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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0675**

State of Minnesota,
Respondent,

vs.

Ramon D. Smith,
Appellant.

**Filed June 2, 2009
Affirmed; motion denied
Worke, Judge**

Dakota County District Court
File No. KX-04-3218

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

James C. Backstrom, Dakota County Attorney, Lawrence F. Clark, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, MN 55033 (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 Minge, Presiding Judge; Worke, 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UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges his sentence, arguing that the district court abused its discretion by refusing to grant his request for a downward departure from the presumptive sentence that was supported by substantial and compelling circumstances. The state moves to strike portions of appellant's brief that reference pretrial plea negotiations. We affirm appellant's sentence and deny the state's motion.

DECISION

In 2007, this court vacated appellant Ramon D. Smith's conviction related to a drive-by shooting, but affirmed his conviction for attempted second-degree murder and remanded for resentencing. Appellant now challenges the sentence imposed on remand, arguing that the district court abused its discretion by denying his request for a downward departure from the presumptive sentence. A district court has broad discretion in determining an appropriate sentence, and we will not reverse a district court's refusal to impose a downward departure unless the district court has abused its discretion. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Reversing a refusal to depart is warranted only in "rare" circumstances. *Id.* In considering a request for a downward dispositional departure, Minnesota courts weigh numerous factors, including the defendant's "age, his prior record, [] remorse, [] cooperation, [and] attitude while in court." *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). "Departures from the presumptive sentence are justified *only* when substantial and compelling circumstances are present in the record." *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008).

Here, the district court considered but rejected appellant's argument for a downward departure. Appellant argued that he had no prior criminal history, had completed and received his GED in prison, and had completed classes in welding. Appellant testified that he had a "second chance" and that he understood "what the wrong was, to be involved in [that] situation." The state argued for a maximum presumptive sentence. But the district court did not find either parties' argument persuasive, stating that "[t]he arguments of counsel are taken by the [c]ourt, but they haven't persuaded the [c]ourt to do anything different in [] regard [to sentencing]." After being resentenced, appellant declared "I didn't do it."

The district court had valid reasons to deny appellant's motion for a downward departure. Appellant used a gun, fired several shots in a public place, and attempted to flee from police and destroy evidence. Additionally, appellant's testimony that he was remorseful, had learned his lesson, and is grateful for a second chance is contradicted by the statements he made to the district court after he was resentenced. In light of the evidentiary record, the district court reasonably concluded that a downward departure from the presumptive sentence was not appropriate and reasonably concluded that the middle-of-the-box sentence was appropriate. In sum, the district court did not abuse its discretion in refusing to depart from the presumptive sentence.

The state moves to strike portions of appellant's brief referencing pretrial plea negotiations. At the resentencing hearing, appellant's counsel argued that the state's argument for a top-of-the-box sentence was disingenuous because during plea negotiations the state offered appellant a much lower sentence in return for a guilty plea.

The state objected, but the district court did not rule on the objection. We acknowledge that statements made in connection with pleas or offers during plea negotiations are not admissible. Minn. R. Evid. 410. But we have not considered these statements and inclusion of them in appellant's brief does not affect the outcome. Because the state can show no prejudice, we deny the motion to strike. *See* Minn. R. Crim. P. 31.01 (setting out harmless-error rule).

Affirmed; motion denied.