed against him and wanted him to get help with his substance abuse issues on probation. Wetzel's mother also submitted a letter to the district court detailing how Wetzel had thrived while living with her and her husband in North Carolina and had made positive changes in his life.

Wetzel also argued that a downward dispositional departure would be appropriate because this offense was less serious than a typical first-degree burglary. He explained that he never entered the living space of the house, no one was present at the time of the burglary, and that he did not enter the garage in possession of a firearm or threaten anyone with a firearm while committing the burglary. Wetzel asserted that these facts more closely fit a second-degree burglary offense, which would carry a presumptive sentence of 18 months stayed, than a first-degree burglary.

The district court held a sentencing hearing in December 2018. At the hearing, the state argued for the presumptive sentence, essentially reiterating what was in the PSI and pointing out that Wetzel has previously had opportunities to receive chemical dependency treatment and be on probation, but has not succeeded. Wetzel reiterated many of the

¹ The record is unclear as to precisely how long Wetzel was in North Carolina, but it appears he was there for at least a few months.

arguments from his sentencing memorandum and pointed out that most of his prior opportunities for treatment and probation were from when he was a juvenile.

The district court granted Wetzel's motion for a downward dispositional departure.

In explaining its reasoning, the district court addressed Wetzel and said the following:

[Y]ou [were] very young when you attempted – the treatments, you have great family support, the thing that strikes me is that you did well down in North Carolina. . . . I am also struck by the fact that your grandparents are here saying that they didn't even want to press these charges, not only that but they are here now asking for you to . . . have an opportunity to do some treatment. . . . [A]s [defense counsel] rightly pointed out, the only reason this is a commit to the Commissioner is because of that gun. That he pointed it out, but I noticed also that gun that you took was at that point, not operatable cuz (sic) there was no ammunition or anything there . . . that doesn't really matter on the other hand it sort of does. . . . I am troubled by the fact that you have left treatment a couple of times, that is a problem . . . on the other hand maybe you have grown up

I am not going to send you to prison, you are a young man, you have a chance, you have a great family – a lot of family support here and I appreciate that, I am struggling with the [amenable] to probation part that I need to say as a result of this departure, but I will err on the fact that you were young . . . and give you a second chance, what I think you need to do most appropriately is go back to live with your mom in North Carolina. . . . I am not sure that prison is the right place for you at this point in your life, and I am going to give you a break

This appeal by the state follows.

DECISION

The state challenges the imposition of a downward dispositional departure in this case. We review a district court's decision to impose a downward dispositional departure for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014). And a

departure constitutes an abuse of discretion if the district court's reasons for departing are "improper or insufficient and there is insufficient evidence of record to justify the departure." *Id.* at 308 (quotation omitted).

The sentencing guidelines establish an applicable disposition and range of sentence durations for different offenses. Minn. Sent. Guidelines II.D.1. A district court must sentence a defendant to that disposition and within that range unless "identifiable, substantial, and compelling circumstances" exist that would support a departure. *Id.* "Substantial and compelling circumstances are those that make a case atypical." *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). "[W]hen justifying only a *dispositional* departure, the trial court can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). But, a district court is not limited to considering only offender-related factors when deciding whether to impose a downward dispositional departure; it may also consider offense-related factors. *Walker*, 913 N.W.2d at 468; *see also State v. Stempfley*, 900 N.W.2d 412, 418 (Minn. 2017) (affirming a downward dispositional departure based on the defendant playing a minor role in the offense).

The sentencing guidelines provide a *non-exclusive* list of mitigating factors that may be used as reasons for a downward departure. Minn. Sent. Guidelines II.D.3.a. Relevant to this appeal, the list includes: "(5) Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense" and "(7) The offender is particularly amenable to probation." *Id.*

At the sentencing hearing, the district court seemed to focus on the seventh mitigating factor, particular amenability to probation. In assessing whether a defendant is particularly amenable to probation, a district court may consider the *Trog* factors: “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); *see also State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003) (applying the *Trog* factors to particular amenability to probation). The district court specifically cited to Wetzel’s youth and family support network at the sentencing hearing, and in the departure report, under the offender-related mitigating factors, the box next to “Shows remorse/accepts responsibility” was checked. But at the sentencing hearing, the district court also said “I am struggling with the [amenable] to probation part that I need to say as a result of this departure.” And the district court never went on to explicitly find Wetzel particularly amenable to probation despite repeatedly noting how well Wetzel did in North Carolina and the exceptional family support he had.

This stands out because the *Trog* factors are typically used to support a finding that a defendant is particularly amenable to probation (or the inverse). *See, e.g., Hickman*, 666 N.W.2d at 732–33 (affirming a downward dispositional departure based in part on particular amenability to probation). And no such particular-amenability-to-probation finding was made here. Yet the district court still granted a downward dispositional departure. But the lack of a particular-amenability-to-probation finding is not fatal to the departure because particular amenability to probation is just one of several factors on a non-exclusive list that can justify a downward dispositional departure. The true inquiry is

whether there exist “identifiable, substantial, and compelling circumstances” to justify the departure. Minn. Sent. Guidelines II.D.1. We conclude that the district court did not abuse its discretion in concluding that such circumstances exist in this case.

At sentencing, the district court placed special emphasis on Wetzel’s family support. It noted that Wetzel has “a great family – a lot of family support here.” The district court then went on to say “what I think you need to do most appropriately is go back to live with your mom in North Carolina,” and emphasized that this should be done as soon as possible. This comment makes sense in the context of the district court’s prior observation that “you did well down in North Carolina . . . and obviously the reason was you got away from the people . . . that you were hanging out with here in Mankato, that is always the problem; that is always the situation . . . as long as you were away from those sort of folks, you were fine.”

The district court also twice stated that it was “struck by” and “appreciated” the victims’ desire that Wetzel not be prosecuted and that he be given probation so that he may seek treatment for his chemical addiction. In their victim impact statement to the district court, Wetzel’s grandparents explained that they had specifically asked that charges not be pressed against Wetzel. They also said that in North Carolina, Wetzel “was in a good place; the best place he has been in for many years,” that they wanted him to be able to go back to North Carolina, and that they did not believe that prison would help him. And, in their interview for the PSI, they asserted that “there were no damages or harm done” to them through the burglary. Finally, it seems that in stating “I am not sure that prison is the right place for you at this point in your life,” the district court was following the *Heywood*

court's holding that a district court can focus "on whether the presumptive sentence would best for [the defendant] and for society." 338 N.W.2d at 244.

Also relevant, though perhaps not dispositive on its own, is that the offense committed by Wetzel was less serious than the usual first-degree burglary. As stated above, a downward dispositional departure can be based on offense-related factors. *Walker*, 913 N.W.2d at 468. It is relevant in assessing the circumstances of this case that the unloaded firearm in question was the object of his crime and not a tool used in furtherance of it, that Wetzel burglarized the garage but not the house, and that the victims of the crime were not home at the time of the burglary.

Looking at the case as a whole, including especially Wetzel's youth, his lack of a criminal history score, his strong family support, his remorse and cooperation with law enforcement, and the details of the offense, we conclude that the district court did not abuse its discretion in determining that this is the rare case where there are substantial and compelling circumstances justifying a downward dispositional departure.

Affirmed.