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**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A13-0253**

State of Minnesota,  
Respondent,

vs.

Felix Lopez-Martinez,  
Appellant.

**Filed March 10, 2014  
Affirmed  
Kalitowski, Judge**

Hennepin County District Court  
File No. 27-CR-12-5271

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Bradford Colbert, Legal Assistance to Minnesota Prisoners, St. Paul, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Rodenberg, Judge; and Chutich, Judge.

**UNPUBLISHED OPINION**

**KALITOWSKI**, Judge

Appellant Felix Lopez-Martinez challenges his 172-month sentence, a double durational departure, for conspiracy to commit a controlled-substance offense in the first

degree. At the district court, appellant pleaded guilty to this crime and agreed that the facts of his case warranted a double durational departure. Appellant now argues that (1) the district court erred by imposing the 172-month sentence because it failed to state reasons for the upward departure on the record and (2) substantial and compelling factors were not present to support an upward departure. We affirm.

## D E C I S I O N

### I.

Appellant argues that the district court abused its discretion by imposing a 172-month, double-upward-departure sentence without stating reasons for the departure on the record. Appellant contends that even though he agreed to this departure as part of his plea agreement, his sentence must now be reduced to the presumptive, 86-month sentence because of the district court's error. We disagree.

A district court's decision to depart from a presumptive sentence is reviewed for an abuse of discretion. *State v. McIntosh*, 641 N.W.2d 3, 8 (Minn. 2002). A district court has discretion to depart only if aggravating or mitigating circumstances exist. *State v. Shattuck*, 704 N.W.2d 131, 140 (Minn. 2005). “[I]n exercising the discretion to depart from a presumptive sentence, the judge must disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.” Minn. Sent. Guidelines 2.D. (2012). The district court also must articulate reasons for the departure on the record at the sentencing hearing and in its departure report. *Williams v. State*, 361 N.W.2d 840, 843-44 (Minn. 1985); *see also* Minn. R. Crim. P. 27.03, subd. 4(C) (stating that the district court must

indicate the reasons for departure in a sentencing order or departure report). If the district court fails to state reasons for the sentencing departure, no departure will be allowed. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). The purpose of stating reasons for the departure is to “inform the defendant why the departure is being made” and to ensure that the defendant has not been deprived “of knowing that the reasons used to enhance the sentence were legitimate.” *State v. Bale*, 493 N.W.2d 123, 125 (Minn. App. 1992), *review denied* (Minn. Jan. 28, 1993).

In compliance with Minn. R. Crim. P. 27.03, subd. 4(C), the district court filed a departure report, indicating three reasons why it departed from the sentencing guidelines. Its reasons were: (1) appellant committed the crime as part of a group of three or more persons who all actively participated in the crime, (2) appellant committed a major controlled-substance offense, and (3) multiple persons were put at risk.

These reasons were discussed and admitted to by appellant at his guilty-plea hearing. As part of his plea agreement, appellant waived his right to a jury trial on aggravating factors for sentencing and agreed the court could impose an upward-departure sentence of 172 months. Appellant admitted that the factors cited above justified an upward departure, acknowledging that if his case proceeded to trial the state intended to seek the statutory-maximum sentence of 30 years. *See* Minn. Stat. § 152.021, subd. 3(a) (2012) (providing that a person convicted of first-degree controlled-substance crime may be imprisoned for up to 30 years). At the plea hearing, the district court expressly stated, on the record, that it found that aggravating factors were present.

At appellant's sentencing hearing, both the state and defense counsel sought the imposition of a 172-month sentence based on the parties' plea agreement and the district court's earlier reasons on the record at appellant's plea hearing supporting the aggravating factors. Defense counsel referred to the reasons identified by the district court at the plea hearing, and the district court reiterated those reasons on the record. Because appellant agreed to the 172-month sentence, he was well informed as to why the departure was made and knew that the reasons used to enhance his sentence were legitimate. On this record, where the district court's earlier reasons were incorporated by reference, we cannot conclude that the district court abused its discretion by failing to make an adequate record supporting the departure at the sentencing hearing.

Moreover, as discussed below, there is sufficient evidence in the record justifying the upward departure. *See State v. Heath*, 685 N.W.2d 48, 65 (Minn. App. 2004), *review denied* (Minn. Nov. 16, 2004) (providing that if the stated reasons for departure are improper or inadequate the departure will be affirmed if there is sufficient evidence in the record to justify departure).

## II.

Appellant argues that, because his conduct was not more serious than or atypical of the conduct generally associated with conspiracy to commit a controlled-substance crime, his sentence must be reduced. We disagree.

Whether a particular ground for an upward departure is permissible is a question of law, subject to *de novo* review. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). An upward departure is permissible when

substantial and compelling circumstances are present. *McIntosh*, 641 N.W.2d at 8. “Substantial and compelling” circumstances are those showing that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the offense in question. *Tucker v. State*, 799 N.W.2d 583, 586 (Minn. 2011). The Minnesota Sentencing Guidelines provide a list of aggravating factors to aid in determining whether to depart from a presumptive sentence. *Id.* And notably, the presence of one aggravating factor is sufficient to justify a double-duration departure. *State v. O’Brien*, 369 N.W.2d 525, 527 (Minn. 1985).

Our review of the record leads us to conclude that substantial and compelling circumstances are present, justifying appellant’s sentencing departure.

#### **Appellant Committed the Crime as Part of a Group of Three or More**

Under the sentencing guidelines, a “substantial and compelling circumstance” exists if “[t]he offender committed the crime as part of a group of three or more persons who all actively participated in the crime.” Minn. Sent. Guidelines 2.D.2.b.(10).

At his guilty-plea hearing, appellant admitted that he worked with the individuals named in the state’s amended complaint. The amended complaint named 17 individuals, each playing a specific role in the group’s methamphetamine-distribution operation. Moreover, appellant was alleged to have been a key member of the drug cartel La Familia Michoacana, working with other, unnamed individuals located in Mexico and California. We conclude that the number of individuals involved here is “significantly more serious than that typically involved” in other controlled-substance crimes. *State v. Misquadace*,

644 N.W.2d 65, 69 (Minn. 2002). Therefore, this factor alone is sufficient to affirm appellant's 172-month sentence.

### **Appellant Committed a Major Controlled-Substance Offense**

The record further establishes that appellant committed a major controlled-substance offense, justifying an upward sentencing departure. Minn. Sent. Guidelines 2.D.2.b.(5). To qualify as a major controlled-substance offense, two or more of the following circumstances must be present:

- (a) the offense involved at least three separate transactions wherein controlled substances were sold, transferred, or possessed with intent to do so; or
- (b) the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use; or
- (c) the offense involved the manufacture of controlled substances for use by other parties; or
- (d) the offender knowingly possessed a firearm during the commission of the offense; or
- (e) the circumstances of the offense reveal the offender to have occupied a high position in the drug distribution hierarchy;
- (f) the offense involved a high degree of sophistication or planning or occurred over a lengthy period of time or involved a broad geographic area of disbursement; or
- (g) the offender used his or her position or status to facilitate the commission of the offense, including positions of trust, confidence or fiduciary relationships (e.g., pharmacist, physician or other medical professional).

*Id.*

From July 2011 to March 2012, appellant conspired with other individuals to distribute methamphetamine throughout the Twin Cities. At his plea hearing, appellant admitted that he did what police alleged in the amended complaint. The amended complaint describes how individuals called each other on various cell phones speaking in

coded language in an effort to complete various drug transactions. The amended complaint further states that appellant typically dealt with the highest-level manufacturers in Mexico and California when obtaining controlled substances and had numerous individuals working under him. Moreover, appellant admitted to being involved in 30 drug transactions where four to eight grams of methamphetamine were distributed, and that at times, he distributed an amount “that was far in excess of ten grams.” Appellant agreed that at one point, he was in control of a pickup truck that contained five pounds of methamphetamine. Appellant also admitted he was responsible for collecting money for the methamphetamine that had been delivered and depositing the money he collected into various bank accounts. Further, appellant admitted to having a gun and agreed that, even though he did not use the gun as part of his drug sales, there was a risk that the gun combined with the drugs and drug proceeds could result in gun violence.

Based on these facts, the district court’s conclusion that appellant committed a major controlled-substance offense was not an abuse of discretion. And we reject appellant’s argument that this factor does not justify an upward departure because it duplicates elements of appellant’s underlying offense. *See State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008) (holding that “the reasons used for departing must not themselves be elements of the underlying crime”) (quotation omitted); *see also* Minn. Stat. § 152.021, subd. 1(1) (2012) (providing that a person is guilty of first-degree controlled-substance crime when the person, on one or more occasions, sells ten or more grams of methamphetamine). We recognize that the supreme court has cautioned courts against relying on the quantity of drugs to support a departure under section 2.D.2.b.(5) when

doing so duplicates an element of the offense. *McIntosh*, 641 N.W.2d at 12. But here, even if we were to exclude the quantity of drugs involved, the record indicates that the number of sales transactions that occurred, the high degree of planning involved, and appellant's position in the drug-distribution hierarchy warrant an upward sentencing departure.

Because the record contains sufficient evidence justifying an upward departure, we affirm appellant's 172-month sentence.

**Affirmed.**