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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1299**

State of Minnesota,
Respondent,

vs.

David Andrew Greenhow,
Appellant.

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

Washington County District Court
File No. 82-CR-08-5354

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

Douglas H. Johnson, Washington County Attorney, Kari A. Lindstrom, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sean M. McGuire, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Klaphake, Judge; and
Shumaker, Judge.

UNPUBLISHED OPINION

PETERSON, Judge

In this appeal from a 144-month presumptive sentence for first-degree criminal sexual conduct, appellant argues that the district court abused its discretion in denying his motion for a dispositional departure. We affirm.

FACTS

Appellant David Andrew Greenhow entered a straight guilty plea to a charge of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006). Psychologist Michael D. Thompson performed a psychosexual evaluation of appellant in September 2008 and a follow-up evaluation in April 2009 after new information was disclosed regarding sexual improprieties that were committed by appellant during his adolescence. In the initial evaluation, Thompson concluded that appellant was amenable to treatment and appeared amenable to community supervision. In the follow-up evaluation, Thompson expressed concern about appellant's amenability to treatment based on the new information and concluded that appellant's "amenability remains in question . . . until his sexual history is explained to the satisfaction of treatment providers".

Appellant sought a downward dispositional sentencing departure. Defense counsel argued in support of the departure based on Thompson's evaluations. The state opposed the departure, arguing that Thompson's follow-up evaluations raised concerns regarding appellant's amenability to treatment.

The district court concluded:

[B]ased on the evaluation, the expert here is saying that you are amenable to treatment under the circumstances. What's required by me is to compare what the guidelines call for and the information, all of the information I have to determine whether these mitigating factors are substantial and compelling. And that's not always an easy process. It's not an exact process. It's not a scientific process. And much goes into it. And these decisions are some of the most difficult decisions that judges have to make.

. . . .

And it also means that these decision[s] that judges make aren't always the right decisions either. Just because we make them doesn't mean that we make them right. And I've spent a lot of time going through the file and looking at it all, listening to what everyone says, and I feel that there are mitigating factors here. I see that you have done what I required you to do as far as probation and conditions.

As far as I know you didn't violate any of those things. But the problem, I have to be honest with you, . . . the problem I have is whether these mitigating factors that I know exist and I've reviewed and analyzed rise to that level of what is called substantial and compelling. And I simply haven't been able to say clearly in my mind that all of those factors are substantial and compelling, even though I do know that they exist and you've done many good things.

Defense counsel then requested a downward durational departure, which the district court denied. The district court sentenced appellant to the presumptive sentence, an executed term of 144 months in prison. This appeal followed.

DECISION

Appellant argues that the district court erred in denying his motion for a downward dispositional departure. He does not challenge the denial of his request for a durational departure.

The decision to depart from the sentencing guidelines is within the district court's discretion and will not be reversed absent a clear abuse of discretion. *State v. Givens*, 544 N.W.2d 774, 776 (Minn. 1996). The district court may depart from the presumptive sentence provided in the sentencing guidelines if the case involves “substantial and compelling circumstances” to warrant a downward departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The supreme court has stated that only a rare case would warrant reversal of a refusal to depart from the guidelines. *Id.*

When a district court departs from the presumptive sentence, the sentencing guidelines require the court to “disclose in writing or on the record the particular substantial and compelling circumstances that make the departure more appropriate than the presumptive sentence.” Minn. Sent. Guidelines II.D. Similarly, the rules of criminal procedure require findings on the record when the court departs from the presumptive sentence for a felony offense. Minn. R. Crim. P. 27.03, subd. 4(C). These provisions do not require the district court to make findings on the record explaining why potentially mitigating factors are not substantial and compelling. But the district court must weigh the reasons for and against departure and make a deliberate decision. *State v. Mendoza*, 638 N.W.2d 480, 484 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002); *see also State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984) (noting that record suggested

factors for departure that should be deliberately considered). The district court must demonstrate that an exercise of discretion has occurred. *See Mendoza*, 638 N.W.2d at 484 (recognizing district court's sentencing discretion, but remanding for resentencing when record suggested "that such an exercise of discretion may not have occurred").

When considering a downward dispositional departure, the district court may focus "on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). A relevant factor for consideration when determining whether to impose a downward dispositional departure is the defendant's amenability to probation. *Id.* Other relevant factors include the defendant's age, prior criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Appellant relies on *Mendoza* and *Curtiss* to support his argument that the record is inadequate to show which factors the district court considered as mitigating and which it considered as supporting imposition of the presumptive sentence. In *Mendoza*, the district court refused to grant a departure for probation because of the defendants' immigration status. 638 N.W.2d at 482. This court concluded that it was improper to consider the defendants' immigration status and that the record contained evidence that could support a departure. *Id.* at 484. Therefore, this court remanded to give the district court an opportunity to exercise its discretion based on appropriate factors. *Id.* In *Curtiss*, the district court concluded that "there is no justifiable reason to deviate" and refused to give further consideration to a downward departure. 353 N.W.2d at 263.

Because the district court did not consider the reasons favoring a departure, this court remanded to permit the district court to exercise its discretion. *Id.* at 264.

Here, in contrast to *Mendoza* and *Curtiss*, nothing in the record indicates that the district court considered improper factors or failed to consider mitigating factors. Rather, the district court's comments at the sentencing hearing show that it carefully analyzed all of the information in the file and concluded that the mitigating factors did not rise to the level of substantial and compelling circumstances warranting a sentencing departure. Also, defense counsel and the prosecutor addressed the factors for and against a sentencing departure in their arguments at the sentencing hearing, and Thompson's follow-up evaluation raised concerns about appellant's amenability to probation based on his failure to disclose the sexual misconduct that occurred during appellant's adolescence. Appellant has not shown that the district court abused its discretion in denying appellant's motion for a dispositional departure.

Affirmed.