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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0835**

State of Minnesota,
Appellant,

vs.

Michael Thomas Applegate,
Respondent.

**Filed April 7, 2009
Reversed and remanded
Stauber, Judge**

Morrison County District Court
File No. 49CR07549

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

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Considered and decided by Minge, Presiding Judge; Larkin, Judge; and
Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

In this sentencing appeal, the state argues that the district court abused its discretion when it departed downward dispositionally and durationally from the sentencing guidelines by sentencing respondent to a gross misdemeanor for his crime of felony second-degree controlled substance crime. Because the district court failed to provide offense-related factors justifying the durational departure, we reverse and remand for resentencing.

FACTS

In March 2007, respondent Michael Applegate was charged with one count of controlled substance crime in the second degree after allegedly selling two “eight-balls”¹ of methamphetamine to an undercover narcotics agent. Respondent pleaded guilty to the charged offense and, at sentencing, requested a downward dispositional and/or durational departure from the presumptive felony sentence of 48 months. The district court granted respondent’s motion and imposed a sentence of 365 days and a \$3,000 fine. The court also stayed \$1,500 of the fine and placed respondent on probation for two years. Respondent’s sentence was a gross misdemeanor sentence and constituted a downward durational departure from the presumptive sentence. This appeal followed.

DECISION

The state challenges the district court’s decision to depart downward durationally and dispositionally from the presumptive guidelines sentence. This court reviews a

¹ An “eight-ball” weighs approximately three and a half grams.

district court's departure from the guidelines for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

A district court “has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). That is, the sentence ranges in the sentencing guidelines “are presumed to be appropriate for the crimes to which they apply.” Minn. Sent. Guidelines II.D. A district court, therefore, must impose the presumptive sentence unless the case involves “substantial and compelling circumstances” that warrant a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). To support a downward dispositional departure from the presumptive guidelines sentence, a district court may consider both offender-related and offense-related mitigating factors. *See State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995). But to support a downward durational departure, a district court may consider only offense-related mitigating factors. *Id.* (stating that unamenability to probation, an offender-related factor, may be used to support a dispositional departure but not a durational departure).

I. Dispositional departure

The state argues that the dispositional departure was an abuse of discretion because the sentence unreasonably depreciates the severity of the offense. We disagree. If a defendant is particularly amenable to probation, a downward dispositional departure is warranted. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). When determining whether to depart dispositionally, a district court may consider a defendant as an individual and evaluate the presumptive sentence on the basis of what is the best outcome

for the defendant and for the community. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The district court may consider the defendant's age, prior record, remorse, cooperation, attitude in court, and the support of family and friends. *Trog*, 323 N.W.2d at 31.

Here, in sentencing respondent, the district court specifically found that it “did not believe that [respondent] was a risk to reoffend, so that society did not need protection from him, and punishment would be fair and proper if he were to serve one year in the county jail.” In making this determination, the court considered that this offense was respondent's only drug sale, and that respondent's limited use of methamphetamine appeared to be “nipped in the bud” as a result of the charge because all of respondent's random UA's over the last 17 months had been negative. The court further noted that respondent has no prior criminal history and that respondent has “a myriad of medical problems.” The reasons justifying the departure are appropriate and support the decision to depart from the guidelines sentence. Accordingly, the district court did not abuse its discretion in sentencing respondent to a downward dispositional departure.

II. Durational departure

The state also contends that the district court abused its discretion by durationally departing from the presumptive sentence because the factors listed by the district court are offender-related rather than offense-related. We agree. Although sufficient to support a dispositional departure from the sentencing guidelines, the non-offense related factors cited by the district court do not provide an adequate basis to support a durational departure from the guidelines sentence. Thus, a remand for resentencing is appropriate.

We note that if the sentence had been an upward departure, imposition of the presumptive sentence would be required on remand. *See Geller*, 665 N.W.2d at 517 (stating that when a district court offers no reasons for departing upwardly at the time of sentencing, the departure will be reversed and the presumptive sentence imposed). However, because the sentence here constitutes a downward departure, equitable principals produce the opposite result. *See State v. Dokken*, 487 N.W.2d 914, 918 (Minn. App. 1992) (“[T]o . . . reverse a dispositional downward departure and institute a . . . presumptive sentence is a weighty and grave matter for an intermediate appellate court. We have the authority . . . but the action is drastic.”), *review denied* (Minn. Sept. 30, 1992). If, on remand, the district court specifically finds and articulates substantial and compelling circumstances related to the offense that justify a downward durational departure, such a departure would be permissible. Accordingly, we reverse and remand respondent’s sentence for resentencing consistent with this opinion.

Reversed and remanded.