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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2252**

State of Minnesota,
Respondent,

vs.

Pierre Diamond Glass-McCoy,
Appellant.

**Filed December 22, 2009
Affirmed
Bjorkman, Judge**

Ramsey County District Court
File No. 62-CR-08-1560

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 Kellogg Boulevard West, Suite 315, St. Paul, MN 55102 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Klaphake, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge

On appeal from his 60-month sentence for possession of a firearm by an ineligible person, appellant argues that the district court failed to make adequate findings to support its refusal to depart downward from the presumptive sentence. Appellant also raises several issues in his pro se supplemental brief. Because the record indicates that the district court considered appellant's request for a downward departure and appellant's remaining arguments do not merit reversal, we affirm.

FACTS

Appellant Pierre Diamond Glass-McCoy was arrested on May 5, 2008, after exiting a vehicle that was fleeing from police. One officer pursued Glass-McCoy on foot and eventually arrested him. During the foot chase, the officer saw Glass-McCoy reach toward his waistband. Upon arrest, Glass-McCoy indicated to the officer that he had a revolver in his pocket. The officer found a loaded .38 cobra revolver in Glass-McCoy's front jeans pocket.

At trial, Glass-McCoy stipulated that on the date of his arrest he was ineligible to possess a firearm because of a juvenile adjudication of second-degree burglary. At the end of the state's case, an in-chambers discussion was held to determine whether Glass-McCoy would testify the next day. The district court ruled Glass-McCoy's proposed testimony irrelevant, and therefore inadmissible. Glass-McCoy then agreed to plead guilty to the charge of felony possession of a firearm by an ineligible person under Minn. Stat. § 624.713, subd. 1(6) (2006). Sentencing was scheduled for a later date.

The district court continued Glass-McCoy's sentencing hearing to give the parties the opportunity to review the numerous letters and other documents the court had received regarding sentencing. At the beginning of the rescheduled hearing, the district court indicated that it had reviewed all of the information that had been submitted. Glass-McCoy moved the district court to depart dispositionally or durationally down from the 60-month presumptive sentence required by Minn. Stat. § 609.11, subd. 5(b) (2006). To support this motion, Glass-McCoy submitted (1) letters of support from friends and family; (2) his girlfriend's testimony that Glass-McCoy is the sole daycare provider for her children; (3) a letter indicating that Glass-McCoy had initiated a chemical-health evaluation; (4) proof of school enrollment; and (5) his testimony that he was acting in self-defense on the night in question, having wrestled the gun away from an assailant a few hours before. Glass-McCoy also argued that a probationary disposition would allow him to continue his weekly meeting with a psychologist.

The state urged the district court to impose the presumptive sentence. The state noted that (1) a letter from the mother of Glass-McCoy's girlfriend was predominately negative; (2) Glass-McCoy has seven children, all under the age of ten, whom he does not support; (3) the fleeing vehicle Glass-McCoy exited was driven by a convicted felon, and the other passenger was charged with a homicide involving a firearm; (4) Glass-McCoy had a pending felony drug charge at the time of his arrest; (5) Glass-McCoy knew he could not possess a gun, yet failed to call the police or get rid of it after the alleged altercation in which he took the gun; and (6) Glass-McCoy was under the influence of drugs and experiencing mental-health issues at the time of his arrest.

After hearing from Glass-McCoy himself, the district court stated, “Okay. Well, I’m going to deny [Glass-McCoy’s] motions for a departure in all respects. I’m not going to make any further comment. I believe that most, if not all of [the state’s] comments, have been appropriate.” The district court then imposed the presumptive 60-month sentence. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying Glass-McCoy’s motion for a downward departure from the presumptive sentence.

The sentencing range provided by the Minnesota Sentencing Guidelines is “presumed to be appropriate” unless “identifiable, substantial, and compelling circumstances” support departure. Minn. Sent. Guidelines II.D. (2008); *see also State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996) (“[T]he presumptive sentence should be imposed, unless the circumstances of the crime indicate that a departure is warranted.”). The district court has broad discretion in deciding whether departure from the presumptive sentence is warranted, but it should depart only “in a small number of cases.” *State v. Cook*, 351 N.W.2d 385, 386 (Minn. App. 1984).

On appeal, this court determines “whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b) (2008). We will overturn a district court’s sentencing decision only if there is a clear abuse of discretion. *State v. Schmidt*, 601 N.W.2d 896, 898 (Minn. 1999).

Reversal based on the district court's refusal to depart from the presumptive sentence is rarely warranted. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Glass-McCoy argues that this case should be remanded for resentencing because the district court did not make findings of fact and conclusions of law with regard to his departure motion as required by Minn. R. Crim. P. 27.03, subd. 1(F). Glass-McCoy also relies on the requirement contained in the Minnesota Sentencing Guidelines that the district court disclose in writing or on the record its reasons for departing from the guidelines. Minn. Sent Guidelines II.D.

Although the rules and sentencing guidelines require the district court to make written findings when it departs from the presumptive guideline sentence, a written explanation "is not required when the court considers reasons for departure but elects to impose the presumptive sentence." *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984); *see also* Minn. R. Crim. P. 27.03, subd. 4(C). But the record must demonstrate that "the sentencing court carefully evaluated all the testimony and information presented before making a determination." *State v. Van Ruler*, 378 N.W.2d 77, 81 (Minn. App. 1985).

Our review of the record leads us to conclude that the district court sufficiently considered Glass-McCoy's arguments in favor of departure. When faced with a large quantity of letters and other documents, the district court continued the sentencing hearing to afford the court and parties the opportunity to review the information. During the continued hearing, the district court listened to Glass-McCoy's testimony and that of his witness. The district court then expressed agreement with the state's arguments as to

why a downward departure was not warranted. While the district court's comments on the record lack detail, the court is not required to explain the reasons for its refusal to depart; it is required only to demonstrate that it has considered the reasons for departure. The district court's careful attention to the letters, other documents, and oral statements coupled with its expressed agreement with the state's argument indicates the court considered Glass-McCoy's motion and made a reasoned decision to impose the presumptive sentence. On this record, we conclude that the district court has not abused its discretion.

II. The issues raised in Glass-McCoy's supplemental brief do not merit reversal and remand.

In his pro se supplemental brief, Glass-McCoy raises several evidentiary and fair-trial issues. We conclude that none of these issues provides a basis for reversal.

First, Glass-McCoy argues that he was deprived of effective assistance of counsel because his attorney informed him that he could not testify at his trial. An attorney provides effective representation if he or she "exercise[s] the customary skill and diligence that a reasonably competent attorney would exercise under similar circumstances." *Marhoun v. State*, 451 N.W.2d 323, 328 (Minn. 1990) (quotation omitted). To show ineffective assistance of counsel, Glass-McCoy must affirmatively prove both "that his counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quotations omitted).

Glass-McCoy is unable to meet either of these requirements. The record is clear that the district court ruled Glass-McCoy's testimony inadmissible; no conduct of defense counsel deprived him of his right to testify. In addition, Glass-McCoy has not alleged that the result of the proceeding would have been different if he had testified. His ineffective-assistance-of-counsel claim therefore fails.

Second, Glass-McCoy asserts that the district court erred by considering letters that were unfavorable to him and crimes committed by other vehicle occupants. These arguments fail because the district court has broad discretion in evidentiary matters. The district court allowed both Glass-McCoy and the state wide latitude to submit information relative to sentencing. On this record, we conclude that the district court did not abuse its discretion.

Finally, Glass-McCoy alleges that the district court erred in imposing a 60-month sentence based on a prior controlled-substance conviction. This argument is unavailing. Glass-McCoy stipulated that he was ineligible to possess a firearm because of a juvenile adjudication of second-degree burglary. By virtue of his guilty plea, the district court properly convicted him of violating Minn. Stat. § 624.713:

The following persons shall not be entitled to possess a pistol
or . . . any other firearm:

. . . .

. . . a person who has been convicted of, or adjudicated
delinquent or convicted as an extended jurisdiction juvenile
for committing, in this state or elsewhere, a crime of violence.

Minn. Stat. § 624.713, subd. 1(b) (2006). The definition of "crime of violence" includes second-degree burglary. Minn. Stat. § 624.712, subd. 5 (2006). A defendant convicted

of violating Minn. Stat. § 624.713 is subject to a presumptive sentence of 60 months. Minn. Stat. § 609.11, subd. 5(b). Accordingly, the district court did not err in imposing a 60-month sentence.

Affirmed.