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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0951**

State of Minnesota,  
Appellant,

vs.

David Nyles Booher, II,  
Respondent.

**Filed January 22, 2013  
Reversed and remanded  
Worke, Judge**

Isanti County District Court  
File No. 30-CR-11-683

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

Jeffrey R. Edblad, Isanti County Attorney, Stacy A. St. George, Assistant County Attorney, Cambridge, Minnesota (for appellant)

David W. Merchant, Chief Appellate Public Defender, Andrea G.M. Barts, Assistant Public Defender, Cathryn Young Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Chutich,  
Judge.

## UNPUBLISHED OPINION

**WORKE**, Judge

The state argues that the district court abused its discretion by sentencing respondent to a 28-month stayed sentence for second-degree burglary, asserting that the record lacks support for the downward dispositional departure from the presumptive sentence. We agree, and reverse and remand for resentencing.

### FACTS

On November 11, 2011, respondent David Nyles Booher, II participated in a home burglary. Respondent agreed to plead guilty to a charge of second-degree burglary in exchange for receiving a 28-month stayed sentence and other sentencing conditions, including ten years of probation.

Following the district court's acceptance of the plea, the parties discovered that the plea agreement had been made in reliance on respondent having a criminal-history score of two, rather than the correct score of four. Respondent's criminal-history score was comprised of one custody-status point, one point for prior misdemeanor offenses, and two points for prior felony offenses.

At sentencing, respondent's attorney asked the district court to honor the plea agreement, arguing that one of respondent's convictions was nearly decayed, and requested a downward dispositional departure to enable him to personally assist with the care of his ill mother. The district court found that these facts constituted compelling circumstances justifying the downward dispositional sentencing departure.

## DECISION

The district court must impose the presumptive sentence set forth in the Minnesota Sentencing Guidelines unless “substantial and compelling circumstances” exist to warrant a departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008); Minn. Sent. Guidelines 2, subd. D(1) (Supp. 2011). In determining whether to impose a downward dispositional departure from the presumptive sentence, a district court considers “the defendant as an individual and [focuses] 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). The district court considers a number of factors in making this decision, including the defendant’s amenability to probation, age, prior criminal history, remorse, cooperation, attitude in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). The district court’s sentencing decision is discretionary, and an appellate court will reverse only for a clear abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001).

The district court’s enumerated reasons for granting a downward dispositional departure were (1) one of the felony sentences and one of the misdemeanor sentences that were included in respondent’s criminal-history score were nearly 15 years old and therefore were nearly “decayed” for purposes of calculating his criminal-history score, and (2) respondent was needed to provide health care for his ill mother. Neither of these reasons provides a proper basis for a downward dispositional departure.

As to the prior felony sentence, the guidelines for calculating criminal-history score prohibit use of a prior felony sentence “if a period of fifteen years has elapsed since the date of discharge from or expiration of the sentence, to the date of the current offense.” Minn. Sent. Guidelines 2, subd. B(1)(f) (Supp. 2011). Here, the district court computed the prior felony sentence in question by measuring from the time of commission of the offense, not the time of the discharge of sentence on that offense, as required by the guidelines. Even under the district court’s computation, the prior felony sentence fell short of being subject to exclusion, because it was not fully decayed. Likewise, the district court stated that the misdemeanor sentence had not expired, for purposes of calculation of respondent’s criminal-history score. Thus, the district court erred by excluding the prior misdemeanor and felony sentences from the calculation of respondent’s criminal-history score. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) (stating that “sentences must be based on correct criminal history scores”); *see also State v. Ferguson*, 441 N.W.2d 508, 509 (Minn. App. 1989) (stating that “[o]ffenses that are . . . years away from decay cannot be blithely dismissed if the sentencing guidelines are to have meaning”), *review denied* (Minn. July 12, 1989).

Further, respondent’s need to provide health-care assistance to his mother does not constitute a permissible reason for a dispositional departure. The *Trog* sentencing departure factors relate to offender-related facts, not collateral consequences. 323 N.W.2d at 31. Collateral consequences are not relevant to a sentencing-departure decision. *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002) (“[C]onsideration of a possible collateral consequence, which is beyond the control of the district court . . .

is not a valid consideration in deciding whether to impose a presumptive sentence or to depart from the guidelines.”), *review denied* (Minn. April 16, 2002).

Finally, other *Trog* sentencing factors are either neutral or do not provide a basis for granting a downward dispositional departure in this case. Respondent committed this offense and several others while he was on probation for a prior offense, demonstrating that he is not amenable to probation. He also has a somewhat lengthy and consistently recurring criminal history, was 43 years of age at the time of the offense, and minimized his culpability for the offense at his plea hearing. The record does not include particular information about respondent’s cooperation or attitude in court, or whether his family or friends were available to support him. Overall, the *Trog* factors do not support a downward dispositional departure here.

Because the district court abused its discretion by imposing a sentence that was a downward dispositional departure from the presumptive guidelines sentence, we reverse respondent’s sentence and remand for resentencing.

**Reversed and remanded.**