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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1707**

Ashley Durwin Underwood, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed March 30, 2010
Affirmed
Larkin, Judge**

Wabasha County District Court
File No. 79-CR-07-1784

David W. Merchant, Chief Appellate Public Defender, Ngoc Nguyen, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

James C. Nordstrom, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

Considered and decided by Toussaint, Chief Judge; Larkin, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant Ashley Durwin Underwood challenges the denial of his postconviction petition, which sought review of the district court's decision denying appellant's motion for a dispositional departure and imposing a presumptive sentence. Because the district court did not abuse its discretion in denying appellant's motion for a dispositional departure, we affirm.

FACTS

On August 12, 2008, appellant pleaded guilty to felon in possession of a firearm, second-degree assault, and terroristic threats. He admitted that on October 15, 2007, he drove to his now ex-wife's residence, called out to her and told her to have her new boyfriend come downstairs to meet him, and waved a pellet gun at the window in order to terrorize or frighten them. Appellant also admitted that he was unauthorized to possess a firearm, because of a prior conviction for reckless endangerment, that he had a pellet gun with him that night, and that he had cleaned and possessed other firearms on another occasion.

At sentencing on October 28, 2008, appellant argued for a downward dispositional departure, claiming that he is amenable to probation. The district court denied the motion and, based on appellant's criminal history score of six, sentenced appellant to presumptive guidelines sentences of 57 months for second-degree assault conviction, 33 months for terroristic threats, and 60 months for felon in possession, to be served concurrently.

Appellant thereafter filed a petition for postconviction relief to challenge the district court's sentencing decision. The district court summarily denied the petition, and this appeal followed.

D E C I S I O N

Appellant argues that the district court abused its discretion by denying his request for a dispositional departure. A district court has discretion to depart from the presumptive guidelines sentence when substantial and compelling circumstances exist. Minn. Sent. Guidelines II.D (2007); *State v. Olson*, 359 N.W.2d 53, 54 (Minn. App. 1984). With regard to a dispositional departure, those circumstances may involve offense-related mitigating factors or the defendant's particular amenability to probation. *See* Minn. Sent. Guidelines cmt. II.D.02 (2007) (stating that substantial and compelling mitigating factors may support a dispositional departure); *State v. Olson*, 765 N.W.2d 662, 664-65 (Minn. App. 2009) (A "district court has discretion to impose a downward dispositional departure if a defendant is particularly amenable to probation."). Thus, when considering a dispositional departure, a district court may focus on the defendant as an individual and on whether the presumptive sentence would be best for the defendant and for society. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983).

In his brief on appeal, appellant claims that he is amenable to probation, treatment, and counseling; he has had much difficulty overcoming his addictions to cocaine, methamphetamine, and marijuana; he completed a treatment program while in custody in North Dakota and has had clean urinalyses for those drugs since; his only relapse was with alcohol on the date of the offense here; he has been accepted into the Teen

Challenge Program; he is capable of remaining sober, as he has shown during his conditional release period in this case; he took responsibility for his actions and apologized to the victims during the sentencing hearing; he has appeared for his court hearings and presented himself appropriately; and he has support among family and friends in the community. Appellant also claims that his use of a pellet gun in this case was different and less egregious than the conduct typically seen in connection with a second-degree assault case and that the facts involved in his possession of a firearm were not directly related to the second-degree assault offense.

The district court was presented with these arguments but determined that there were no substantial and compelling reasons to depart from the presumptive sentence in this case. The court noted that appellant had a high criminal history score, coupled with the current offense, which the court considered very serious and which occurred while appellant was on probation for prior offenses in North Dakota. The court further expressed concern with appellant's comments during the months preceding the sentencing hearing, which the court believed cast doubt on the sincerity of appellant's remorse. Those comments included appellant stating that "this case is bull" and that he was "pushed to the breaking point by the victim."

Only in a "rare" case will this court overturn a district court's denial of a motion to depart and imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We recognize that a district court's withholding the exercise of its discretion or relying on an improper factor may present the rare circumstance that warrants remand. *See* Minn. Sent. Guidelines II.D.1 (2007) (listing factors that should

not be relied on for departure from the presumptive sentence); *State v. Mendoza*, 638 N.W.2d 480, 483-84 (Minn. App. 2002), (remanding when exercise of discretion by district court “may not have occurred”), *review denied* (Minn. Apr. 16, 2002); *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (remanding when record established that district court failed to even consider arguments for and against departure).

This is not one of those rare cases. The record includes an updated presentence investigation report, testimony from appellant and from his current girlfriend, and extensive arguments by counsel for and against the request for a dispositional departure. This court can assume that the district court considered all of the information that was presented to it. *Cf. Curtiss*, 353 N.W.2d at 263-64 (remanding when record suggested that district court put aside arguments and abandoned departure topic before court exercised discretion). In addition, the reasons specifically cited by the district court were proper: the court cited the seriousness of appellant’s current offense, his lengthy criminal history, and his lack of remorse. Finally, examination of the guidelines makes it clear that stayed sentences and probation are generally reserved for less serious offenses and for defendants with little or no prior criminal history. *See Minn. Sent. Guidelines IV* (2007).

We therefore conclude that the district court did not abuse its discretion by denying appellant’s motion for a downward dispositional departure and imposing the presumptive guidelines sentence.

Affirmed.

Dated:

Judge Michelle A. Larkin