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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-1242**

State of Minnesota,  
Appellant,

vs.

Nicole Marie Poillon,  
Respondent.

**Filed April 14, 2014  
Affirmed  
Hooten, Judge**

Winona County District Court  
File Nos. 85-CR-10-876, 85-CR-10-877, 85-CR-11-1818

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Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and  
Randall, 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## UNPUBLISHED OPINION

**HOOTEN**, Judge

The state appeals respondent's sentence, arguing that the district court abused its discretion by dispositionally and durationally departing from the Minnesota Sentencing Guidelines. Because the record demonstrates that the district court's imposition of sentence was not an abuse of its discretion, we affirm.

### FACTS

Respondent Nicole Poillon was convicted of three first-degree controlled substance crimes arising from a series of cocaine sales that she made in April 2010 to a confidential informant working with the Winona Police Department. Each conviction carried a presumptive disposition of commitment under the Minnesota Sentencing Guidelines.

Poillon moved the district court for a downward dispositional departure or, in the alternative, a downward durational departure, from the guidelines, arguing that: (1) she has a minimal criminal history and had remained law abiding for the three-year time period after she was charged; (2) she is a 30-year-old single mother and her imprisonment would devastate her twelve-year-old daughter; (3) she is amenable to probation; (4) she was respectful and cooperative throughout the proceedings; and (5) mitigated departures are common.

A presentence investigation (PSI) indicated that Poillon had remained law abiding, was cooperative and respectful, and had not been a behavioral problem while she was in custody. The probation agent who had prepared the PSI opined that she was a "low risk

for recidivism.” During the three years following her arrest, Poillon attended Southeast Technical College, earning a 3.8 grade point average. At the time of the sentencing hearing, she was one semester from graduating with a degree as a paralegal. Poillon argued that letters written on her behalf by family, teachers, and friends indicated that she had substantial family and community support.

The state opposed her motion for a dispositional departure, urging the district court to impose a 189-month sentence, the top of the guidelines’ presumed range.<sup>1</sup> The state argued that Poillon endangered her daughter by exposing her to drugs and associating with the state’s confidential informant, who has spent nearly 17 years of his life in prison. The state noted that Poillon had previously received a stay of imposition on a third-degree assault charge and that the stay was revoked when she violated the conditions of her probation.

At the beginning of Poillon’s sentencing hearing on April 17, 2013, the district court acknowledged that it was unsure of what sentence to impose. After hearing arguments from both sides, the district court summarized a number of reasons why it should not depart, noting that there were “very strong advantages to simply sending [her] to prison.” It stated that Poillon had violated probation before and added, “I don’t know that amenable to probation is a factor that I’m going to be able to use.”

But the district court concluded that Poillon would receive three concurrent 132-month sentences, a slight downward durational departure for one conviction. In support

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<sup>1</sup> The state’s maximum sentence duration was based upon the formula set forth in *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981).

of its durational departure, the court explained: “That’s for a couple of reasons. One, I think it fairly represents [Poillon’s] criminality, and second, it doesn’t unfairly exaggerate it or give the, um, State motive to basically run up a string of crimes.” The court then stayed execution of the sentences, placed Poillon on probation for 30 years, and imposed a \$15,000 fine. The court explained the dispositional departure:

The reason I’m going to stay execution is one, because on balance I’m going to find that you are now at this age amenable to probation. Two, I’m going to impose financial penalties that will give you an opportunity to pay those off and ensure your compliance with probation and allow longer supervision. That’s as good as I can do for finding a reason to mitigate.

The district court wrote in its departure report that it “made a slight downward [durational] departure, in the interest of justice and fairness on the last case only to make these 3 sentences, which will run concurrently, consistent with each other, and to not unfairly exaggerate [Poillon’s] criminal history.” The district court marked as mitigating factors in support of the dispositional departure “[a]menable to treatment,” “[i]mpose restitution/ensure financial penalties paid,” and “[e]nsure compliance [with] probation or allow longer supervision.”

This appeal follows.

## **D E C I S I O N**

The state challenges the district court’s decision to depart from Poillon’s presumptive sentence under the guidelines. “The district court must order the presumptive sentence provided in the sentencing guidelines unless substantial and compelling circumstances warrant a departure.” *State v. Pegel*, 795 N.W.2d 251, 253

(Minn. App. 2011) (quotation omitted). The decision whether to depart rests in the district court’s discretion, and we will not reverse absent an abuse of that discretion. *Id.*

The district court here departed downward in terms of both duration and disposition. The durational departure was slight—three months below the low end of the presumptive range for the last of Poillon’s three convictions. “Requests for durational departures require the district court to consider whether the conduct involved in the offense of conviction was significantly more or less serious than the typical conduct for that crime.” *State v. Peter*, 825 N.W.2d 126, 130 (Minn. App. 2012), *review denied* (Minn. Feb. 27, 2013). The district court stated that departing durationally more fairly represented Poillon’s criminality and deterred the state from “run[ning] up a string of crimes.” The court also wrote that it departed durationally to “make the three sentences, which will run concurrently, consistent with each other, and to not unfairly exaggerate [Poillon’s] criminal behavior.” This was not an abuse of discretion. The district court clearly indicated that it believed imposing a presumptive sentence on Poillon’s last conviction would overstate her criminality. One of the purposes of the sentencing guidelines is to “ensure that the sanctions imposed for felony convictions are proportional to the severity of the conviction offense.” Minn. Sent. Guidelines 1.A (Supp. 2013). Accordingly, the district court acted within its discretion by sentencing Poillon to a term three months below the presumptive range for one conviction based on proportionality.

The district court’s dispositional departure was more significant. Instead of executing Poillon’s 132-month sentence as the guidelines presumed, the court placed Poillon on probation. To depart dispositionally, the district court must look at the

defendant individually and determine whether the presumptive sentence would benefit the defendant and society. *Wells v. State*, 839 N.W.2d 775, 778 (Minn. App. 2013). Relevant factors include the defendant's age, prior record, remorse, cooperation, attitude while in court, and support from friends and family. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). But employment and social factors, such as educational attainment, should not be considered because they "are highly correlated with sex, race, or income level." Minn. Sent. Guidelines cmt. 2.D.201 (Supp. 2013). Employment is especially problematic because it is "manipulable." *Id.* Accordingly, "[t]he use of these factors, alone, to explain the reason for departure is insufficient, and the trial court should demonstrate that the departure is not based on any of the excluded factors." *Id.*

The district court did not abuse its discretion by dispositionally departing downward. It stated that it did not execute Poillon's sentence because it ultimately concluded that Poillon is amenable to probation and that probation would ensure that she pays her fine and is supervised longer. Amenability to probation by itself can support a downward departure. *State v. Gebeck*, 635 N.W.2d 385, 389 (Minn. App. 2001). Despite this, the state contends that the district court based its departure decision on improper factors such as Poillon's schooling, employment, status as a mother, age, and decision to have a jury trial. The state's argument is unconvincing. The state's assertion that "[b]y imposing a financial sanction instead of incarceration, the district court essentially agreed with the defense argument putting great weight on the defendant's schooling and ability to achieve employment" is not supported in the record. The same can be said of the state's assertion that the district court departed because Poillon is a mother or she went to

trial. These circumstances were discussed during the sentencing hearing, but nothing suggests that the district court actually based its decision on them. The district court gave explicit reasons for departing, and those reasons are not improper.

The state further argues that the district court erred by concluding that Poillon is amenable to probation, noting that the district court stated before announcing Poillon's sentence that it did not believe she is amenable to probation. At first glance, the district court seems to have contradicted itself. But in the context of the entire hearing, it is clear that the court simply listed all of the facts that it considered in support of Poillon's unamenability to probation and then announced its resolution of that issue. The district court began the hearing by acknowledging that it was unsure about what sentence to impose and would likely base its decision on the oral arguments. It later stated that "[i]t sounds like I'm rambling here, but I'm really trying to talk myself into making one decision over another one." And in the departure report, the district court confirmed that "[t]his is [a] difficult case." All of these statements support the conclusion that after initially considering that Poillon was not amenable to probation and listening to arguments of counsel, the district court changed its mind and decided that she was amenable to probation. Accordingly, the state's insistence that the district court found that Poillon was unamenable to probation is unfounded.

The record shows that the district court considered several sources of information, including the circumstances highlighted by the state, before making its sentencing decision. In addition to hearing arguments by the state, the defense, and Poillon herself, the district court considered the facts of the case, Poillon's familial and criminal history,

her behavior between the time she was charged and sentenced, and the support she received from family and friends. These facts demonstrate that the district court, in carefully considering the relevant factors, properly exercised its discretion. *See State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (determining that the district court did not abuse its discretion when “the record demonstrate[d] that [it] carefully considered circumstances for and against departure and deliberately exercised its discretion”). The fact that the district court struggled with its decision or that another court may have reached a different result does not mean that the district court abused its discretion.

**Affirmed.**