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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0264

State of Minnesota,
Respondent,

vs.

Corey Thomas Vener,
Appellant.

Filed January 8, 2018
Affirmed
Ross, Judge

McLeod County District Court
File No. 43-CR-16-270

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

Michael K. Junge, McLeod County Attorney, Daniel R. Provencher, Assistant County Attorney, Glencoe, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Johnson, Judge; and Bratvold, Judge.

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

ROSS, Judge

Corey Vener pleaded guilty to possessing a firearm as a prohibited person and faced a presumptive five-year prison sentence under the sentencing guidelines. Vener moved the

district court to depart dispositionally from the presumptive sentence and order probation instead of prison. The district court denied Vener's motion. Vener appeals his sentence, arguing that the district court was required to depart downward because he is particularly amenable to probation. Because the district court acted within its discretion by imposing the presumptive sentence rather than departing downward from it, we affirm.

FACTS

Vener was required to register as a predatory offender and is ineligible to possess firearms because he was convicted in 2003 for falsely imprisoning a 17-year-old child. In June 2015, child-protection workers became involved after they learned that Vener's four-year-old son had suffered severe burns when he fell into a fire pit and that Vener removed the boy from the hospital without first initiating a required trauma plan. About eight months later, the child's personal-care attendant told a Hutchinson police investigator that she recalled a therapy session with Vener during which he showed her photos of his firearms on his cellular phone. The child's foster mother told the investigator that she had a similar experience with Vener. The investigator obtained and executed a search warrant at Vener's home, finding about half a dozen shotguns and rifles.

Police arrested Vener and the state charged him with possessing a firearm as a prohibited person. While the felon-in-possession charge was pending, the state charged Vener with, and Vener was convicted of, failing to register as a predatory offender. Vener's failure-to-register offense carried a presumptive prison term under the sentencing guidelines. But the district court departed downward and ordered probation, finding Vener

particularly amenable to probation. In the next seven months, Vener failed one drug test. He otherwise complied with the terms of his probation.

Vener pleaded guilty to the felon-in-possession charge, a crime that carries a five-year presumptive sentence under the guidelines. Vener asked the district court to depart from the presumptive sentence and impose a term of probation because "no new issues, new facts, [or] new crimes" had arisen since his failure-to-register conviction when the district court found him particularly amenable to probation. The district court denied Vener's request, stating that it could not "find substantial and compelling reasons not to impose the presumptive sentence."

Vener appeals.

D E C I S I O N

Vener challenges his sentence. District courts enjoy "great discretion" in their choice in how to sentence a convicted defendant. *State v. Soto*, 855 N.W.2d 303, 307–08 (Minn. 2014). We will reverse the district court's sentencing decision only if the sentence reflects an abuse of discretion. *Id.* at 308. The sentencing guidelines frame the district court's discretion. *Id.* A district court may depart from a presumptive guidelines sentence only if it finds "substantial and compelling" reasons to do so. Minn. Sent. Guidelines II.D.2.D (Supp. 2015).

Vener argues that he presented a substantial and compelling reason for the district court to depart downward from the presumptive prison sentence because he has shown that he is particularly amenable to probation. A defendant who shows he is particularly amenable to probation has presented a substantial and compelling circumstance that may

justify a downward dispositional departure. *Soto*, 855 N.W.2d at 309. But we are not convinced that Vener has the characteristics of one who is "particularly" amenable to probation. "Particular" is not an empty modifier. To be *particularly* amenable to probation means to be exceptionally, distinctively, especially, specifically amenable to probation. *Id*. In determining whether a defendant is particularly amenable to probation, the district court may consider a nonexclusive list of factors, including the defendant's age, criminal record, remorse, cooperation, attitude in court, and the support of family or friends. *State v. Trog*, 323 N.W.2d 28, 31 (Minn.1982).

Vener says that probation "is best" for him. He points out that he was 42 years old at sentencing. Vener's age is relevant, but he fails to say why it is entitled to much weight. *See Soto*, 855 N.W.2d at 310 ("We cannot see how being 'only' 37 years old could make Soto *particularly* amenable to probation relative to other defendants."). He says that he remained law abiding for 13 years, but he does not explain why being partially law-abiding makes him especially suited for probation term. *See id*. at 311 ("We do not see anything in Soto's criminal history that would set him apart and make him particularly amenable to probation . . . ."). He emphasizes that he "substantially complied" with his probationary terms except for using marijuana and that he "remedied" the "question about whether [he] was properly registering as a predatory offender" during his probation. Again Vener does not explain how being mostly but not completely compliant with current probationary terms makes him uniquely amenable to another probation. And also without explaining any significance, he points out that he met with his probation officer "several times."

Vener might be correct that these circumstances establish that he "is capable of abiding by probation." But he does not explain how they make him *exceptionally* or *distinctively* amenable to probation. He adds three other facts. He says that he "was cooperative in court," even "courteous and respectful." That a defendant cooperates respectfully in court is somewhat relevant, but it is merely an expected circumstance that is not, without more, a compelling circumstance. *Soto*, 855 N.W.2d at 312 ("But a respectful attitude in court, in this context, is far outweighed by the other relevant considerations."). He says that the collateral consequence of his charge is that he is prevented from regaining custody of his son. That probation rather than prison might help a defendant's familial relations is certainly a factor important to the defendant, but it does nothing to establish that the defendant is distinctively amenable to probation. And he says that his firearms possession "was not motivated by criminal endeavors" but was instead his lifelong "hobby" and a "means of bonding with his step-father." Of course it is better that Vener possessed his guns as a collector rather than, say, as a robber; but we do not see how this makes him especially suited for probation.

The supreme court has explained that a downward dispositional departure in the form of a stayed sentence with probationary terms may be justified, for example, because of the "defendant's particular amenability to individualized treatment in a probationary setting." *Trog*, 323 N.W.2d at 31; *see also Soto*, 855 N.W.2d at 314 ("When we first recognized that a defendant's particular amenability to probation could justify staying a presumptively executed sentence, we acknowledged the danger that such a justification could be loosely applied.") (quotation omitted). We see little in this record that would even

support a finding that Vener is particularly amenable to probation, even if he might be amenable to probation. We therefore have no difficulty concluding that Vener's showing did not *compel* a finding that he is particularly amenable to probation.

Vener maintains that the district court should have found that he was particularly amenable to probation because seven months earlier it made the finding and departed downward, ordering probation for failure to register. Vener cites no authority suggesting that the district court must depart downward in successive criminal sentences. And although a district court's finding that a defendant is particularly amenable to probation will justify downward departure, the finding does not require a departure. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984) ("[T]hat a mitigating factor was clearly present did not obligate the court to place defendant on probation . . . ."). The court found that Vener had a long criminal history (including his recent felony), that Vener had a history of violating probationary terms, that Vener had a recent history of substance abuse, and that Vener failed to show remorse or accept responsibility for illegally possessing the guns. So even if Vener is right that the district court should have found him particularly amenable to probation in this case, the district court still was not bound to depart from the presumptive prison sentence and its counterbalancing findings would undermine a departure.

Vener fails to establish that he was entitled to a downward dispositional departure.

Affirmed.