

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2012).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0168**

State of Minnesota,
Respondent,

vs.

Lucindy Daniels,
Appellant.

**Filed October 7, 2013
Affirmed
Peterson, Judge**

Ramsey County District Court
File No. 62-CR-12-6642

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

John Choi, Ramsey County Attorney, Thomas Rolf Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle Rene Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

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

FACTS

Appellant Lucindy Daniels was charged with one count each of second- and third-degree burglary for breaking into an assisted-living facility. Appellant pleaded guilty to second-degree burglary in exchange for the state's dismissal of the third-degree charge and agreement not to amend the second-degree charge to a first-degree charge. Appellant admitted that she entered apartments in the assisted-living facility intending to steal credit cards and that she did not have permission to be in either the facility or the apartments.

The plea agreement did not include an agreement on sentencing. The state indicated that it would request that appellant be sentenced to the statutory maximum sentence based on her status as a career criminal, and appellant indicated that she would seek a downward departure. Appellant waived her right to a *Blakely* hearing. When questioned by the district court during the plea hearing, appellant stated that she understood that she could be sentenced to the statutory maximum of ten years in prison.

Appellant was 47 years old at the time of the current offense and has 19 prior felony convictions, six of which are for burglary offenses. The current offense occurred less than three weeks after appellant was placed on supervised release. At the sentencing hearing, defense counsel requested a continuance because a rule-20 evaluation in a previous case resulted in a recommendation that appellant undergo a mental-health evaluation. The prosecutor noted that appellant had had multiple rule-20 evaluations and that none of them had indicated that appellant suffered from a major mental illness that affected her competency or ability to proceed. Also, the presentence investigation (PSI) report indicated that mental-health treatment would be available to appellant in prison.

Appellant requested a downward dispositional departure based on the fact that she was pursuing her GED and was willing to participate in chemical-dependency treatment. The district court denied appellant's motion for a dispositional departure and sentenced her to 96 months in prison, an upward departure from the 48-month presumptive guidelines sentence, based on her status as a career offender.

D E C I S I O N

Appellant challenges only the denial of her motion for a dispositional departure. In deciding whether a downward dispositional departure is justified, the district court considers "the defendant as an individual and . . . whether the presumptive sentence would be best for [the defendant] and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The district court has discretion to grant a downward dispositional departure when a defendant is particularly amenable to probation. *State v. Olson*, 765 N.W.2d 662, 665 (Minn. App. 2009). But the presence of a mitigating factor does not obligate the district court to depart. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). The decision whether to depart lies within the district court's discretion and will not be reversed absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001).

Appellant argues that she is amenable to probation based on the facts that she is pursuing her GED, she is willing to seek chemical-dependency treatment, and she accepted responsibility for her actions by pleading guilty when she received no benefit from doing so. Factors relevant in determining amenability to probation include the defendant's age, remorse, cooperation, attitude in court, and support of family and

friends. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). At the sentencing hearing, the state noted that there is evidence that undercuts appellant's claim of chemical dependency, including her statement during the PSI that she has not used drugs since 2003 and the fact that none of her 20 felony convictions involved a violation of controlled-substance laws. The district court found that appellant did receive a benefit from the plea agreement because she faced a maximum of ten years in prison for the second-degree burglary conviction, instead of the 20-year statutory maximum for the first-degree-burglary charge that the state agreed not to pursue. *See* Minn. Stat. § 609.582, subds. 1, 2 (2012) (statutory maximum sentences for first- and second-degree burglary); *see also* Minn. Stat. § 609.1095, subd. 4 (2012) (permitting sentence up to statutory maximum for offender who commits sixth felony as part of pattern of criminal conduct). And appellant's claim that she has accepted responsibility for her actions is contrary to her attitude during the PSI. In denying appellant's motion for a downward dispositional departure, the district court considered appellant's failure to take advantage of multiple opportunities for rehabilitation in the past, which indicates that appellant is not particularly amenable to probation, and we note that appellant committed the current offense less than three weeks after having been placed on supervised release. The district court did not abuse its discretion in denying appellant's motion for a downward dispositional departure.

Affirmed.