STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0997

State of Minnesota,
Appellant,

vs.

Jose Arriaga Soto, Jr.,
Respondent.

Filed December 16, 2013
Reversed and remanded
Rodenberg, Judge

Polk County District Court
File No. 60-CR-12-1172

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

Gregory A. Widseth, Polk County Attorney, Crookston, Minnesota (for appellant)

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

Considered and decided by Larkin, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

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

RODENBERG, Judge

Appellant State of Minnesota appeals from the district court's sentence of respondent after his conviction of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342 subd. 1(e)(i) (2010). Because the district court's dispositional

departure from the Minnesota Sentencing Guidelines is not supported by evidence in the record, depreciates the criminality of respondent's conduct and is inconsistent with respondent's lack of remorse, we reverse the sentence and remand for resentencing.

FACTS

On May 18, 2012, respondent Jose Arriaga Soto, Jr. and his co-defendant Ismael Hernandez attended a bonfire where M.L.F. was present. After respondent, Hernandez, M.L.F., and another person left the bonfire together, they went to an apartment. Once there, respondent and Hernandez ended up in a bedroom with M.L.F. According to the complaint, respondent pinned M.L.F. face-down against the bed while Hernandez anally raped her. Hernandez left the room and respondent proceeded to forcibly rape M.L.F. several times, using multiple forms of penetration. As a result, M.L.F. blacked out and received numerous injuries. She went to the emergency room the next day, where her injuries were photographed.

Respondent and Hernandez were each charged with one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(e)(i). Respondent pleaded guilty by way of what the district court minutes refer to as a "combined" *Alford*/*Norgaard* plea,[1] pursuant to a written plea agreement. As part of the plea agreement, the state agreed to recommend the presumptive guidelines sentence of 144 months imprisonment and agreed not to seek an upward durational departure. The district court accepted the plea and ordered the completion of a presentence investigation (PSI) and sentencing worksheet.

[1] The record on appeal does not include a transcript of the plea hearing.

As part of the PSI process, a "Diagnostic Assessment for Adults" was completed and a report was prepared through the Upper Mississippi Mental Health Center on January 11, 2013 (Upper Mississippi report). Several diagnostic tests were administered to respondent and scale scores were given for several risk categories, establishing that respondent minimizes both his sex-related and other problems and concerns. Respondent fell in the "problem risk range" for his sex-item truthfulness and test-item truthfulness scale scores. Respondent also was found to "exhibit[] and use[] denial excessively." Also, because respondent "exhibit[s] some sex-related frustration and anger," his sexual adjustment scale score and sexual assault scale score place him within the "medium risk range" for each category. Finally, respondent's violent scale score placed him in the "medium risk range."

The Upper Mississippi report noted that respondent does not accept responsibility for his actions and blames M.L.F. Respondent contended to the assessor that M.L.F.'s claim that he had raped her was motivated by M.L.F. having been in a relationship at the time of the offense. The assessor noted that respondent used M.L.F. "for his own sexual gratification without care or concern for the impact his actions may have had on this individual. . . . [Respondent] clearly violated the rights of another without remorse." Despite these findings, a comment near the end of the report stated that respondent "appears to be an appropriate candidate for participation in the outpatient Sexual Abuse Treatment program."

An agent of the Tri-County Community Corrections completed a PSI on February 14, 2013. The agent recommended in the PSI report that respondent be sentenced to 144

months in prison consistent with the Minnesota Sentencing Guidelines.[2] The agent noted that respondent attempts to shift blame to M.L.F. and poses a "high risk to re-offend" and a "high risk to the community." The agent also indicated that respondent's family members believe him to be innocent of the charges, noting that a family member had at one point acted in a threatening manner toward the agent, causing the agent to conclude that the relative would not be a "pro-social influence" for respondent. The agent also reported that, during the interview, respondent "spent a huge portion of his time minimizing his actions." The agent, referring in part to the Upper Mississippi report and its conclusions and recommendations, concluded: "Community safety may best be served by [respondent] serving his time in the Minnesota Correctional Facility as the plea agreement states. [Respondent] would also benefit from completing a sexual abuse treatment and cognitive behavior program while incarcerated."

At the sentencing hearing, M.L.F. gave a brief victim-impact statement, summarizing the effects she suffered as a result of the sexual assault. Respondent argued for a downward dispositional departure, while the state argued for execution of the presumptive 144-month sentence. The district court sentenced respondent to 144 months in prison, but stayed the execution of the sentence and placed respondent on probation for 30 years with conditions. The district court emphasized respondent's amenability to probation in dispositionally departing from the recommended guidelines sentence. This appeal by the state followed.

[2] The range in the relevant grid of the guidelines calls for a presumptive sentence of 144 months, and a range of permissible sentences from 144 to 172 months.

D E C I S I O N

"A district court has broad discretion to depart from the sentencing guidelines, and we review its decision to depart for an abuse of discretion." *State v. Peter*, 825 N.W.2d 126, 129 (Minn. App. 2012) (citing *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996)), *review denied* (Minn. Feb. 27, 2013); *see also State v. Case*, 350 N.W.2d 473, 476 (Minn. App. 1984) (stating that this court is "loath to interfere" with the district court's discretion in sentencing). In departing from a presumptive guidelines sentence, the district court must identify "substantial and compelling" reasons that support the departure. Minn. Sent. Guidelines 2.D (2011). Substantial and compelling circumstances are those that make the case atypical. *Taylor v. State*, 670 N.W.2d 584, 587 (Minn. 2003).

We will reverse a departure when the district court's reasons "are improper or inadequate and there is insufficient evidence of record to justify the departure." *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002); *see also State v. Warren*, 592 N.W.2d 440, 451 (Minn. 1999) (stating that abuse-of-discretion standard "is not a limitless grant of power" to the district court). Additionally, "a departure will be modified . . . [if we] have a 'strong feeling' that the sentence is inappropriate to the case." *State v. Malinski*, 353 N.W.2d 207, 209 (Minn. App. 1984) (quoting *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981)), *review denied* (Minn. Oct. 16, 1984). We will interfere with a district court's departure decision only after the panel members have reached "a 'collegial conclusion' that a sanction is disproportional to the severity of the crime." *State v. Behl*,

573 N.W.2d 711, 714 (Minn. App. 1998) (quoting *Schantzen*, 308 N.W.2d at 487), *review denied* (Minn. Mar. 19, 1998).

Respondent's guilty plea is referred to in the court minutes from the plea hearing as having been a "combined" *Alford* and *Norgaard* plea.[3] When a defendant pleads guilty pursuant to the procedures set forth in either *Alford* or *Norgaard*, the district court

[3] An *Alford* plea allows a defendant to plead guilty to an offense while maintaining innocence. In *North Carolina v. Alford*, the defendant was charged with first-degree murder. 400 U.S. 25, 26-27, 91 S. Ct. 160, 162 (1970). If he went to trial, he faced the possibility of a death sentence. *Id.* The defendant was adamant that he was innocent of the charge. *Id.* at 28-29, 91 S. Ct. at 162-63. He nonetheless entered a guilty plea to avoid the possibility of a death sentence. *Id.* After being sentenced to 30 years in prison, the defendant sought to withdraw his plea, arguing that he was forced to enter the guilty plea for fear of receiving a death sentence. *Id.* at 29, 91 S. Ct. at 163. The *Alford* Court held that a guilty plea in such a situation is not invalid, so long as evidence exists that could support a conviction, and the defendant "concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." *Id.* at 37, 91 S. Ct. at 167.

Minnesota adopted the *Alford* procedure in *State v. Goulette*, 258 N.W.2d 758 (Minn. 1977). There, the Minnesota Supreme Court held:

> [A district] court may accept a plea of guilty by an accused even though the accused protests that he is innocent if the court, on the basis of its interrogatories of the accused and its analysis of the factual basis offered in support of the plea, concludes that the evidence would support a jury verdict of guilty, and that the plea is voluntarily, knowingly, and understandingly entered.

Goulette, 258 N.W.2d at 761.

A *Norgaard* plea differs from an *Alford* plea in that the defendant's plea of guilty is unsupported by any recollection of the facts constituting the offense. Unlike an *Alford* plea, a *Norgaard* plea does not involve an accused's maintenance of his innocence or the desire to avoid a particular sentencing possibility. *See State ex rel. Norgaard v. Tahash*, 261 Minn. 106, 108, 110 N.W.2d 867, 869 (1961) (summarizing that the defendant believed the charges to be true, despite his lack of memory). If adequate procedures are followed to ensure that the accused is aware of his rights, and he voluntarily enters a guilty plea despite the lack of memory, the plea is constitutional. *Id.* at 111-12, 110 N.W.2d at 871.

must establish a factual basis for the guilty plea. *State v. Hoaglund*, 307 Minn. 322, 325, 240 N.W.2d 4, 5 (1976). The district court must be convinced that the "plea is voluntarily, knowingly, and understandingly made." *Goulette*, 258 N.W.2d at 761. Here, and despite the absence of a transcript of the plea hearing in the record on appeal, neither party argues that respondent's guilty plea was invalid. Accordingly, we proceed with our analysis based on a valid plea of guilty to the offense of first-degree criminal sexual conduct, unaccompanied by any acknowledgment of respondent's subjective acceptance or recollection of culpability. Because of the "combined" *Alford* and *Norgaard* plea, we proceed with the understanding that respondent was asserting that he (1) is innocent of the charged offense and/or (2) has no recollection (or an impaired recollection) of the charged offense. But the guilty plea renders respondent legally responsible for the first-degree criminal sexual conduct.

Respondent's "combined" *Alford/Norgaard* plea, and his continued denial of criminal responsibility through sentencing, appears to us to be inconsistent with a finding that he is amenable to probation. The district court is responsible to ensure that a plea agreement serves the "interests of justice." Minn. R. Crim. P. 15.04, subd. 3(2). We think it axiomatic that the interests of justice require that a convicted violent sex offender cannot be placed on probation unless and until the offender accepts responsibility for his crime. Here, respondent's acceptance of responsibility is absent.

Respondent argued at the sentencing hearing that his guilty plea should be used as a basis for departure because M.L.F. did not have to face the difficult task of testifying at trial. But the record is clear that respondent entered his plea to save *himself* from the

prospect of a trial and a request by the state in the event of his conviction for an upward durational departure. The state's written plea offer prominently offered the state's agreement to "waive [the right] to seek an aggravated departure" despite the existence of possible aggravating factors. The state could have sought an aggravated sentence absent the plea agreement. *See Warren*, 592 N.W.2d at 452 (noting that aggravating factors were present despite the district court's failure to acknowledge them). If a defendant wishes to assert his innocence, he should avail himself of his constitutionally protected right to a trial. A guilty plea cannot be properly treated as a "substantial and compelling" reason to depart from a presumptive sentence under the sentencing guidelines in the absence of acceptance of responsibility. Minn. Sent. Guidelines 2.D; *see also State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005) (discussing the importance of following the sentencing guidelines). And we think that is particularly so where, as discussed below, a conviction of forcible rape is unaccompanied by any acknowledgment of culpability.

The district court based its decision to dispositionally depart and stay the execution of respondent's sentence on its finding that respondent is particularly amenable to probation. Amenability to probation can provide a basis for a dispositional departure. *See State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (stating that the district court can focus on defendant as an individual and on whether the presumptive sentence is good for him and for society in justifying a dispositional departure); *State v. Wright*, 310 N.W.2d 461, 462-63 (Minn. 1981) (upholding a dispositional departure when a defendant with no prior criminal history was "particularly unamenable to incarceration and particularly amenable to individualized treatment in a probationary setting"). Whether a

person is amenable to probation depends on "[n]umerous factors, including 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).

The state argues that the record does not support the conclusion that respondent is amenable to probation based on a proper application of the "*Trog* factors." *See McIntosh*, 641 N.W.2d at 8 (stating that there must be evidence sufficient to justify a departure). The state also argues that the district court conflated amenability to treatment with amenability to probation in coming to the conclusion that respondent is particularly amenable to probation. We discuss each argument in turn.

The district court discussed several of the "*Trog* factors" to explain its decision to dispositionally depart from the sentencing guidelines. These include respondent's lack of a long criminal record, his age, his attitude before the district court, his family support, and the fact that respondent has a ten-year-old son. The district court concluded that "the sole reason, frankly, the court is departing here is your amenability to probation." In light of the facts of this case, we cannot countenance the district court's application of the "*Trog* factors" in dispositionally departing. We conclude that the district court abused its discretion in departing based on a finding that respondent is amenable to probation.

First, the district court relied on the fact that respondent lacks a serious criminal record. The sentencing guidelines account for an offender's criminal history score in calculating the presumptive sentence. *Trog*, 323 N.W.2d at 31. The lack of serious

crimes on respondent's record therefore should not have been considered by the district court as a factor justifying a dispositional departure from the presumptive sentence.

Second, respondent's age does not support a finding of amenability to probation here. This factor is usually applied to very young offenders. *See Heywood*, 338 N.W.2d at 243-44 (discussing the use of "youth" as a factor justifying a departure); *see also State v. Donnay*, 600 N.W.2d 471, 474 (Minn. App. 1999) (upholding a downward dispositional departure for a 20-year-old defendant), *review denied* (Minn. Nov. 17, 1999); *State v. Patton*, 414 N.W.2d 572, 575 (Minn. App. 1987) (upholding a downward dispositional departure for a 19-year-old defendant). The district court has discretion to depart from sentencing young offenders to prison when it appears that an offense was the product of youthful immaturity, rather than a criminal disposition. Here, respondent was 37 years old at the time of sentencing. Moreover, a violent and forcible rape by two men is simply not a function of youth, immaturity, or the lack of discretion that comes with age. The district court misapplied this *Trog* factor, and respondent's age does not support departure in this context. *Cf. State v. Andren*, 347 N.W.2d 846, 848 (Minn. App. 1984) ("[The accused] is an adult and his age does not excuse responsibility for his actions.").

Third, the district court relied on respondent's attitude when respondent appeared before the district court in supporting the departure. The record establishes that respondent was generally respectful in the presence of the court. Standing alone, however, this factor does not support a departure as a "substantial and compelling" circumstance. Minn. Sent. Guidelines 2.D. Every litigant is required to respect the court

process. *See, e.g.*, Minn. Stat. § 588.01, subd. 2 (2012) (defining direct contempt of court).

Fourth, the district court relied on respondent's family support as supporting a dispositional departure. "Family support," in the context of amenability to probation, necessarily means that respondent's family members will encourage him to meaningfully participate in treatment and comply with other conditions of probation. Here, the PSI indicates that respondent's family members believe him to be innocent of the charge. They support respondent not in accepting a need to change, but in denying his responsibility for the violent crime to which he has pleaded guilty. In context, this factor does not support a determination that respondent is amenable to probation. *Cf. State v. Pickett*, 343 N.W.2d 670, 673 (Minn. App. 1984) (refusing a dispositional departure in a first-degree criminal sexual conduct case despite the district court receiving over 50 letters from friends and family on behalf of the defendant), *rev'd on other grounds*, 358 N.W.2d 38 (Minn. 1984).

Finally, the district court correctly observed that respondent has a ten-year-old son who lives with his mother and not with respondent, but considered that as a factor supporting the dispositional departure. The sentencing guidelines prohibit reliance on social or economic factors as supporting a departure from the guidelines. Minn. Sent. Guidelines 2.D.1. And caregiver status is a social or economic factor that should not be considered in departing from the sentencing guidelines. *State v. Sherwood*, 341 N.W.2d 574, 577 (Minn. 1983).

An important consideration under *Trog* is remorse. 323 N.W.2d at 31. As discussed above, there is none here. The state argues that respondent's lack of remorse favors the execution of respondent's sentence. *See State v. Sejnoha*, 512 N.W.2d 597, 600 (Minn. App. 1994) ("The presence or absence of remorse can be a very significant factor in determining whether a defendant is particularly amenable to probation."), *review denied* (Minn. Apr. 21, 1994). The district court stated that it "was troubled to a significant degree . . . that [respondent] did seem to minimize [his] participation in this and [his] culpability, and did attempt at times . . . to shift blame to the victim here." But this was not a case of simple minimizing of responsibility. Respondent completely denies any culpability for the rape to which he has pleaded guilty. Both the Upper Mississippi report and the PSI report indicate that respondent demonstrates no remorse. He entered a "combined" *Alford/Norgaard* plea, obtained the state's agreement not to seek an upward durational departure from the guidelines, and thereafter maintains that he does not believe himself to be guilty of any wrongdoing. The district court imposed sex offender treatment as a condition of respondent's probation, but we find it difficult to see how respondent can comply with that condition while denying any criminal responsibility for his actions. *See State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003) (admitting guilt is an important step in determining amenability to probation). Respondent's lack of remorse is impossible to reconcile with a dispositional departure for his conviction.

We also agree with the state that the district court conflated amenability to treatment and amenability to probation in departing from the sentencing guidelines. Although the Upper Mississippi report stated that respondent may be amenable to treatment, the narrative and test results preceding that opinion do not support that opinion. More importantly, the opinion says nothing of respondent's amenability to probation.[4] The PSI implicitly found respondent unamenable to probation. And a properly applied *Trog* analysis does not suggest otherwise.

Trog identified "amenability to individualized treatment *in a probationary setting*" as a proper consideration in departing from a guidelines sentence. 323 N.W.2d at 31 (emphasis added); *see also State v. Evenson*, 554 N.W.2d 409, 412 (Minn. App. 1996) (discussing generally amenability to treatment as not dictating imposition of a probationary sentence), *review denied* (Minn. Oct. 29, 1996). Here, the Upper Mississippi report said only that respondent would be an appropriate candidate for treatment, not that such treatment would be best or even appropriately delivered in a probationary setting. The state correctly notes that respondent can receive treatment while incarcerated. As discussed, it is difficult to understand how treatment can be effective where the person proposed to be treated denies the existence of any condition requiring or justifying the treatment proposed. And, more importantly, there is nothing in

[4] "Admitting guilt, and taking responsibility for one's criminal conduct, is a critical factor in an offender's amenability to treatment. But amenability to probation depends on an offender's ability to comply with the conditions of probation and benefit from the opportunity for rehabilitation that probation affords." *Hickman*, 666 N.W.2d at 732 (citations omitted).

the record before us that warrants a conclusion that probation is an appropriate setting for treatment in the unique circumstances of this case.

We will reverse a sentencing departure when it "depreciates the severity of the offense," and the departure is therefore "not supported by compelling circumstances." *State v. Law*, 620 N.W.2d 562, 565 (Minn. App. 2000), *review denied* (Minn. Dec. 20, 2000). We do not do so lightly, and must come to a "collegial conclusion" that the severity of the crime "dictates a different result." *Id.* (quoting *Schantzen*, 308 N.W.2d at 487) (citation omitted). Even when probation is best for an offender, "we cannot disregard the [penal] goals of deterrence of the individual, of others, and even retribution."[5] *Id.* at 566. "[T]he quest for rehabilitation alone cannot be used as a basis for a downward departure." *Id.* at 565.

Although we are "loath to interfere" with the sentencing decisions of the district court, *Case*, 350 N.W.2d at 476, we are firmly convinced that the sentence in this case understates the criminality of respondent's conduct and that the record "dictates a different result," *Law*, 620 N.W.2d at 565. We therefore reverse the sentence and remand

[5] The state argues that respondent's co-defendant received an executed 144-month sentence, and that this should be taken into consideration in determining the appropriate punishment for respondent. *See State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983) ("If both defendant's sentence and that of his accomplice were before us, the appropriate remedy to the inequity would not be to reduce defendant's sentence but to increase his accomplice's sentence."). Equity in sentencing "also involves comparing the sentence of the defendant with those of other offenders." *Id.* Although nothing in the record specifically indicates the sentences that similar offenders generally receive, the guidelines require "substantial and compelling" reasons for a departure. Minn. Sent. Guidelines 2.D.; *see also Shattuck*, 704 N.W.2d at 141 (discussing the importance of adhering to the sentencing guidelines). The presumptive sentence is a strong indication of the sentences other offenders receive.

to the district court with directions to execute respondent's 144-month sentence consistent with the Minnesota Sentencing Guidelines.

Reversed and remanded.