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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0484**

Alphonso Walton, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed February 17, 2009
Affirmed
Lansing, Judge**

Olmsted County District Court
File No. 55-K8-98-3379

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

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

Mark A. Ostrem, Olmsted County Attorney, James S. Martinson, Chief Deputy, Government Center, 151 Fourth Street Southeast, Rochester, MN 55904 (for respondent)

Considered and decided by Lansing, Presiding Judge; Kalitowski, Judge; and Schellhas, Judge.

UNPUBLISHED OPINION

LANSING, Judge

In this appeal from the denial of his postconviction petition, Alphonso Walton argues that the postconviction court abused its discretion when it denied his request for a downward durational departure. Because the postconviction court properly concluded that it lacked authority to modify an executed, lawful sentence, and the facts do not warrant reversal of the district court's refusal to depart durationally, we affirm.

F A C T S

A jury found Alphonso Walton guilty of two counts of first-degree, controlled-substance crime in 1999. The first count was charged under Minn. Stat. § 152.021, subd. 1(1) (1998), which prohibits selling more than ten grams of a cocaine mixture, and the second count was charged under Minn. Stat. § 152.021, subd. 2(1) (1998), which prohibits possessing more than twenty-five grams of a cocaine mixture.

At the sentencing hearing, it was undisputed that the district court should impose sentence only on the first count. The presumptive sentence for that count was an eighty-six-month commitment to the commissioner of corrections. Walton moved for a downward dispositional departure and a downward durational departure. The district court found that Walton's lack of "substantial mental capacity for judgment" at the time of the offense was a substantial and compelling reason for departure. It sentenced Walton to eighty-six months in prison, but granted a dispositional departure by staying execution of the sentence and placing him on probation for thirty years. The district court required Walton to comply with several conditions of probation, including abstaining

from chemicals and alcohol, maintaining a residence approved by court services, and completing a chemical-dependency evaluation and following recommendations for treatment and aftercare.

Walton violated his probation four times before it was finally revoked in 2005. His first violation occurred in 2000 when he absconded from supervision. The district court reimposed the original stay of execution, ordered Walton to serve an additional ten days in jail, and provided for Walton's probation to be transferred to the State of Illinois. Walton violated his probation again in 2004 by failing to maintain contact with and report to Illinois authorities. The district court again reimposed the original conditions of probation. Walton violated his probation a third time in early 2005. He failed to maintain scheduled appointments and twice tested positive for cocaine. The district court reimposed the original conditions of probation and ordered Walton to serve sixty days in jail with credit for time served. Walton's fourth violation occurred less than a month after the district court ruled on his third violation. Walton's probation officer reported that he failed to provide a valid address and that he had again tested positive for cocaine. At the probation-violation hearing, the district court found that Walton's failure to abstain from cocaine "was intentional and inexcusable" and stated that it had "run out of options." It revoked the stay of execution and committed Walton to the commissioner of corrections for eighty-six months.

Walton did not file a direct appeal from the 2005 revocation and commitment order. He instead filed a petition for postconviction relief in 2007, asking the postconviction court to grant "a downward durational departure from the [eighty-six-

month] sentence he is currently serving.” The postconviction court summarily denied the petition, declaring that it lacked authority to modify an executed sentence and that no substantial and compelling circumstances warranted “a durational downward departure from the sentence properly executed in 2005.” Walton appeals from the denial of his postconviction petition.

DECISION

We review the district court’s summary denial of a postconviction petition for abuse of discretion. *Lee v. State*, 717 N.W.2d 896, 897 (Minn. 2006). “[I]f the petition, files and records conclusively show that the petitioner is entitled to no relief,” a postconviction court may dismiss the petition without an evidentiary hearing. *Scales v. State*, 620 N.W.2d 706, 707-08 (Minn. 2001) (quoting Minn. Stat. § 590.04, subd. 1 (2008)) (quotation marks omitted).

We affirm the denial of postconviction relief for two reasons. First, a district court has the power to correct an unlawful or unauthorized sentence at any time, but its power to change a lawful sentence is limited to changes made during a stay of execution or imposition. Minn. R. Crim. P. 27.03, subd. 9. Thus, once Walton began to serve his lawfully imposed sentence in 2005, he could not obtain a modification by filing a postconviction petition and rearguing reasons for a downward durational departure. *State v. Hockensmith*, 417 N.W.2d 630, 633 (Minn. 1988).

Second, Walton has not alleged facts that would entitle him to relief. A district court may depart from the presumptive sentencing range only if “identifiable, substantial, and compelling circumstances” support the departure. Minn. Sent. Guidelines II.D.

Departure decisions are reviewed for an abuse of discretion and will generally be upheld if they are within the presumptive range, even if grounds exist that would justify a departure. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only a rare case would warrant reversal of a refusal to depart durationally when, as here, the defendant was granted a dispositional departure and violated the conditions of his probation. *See id.* (noting that “it would be a rare case which would warrant reversal of the refusal to depart” (quotations omitted)).

Walton argues that the district court should have granted a durational departure from the presumptive eighty-six-month sentence in 2005 because several mitigating factors existed and also argues that the district court failed to consider his “conduct on probation from 1999 to 2003.” But the fact that mitigating factors are present does not obligate a court to depart from the guidelines. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984). And Walton cites no authority indicating that a district court may consider the defendant’s behavior while on probation in deciding whether to grant a durational departure. A defendant’s compliance with his probationary terms merely shows that he has been meeting the district court’s expectations to avoid execution of his sentence. Even if the postconviction court had authority to modify Walton’s sentence, the alleged facts in his case would not warrant intervention.

Affirmed.