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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2010**

State of Minnesota,
Respondent,

vs.

Kevin A. Hillyer,
Appellant.

**Filed January 15, 2008
Affirmed
Ross, Judge**

Clay County District Court
File No. K5-06/820

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brian J. Melton, Clay County Attorney, 807 North 11th Street, P.O. Box 280, Moorhead, MN 56561 (for respondent)

John M. Stuart, State Public Defender, Roy Spurbeck Assistant Public Defender, 2221 University Avenue Southeast, Suite 425, Minneapolis, MN 55414, (for appellant)

Considered and decided by Dietzen, Presiding Judge; Ross, Judge; and Harten,
Judge.*

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

UNPUBLISHED OPINION

ROSS, Judge

This appeal arises from the denial of a motion for a downward dispositional departure after Kevin Hillyer was convicted of domestic assault by strangulation. Hillyer argues that the district court abused its discretion when it denied his motion because he was mentally impaired and lacked substantial capacity for judgment at the time of the assault. Because the district court deliberately considered whether Hillyer presented substantial and compelling reasons for the court to depart from the presumptive sentence, the court did not abuse its discretion by imposing the presumptive sentence. We affirm.

FACTS

Kevin Hillyer was charged with felony domestic assault by strangulation and misdemeanor domestic assault after he assaulted his ex-girlfriend in her home. On April 15, 2006, a loud crash awoke the woman, and she saw Hillyer standing in the doorway to her bedroom holding a stick. While she lay in bed, he placed his arm across her neck, restricting her breathing. She complied with his request for sexual intercourse because she feared he would become angry and beat her if she refused. He also squeezed her jaw and lifted her arm, which had limited mobility from a stroke. The victim testified that during her encounter with Hillyer, he was “saying weird stuff.” At the time of the assault, Hillyer was not taking his medication but had been using alcohol and drugs.

The district court ordered Hillyer to be examined under rule 20.01 of the Minnesota Rules of Criminal Procedure. The examination results led the district court to conclude that Hillyer was competent to aid in his own defense. A jury found Hillyer

guilty of domestic assault by strangulation and misdemeanor domestic assault. At sentencing, Hillyer moved for a downward dispositional departure, requesting probation instead of the presumptive 36-month prison sentence. He based the request on mental impairment at the time of the offense. He claimed that when he assaulted the victim he was mentally impaired because he had not taken his medication. The district court expressed concern about Hillyer's past failure to stay on medication and concluded that he was not amenable to probation. The court denied Hillyer's motion and imposed the presumptive sentence of 36 months in prison and a \$300 fine. It vacated the misdemeanor-domestic-assault conviction because it was an included offense. This appeal follows.

DECISION

Kevin Hillyer contends that the district court abused its discretion by denying his motion for a downward departure to a probationary sentence, arguing that he presented substantial and compelling reasons to justify the departure. He repeats the argument he made to the district court that he is amenable to probation because he was mentally impaired when he committed the offense. Because the district court considered the alleged mitigating factor raised by Hillyer and provided reasons for its denial of Hillyer's motion, it did not abuse its broad discretion by imposing the presumptive sentence.

The sentences set forth in the Minnesota Sentencing Guidelines are presumed appropriate for the crimes to which they apply. Minn. Sent. Guidelines II.D. A district court has no discretion to depart from the sentencing guidelines unless the record contains aggravating or mitigating factors. *State v. Spain*, 590 N.W.2d 85, 88 (Minn.

1999); Minn. Sent. Guidelines II.D. But the decision whether to depart from the sentencing guidelines rests within the district court's discretion, and this court will not disturb the district court's decision absent a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001).

When deciding whether to depart from the presumptive sentence, a district court must weigh the reasons for and against departure and make a deliberate decision. *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). The presence of a mitigating factor does not oblige the district court to place a defendant on probation or to impose a shorter term of imprisonment than the presumptive sentence. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). A departure may be based on the mitigating factor that an "offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed." Minn. Sent. Guidelines II.D.2.a(3); *see also State v. Martinson*, 671 N.W.2d 887, 891-92 (Minn. App. 2003) (holding that a well-documented record of mental impairment was a substantial and compelling factor that justified a downward durational departure). But the supreme court has opined that only a "rare case" would warrant reversal of a district court's refusal to depart from the presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

This is not that rare case. It may be that, as Hillyer argues, he lacked substantial capacity for judgment during the assault. But he admitted to using alcohol and drugs at the time, and he failed to show that taking his medication would have prevented the assault. The record demonstrates that the district court carefully deliberated and weighed

the relevant factors and argument before reaching its decision. It heard and considered arguments for and against the departure motion. It found that Hillyer was not amenable to probation because of his failure to stay on his medication and his inability to control his impulses. Hillyer has admitted that each time he committed 15 previous felonies, he was not taking his prescribed medication. The district court noted that the state was lenient in choosing not to charge Hillyer with a more serious crime, such as burglary or criminal sexual conduct. The court concluded that Hillyer did not present substantial and compelling reasons for the court to depart from the presumptive sentence of 36 months' imprisonment. Because the district court deliberately considered the relevant factors, it did not abuse its discretion by imposing the presumptive sentence.

Affirmed.