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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1782**

State of Minnesota,  
Respondent,

vs.

Michael Ray Sauve,  
Appellant.

**Filed July 20, 2010  
Affirmed; motion denied  
Willis, Judge\***

Dakota County District Court  
File No. 19HA-CR-08-1911

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

James C. Backstrom, Dakota County Attorney, Helen R. Brosnahan, Assistant County Attorney, Hastings, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Toussaint, Chief Judge; Hudson, Judge; and Willis,  
Judge.

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

## **UNPUBLISHED OPINION**

**WILLIS, Judge**

Appellant pleaded guilty to five counts of theft by swindle, in violation of Minn. Stat. § 609.52 (2008), for embezzling \$210,000 from his employer. On appeal, he challenges the district court's decision to deny his request for a probationary sentence, a downward dispositional departure from the presumptive sentence under the Minnesota Sentencing Guidelines. Because the district court properly exercised its discretion in denying appellant's request, we affirm. We also deny as moot respondent's motion to strike portions of the appendix to appellant's brief.

### **FACTS**

Appellant Michael Ray Sauve worked at Banker's Mortgage from 2002 to 2008. In his position as controller, Sauve oversaw the company's finances, including payroll, billing, and other financial transactions. Beginning in 2003, Sauve began to steal money from Banker's Mortgage to fund his gambling habit. He accomplished the thefts by such means as issuing extra paychecks to himself, increasing employer contributions to his 401(k) and retirement accounts, writing unauthorized company checks payable to himself, and manipulating his pre-tax spending and health savings accounts. According to the presentence investigation report, between 2003 and 2008, Sauve stole a total of \$218,235 from Banker's Mortgage. The thefts were discovered in 2008 during an outside audit of the company.

Sauve was charged with 22 counts of theft by swindle; he pleaded guilty to five counts and agreed to pay full restitution in exchange for dismissal of the remaining

counts. The state sought an upward durational departure from the presumptive sentence, and Sauve sought a downward dispositional departure, requesting probation rather than an executed prison sentence.

Finding the existence of both mitigating and aggravating factors but concluding that the aggravating factors predominated, the district court imposed concurrent executed sentences of 98 months, a double durational departure from the presumptive sentence. The court also ordered Sauve to pay restitution of \$210,000. In rejecting Sauve's probation request, the district court found that Sauve's conviction of felony theft in 2001 for stealing \$117,680 from a previous employer weighed against finding him amenable to probation for the current offenses.

During the pendency of this appeal, the state moved to strike pages one through eight of the appendix to Sauve's brief, which includes text from a Mayo Clinic on-line publication that addresses compulsive gambling. The state claims that those materials are outside the record on appeal.

## **DECISION**

### **I. The district court did not abuse its discretion by declining Sauve's request for a probationary sentence.**

Ordinarily, a district court must impose the presumptive sentence unless "substantial and compelling circumstances" warrant a different sentence. Minn. Sent. Guidelines II.D. Reviewing courts apply an abuse-of-discretion standard of review to a district court's refusal to impose a downward dispositional departure from the presumptive sentence, and if a district court imposes a disposition that is within the

guidelines, this court will ordinarily sustain the sentence even if grounds for departure exist. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). On appeal, Sauve does not challenge the district court's imposition of an upward durational departure from the presumptive guidelines sentence. Rather, he claims that the district court abused its discretion by imposing the presumptive disposition of commitment instead of granting his motion for a probationary sentence.

In deciding whether to impose a probationary sentence, the district court was required to consider Sauve as an individual in deciding whether to depart dispositionally. *State v. Wright*, 310 N.W.2d 461, 462 (Minn. 1981). The district court considered such factors as Sauve's amenability to probation, age, prior record, remorse, cooperation, attitude while in court, and the support of friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982); *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009).

Here, the district court weighed Sauve's past and pending criminal history, failed prior probation, and probationary status during commission of the current offenses, against his remorse, exemplary attitude in court, willingness to participate in treatment, and strong support from friends and family. The court noted that Sauve voluntarily entered and completed a 30-day inpatient treatment program for compulsive gambling, and the court heard testimony from Sauve's family, friends, and counselors about his successful ongoing treatment.

But despite the existence of some factors that favored a probationary sentence, the district court rejected Sauve's request because the court ultimately concluded that he was

not amenable to probation. Sauve's criminal conduct in the past decade has involved repeatedly swindling his employers, and he committed the current offense while on probation for the same offense in a case that involved very similar criminal conduct.

While Sauve stresses that he committed the previous theft when his gambling problem was untreated, a court may consider "a defendant's prior failures at treatment *or* unwillingness to admit the existence of a problem" in determining whether to depart dispositionally. *State v. Case*, 350 N.W.2d 473, 475 (Minn. 1984) (emphasis added). Because Sauve's criminal record weighs heavily against finding him suitable for probation, this is not the "rare" case that merits reversal of the district court's imposition of the presumptive disposition. *See State v. O'Brien*, 429 N.W.2d 293, 295-96 (Minn. App. 1988) (rejecting offender's request for a probationary sentence following convictions on six counts of theft by swindle, when psychologist's testimony on offender's compulsive gambling disorder did not establish substantial and compelling basis to support a departure), *review denied* (Minn. Nov. 16, 1988). For these reasons, we see no abuse of discretion in the district court's sentencing decision.

## **II. Respondent's motion to strike is moot.**

The state moved to strike pages one through eight of the appendix to Sauve's appellate brief, claiming they are outside the record on appeal. Those pages consist of an article on compulsive gambling from the Mayo Clinic website that defines compulsive gambling as a medical condition and addresses symptoms, causes, risk factors, complications, diagnosis, and treatment. The trial record consists of "papers filed in the trial court, the exhibits, and the transcript of the proceedings," Minn. R. Civ. App. P.

110.01. This court will generally not consider evidence outside the trial record. *State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). But because this court's decision and analysis do not rely on the contested article, this issue is moot, and we therefore deny the state's motion. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying motion to strike as moot when appellate court did not rely on contested documents in reaching decision).

**Affirmed; motion denied.**