**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-833**

State of Minnesota,
Respondent,

vs.

Thomas Marvin Staff, Jr.,
Appellant.

**Filed May 4, 2010**
**Affirmed**
**Schellhas, Judge**

Polk County District Court
File No. 60-CR-08-2108

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

Gregory A. Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Wright, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

## U N P U B L I S H E D  O P I N I O N

**SCHELLHAS**, Judge

Appellant challenges the district court's denial of his motion for a downward dispositional sentencing departure. Because the district court did not abuse its discretion, we affirm.

## FACTS

On July 26, 2008, at the age of 19, appellant Thomas Marvin Staff Jr. took a friend's car without permission, drove recklessly through Crookston, stopped at a home looking for someone he believed had assaulted him at a party the previous night, removed a shotgun from the trunk of the car, loaded it, and fired it into the air. When Crookston police officers later found appellant hiding in a crawlspace in his basement, he was uncooperative, belligerent, and refused to submit to a breath test.

Respondent State of Minnesota charged appellant with felon in possession of a firearm in violation of Minn. Stat. § 624.713, subds. 1(b) and 2(b) (2006) (count 1); felony theft of a firearm in violation of Minn. Stat. § 609.52, subd. 2(5)(i) (2006) (count 2); reckless discharge of a firearm within a municipality in violation of Minn. Stat. § 609.66, subd. 1a(a)(3) (2006) (count 3); unauthorized use of a motor vehicle in violation of Minn. Stat. § 609.52, subd. 2(17) (2006) (count 4); second-degree refusal to submit to chemical test in violation of Minn. Stat. §§ 169A.20, subd. 2, and .25, subd. 1(b) (2006) (count 5); and third-degree driving while impaired in violation of Minn. Stat. §§ 169A.20, subd. 1(1), and .26, subd. 1(a) (2006) (count 6).

Appellant pleaded guilty to counts 1, 3, and 5—felon in possession of a firearm, reckless discharge of a firearm within a municipality, and second-degree test refusal. In exchange for appellant's pleas, the prosecution dismissed the remaining counts, and the parties agreed that defense counsel could argue at sentencing for a dispositional departure.

Before sentencing, the defense moved the district court for a downward dispositional departure from the presumptive 60-month prison sentence on his conviction of felon in possession.[1] Appellant argued that he graduated from high school in 2007 with a grade-point average of 3.0, worked for a company in Fargo, North Dakota, from August 2007 to June 2008, and came from a "strong family" that continued to support him and were ready to "stand by him to ensure he gets the treatment that he needs." Appellant also argued that he was only 12 years old when he was adjudicated delinquent for terroristic threats, the predicate offense for the felon-in-possession charge. And appellant emphasized that the corrections agent who prepared the presentence investigation report recommended that the district court give him a downward dispositional departure rather than an executed 60-month prison sentence. The prosecution objected to a downward departure.

[1] Under Minn. Stat. § 609.11, subd. 5(b) (2006), the statutory minimum sentence for a defendant convicted of violating Minn. Stat. § 624.713, subd. 1(b), is not less than five years' commitment to the commissioner of corrections. Under Minn. Stat. § 609.11, subd. 8(a) (2006), prior to the time of sentencing, the prosecutor may move to have the defendant sentenced without regard to the mandatory minimum sentence established under section 609.11. Here, the prosecutor agreed that the defendant could argue for a downward departure at sentencing.

The court imposed concurrent sentences of 60 months' imprisonment on appellant's conviction of felon in possession, 12 months and 1 day on appellant's conviction of reckless discharge of a firearm within a municipality, and 12 months on appellant's conviction of second-degree test refusal. This appeal follows.

**D E C I S I O N**

A district court has broad discretion in imposing a sentence. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). This court reviews a decision on sentencing departure for an abuse of discretion and ordinarily will sustain a sentence that is within the presumptive guidelines range even if grounds exist that would justify a dispositional or durational departure. *Id*.; *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). Only a rare case warrants reversal of a district court's refusal to depart. *Bertsch*, 707 N.W.2d at 668.

Under Minn. Stat. § 624.713, subd. 1(b), a person who has a past conviction for a crime of violence is prohibited from possessing a firearm. If this prohibition is violated, the person "shall be committed to the commissioner of corrections for not less than five years." Minn. Stat. § 609.11, subd. 5(b). A district court may sentence a defendant without regard to the mandatory minimum sentence established by section 609.11 "if the court finds substantial and compelling reasons to do so." Minn. Stat. § 609.11, subd. 8(a) (2006). Such a sentence is considered a departure from the sentencing guidelines. *Id.* But the presence of a mitigating factor does not require departure from the guidelines. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001).

Appellant argues that he presented substantial and compelling circumstances to support a downward dispositional departure.

I

Appellant argues first that his "culpability is mitigated because his conduct in committing this offense was less serious than that typically involved in a felon-in-possession case—the nature of his felony adjudication is in a completely different class than that of other offenders." He argues that the record does not support the district court's characterization at sentencing of his felony offense committed when he was 12 years old. The district court characterized the offense as "serious: he threatened to kill a teacher." Appellant argues in his brief that he "did not threaten to kill the [victim]. He told her she would die, and that his Dad would kill her." We do not agree that the offense was less than serious. Moreover, the district court noted in its order that appellant's "threats were not an isolated event, but charged after two earlier occasions in which threats were made."

Additionally, the court noted that appellant "did not unwittingly possess a firearm while forgetting about the old juvenile felony, thereby triggering the presumptive commit. Instead, [appellant] possessed a stolen firearm that he took from a stolen car, and fired that shotgun within the Crookston city limits, all while being extremely intoxicated." This observation by the district court is especially significant in light of appellant's argument that his predicate felony adjudication should be ignored because there is no record that appellant or his mother was informed after his delinquency adjudication for terroristic threats that he was not allowed to possess a firearm.

Ignorance of the law is not a defense when it would have been possible, had appellant made the effort to do so, to learn of the existence of the prohibition. *See State v. King*, 257 N.W.2d 693, 697-98 (Minn. 1977).

The district court's characterization of appellant's felony offense committed when he was 12 years old is accurate; it was serious. The district court did not abuse its discretion by concluding that appellant did not meet his burden of proving a substantial and compelling circumstance with this argument.

II

Appellant also argues that he presented substantial and compelling reasons to depart downward because he is amenable to probation and both the corrections agent "and his supervisor concluded that [appellant] should serve a year in jail and undergo chemical dependency treatment while on probation." But a district court must make its sentencing decision based on the particular facts of each case and not simply defer to the recommendations of the probation agent who authored the report. *State v. Park*, 305 N.W.2d 775, 776 (Minn. 1981).

Here, the district court noted the corrections agent's statement that appellant's "behavior was out of control and very dangerous to the community," and that if "[appellant] can control his chemical dependency issues, he could experience success in his life." (Quotations omitted.) But the court also noted that the agent "did not expressly state that [appellant] is amenable to probation or treatment, but ultimately recommended that the court give [appellant] a downward dispositional departure, and stay rather than execute the 60-month prison sentence recommended by the guidelines for Count 1." And

the court stated that "although [appellant] is young, he already has an extensive criminal record and is considered 'maximum high risk'" by the corrections agent.

Relating to appellant's intoxication during the commission of the offense in this case, the district court said:

> [A]lthough [appellant] was under the influence of alcohol when he committed these crimes, this does not constitute a mitigating factor under the sentencing guidelines. The Court further notes that [appellant] has completed at least two inpatient treatment programs, to no avail. Although [appellant]'s family and friends care for him and are ready to support him, the Court presumes that these family and friends have provided support in the past, as well. Unfortunately, this support has not enabled [appellant] to stick to sobriety and be law-abiding.

The district court's findings are supported by the record.

III

Appellant also argues that the district court's consideration of conduct underlying other convictions and dismissed charges was reversible error. Appellant is correct in stating that a departure "cannot be based on uncharged criminal conduct," *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008), nor can the factors for a departure "themselves be elements of the underlying crime," *State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008) (quotation omitted). But these cases cited by appellant involve fact situations in which the district court departed upward from the presumptive sentence. *See Jackson*, 749 N.W.2d at 355; *Jones*, 745 N.W.2d at 847. Appellant's legal arguments are not applicable to this case.

In conclusion, the record reflects that the district court carefully reviewed appellant's motion for a downward departure, the argument of counsel, the letters submitted from his family and friends, and the presentence-investigation report before concluding that the evidence did not constitute substantial and compelling circumstances to justify a departure. "While it is true that a district court errs when it fails to consider valid departure factors," a court does not err when it explicitly addresses the reasons for a dispositional departure before exercising its discretion to deny the departure. *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). Here, the district court explicitly addressed appellant's arguments in support of a downward dispositional departure and properly exercised its discretion by denying appellant's motion.

**Affirmed.**