STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0123

State of Minnesota,
Respondent,

vs.

Dane Michael Vandervoort,
Appellant.

Filed November 30, 2020
Affirmed
Worke, Judge

Renville County District Court
File No. 65-CR-19-69

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

David Torgelson, Renville County Attorney, Olivia, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Bratvold, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant argues that the district court abused its discretion by denying his motion for a downward dispositional departure. We affirm.

FACTS

On March 16, 2019, appellant Dane Michael Vandervoort sent his ex-girlfriend, A.B., text messages threatening things, like "he was going to take everyone he hates to HELL with him." Later that evening, A.B. was at home with a friend when Vandervoort walked in, pulled out a gun, and stated that if anyone called the police he would "start shooting." When A.B. told Vandervoort that he was not going to shoot her, he grabbed her and said, "You don't think I will shoot you," and pointed the gun against her leg.

A.B. freed herself from Vandervoort and sent a text message to her mother instructing her to call the police. A.B.'s mother called the police, and an officer was dispatched to the residence. When the officer entered the residence, Vandervoort walked toward the officer and pointed a gun at him. The officer directed Vandervoort multiple times to give him the gun, but Vandervoort replied, "It's you or me." The officer used weapon-retention techniques to disarm Vandervoort, but Vandervoort retained control of the gun and a fight ensued. A.B. yelled that Vandervoort had another gun and knives. Vandervoort reached for the officer's weapon. The officer punched Vandervoort in the face and tasered him before gaining control of Vandervoort's gun. The officer retrieved another gun from Vandervoort's pocket and handcuffed him.

During an interview with police, Vandervoort stated that he heard that A.B. was talking badly about him, and he was upset because he could not see his two children from previous relationships, so he snapped and wanted A.B. to watch him die. Vandervoort stated that "[h]e wanted to do something so he could go to jail and be forgot about forever."

In August 2019, Vandervoort pleaded guilty to three counts of second-degree assault with a dangerous weapon, one for each victim—A.B., A.B.'s friend, and the officer. Vandervoort moved for a downward dispositional departure and submitted letters of support from family and friends and a report from a psychological evaluation.

A presentence-investigation report (PSI) outlined Vandervoort's criminal history, including: a gross-misdemeanor driving while impaired (DWI) from 2006, a gross-misdemeanor DWI from 2008, a misdemeanor DWI from 2006, an open-bottle conviction from 2005, a conviction for underage drinking and driving from 2005, and a pending domestic-assault charge from January 2019. The PSI indicated that Vandervoort expressed remorse and appeared to take responsibility for his actions. But the PSI noted that although Vandervoort "acknowledged that his usage of alcohol has been problematic for him," he declined to participate in an outpatient chemical-dependency program. The PSI recommended the presumptive sentences.

Following a sentencing hearing, the district court stated:

> I have now carefully considered the report of the psychologist and while she does present factors which could be seen as mitigating factors including . . . [posttraumatic stress disorder] . . . I believe that they are outweighed by other factors and specifically the dangerousness that was exhibited in the commission of this offense. And I do not believe that a short stint in jail has alleviated this dangerousness and one of the things that reinforces that belief is the prior occasion when Mr. Vandervoort was in jail and finished a treatment program and relapsed as soon as he had finished the program. . . . [T]he very nature of this offense indicates to me that Mr. Vandervoort is dangerous. And this was not a one-time offense, even reviewing the psychological report . . . there's a history of anger, a pattern of impulsiveness and aggression. . . . In this particular case, . . . [he] threatened to kill people and when a

> law officer arrived, he engaged in a life or death struggle with a law officer. He or someone else could have easily been killed and therefore, I think those factors outweigh any argument that this should be a departure based on amenability to treatment.

The district court sentenced Vandervoort to three 36-month prison sentences, two to be served consecutively and one concurrently. This appeal followed.

D E C I S I O N

Vandervoort argues that the district court abused its discretion by denying his request for a downward dispositional departure. The district court imposed presumptive sentences. A sentence that is prescribed under the sentencing guidelines is "presumed" appropriate. *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014). A district court may depart from a presumptive sentence only if "identifiable, substantial, and compelling circumstances" warrant a departure. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). Appellate courts "afford the [district] court great discretion in the imposition of sentences and reverse . . . only for an abuse of that discretion." *Soto*, 855 N.W.2d at 307-08 (quotation omitted). "[I]t would be a rare case which would warrant reversal of the refusal to depart." *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

In considering a motion for a downward dispositional departure, a district court's focus is on the defendant and whether he is particularly amenable to probation. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But a district court may also consider offense-related factors in deciding whether a dispositional departure is appropriate. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018). A district court is not required to depart from a

presumptive sentence even if the record shows that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009).

Lacked capacity

Vandervoort first argues that a downward dispositional departure was appropriate because he lacked capacity due to a mental illness. A district court may consider, as a mitigating factor, that "[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Minn. Sent. Guidelines 2.D.3.a.(3) (2018). However, "[t]he voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor." *Id.* And this is the downfall of Vandervoort's argument.

The PSI showed that Vandervoort has several alcohol-related offenses. And Vandervoort acknowledged that "his usage of alcohol has been problematic for him." Vandervoort admitted that he began drinking at 10:30 a.m. on the date of the offense. Thus, Vandervoort, although aware that alcohol is "problematic for him" and has led to previous criminal convictions, became intoxicated before he committed the offenses. The district court determined that, even if Vandervoort suffered from a mental illness, the dangerousness of the offense outweighed any mitigating factor. Thus, the district court did not abuse its discretion by denying Vandervoort's motion on this basis because Vandervoort was voluntarily intoxicated, and the district court determined that the dangerousness of the offense supported the presumptive sentences.

Severe mental illness

Vandervoort next argues that he should have received a downward dispositional departure because he has a severe mental illness. A district court may, "when consistent with public safety," place an offender "with a serious and persistent mental illness," on probation with the requirement that the offender successfully complete treatment, rather than impose a prison sentence. Minn. Stat. § 609.1055 (2018). For purposes of this statute, "mental illness" is defined under Minn. Stat § 245.462, subd. 20(c) (2018). Under section 245.462, subdivision 20(c)(4), an adult meeting the definition of having a "mental illness"

> (i) has a diagnosis of schizophrenia, bipolar disorder, major depression, schizoaffective disorder, or borderline personality disorder;
> (ii) indicates a significant impairment in functioning; and
> (iii) has a written opinion from a mental health professional, in the last three years, stating that the adult is reasonably likely to have future episodes requiring inpatient or residential treatment, of a frequency described in clause (1) or (2), unless ongoing case management or community support services are provided.

Vandervoort claims that he meets the statutory definition because "[h]e supplied the court with an expert opinion in the form of a psychological evaluation [that] concluded [he] was struggling with a serious mental illness before, during, and even after the offense." But section 609.1055 uses the word "may," which grants a district court discretion in deciding whether to place a mentally ill offender on probation. *See State v. Abdi*, 855 N.W.2d 546, 548-49 (Minn. App. 2014). And here, the district court, after "carefully" considering the psychological report, determined that any mitigating factor was outweighed by "the dangerousness" of the offense. The district court noted Vandervoort's

previous relapse immediately after completing a treatment program. The district court stated that "Vandervoort is dangerous," referencing the psychological report that stated that Vandervoort has "a history of anger, a pattern of impulsiveness and aggression." Thus, the district court determined that a downward dispositional departure was not consistent with public safety and did not abuse its discretion by denying Vandervoort's motion on this basis.

Particularly amenable to probation

Finally, Vandervoort argues that application of the *Trog* factors shows that he is particularly amenable to probation. *See* 323 N.W.2d at 31 (stating that in assessing whether a defendant is particularly amenable to probation, a district court may consider age, prior record, remorse, cooperation, attitude in court, and support of family and friends). The supreme court has explained what it means to be "particularly amenable to probation."

> "Particular" means "exceptional" or "[d]istinctive among others of the same group," and "particularly" means "especially" or "specifically." By requiring a defendant to be *particularly* amenable to probation, therefore, we 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. At the same time, insisting on particular amenability to probation limits the number of departures and thus fosters uniformity in sentencing, which is a primary purpose of the Sentencing Guidelines.

Soto, 855 N.W.2d at 309 (citations omitted).

Vandervoort claims that he is particularly amenable to probation because, although he is not considered a young man at 33 years old, he lacks a criminal history, he has shown that he can succeed on probation, he is motivated to change, he is remorseful, he accepted

responsibility for his actions, he was cooperative and respectful in court, and he has support from family and friends.

The record, however, refutes Vandervoort's claims. First, Vandervoort has several alcohol-related offenses. And while Vandervoort completed a treatment program, he relapsed the day he completed it. Next, while the state concedes that Vandervoort was remorseful, respectful, and cooperative in court, it asserts that Vandervoort's expressed motivation to change could actually be his desire to avoid prison. The record supports this assertion. A jail evaluation noted concerns that Vandervoort was "over-reporting" and lacked overt symptoms of mental illness. Finally, Vandervoort provided several letters of support from family and friends. But most, if not all, of these individuals have been in Vandervoort's life for many years, and none have been able to provide the support up to this point to prevent Vandervoort from committing his offense.

The district court stated that "Vandervoort is dangerous," and this was not a "one-time offense." The district court explained that Vandervoort "threatened to kill people and . . . engaged in a life or death struggle with a law officer. He or someone else could have easily been killed and therefore . . . those factors outweigh any argument that this should be a departure based on amenability to treatment." Based on the district court's reasoning and the consideration of the *Trog* factors, the district court properly denied Vandervoort's request for a downward dispositional departure because Vandervoort has not shown that he is "particularly" amenable to probation.

Affirmed.