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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1424**

State of Minnesota,
Respondent,

vs.

Sabin Mitchell Myhra,
Appellant.

**Filed June 9, 2014
Affirmed
Larkin, Judge**

Beltrami County District Court
File No. 04-CR-12-4338

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

Timothy R. Faver, Beltrami County Attorney, Annie P. Claesson-Huseby, Assistant
County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer L. Lauermann,
Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and
Klaphake, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his 18-month prison sentence for felony check forgery, arguing that the district court abused its discretion by denying his motion for a dispositional departure. Because the district court did not abuse its discretion by imposing a presumptive guidelines sentence, we affirm.

FACTS

Appellant Sabin Mitchell Myhra has a criminal history that includes three felony theft-by-check convictions, two felony theft-by-swindle convictions, four gross-misdemeanor theft convictions, one misdemeanor theft conviction, and three juvenile offenses. He also has a history of mental-health issues. In August 2012, he was diagnosed with borderline personality disorder with histrionic features, cognitive disorder not otherwise specified, mood disorder not otherwise specified, and anxiety disorder not otherwise specified. As a juvenile, Myhra spent three years at Mille Lacs Academy, a residential treatment facility.

In December 2012, three months after he was released from prison, Myhra forged nearly \$7,000 worth of checks on his mother's business account. Respondent State of Minnesota charged Myhra with one count of felony check forgery, and he pleaded guilty to the charge. Because Myhra had five criminal-history points, the presumptive guidelines sentence was a 21-month executed prison sentence.

Myhra moved for a dispositional departure. At the sentencing hearing, Myhra's attorney argued that a departure is warranted based on Myhra's "serious and persistent

mental illness” and informed the district court “that a community based placement has been arranged for him.” The district court voiced concerns about protecting the public from additional criminal activity by Myhra, and Myhra’s attorney conceded that the proposed community-based placement was not in a locked facility. The state opposed Myhra’s request for a dispositional departure, noting that Myhra had completed an updated diagnostic assessment in prison, was assigned a mental-health caseworker upon release, and was accepted into a mental-health program when he committed the underlying offense. The state argued that Myhra did not follow through with that programming. After hearing from the attorneys, Myhra’s mother, Myhra, and a case manager, the district court took Myhra’s request for a dispositional departure under advisement.

The district court ultimately sentenced Myhra to serve 18 months in prison, noting that it did not “find any [reason] to depart from the guidelines.”¹ The district court reasoned that it needed to “protect the public from [Myhra’s] behavior” and stated that “[t]here is a lot of programming in prison and it appears that [Myhra has] programming when [he] get[s] out.” This appeal follows.

D E C I S I O N

A district court may depart from the presumptive guidelines sentence only if “substantial and compelling” circumstances warrant a departure. Minn. Sent. Guidelines 2.D. (2012). “Substantial and compelling circumstances are those circumstances that

¹ The presumptive guidelines sentencing range was 18-25 months. Minn. Sent. Guidelines 4.A. (2012).

make the facts of a particular case different from a typical case.” *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Whether to depart from the guidelines sentence rests within the district court’s discretion, and this court will not reverse the decision “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). Only in a “rare” case will a reviewing court reverse a district court’s imposition of the guidelines sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

When considering a downward-dispositional departure, the district court may “focus more on the defendant as an individual and on whether the [guidelines] sentence would be best for him and for society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). “[A]menability to probation is a sufficient basis for a downward dispositional departure.” *State v. Donnay*, 600 N.W.2d 471, 474 (Minn. App. 1999), *review denied* (Minn. Nov. 17, 1999). “Numerous 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, 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).

Myhra contends that “[t]he district court abused its discretion by denying [his] motion for a dispositional departure to an alternative mental health placement as allowed by Minn. Stat. § 609.1055, where [he] suffered from serious and persistent mental illness and [an] alternative placement was available in the community.” Minn. Stat. § 609.1055 provides that

[w]hen a court intends to commit an offender with a serious and persistent mental illness, as defined in section 245.462, subdivision 20, paragraph (c), to the custody of the commissioner of corrections for imprisonment at a state correctional facility, either when initially pronouncing a sentence or when revoking an offender's probation, the court, when consistent with public safety, *may* instead place the offender on probation or continue the offender's probation and require as a condition of the probation that the offender successfully complete an appropriate supervised alternative living program having a mental health treatment component.

Minn. Stat. § 609.1055 (2012) (emphasis added). Because the statute is permissive, it does not alter the general rule that a sentencing departure rests within the sound discretion of the district court.

Myhra argues that under the *Trog* factors, “it is abundantly clear that [he] is amenable to probation and an alternative placement in an individualized mental health setting.” We disagree. Although the record suggests that Myhra has a serious and persistent mental illness, it does not show that Myhra is amendable to probation. Myhra was only 22 years old when he pleaded guilty in this case, but it resulted in his sixth adult felony-level conviction. He also has three juvenile-delinquency adjudications and was placed in a residential-treatment facility for three years as a juvenile. Myhra committed the current offense approximately three months after he was released from prison to “get back at” his mother. At that time, Myhra had been assigned a mental-health caseworker, had been accepted into the Adult Rehabilitative Mental Health Services program through the Upper Mississippi Mental Health Center, and had access to individual and group programming. We therefore disagree with Myhra's contention that the district court should have given him “a chance to participate in community-based mental health

treatment and focus on rehabilitation before prison.” Myhra had that opportunity when he committed the current offense.

Moreover, even if Myhra were amenable to probation, it would not follow that the district court abused its discretion by refusing to depart from the guidelines sentence. A “district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation.” *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009). But a district court does not abuse its discretion by refusing to depart “from a presumptively executed prison sentence, even if there is evidence in the record that the defendant would be amenable to probation.” *Id.* at 663.

Myhra also argues that the district court abused its discretion by failing to “analyze the *Trog* factors prior to sentencing [him] to eighteen months imprisonment.” The district court must “exercise [its] discretion by deliberately considering circumstances for and against departure.” *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). “When the record demonstrates that an exercise of discretion has not occurred, the case must be remanded for a hearing on sentencing and for consideration of the departure issue.” *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011).

The record shows that the district court exercised its discretion by considering the reasons for and against a dispositional departure. At the sentencing hearing, the district court stated that “whether [Myhra] is amenable to probation is a significant factor.” The district court also stated that “[i]t’s presumed that [Myhra is] supposed to go to prison” and asked what would “protect the public from [his] behavior” if he were placed in a

mental-health facility. The court also asked about the security of the proposed treatment facility. After hearing the arguments of counsel for and against departure, and the statements of Myhra, his mother, and a caseworker, the district court took the matter under advisement. The following documents regarding Myhra's mental health and criminal history were available to the district court: a five-page presentence investigation report; a six-page assessment, diagnosis, and plan dated August 30, 2012; five pages of records regarding his psychiatric hospitalization in 2008; and a ten-page neuropsychological evaluation dated June 14, 2007. When the district court announced and explained its decision to deny Myhra's request for a dispositional departure at a later hearing, it stated that it needed to "protect the public from [Myhra's] behavior." It noted the availability of mental-health treatment in prison and imposed a bottom-of-the-box sentence.

We are satisfied that the district court considered the reasons for and against departure and that the district court did not abuse its discretion by refusing to grant a dispositional departure. In sum, this is not a rare case that warrants reversal of the presumptive guidelines sentence.

Affirmed.