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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-228**

State of Minnesota,
Respondent,

vs.

Phuc Joseph Anh Vo,
Appellant.

**Filed July 18, 2011
Affirmed
Kalitowski, Judge**

Ramsey County District Court
File No. 62-CR-09-9332

Lori Swanson, Attorney General, St. Paul, Minnesota; and

John Choi, Ramsey County Attorney, Thomas R. Ragatz, John T. Freeman, Assistant
County Attorneys, St. Paul, Minnesota (for respondent)

Jennifer M. Macaulay, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

KALITOWSKI, Judge

Following his conviction of first-degree arson, appellant Phuc Joseph Anh Vo argues that the district court abused its discretion by denying his motion for a downward dispositional and durational departure from the presumptive sentence. We affirm.

DECISION

Appellant Phuc Joseph Anh Vo was charged on May 18, 2009, with one count of first-degree arson involving an accelerant under Minn. Stat. § 609.561, subd. 3(a), and one count of first-degree arson involving a dwelling under Minn. Stat. § 609.561, subd. 1, for starting a fire with gasoline and Molotov cocktails at a coffee shop owned by his ex-girlfriend. On August 26, 2009, appellant pleaded guilty to one count of first-degree arson involving an accelerant. Prior to this incident, appellant had no criminal history. The sentencing judge denied appellant's motion for a durational and dispositional sentencing departure and sentenced him to 48 months in prison.

The decision to depart from the sentencing guidelines rests within the discretion of the district court. *State v. Schmit*, 601 N.W.2d 896, 898 (Minn. 1999). A district court may depart from the presumptive guidelines sentence only when “substantial and compelling circumstances are present.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case.” *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Even if reasons for departing downward from the presumptive guidelines sentence exist, we ordinarily will not disturb the district court's sentencing decision. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Dispositional departure

When considering a downward dispositional departure, the sentencing judge may focus “on the defendant as an individual and on whether the presumptive sentence would be best for [the defendant] and for society.” *State v. Heywood*, 338 N.W.2d 243, 244

(Minn. 1983). A significant consideration in determining whether to grant a dispositional departure is the defendant's amenability to probation. *State v. Wright*, 310 N.W.2d 461, 462-63 (Minn. 1981). A defendant's amenability to probation, in turn, depends on a number of factors, which can 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).

Age

Appellant argues that his age shows that he is particularly amenable to probation and supports a departure because he "had only been 18 years old for a few months" and was still a senior in high school at the time of the incident. Appellant argues that the district court abused its discretion because it "essentially ignored" the *Trog* factor of age by stating that appellant's "age alone is not a factor for departure." But this is not an abuse of discretion. The record indicates that the district court considered appellant's age and naivety, but concluded that appellant was a competent adult and aware of the consequences of his actions when he committed this "very serious" offense.

Prior record

Appellant next argues that he has no prior criminal record, making this incident "a fluke." Although a defendant's past criminal history is a factor to consider, a clean record does not compel a dispositional departure. *Trog*, 323 N.W.2d at 31; *Bertsch*, 707 N.W.2d at 668. And the district court noted that it considered the fact that this was appellant's first criminal offense in reaching its decision not to depart.

Remorse

Appellant argues that the district court's conclusion that he did not show a significant amount of remorse "seems to be baseless." "The presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation." *State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994), *review denied* (Minn. Apr. 21, 1994). And given the district court's opportunity to observe the defendant, "a reviewing court must defer to the sentencing judge's assessment of the sincerity and depth of the remorse and what weight it should receive in the sentencing decision." *Id.*

At sentencing, the court stated, "Up until several days ago, [appellant] showed no remorse for his actions," and he "had more concern about the guy who ratted [him] out . . . than really the significance of [his] action." This evaluation of appellant's remorse is supported by the record. Twice before appellant pleaded guilty, when the police questioned him, he denied starting the fire or having any involvement with it. The psychologist who evaluated appellant stated in his original report that appellant "apologized profusely for his actions but in a somewhat rambling, unfocused manner[,] which suggested he remains confused about the events surrounding this offense and is just beginning to understand the implications thereof." The psychologist also remarked that appellant "expressed limited remorse for the victim," and had not "classified his actions as violent" until "offered that perspective" by the psychologist. And in a subsequent letter submitted by the psychologist to the sentencing judge on October 9, 2009, the psychologist noted that appellant "is a rather immature young man who had

little insight into the seriousness of his actions until having to respond to the inquiry of this evaluation and contact with the court process.”

Cooperation and attitude in court, support of family and friends, and likelihood of repetition of crime

Appellant argues briefly that the remaining *Trog* factors also weigh in favor of a downward departure. Appellant asserts that he did everything asked of him by his lawyer, the court and probation prior to sentencing; had no disciplinary problems while in custody; and that both the presentence investigation and psychological evaluation show that there is no indication that appellant will repeat this or any crime. Appellant also argues that the fact that he was very depressed and distraught, and had abused alcohol and marijuana immediately prior to the offense, are mitigating factors the district court should have considered.

Appellant concludes that together these factors show that he is “uniquely amenable to probation.” But even if factors for departing downward exist, we ordinarily will not disturb the district court’s sentencing decision to impose a presumptive sentence. *Bertsch*, 707 N.W.2d at 668. The record shows that the district court had all of the information that appellant presents on appeal, and considered this information in reaching its decision. The court noted the significance of the fact that appellant first discussed with a friend his intentions to set fire to the coffee shop a month before he actually did it, indicating that appellant had been thinking about and planning the commission of the offense for some time. Acknowledging that appellant was young and naive, the court nevertheless concluded that appellant planned this very serious criminal activity. And

finally, after interviewing appellant, the probation officer recommended the presumptive sentence.

Durational departure

A district court may consider only offense-related mitigating factors to support a downward durational departure. *See State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998) (holding that conduct unrelated to offense is not relevant to durational departure decision), *review denied* (Minn. Mar. 19, 1998); *see also State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995) (holding that offense-related factors may be used to support durational departure). But the existence of mitigating factors does not compel the district court to impose a downward departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). “[A] downward durational departure is justified if the defendant’s conduct is significantly less serious than typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985).

Appellant argues that his depression, immaturity, and vulnerability indicated that he did not have “substantial capacity for judgment when the offense was committed.” He notes the two shots of vodka he took and the marijuana he smoked the night of the incident, as well as the fact that he was “extremely depressed and distraught.” But the district court considered this information in reaching its decision not to depart from the presumptive sentence.

The St. Paul Fire Chief also opposed any sentencing departure, stating that extinguishing the fire required 29 firefighters and 8 pieces of equipment and cost the city \$4,000 to \$5,000. The fire chief noted that Molotov cocktails are difficult to see in the

smoke and can explode at any time, and that fires started with gasoline are particularly difficult to fight. Moreover, the record indicates that a neighboring business lost clientele as a result of the fire, depriving three families of income for more than three months.

Appellant argues that the court should have departed from the presumptive sentence because Minnesota prisons are full and the cost of incarceration is significant. Appellant cites to the sentencing guidelines' statement of purpose to support his argument: "Because the capacities of state and local correctional facilities are finite, use of incarcerative sanctions should be limited to . . . those who have longer criminal histories." Minn. Sent. Guidelines I.3 (2009). But this same provision includes "*those convicted of more serious offenses*" as appropriate recipients of incarcerative sanctions. *Id.* (emphasis added). Appellant was convicted of a "very serious" offense, and he received the presumptive sentence based on his criminal history score of zero.

In conclusion, the district court's decision to deny appellant's motion for a dispositional and durational departure is supported by the record. Thus, we conclude that the district court did not abuse its discretion in sentencing appellant to the presumptive sentence under the guidelines.

Affirmed.