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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1039**

State of Minnesota,
Respondent,

vs.

Barbara Jean Walker,
Appellant.

**Filed June 10, 2008
Affirmed
Willis, Judge**

Stearns County District Court
File No. K7-06-616

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, Administration Center, Room 448, 705 Courthouse Square, St. Cloud, MN 56303-4701 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Willis, Presiding Judge; Shumaker, Judge; and Harten, Judge.*

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

UNPUBLISHED OPINION

WILLIS, Judge

Following her conviction of two counts of controlled-substance crime, appellant challenges the denial of her motion for a downward dispositional sentencing departure, arguing that the district court abused its discretion by not adequately considering the fact that appellant has terminal lung cancer requiring ongoing chemotherapy treatment. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

In January 2006, appellant Barbara Jean Walker sold cocaine to a police informant on two occasions. The informant bought cocaine a third time, from Walker and another woman, in February 2006. The state filed a complaint in Stearns County District Court charging Walker with two counts of controlled-substance crime in the third degree, in violation of Minn. Stat. § 152.023, subd. 1(1) (2004), and one count of aiding and abetting a controlled-substance crime in the third degree, in violation of Minn. Stat. §§ 152.023, subd. 1(1), 609.05 (2004). Walker pleaded guilty to the two counts of controlled-substance crime in the third degree in exchange for the state's dismissal of the aiding-and-abetting charge. Before sentencing, Walker moved the district court for a downward dispositional departure from the presumptive sentence of incarceration because of her medical condition. The district court denied Walker's departure motion and sentenced her to concurrent terms of 27 and 34 months in prison. This appeal follows.

DECISION

The sentences set forth in the Minnesota Sentencing Guidelines are presumed to be appropriate. Minn. Sent. Guidelines II.D; *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). The district court has discretion to depart downwardly from these guidelines only if there are mitigating circumstances that create “substantial” and “compelling” reasons for a departure. Minn. Sent. Guidelines II.D; *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). If mitigating circumstances are present, the district court has “great discretion” to decide whether a departure is appropriate, and “we cannot simply substitute our judgment for that of the [district] court.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). Even if reasons for departing exist, we review a refusal to depart for an abuse of discretion and will not disturb the district court’s sentence if the district court had reasons for refusing to depart. *See State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Walker argues that the district court abused its discretion by “fail[ing] to deliberately consider the individual factors of [her] case and determine what was best for both [her] and for society.” In particular, Walker emphasizes the fact that she has stage IV lung cancer, which causes severe pain and requires chemotherapy. At the sentencing hearing, the district court explained its reasons for not departing:

I am sorry that you ha[ve] this disease. I realize that it’s a serious thing, serious thing that you’re facing at this point. However, I also have to look at your previous criminal history. I have to look at the treatments that you’ve been in the past and have failed to complete. And I have to look at the nature of this crime itself or these two crimes.

....

I also believe that there's not a satisfactory alternative to the prison sentence. . . . Placing you in local jail, which would be the usual alternative, in my mind, is much worse for your health than going to prison. In prison they have the facilities and they have the ability to care for your condition. In local jail, I don't believe that they do.

Based on this record, we conclude that the district court deliberately considered the individual circumstances of Walker's case and the best interests of both Walker and society.

Walker also argues that she is particularly amenable to probation, and, therefore, the district court abused its discretion by not granting a dispositional departure. We disagree.

“[A]menability to probation depends on an offender's ability to comply with the conditions of probation and benefit from the opportunity for rehabilitation that probation affords.” *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003). Relevant factors include a defendant's age, prior record, remorse, cooperation, attitude while in court, and support from family and friends. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). Walker asserts that she has had a cooperative and positive attitude in this case and has the support of friends and family. But other factors weigh against her. As the district court noted, Walker has a criminal history and has failed to complete treatment programs in the past. And rather than showing remorse for her crimes, Walker has asserted that she is “just a victim” and that her drug use is “the only way to keep out of severe pain.” Even if the pain caused by her cancer could explain her personal use of cocaine, it does not lessen her culpability for selling illegal drugs.

Because the district court deliberately considered the circumstances of this case and had valid reasons for denying Walker's motion, the district court did not abuse its discretion.

Affirmed.