STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0326

State of Minnesota,
Appellant,

vs.

Timothy John Wright,
Respondent.

Filed September 13, 2021
Reversed and remanded; motion granted in part and denied in part
Bratvold, Judge

Waseca County District Court
File No. 81-CR-20-397

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

Rachel V. Cornelius, Waseca County Attorney, Waseca, Minnesota (for appellant)

Robert J. Shane, Minneapolis, Minnesota (for respondent)

Bethany Assell, Ann McFarland, Standpoint, Minneapolis, Minnesota (for amicus curiae Standpoint)

Considered and decided by Bratvold, Presiding Judge; Connolly, Judge; and Hooten, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant State of Minnesota seeks review of an order granting a downward dispositional departure on respondent Timothy John Wright's sentence for first-degree

criminal sexual conduct, arguing the district court abused its discretion. Because the district court did not identify substantial and compelling reasons to depart from the sentencing guidelines, we reverse and remand to execute the guidelines sentence of 168 months in prison. We also grant in part and deny in part respondent's motion to strike portions of the amicus brief.

FACTS

In June 2020, the state charged Wright with seven counts of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a), (b), (g), (h)(iii) (2010) (counts 1 to 7), and eight counts of second-degree criminal sexual conduct, Minn. Stat. § 609.343, subd. 1(a), (b), (g), (h)(iii) (2010) (counts 8 to 15). Wright was married at the time and has seven children—the state accused him of sexually abusing his two oldest children: his sixteen-year-old son (child 1) and thirteen-year-old daughter (child 2).

At an October 2020 hearing, the parties told the district court they had reached a plea agreement: Wright agreed to plead guilty to count 1, first-degree criminal sexual conduct, and the state agreed to dismiss the remaining 14 counts. The prosecuting attorney stated, "[e]ven though he's pleading guilty to Count 1, that in the 'to wit,' where it says, 'Sexual penetration with Child 1,' it would also . . . include Child 2." Thus, Wright would admit to "penetration with the children and it would be multiple acts over time." Wright "reserv[ed] the right" to move for a downward dispositional departure. But if the district court denied the departure motion, "the parties have then agreed to a fixed sentence of 168 months." We note that 168 months is at the high end of the guidelines range because of Wright's criminal history and offense level.

Under oath, Wright waived his trial rights and pleaded guilty to count 1. As a factual basis for the plea, Wright agreed that child 1 told Wright's wife about the "sexual abuse that [Wright] committed against him." Wright also agreed that, when his wife confronted him about the abuse, Wright "fully admitted" he sexually abused child 1, and also "volunteered" that he sexually abused child 2.

Wright agreed he abused child 1 by "touching" and "oral sex," and he abused child 2 by touching her "breasts" and "vagina" and "performing oral sex on her." He admitted he sexually abused both children "on multiple occasions" and "over an extended period of time." Wright agreed that he began abusing child 1 when he was eight years old, and child 2 when she was seven years old. He also agreed the abuse "sometimes . . . occurred daily." The district court accepted Wright's plea, ordered a presentence investigation (PSI), and continued the case for sentencing.

Before the PSI, Wright underwent two psychosexual examinations by licensed psychologists, who issued reports received by the district court. The first report, prepared on Wright's attorney's recommendation while Wright was in jail, recommended Wright complete a sex-offender-specific treatment program but did not discuss treatment outside of a prison setting. The second report, prepared at the direction of probation, also concluded Wright should complete sex-offender treatment, and this treatment could be provided on an outpatient basis. Both reports said Wright had an average-to-low risk of reoffending. The PSI cited the second report's recommendation that Wright undergo sex-offender treatment and recommended a guidelines sentence of 168 months in prison.

Before sentencing, Wright moved for a downward dispositional departure. During the sentencing hearing, the prosecuting attorney read a victim-impact statement from Wright's ex-wife.[1] She stated, "[o]ne child was already admitted to a mental hospital for suicidal thoughts," and "[i]t will be a battle for many [of her children] for a long time." She told the district court that her "son made [her] aware of the threatening demeanor that was being held over him this whole time, that he must never allow mom to know about these happenings. [Her] daughter said she was threatened that if she ever told and the offender went to jail, it would all be her fault." Wright's ex-wife also stated her "only source of monthly income was stripped away, leaving [her] to single parent all the emotionally hurting and abandoned feelings, on top of now also needing to find a way to be able to work on [her] own to compensate [for] the missing income."

The prosecuting attorney argued against any departure: "[T]his was ten years of abuse to one of the children and . . . about seven or eight for the other child," so "[t]his is also multiple victims."

Wright's attorney asked the district court to stay any sentence and impose probation, a downward dispositional departure. He pointed to Wright's age of 39, lack of a prior criminal record, acceptance of responsibility for his offense, remorse, cooperation, and support from Wright's father, mother, and sister. He also argued Wright is amenable to probation, noting Wright's low risk of reoffending combined with his work history, and "strong faith." Wright's attorney argued Wright took "positive steps already by meeting

[1] The record suggests Wright and his wife divorced at some point after the complaint and before sentencing.

with [a counselor].” Finally, Wright’s attorney contended Wright “can’t contribute to the support of his family and he’s not necessarily going to become rehabilitated” if the district court imposed a prison sentence,

During Wright’s allocution, he stated, “I know what I did was completely wrong.” Wright apologized to all his children including the victims, ex-wife, extended family, “church family,” and “work family.” And he stated, “my goal is to be able to support my ex-wife and kids.”

In pronouncing Wright’s sentence, the district court stated, “I’ve gone back and forth on what to do with you.” The district court was “torn” about whether to impose a prison sentence. It noted the recommendations from two “very well respected” psychosexual evaluators and “put a lot of weight in what they put in their reports.” The district court concluded, “In my opinion, the best thing you can do for your children is to get out and work and support them financially.”

The district court granted Wright’s motion for a downward dispositional departure, and made “specific findings,” including: Wright’s age of 39 years old, zero criminal-history score, cooperation with law enforcement “after this came to light,” and the “support of family and friends and [his] church.” The district court imposed a 168-month prison sentence but stayed execution for 15 years. The district court also imposed supervision by probation with several conditions, including that Wright enter and complete sex-offender treatment, submit to polygraph examinations and other terms of sex-offender treatment, have no contact with minors unless approved by probation, not

possess or use any pornographic or sexually explicit material, and "contribute to the child support of [his] minor children."

The state appealed. Standpoint (formerly known as Battered Women's Legal Advocacy Project) and the Minnesota Coalition Against Sexual Assault (MNCASA) petitioned to file a joint amicus brief, which this court granted. After the joint brief was filed, Wright moved to strike portions of the brief. Counsel for Standpoint responded in opposition to the motion, but counsel for MNCASA withdrew. We deferred ruling on the motion to strike and dismissed MNCASA from the appeal.

DECISION

I. The district court abused its discretion by granting a dispositional departure without substantial and compelling circumstances.

While "[t]he sentences provided in the [Minnesota Sentencing Guidelines] Grids are presumed to be appropriate for the crimes to which they apply," the district court "may depart from the presumptive disposition or duration" if "there exist identifiable, substantial, and compelling circumstances to support a departure." Minn. Sent. Guidelines 2.D.1 (2020). "A dispositional departure typically focuses on characteristics of the defendant that show whether the defendant is particularly suitable for individualized treatment in a probationary setting." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted). A "defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family are relevant to a determination whether a defendant is particularly suitable to individualized treatment in a probationary setting." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). These are often called the "*Trog*

factors." *See Wells v. State*, 839 N.W.2d 775, 778 (Minn. App. 2013), *rev. denied* (Minn. Feb. 18, 2014).

Reviewing courts "afford the trial 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). "A district court abuses its discretion if its reasons for departure are inadequate or improper." *State v. Barthman*, 938 N.W.2d 257, 269 (Minn. 2020). "When the district court gives improper or inadequate reasons for a *downward* departure, we may independently examine the record to determine whether alternative grounds support the departure." *State v. Rund*, 896 N.W.2d 527, 532–33 (Minn. 2017). Otherwise, reversal is required. *Id.* at 533; *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985).

The district court granted Wright's motion for a downward dispositional departure and stayed his 168-month prison sentence in favor of probation based on the *Trog* factors. The state argues the record does not support the district court's decision to depart because it does not include substantial and compelling circumstances. Wright argues the district court "based the departure on the statements in the sentencing guidelines and the factors identified in caselaw," and, therefore, did not abuse its discretion. We address each *Trog* factor in turn.

a. Age

The district court found that Wright was 39 years old at the sentencing hearing. The district court, however, did not explain why Wright's age made him particularly amenable

to probation. The state argues Wright is "too old to blame his offense, which lasted for 5-8 years, on immaturity or a youthful lack of impulse control or judgment."

Wright points to *Soto*, where the supreme court stated, "age can be relevant to the defendant's amenability to probation." 855 N.W.2d at 310. In *Soto*, the district court granted a downward dispositional departure, but the supreme court vacated the sentence and remanded for resentencing after determining the district court abused its discretion. *Id.* at 305. In considering the defendant's age, the supreme court "reject[ed] the district court's conclusion that Soto's age made him amenable to probation. The district court's only explanation for its conclusion was that Soto was young enough that he still 'ha[d] an opportunity to correct [his] behavior.'" *Id.* at 310. Here, the district court failed to explain why Wright's age of 39 makes him particularly amenable to probation. Thus, at best, Wright's age is a neutral factor.[2]

b. Prior criminal record

The district court stated Wright had "zero criminal history, not even so much as a speeding ticket on [his] record, [which] gives the Court a lot of encouragement that [he is] going to take this seriously and be amenable to probation." The state argues the district court's finding does not support a departure because the guidelines "already take into

[2] We discuss Wright's motion to strike the amicus brief below. We do not strike Standpoint's argument that "age, with regard to pedophilic offenders, is too variable to be a reliable indicator of amenability to probation," but we reject the argument. The supreme court has "specifically recognized" age as a relevant and proper consideration. *Soto*, 855 N.W.2d at 305. We are aware of no caselaw carving out an exception to this rule for pedophilic offenders. And Wright correctly notes he is not a diagnosed "pedophile." Thus, Standpoint's argument is not helpful because it does not apply to Wright.

account a defendant's clean history when determining the presumptive sentence." The state is correct. The supreme court has stated a "defendant's clean record does not by itself justify mitigation of sentence" because the guidelines use criminal history to determine the presumptive sentence. *Trog*, 323 N.W.2d at 31. Wright agrees in part but also argues the state "overlooks the other factors the court found to justify the departure." The district court did not exceed its discretion by noting that Wright's otherwise law-abiding history may mean that he will comply with probation.

But the district court abused its discretion by overlooking Wright's nearly decade-long repeat offenses against his two children. At sentencing, the district court stated that "if you had a criminal history score, I wouldn't even be considering a downward departure because it tells me you have a criminal mindset, and repeat offenses tells the Court a lot." Still, at the plea hearing, Wright admitted to sexually abusing both children "on multiple occasions" over nearly a decade, and "sometimes those [abuses] occurred daily." Thus, to the extent that consideration of Wright's criminal history was proper, this factor is also neutral at best.

c. Remorse

The district court was "torn on making a finding of remorse," but ultimately determined Wright is remorseful "because [he] got caught." The state argues this finding weighs against departure, but Wright argues "there is sufficient evidence in the record that [Wright] acknowledged responsibility and expressed remorse for his past wrongs." Because the district court's remorse finding is based on Wright's credibility, we defer to

its finding. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992), *aff'd*, 508 U.S. 366, 113 S. Ct. 2130 (1993). Wright's lack of remorse weighs against departure.

d. Cooperation and attitude with the court

The district court found Wright was "cooperative with the PSI process, the psychosexual evaluation process and, frankly, I think you've been a perfect inmate as far as the jail is concerned." While the state argues Wright knew "it was in his interest to cooperate with the process," the record supports the district court's determination, and we defer to it. This factor supports departure.

e. Community support

While the district court found Wright's "support of family and friends and [his] church," to be "encouraging," the state is correct that "the district court failed to note . . . [Wright's] family (parents) lives in Iowa." Our review of the record shows mixed support for the district court's determination. First, Wright's ex-wife's victim-impact statement stated, "[t]he gravity of this offense has caused much strain on multiple relationships between friends, family and church members. . . . Many friends don't know how to handle the details of the crime and the[y] have chosen to stop being friends with us." Second, while the PSI stated that Wright reported a close relationship with family, the first psychosexual evaluation report stated Wright had little contact with his mother. Thus, the community-support factor only somewhat favors departure.

f. Particular amenability to probationary treatment

The district court determined Wright is "particularly amenable to probation" for the above reasons, along with two more reasons: (1) Wright is "capable of working so [he] can

support [his] children" and (2) "the psychosexual evaluations indicate that [he is] amenable to sex offender treatment on an outpatient basis." "[A] defendant's particular amenability to individualized treatment in a probationary setting will justify departure in the form of a stay of execution of a presumptively executed sentence." *Trog*, 323 N.W.2d at 31. A defendant must be *particularly* amenable to probationary treatment to "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." *Soto*, 855 N.W.2d at 309 (quotation omitted).

We are troubled by the district court's determinations. First, the guidelines prohibit a district court from considering "[e]mployment factors," such as employment history or employment at time of the offense or sentencing as reasons for departure. Minn. Sent. Guidelines 2.D.1.c (2011). "While it is true that social and financial factors may not be directly considered as reasons for departure, occasionally they bear indirectly on a determination such as whether a defendant is particularly suitable to treatment in a probationary setting." *State v. King*, 337 N.W.2d 674, 675–76 (Minn. 1983). Here, the district court did not explain how Wright's financial support for his victims would bear on his particular amenability to probation.[3] Thus, the district court's reliance on Wright's ability to work and support his family is improper.

[3] We are unable to discern the district court's reasoning. While we are unaware of any juvenile-protection proceedings against Wright, we note Wright's first-degree criminal-sexual-conduct conviction is "sexual abuse," which would allow a district court to terminate Wright's parental rights. *See* Minn. Stat. §§ 260C.301, subd. 1(b)(9) (2020); 260.012(g)(4) (2020); 260E.03, subd. 20 (2020). Termination of Wright's parental rights

Second, the district court misconstrued the psychosexual evaluation reports. The first report recommended Wright be ordered to complete a sex-offender treatment program focused on cognitive behavioral therapy and relapse prevention. The first report noted that if Wright completed an outpatient program, he could work and help provide financial support for his children but would be unable to have contact with them. The second report also recommended Wright complete sex-offender treatment, and that treatment could be provided on an outpatient basis if the district court determined probation was appropriate.

Neither psychosexual evaluation report directly stated that Wright is "amenable to sex offender treatment on an outpatient basis," as the district court found. Wright argues "psychologists are not lawyers," and we agree. But had the examiners recommended community treatment for Wright, they should have said so. It is accurate that both reports signaled outpatient sex-offender treatment was an option, but neither report recommended outpatient treatment. As a result, the district court erred when it relied on a recommendation for outpatient treatment because there is no record support for it. Thus, this factor weighs against departure.[4]

We conclude the district court failed to identify substantial and compelling reasons to depart and the record does not support such a finding. The district court gave no reason

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would also terminate any future child-support obligation. *See* Minn. Stat § 260C.317, subd. 1 (2020).

[4] The district court also "applaud[ed]" Wright for beginning sex-offender treatment while "being jailed pre-trial in this matter." The record does not disclose the nature of the treatment Wright received while in jail, although it appears he met one-on-one with a counselor on at least nine occasions. While commendable, Wright's voluntary counseling while in jail is different from amenability to outpatient sex-offender treatment.

why Wright's age supported a departure. Its consideration of Wright's criminal history focused only on the lack of previous adjudications of guilt, failing to discuss Wright's admission of sexually abusing his two children on a sometimes-daily basis over nearly a decade. Moreover, the district court's analysis of Wright's particular amenability to probation is flawed: Wright's ability to work is an improper sentencing factor, and the district court should not have relied on an outpatient-treatment recommendation not made in either report. This leaves Wright's cooperation and community support as the sole factors favoring departure. But Wright cooperated only after child 1 disclosed the sexual abuse, and mixed record evidence only somewhat supports the district court's finding of community support. The district court did not sufficiently distinguish Wright from most other offenders, and the record does not support departure.

We therefore reverse the district court's decision to dispositionally depart by imposing a stayed sentence and remand for the district court to execute the guidelines sentence of 168 months in prison.[5]

II. We grant in part and deny in part the motion to strike.

After Standpoint filed an amicus brief, Wright moved to strike some arguments because they "are not contained in nor part of the record." Standpoint disagrees because this court's decision "will have widespread impact on victims of sexual abuse" and "will

[5] Because we determine there are no substantial and compelling reasons to warrant the district court's downward dispositional departure, we need not address the state's argument that "the punishment for this particular case simply does not fit the seriousness of the crime."

also have a statewide impact on the application of the Minnesota Sentencing Guidelines and the Victim's Rights statute."[6]

An amicus brief is intended to "inform the court as to facts or situations which may have escaped consideration or to remind the court of legal matters which have escaped its notice and regarding which it appears to be in danger of making a wrong interpretation." *State v. Finley*, 64 N.W.2d 769, 773 (Minn. 1954). Standpoint's brief refers to professional literature and public reports on pedophilia, victim rights, sentencing, and recidivism. The supreme court has denied a motion to strike "general information concerning . . . a matter of public record" in a brief because it "[saw] no reason why a party may not submit such a report to us as part of its brief when we could refer to such a report in the course of our own research, if we were so inclined." *In re Estate of Turner*, 391 N.W.2d 767, 771 (Minn. 1986). For the same reason, we deny Wright's motion to strike references in Standpoint's brief to matters of public record.

But "[a]mici are not permitted to raise new issues on appeal." *Wilson v. Mort. Res. Ctr., Inc.*, 888 N.W.2d 452, 457 n.5 (Minn. 2016); *see also Lowe's Home Centers, LLC (Plymouth) v. County of Hennepin*, 938 N.W.2d 48, 60 n.4 (Minn. 2020) ("Generally, we do not decide issues raised by an amicus that are not raised by the litigants themselves.")

[6] Wright's motion cites Minn. R. Crim. P. 28.02, subd. 8, defining the record in an appeal by a defendant. Standpoint argues this rule "does not apply to Amicus Curiae's brief." The state's appeal is governed by rule 28.04, which does not reference rule 28.02, subd. 8. But where the criminal rules are silent, we are guided by civil appellate rules. Minn. R. Crim. P. 28.01. And the civil appellate rules provides that "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01. Thus, Wright is correct that facts outside the record on appeal should be stricken.

(quotation omitted). Standpoint raises two issues the parties do not advance. First, Standpoint argues this court should analyze the *Trog* factors "differently and give[] different weight in cases involving pedophilia." Second, Standpoint argues "the court should also give substantial weight to the harm and impact that the victim endured" and thus change Minnesota law. Standpoint cites no Minnesota caselaw in support of either argument, and we are aware of none. Because these issues are new on appeal, we grant Wright's motion to strike references in Standpoint's brief to both issues.[7]

Reversed and remanded; motion granted in part and denied in part.

[7] We also note that even if we did not strike these issues, we are not persuaded by Standpoint's arguments to change existing precedent. "This court, as an error correcting court, is without authority to change the law." *Lake George Park, L.L.C. v. IBM Mid-Am. Employees Fed. Credit Union*, 576 N.W.2d 463, 466 (Minn. App. 1998), *rev. denied* (Minn. June 17, 1998).