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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0978**

State of Minnesota,
Respondent,

vs.

Manuel Enrique Muro, Jr.,
Appellant.

**Filed January 22, 2013
Affirmed
Halbrooks, Judge**

Olmsted County District Court
File No. 55-CR-10-8866

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

Mark A. Ostrem, Olmsted County Attorney, James P. Spencer, Assistant County
Attorney, Rochester, Minnesota (for respondent)

Stephen L. Smith, The Law Firm of Stephen L. Smith, Minneapolis, Minnesota (for
appellant)

Considered and decided by Halbrooks, Presiding Judge; Stauber, Judge; and
Collins, Judge.*

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

UNPUBLISHED OPINION

HALBROOKS, Judge

On appeal from his conviction of second-degree criminal sexual conduct, appellant Manuel Enrique Muro, Jr. challenges the validity of his sentence and guilty plea, arguing that (1) the sentencing court denied his request for a downward dispositional departure without addressing the factors outlined in *State v. Trog*; (2) his sentence is based on an erroneous criminal-history score; and (3) contrary to the findings of community corrections, he is amenable to both probation and sex-offender treatment. We affirm.

FACTS

In December 2010, Muro was charged with first-degree criminal sexual conduct. Pursuant to a plea agreement, he pleaded guilty to second-degree criminal sexual conduct. The plea agreement called for the state to join Muro's recommendation for a downward dispositional departure if Muro was "found amenable to both probation and sex offender treatment." The agreement further contemplated a presumptive sentence of 90 months for Muro's offense based on the parties' belief that Muro had a criminal-history score of zero. The agreement allocated any risk of error in the parties' appraisal of that criminal-history score to Muro, stating: "The defendant bears the risk of his own criminal history score and the guideline[s'] sentence will be adjusted accordingly if his score is something other than zero at the time of sentencing." The district court accepted Muro's guilty plea and ordered a presentence investigation (PSI), including a psychosexual evaluation.

In the PSI report, community corrections concluded that Muro is not amenable to probation and recommended against a dispositional departure. Frank Weber, M.S., L.P., conducted a psychosexual evaluation of Muro. Although Weber stated that Muro should be required to complete adult sex-offender treatment, he never made a finding that Muro is amenable to such treatment. The evaluation concluded that Muro “has potential to become a healthy individual, but he is not there yet.”

In addition, community corrections determined that Muro has a criminal-history score of two. Muro was assigned one felony point for a 2008 conviction of receiving stolen property. As a consequence of that conviction, Muro received a ten-year term of probation but was discharged from probation in 2010. That felony conviction was converted to a misdemeanor on his criminal record at the time of his probationary discharge. Muro was assigned a second criminal-history point—a custody-status point—for having committed the current offense before the initial probationary period for the 2008 offense had expired.

At sentencing, Muro moved for a downward dispositional departure and challenged the assignment of the custody-status point. A probation officer testified that Muro was given that custody-status point because he committed the current offense “within the original pronounced [ten-year] probation period” of his 2008 conviction. The state recommended that Muro be sentenced to 130 months—the presumptive sentence—because he is not amenable to probation.

Muro was sentenced to 130 months’ imprisonment. The sentencing court found that there were “no substantial or compelling reasons to depart” and observed both that

Muro bore any risk of having misunderstood his criminal-history score and that the state was not required to recommend a dispositional departure. Before the sentencing proceeding concluded, Muro made several oral motions, including a motion to withdraw his guilty plea on the basis of an “erroneous criminal history score.” The sentencing court did not allow Muro to withdraw his plea. This appeal follows.

D E C I S I O N

I.

Muro challenges the sentencing court’s imposition of the presumptive sentence. A district court’s decision whether to depart from the sentencing guidelines is reviewed for an abuse of discretion. *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003). Only in a “rare” case will a reviewing court reverse a district court’s imposition of the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “Although the [district] court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

Muro argues that the sentencing court abused its discretion by failing to consider the factors outlined in *State v. Trog*, 323 N.W.2d 28 (Minn. 1982), before denying his request for a dispositional departure. In *Trog*, the supreme court held that “[a] defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of friends and/or family” are factors that are relevant to a determination whether a dispositional departure is justified. 323 N.W.2d at 31. A district court, however, does not abuse its discretion in failing to discuss the *Trog* factors before

imposing a presumptive sentence. *State v. Pegel*, 795 N.W.2d 251, 254 (Minn. App. 2011). The application of *Trog* is limited to the district court's exercise of discretion in *granting* a dispositional departure, not its decision to *deny* such a request. *See id.* at 253-54 (distinguishing between a district court's failure to exercise its discretion to depart and the abuse of that discretion, explaining that denying a departure request requires neither an explanation nor a discussion of *Trog*).

Muro's sentence of 130 months is the presumptive sentence for second-degree criminal sexual conduct committed by an offender with a criminal-history score of two. Minn. Sent. Guidelines IV (2010) (sex-offender grid). We therefore disagree with Muro that *Trog* has any application here. Because the sentencing court was neither required to explain its decision to impose the presumptive sentence, nor to evaluate the factors outlined in *Trog* before so doing, we conclude that the sentencing court acted within its discretion in sentencing Muro.

II.

Muro challenges the sentencing court's refusal to allow him to withdraw his guilty plea, arguing that the assignment of the custody-status point to his criminal-history score, upon which his sentence is based, is unwarranted. At oral argument in this case, Muro also challenged, for the first time, the assignment of the felony point to his criminal-history score for his 2008 conviction of receiving stolen property.

The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). Similarly, a reviewing court will

reverse the district court's determination of whether to permit the withdrawal of a guilty plea only if the district court abused its discretion. *Barragan v. State*, 583 N.W.2d 571, 572 (Minn. 1998).

Custody-status point

The sentencing guidelines require that one point be assigned to an offender's criminal-history score if the offender "committed the current offense within the period of the initial probationary sentence" of another conviction. Minn. Sent. Guidelines II.B.2.b (2010). The assignment of that point is required when an offender is released early from probation and commits a new offense within the initial, although discharged, term of probation:

The basic rule assigns offenders one point if they were under some form of criminal justice custody when the offense was committed for which they are now being sentenced. . . . If an offender receives an initial term of probation that is definite, is released from probation prior to the expiration of that term and commits a new crime within the initial term, it is clear that a custody point will be assigned.

Minn. Sent. Guidelines cmt. II.B.201 (2010).

It is undisputed that Muro received an initial ten-year term of probation for his 2008 conviction of receiving stolen property. Muro was assigned a custody-status point because he committed the current offense prior to the expiration of that term. We therefore conclude, as Muro conceded at oral argument, that the assignment of that point was proper and not an abuse of the sentencing court's discretion.

Felony point

Muro also contends that he should not have been given a criminal-history point for his 2008 conviction of receiving stolen property, arguing that he was given a misdemeanor sentence for that conviction.

A felony conviction is deemed a misdemeanor when “the imposition of the prison sentence is stayed, the defendant is placed on probation, and the defendant is thereafter discharged without a prison sentence.” Minn. Stat. § 609.13, subd. 1(2) (2010). Felonies resulting in a misdemeanor or gross-misdemeanor sentence count as a misdemeanor or gross misdemeanor in the calculation of criminal-history scores. Minn. Sent. Guidelines II.B.1.e (2010). An offender is assigned particular felony points “for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing.” Minn. Sent. Guidelines II.B.1 (2010). Criminal-history points are therefore assigned for felony stays of imposition “no matter what period of probation is pronounced.” Minn. Sent. Guidelines cmt. II.B.101 (2010).

For his 2008 felony conviction of receiving stolen property, the district court stayed the imposition of sentence and placed Muro on probation. That conviction became a misdemeanor on his criminal record in 2010, when Muro was discharged from probation. The sentencing guidelines, however, require that “*every* felony conviction for which a felony sentence was stayed or imposed” be assigned particular felony criminal-history points. Minn. Sent. Guidelines II.B.1 (emphasis added). And Muro’s argument that a stayed felony sentence is a misdemeanor sentence is unsupported by prior decisions of Minnesota’s appellate courts. In *State v. Clipper*, 429 N.W.2d 698, 701 (Minn. App.

1988), we upheld the assignment of felony points under Minn. Sent. Guidelines II.B.1 to convictions governed by Minn. Stat. § 609.13. And more recently, the Minnesota Supreme Court reiterated that Minn. Sent. Guidelines II.B.1.e—the provision under which felony convictions resulting in misdemeanor sentences are treated as misdemeanors for the purpose of calculating criminal-history scores—is not triggered when the imposition of a felony sentence is stayed. *See State v. Campbell*, 814 N.W.2d 1, 6-7 (Minn. 2012) (“By definition, when a court stays imposition of sentence it imposes no sentence. . . . [A]nd Minn. Sent. Guidelines 2.B.1.e. cannot apply.”).¹

As precedent demonstrates, a stayed imposition of a felony sentence is not a misdemeanor sentence under the sentencing guidelines. Because every felony conviction for which a felony sentence is stayed or imposed is subject to felony points, the sentencing court did not abuse its discretion by assigning a felony point to Muro’s criminal-history score for his prior conviction of receiving stolen property.

III.

Muro’s final argument is that he is amenable to probation and sex-offender treatment and therefore should be permitted to withdraw his plea. But community corrections expressly determined that Muro is not amenable to probation. And Weber, who conducted the court-ordered psychosexual evaluation of Muro, opined that Muro could benefit from sex-offender treatment but also observed that he “has potential to

¹ The *Campbell* court refers to the 2011 version of the sentencing guidelines in which arabic numerals replace previously used roman numerals. Minn. Sent. Guidelines 2.B.1.e (Supp. 2011 & 2012) is substantively identical to the corresponding provision in the 2010 guidelines under which Muro was sentenced.

become a healthy individual, but he is not there yet.” Even if Weber’s statements are construed to establish Muro’s amenability to sex-offender treatment, the state was not required to join Muro’s recommendation for a dispositional departure when he was not found amenable to probation. The parties’ plea agreement obligated the state to recommend a downward dispositional departure only if Muro was found amenable to *both* probation and sex-offender treatment.

Muro’s additional allegation that community corrections acted capriciously and in bad faith in conducting its PSI is also without support in the record. The record reflects that community corrections undertook a detailed assessment of the offense to which Muro pleaded guilty—weighing both Muro’s version of the incident and the facts alleged by criminal complaint—and considered Muro’s personal history, prior record, mental health, and present conduct to determine whether, in its professional judgment, Muro is amenable to probation. The ultimate conclusions and recommendations made by community corrections are logically related to its assessment of Muro’s attitude and behavior during its evaluation, his lack of remorse and accountability for his actions, his risk assessment and psychosexual health, and his prior probationary history. There is simply no evidence before us that community corrections acted, as Muro contends, with artifice or caprice in its evaluation of Muro. The sentencing court acted well within its discretion in relying on the findings and opinions of community corrections in sentencing Muro.

Affirmed.