STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1714
A23-1716
A23-1717

State of Minnesota,
Appellant,

vs.

Brian Lee Emerson,
Respondent.

Filed July 8, 2024
Affirmed
Larson, Judge
Dissenting
Connolly, Judge

Isanti County District Court
File Nos. 30-CR-23-141; 30-CR-22-122; 30-CR-22-31

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Jeffrey R. Edblad, Isanti County Attorney, Nicholas J. Colombo, Assistant County Attorney, Cambridge, Minnesota (for appellant)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for respondent)

Considered and decided by Connolly, Presiding Judge; Gaïtas, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant State of Minnesota appeals the district court's decision to grant respondent Brian Lee Emerson's[1] motion for a downward dispositional departure. Because we conclude the district court did not abuse its discretion when it stayed Emerson's sentences and placed him on probation, we affirm.

FACTS

In three separate cases, the state charged Emerson with six counts of check forgery, one count of financial-transaction card fraud, one count of identity theft, fifteen counts of mail theft, two counts of fifth-degree drug possession, and one count of possession of more than 1.4 grams of marijuana in a motor vehicle. Pursuant to a global plea agreement, Emerson pleaded guilty to three counts of check forgery under Minn. Stat. § 609.631, subd. 3 (2020), three counts of check forgery under Minn. Stat. § 609.631, subd. 2(2) (2020), one count of financial-transaction card fraud under Minn. Stat. § 609.821, subd. 2(1) (2020), one count of identity theft under Minn. Stat. § 609.527, subd. 2 (2020), and one count of fifth-degree possession under Minn. Stat. § 152.025, subd. 2(1) (2022). The state dismissed the remaining charges. The plea agreement left open the possibility that Emerson could request a downward departure during sentencing.

Prior to sentencing, a presentence investigation report (PSI) was prepared for each case. The PSIs recommended the district court impose presumptive middle-of-the-box,

[1] Emerson did not file a brief in this appeal. Pursuant to Minn. R. Civ. App. P. 142.03, we will determine the case on its merits.

executed prison terms for each count. Emerson filed a written motion for a downward dispositional departure in each case, asking the district court to stay the presumptive executed prison terms and impose probation.

At the sentencing hearing, the state argued the district court should follow the PSIs' recommendations and impose executed prison terms. According to the state, no mitigating factors justified a downward dispositional departure. The state argued Emerson's criminal history and history on probation both demonstrated that he was not particularly amenable to probation. The state observed that a PSI prepared in 2020 for a prior case described how Emerson claimed to have made significant positive changes in his life, but still opined that Emerson was unlikely to succeed on probation. The state noted that, since the 2020 PSI, Emerson had been charged with a number of different crimes, including the felonies at issue during the sentencing hearing. The state further argued that Emerson qualified as a career criminal, and the sole reason the state did not pursue career-criminal sentences was that the state agreed not to as a term of the plea agreement. Regarding Emerson's past performance on probation, the state observed that Emerson had 14 probation-violation warrants issued against him and 18 warrants for failing to appear. The state argued that Emerson had demonstrated that he was not particularly amenable to probation, and therefore asked the district court to impose the presumptive executed sentences.

In arguing for the departure at the hearing, Emerson emphasized that he had family support and had taken positive steps that indicated he was likely to achieve rehabilitation on probation. Emerson highlighted how, while in custody, he had voluntarily attended Narcotics Anonymous meetings, saw a mental-health therapist regularly, took medication

to treat his depression, arranged for chemical-dependency treatment that could commence when he was released from custody, and had a union job that could begin when his treatment program allowed. He also pointed the court to the letters of support he filed with his motions for a downward dispositional departure. One letter, written by Emerson's girlfriend, described Emerson's desire to change his life, and his family's desire to support him in making that change. Another letter, from Emerson's Narcotics Anonymous facilitator, discussed Emerson's weekly engagement with the support group, and Emerson's desire to leave drugs and jail behind for the sake of his children. In sum, Emerson asked for a last chance to continue the positive steps he had already taken and argued that it would be best for everyone if he were allowed to seek treatment and pursue recovery while on probation, rather than in custody. Emerson personally expressed that he was "willing to accept [his] punishment with [his] head held high," "sorry for [his] wrongdoings," and "very embarrassed for what [he] ha[d] done." Emerson also acknowledged that he is "the only one that can change [his] life," and said he "will do anything possible for another chance to prove . . . to the Courts, [his] family, and [him]self, that [he was] willing to use the help offered to [him] through [his] support group and treatment."

The district court proceeded with an on-the-record analysis of the *Trog* factors to determine whether it should grant Emerson's motion. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court determined Emerson's age weighed slightly in favor of probation because, at 38 years old, he was "old enough to know better," but at the same time, was at a life-stage where people often "turn things around." The district court found

that Emerson's extensive criminal history "weighs entirely against granting a departure." Regarding remorse, the district court observed that the PSI did not indicate Emerson expressed remorse, and that, even in the courtroom, Emerson did not appear to express remorse for how he affected his victims. Yet, the district court found that Emerson "clearly" felt remorse for how his actions impacted "his immediate circle," and "there's remorse expressed sincerely here today and in the [PSI] for the actions committed." Therefore, the district court determined that Emerson's remorse weighed slightly in favor of probation. The district court said that cooperation "cuts in both directions." According to the district court, Emerson's cooperation as it pertained to conditional release had been "[a]wful," but his more recent cooperation with "assessments, [PSIs], [and] with his attorney" favored probation. Finally, the district court determined that the support of his family weighed in Emerson's favor because "[h]e is connected to and receives support from folks committed to wanting him to do better." Additionally, the district court considered "the amount of time that [Emerson] would spend in prison as compared to the amount of time he would spend in county jail and under the supervision of probation," as well as Emerson's difficult childhood.

"[T]aking those factors all together," the district court granted Emerson's motion for a downward dispositional departure, determining "that a lengthy local jail sentence and a stayed prison sentence is most protective of the public safety and Mr. Emerson's safety." The district court sentenced Emerson to stayed, concurrent 25-month and 28-month prison terms, placed Emerson on probation for five years, and required him to serve 270 days in the local county jail.

The state appeals.

DECISION

On appeal, the state argues the district court abused its discretion when it granted Emerson's motion for a downward dispositional departure. "We review a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion." *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). "[A] sentencing court can exercise its discretion to depart from the guidelines *only if* aggravating or mitigating circumstances are present, and those circumstances provide a substantial and compelling reason not to impose a guidelines sentence." *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotations and citations omitted). A district court abuses its discretion if "its reasons for departure are legally impermissible" or "insufficient evidence in the record justifies the departure." *Solberg*, 882 N.W.2d at 623.

"[W]hen justifying . . . a dispositional departure, the [district] court can focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983) (emphasis omitted). The Minnesota Sentencing Guidelines provide:

> The following is a *nonexclusive list* of factors that may be used as reasons for departure:
>
> a. Mitigating Factors.
>
> (1) The victim was an aggressor in the incident.
>
> (2) The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.

(3) The offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed. The voluntary use of intoxicants (drugs or alcohol) does not fall within the purview of this factor.

(4) The offender's presumptive sentence is a commitment but not a mandatory minimum sentence, and either of the following exist:

(a) The current conviction offense is at Severity Level 1 or Severity Level 2 and the offender received all of his or her prior felony sentences during fewer than three separate court appearances; or

(b) The current conviction offense is at Severity Level 3 or Severity Level 4 and the offender received all of his or her prior felony sentences during one court appearance.

(5) Other substantial grounds exist that tend to excuse or mitigate the offender's culpability, although not amounting to a defense.

(6) The court is ordering an alternative placement under Minn. Stat. § 609.1055 for an offender with a serious and persistent mental illness.

(7) The offender is particularly amenable to probation. This factor may, but need not, be supported by the fact that the offender is particularly amenable to a relevant program of individualized treatment in a probationary setting.

(8) In the case of a controlled substance offense conviction, the offender is found by the district court to be particularly amenable to probation based on adequate evidence that the offender is

> chemically dependent and has been accepted by, and can respond to, a treatment program in accordance with Minn. Stat. § 152.152.
>
> (9) In the case of a qualifying United States military service member or veteran, the offender is found by the district court to meet the criteria for particular amenability to probation found in Minn. Stat. § 609.1056, subd. 4.

Minn. Sent'g Guidelines 2.D.3 (Supp. 2021) (emphasis added).[2] When evaluating a defendant's amenability to probation, district courts typically consider the *Trog* factors: "the defendant's age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family." 323 N.W.2d at 31; *see also Soto*, 855 N.W.2d at 310-12 (reviewing district court's application of *Trog* factors in context of particular amenability to probation). But, as highlighted above, amenability to probation is just one of many mitigating factors the district court may consider when deciding whether to grant a downward dispositional departure. *See Heywood*, 338 N.W.2d at 244; *State v. Stempfly*, 900 N.W.2d 412, 413, 419 (Minn. 2017) (affirming downward dispositional departure based on respondent's "minor or passive role" in the crime).

The state first argues the district court abused its discretion because it failed to specifically find that Emerson was particularly amenable to probation. We agree with the state that the district court did not make this specific finding, but we disagree that the absence of the finding amounts to an abuse of discretion. On this point, our

[2] The mitigating-factors provision remained the same in the 2022 sentencing guidelines, which govern Emerson's fifth-degree-possession offense. *See* Minn. Sent'g Guidelines 2.D.3 (2022).

nonprecedential opinions in *State v. Adams*, No. A23-0408, 2023 WL 5525080 (Minn. App. Aug. 28, 2023), and *State v. Wetzel*, No. A19-0091, 2019 WL 4409410 (Minn. App. Sept. 16, 2019), are persuasive.[3]

In *Adams*, we concluded that the district court's failure to find the defendant particularly amenable to probation when granting a downward dispositional departure was not reversible error for two reasons. 2023 WL 5525080, at *3-4. First, we concluded that the *Trog* factors can be relevant to evaluating whether to grant a motion for a downward dispositional departure, even if the dispositional departure is not based on the defendant's particular amenability to probation. *Id.* at *4. We observed that the open-ended nature of the "nonexclusive list of mitigating circumstances" means that the district court may consider the *Trog* factors generally to determine whether "identifiable, substantial, and compelling circumstances . . . support a departure." *Id.* (quotations omitted). Second, we noted that the district court did not rely exclusively on the *Trog* factors to reach its decision because it "relied on other offender-related factors not listed in *Trog*." *Id.*

We came to a similar conclusion in *Wetzel*. *See* 2019 WL 4409410, at *3-4. There, the district court never explicitly found that Wetzel was particularly amenable to probation, despite its focus on several *Trog* factors as justification for granting a downward dispositional departure. *Id.* at *3. However, we concluded that the lack of an explicit finding was "not fatal to the departure because particular amenability to probation is just one of several factors on a non-exclusive list that can justify a downward dispositional

[3] We recognize that these opinions are nonprecedential and, therefore, not binding. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c).

departure. The true inquiry is whether there exist identifiable, substantial, and compelling circumstances to justify the departure." *Id.* (quotation omitted).

Similarly here, the district court did not find Emerson particularly amenable to probation, and it was not required to do so. The district court based its decision to depart on what was "most protective of the public safety and Mr. Emerson's safety," rather than Emerson's particular amenability to probation. To reach that conclusion, the district court evaluated the *Trog* factors, which is allowable given the open-ended nature of the sentencing guidelines' list of mitigating circumstances. Thus, as in *Adams* and *Wetzel*, the district court did not abuse its discretion when it applied the *Trog* factors to evaluate whether "a substantial and compelling reason" existed to not "impose a guidelines sentence." *See Soto*, 855 N.W.2d at 308 (quotation omitted).

The state disagrees with our prior application of the *Trog* factors in *Adams* and *Wetzel* and, instead, argues that *Soto* controls the outcome of this case. But in *Soto* the supreme court evaluated the district court's application of the *Trog* factors *only* as they related to particular amenability to probation. 855 N.W.2d at 307. The supreme court concluded that the record did not support the district court's finding that the defendant was *particularly* amenable to probation and reversed the district court's decision to depart from the sentencing guidelines on that basis. *Id.* at 314-15. Here, the district court did *not* base its decision on Emerson's particular amenability to probation. Instead, the district court based its decision on its finding that staying Emerson's prison terms and imposing probation and jail time was more protective of the public safety and Emerson's safety.

Thus, the requirement from *Soto* that a defendant be *particularly* amenable to probation does not apply here.

The state next argues that, even if the district court did not need to find Emerson particularly amenable to probation, it abused its discretion because it failed to find substantial and compelling reasons to depart after applying the *Trog* factors. We are not persuaded.

We are "extremely deferential" to a district court's decision whether to impose a departure, *Dillon v. State*, 781 N.W.2d 588, 595-96 (Minn. App. 2010), *rev. denied* (Minn. July 20, 2010), and we "cannot simply substitute our judgment for that of the [district] court," *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999); *see also State v. Case*, 350 N.W.2d 473, 476 (Minn. App. 1984) (explaining that appellate courts "are loath to interfere" with district court's dispositional departure from sentencing guidelines). "[A]s long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination," we do not interfere with the district court's decision. *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted).

Here, the record shows the district court evaluated all the relevant information and, in its discretion, determined substantial and compelling reasons existed not to impose a guidelines sentence. The district court conducted a thorough evaluation of the *Trog* factors, including findings regarding Emerson's age, extensive criminal history, history of conditional-release and probationary violations, remorse, and family support. Most importantly, though, the district court determined that staying Emerson's prison terms and imposing probation was more protective of the public safety and Emerson's safety. *See*

Soto, 855 N.W.2d at 312 ("[W]e have repeatedly suggested that [public safety] can be relevant to determining whether a decision to stay a presumptively executed sentence was an abuse of discretion."); *Trog*, 323 N.W.2d at 31 (endorsing the district court's consideration of "the chance that [the] defendant will mend his ways and that society's interests will be safeguarded [best] if the probationary treatment approach is followed" (quotation omitted)). In this case, the district court specifically weighed "the amount of time that [Emerson] would spend in prison as compared to the amount of time he would spend in county jail and under the supervision of probation." In its discretion, the district court determined that placing Emerson on probation for five years and imposing jail time was more protective of the public safety than executing concurrent 25- and 28-month prison terms.

The district court's consideration of public safety and Emerson's safety are legally permissible bases for granting a dispositional departure. *Heywood*, 338 N.W.2d at 244 (allowing district court when granting dispositional departures to focus on what "would be best for [the defendant] and for society"); *Soto*, 855 N.W.2d at 312 (endorsing public safety as relevant determination when evaluating whether to grant dispositional departure); *Trog*, 323 N.W.2d at 31 (endorsing society's interests as relevant determination when evaluating dispositional departure). And the record supports the district court's determination that keeping Emerson under state supervision for a longer time period was more protective of public safety. Therefore, we conclude the district court did not abuse its discretion.

Affirmed.

CONNOLLY, Judge (dissenting)

I respectfully dissent. I would reverse the district court's decision granting respondent a downward dispositional departure because the record does not support the decision. Instead, the record directly contradicts the district court's decision because there are no substantial and compelling reasons not to impose a guidelines sentence. *See* Minn. Sent'g Guidelines 2.D.1 (2022). Moreover, the district court did not find that respondent was particularly amenable to probation as required by *State v. Soto*, 855 N.W.2d 303, 309 (Minn. 2014). This deficiency in and of itself mandates reversal.

The record indicates the following: On January 13, 2022, a complaint was filed in court file number 30-CR-22-31, charging respondent with three counts of check forgery under Minn. Stat. § 609.631, subd. 3 (2020), and one count of financial transaction card fraud in violation of Minn. Stat. § 609.821, subd. 2(1) (2020). On February 9, 2022, a complaint was filed in court file number 30-CR-22-122, charging respondent with three counts of check forgery under Minn. Stat. § 609.631, subd. 2(2) (2020), one count of identity theft in violation of Minn. Stat. § 609.527, subd. 2 (2020), one count of fifth-degree drug possession under Minn. Stat. § 152.025, subd. 2(1) (2020), 15 counts of mail theft in violation of Minn. Stat. § 609.529, subd. 2(6) (2020), and one count of misdemeanor possession of marijuana in a motor vehicle under Minn. Stat. § 152.027, subd. 3 (2020). And on March 3, 2023, a complaint was filed in court number 30-CR-23-141, charging respondent with one count of felony fifth-degree drug possession in violation of Minn. Stat. § 152.025, subd. 2(1) (2022).

Respondent eventually pleaded guilty to the following counts as part of a plea agreement with appellant: In file number 30-CR-22-31, three counts of felony check forgery and one count of felony financial transaction card fraud; in file number 30-CR-22-122, three counts of felony check forgery and one count of identity theft; and in file number 30-CR-23-141, one count of felony fifth-degree possession of a controlled substance. Respondent committed all of these crimes while he was on probation for a felony.

The district court granted respondent's motion for a downward dispositional departure and imposed concurrent sentences of 25 months in prison for the first two counts in file number 30-CR-22-31, and 28 months in prison for the remaining counts. But the district court stayed execution of the sentences for five years, and placed respondent on probation. The district court also ordered respondent to spend 270 days in jail, with credit for 133 days served.

Below is the entire transcript from respondent's sentencing:

> All right. Mr. – well, let's do it this way folks, I'm going to go through the *Trog* factors. A motion has been made for a downward departure and the Court is required to consider the *Trog* factors when considering such a motion.
>
> The first of those is age, and it cuts exactly in the same ways that both counsel have identified. *I think that [respondent] is not as young as he once was when these other offenses were committed*. He's old enough to know better. *But he is also at a point in his life where the Court often does see folks turn things around, as well*. That factor weighs slightly in [respondent's] favor.
>
> His *record weighs entirely against granting a departure*. He has, without cease, committed crime after crime with little thought for their impact on anyone other than himself.

His current state of remorse, *that factor weighs against a departure*. The remorse piece, likewise, cuts in two different directions. First, um, as described by [the prosecutor], I think accurately, *there's an absence in the presentence materials of a sense of remorse*, and even here today, of the understanding or expanding the circle of remorse to include the people who are affected by the crimes that he's committed. You know, when a person has their numbers taken, their name taken, and they have to spend good chunks of their day dealing with banks and companies and, and things because someone has stolen their stuff. *I don't really get the sense that the remorse was truly taking that entire circle into account*.

But there is, *there is remorse clearly by [respondent] for his immediate circle, those most immediately impacted by his actions*. There's also some concern in the presentence – and it's, there's remorse expressed sincerely here today and in the presentence investigation for the actions committed. But there's also, even on the part of the, part of the downward dispositional advisor, *to lay some blame with the mother of [respondent's] children. Now, the fact that a person was engaged in a toxic relationship certainly is not – it is a challenge, but it was – it's not the kind of remorse that the Court would expect to see in a true change of heart*.

That being said, *the remorse factor, given what's been said today and the frame of mind that [respondent] is in here today, weighs just slightly in his favor*.

The factor related to cooperation, good and bad, bad and good. *Awful as to conditional release*. Recently as to *assessments, presentence investigation, with his attorney, that factor cuts in both directions*.

The support of family factor weighs in favor of [respondent]. He is connected to and receives support from folks committed to wanting him to do better. I think [the prosecutor] is right, that has not been sufficiently protective in the past to, um, prevent the kind of, I'll call it, crime spree in which [respondent] historically has engaged. But that's a factor under the *Trog* analysis that weighs in his favor.

> *I think taking those factors all together, and weighing the amount of time that he would spend in prison as compared to the amount of time he would spend in county jail and under the supervision of probation, the factors overall, and taking into* account that as a very, very young child, that selfishness that he has picked up and is part of his background, evident in his history, that he needs to address if he expects to not repeat it, was taught to him very early on by those who should have taken care of him better.
>
> So taking all of that into account, the Court finds that a lengthy local jail sentence and *a stayed prison sentence is most protective of the public safety and [respondent's] safety*. This will be a downward departure based on that information.

(Emphasis added.)

The district court never stated that the respondent was particularly amenable to probation as required by our supreme court. Indeed, prior to his current crime spree, respondent had been convicted of 11 felonies and seven gross misdemeanors stretching back to 2013. And he committed the offenses in this case while on felony probation. Further, the presentence investigation (PSI) indicated that he fell into the very high-risk area with a level of 32 on the Level of Severe Case Management Inventory. Accordingly, the PSI recommended that respondent be sent to prison.

None of the reasons articulated by the district court provide a basis for a downward departure because they are not supported by the record. *See State v. Dentz*, 919 N.W.2d 97, 103 (Minn. App. 2018) (reversing and remanding for resentencing because "the district court relied on an improper reason for granting a downward durational departure"). Our supreme court has stated that several factors can be relevant to determining if a defendant is particularly amenable to probation, 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." *Soto*, 855 N.W.2d at 310.

In *Soto*, the defendant was 37 years old. *Id.* The factor of age is generally neutral with regard to particular amenability. *See id*. Here, the district court mentioned respondent's age, but only stated that he is old enough to know better and is at a point in his life at which the court often does see people turn things around. But rather than turning things "around," the record shows that respondent continues to commit crimes, and there is nothing to support the idea that he has changed. Also, the issue is not whether other defendants are at an age when they turn things around, but whether the record indicates that *this* defendant is at an age when he will change. This is why a downward dispositional departure depends on whether a defendant is particularly amenable to probation. For that reason, "[t]he factors [justifying departures] are intended to describe specific situations involving a small number of cases. The Commission rejects factors that are general in nature, and that could apply to a large number of cases . . . ." Minn. Sent'g Guidelines cmt. 2.D.301 (2022).

The district court correctly noted that respondent's prior "record weighs entirely against granting a departure." The district court then discussed the factor of remorse. First, the district court stated that the factor cuts against departure and specifically noted that there is an absence of a sense of remorse and "even here today of the understanding or expanding the circle of remorse to include the people who are affected by the crimes that he's committed." But then, inexplicably, the district court stated that he showed remorse only for his immediate circle and not for any of his victims. But even then, the district

court stated that he lays the blame with the mother of his children. Thus, the record does not support this factor as a reason for a departure. He is not remorseful.

Next, the district court discussed "cooperation." The district court noted that respondent was "awful as to conditional release." Indeed, the record indicates that he violated his current conditional release terms and had 14 probation violations and 18 warrants for failing to appear. The district court said this factor "cuts in both directions." The record belies this finding. It cuts in only one direction, and that is against a departure.

Next, the district court noted that respondent has the support of family members and that this factor supports a departure. The only thing in the record to support this finding is that family members were in the courtroom at sentencing. That is insufficient and is unlike the nonprecedential and nonbinding case of *State v. Wetzel*, in which a 19-year-old, with no prior criminal record, pleaded guilty to burglarizing his grandparents' garage. No. A19-0091, 2019 WL 4409410, at *1 (Minn. App. Sept. 16, 2019). In that case, the defendant's grandparents, who were the victims of the crime, supported a downward dispositional departure, and indeed the defendant was moving to another state to be with his mother and stepfather where he was able to work two jobs, attend a sober support group, receive mental-health counseling, and submit to drug testing at his parents' request. *Id.* at *1-2. That is the type of family support necessary to support a departure based on family support. That support is absent here and explains why *Wetzel*, does not support the district court's decision.

Merely having a family member present in a courtroom is insufficient to show family support. If it was sufficient, then simply having a family member present in a

courtroom for sentencing would always be grounds for dispositional departure. Therefore, the record does not support this factor as a ground for departure.

The case of *State v. Adams*, No. A23-0408, 2023 WL 5525080 (Minn. App. Aug. 28, 2023), another nonprecedential and nonbinding case, is also easily distinguishable and does not support the district court's decision to depart. In that case, the defendant was charged solely with the crime of failure to register as a predatory offender in 2022. *Adams*, 2023 WL 5525080, at *1. The district court found that he committed his initial crime when he was very young, and that the majority of his criminal-history points stemmed from "a multi-count complaint in 2007." *Id.* at *1-2. The defendant also had been recently evicted and did not have a phone. *Id.* at *1. And unlike this case, the defendant seemed genuinely remorseful. *Id.* at *2. In short, *Wetzel* and *Adams* are neither binding nor persuasive. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (stating that non precedential opinions are not binding authority but may be persuasive authority).

Finally, the district court stated that "a lengthy, local jail sentence and a stayed prison sentence is most protective of public safety." But, based on the record, it is illogical to say that allowing respondent to be at liberty is more protective of public safety than imprisoning him. And the district court's statement is also not supported by the record. The defendant was ordered to serve 270 days in jail. However, considering that one-third of the sentence is credited for good time, and respondent was also to receive credit for 133 days, he would only be serving 47 days in jail. This is not a "lengthy sentence." Moreover, respondent has received numerous stayed sentences and been placed on probation more

than a dozen times. He is not rehabilitated. He continues to commit new crimes and, as already stated, he committed the offenses in this case while he was on felony probation.

In conclusion, the sentence of a downward dispositional departure, and the grounds that the district court relied on for that departure, are not supported by the record. Respondent is not "particularly" amenable to probation. He is not amenable to probation at all.

Accordingly, I must dissent. I would reverse the district court's sentence and remand to the district court for the imposition of a guidelines presumptive prison sentence.