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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1505**

State of Minnesota,
Respondent,

vs.

Thomas Allen Lovitt,
Appellant.

**Filed May 18, 2010
Affirmed
Shumaker, Judge**

Washington County District Court
File No. 82-CR-08-6630

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

Doug Johnson, Washington County Attorney, James C. Zuleger, Assistant County Attorney, Stillwater, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, St. Paul, Minnesota; and

Melissa V. Sheridan, Assistant Public Defender, Eagan, Minnesota (for appellant)

Considered and decided by Shumaker, Presiding Judge; Klaphake, Judge; and
Crippen, Judge.*

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

UNPUBLISHED OPINION

SHUMAKER, Judge

On appeal from his conviction of aiding and abetting first-degree aggravated robbery, appellant contends that the district court abused its discretion by denying his motion for a downward dispositional departure from the presumptive sentence because he demonstrated substantial and compelling circumstances justifying such departure and because he is amenable to probation. We affirm.

FACTS

Appellant Thomas Allen Lovitt and his roommate, Michael Lopez, hatched a plan to rob the Burger King restaurant where Lovitt worked. Lovitt told Lopez about the amounts of money potentially available, and Lopez agreed that Lovitt would receive at least \$400 from the robbery. Lovitt also told Lopez of the respective schedules of the managers and noted that one manager, a pregnant woman, would be an easy target because she would be more frightened than a male might be.

On May 7, 2008, Lovitt and the pregnant manager worked the closing shift at the restaurant. After the restaurant closed, the manager went into the bathroom and Lovitt went outside to smoke. Then Lopez, wearing a black ski mask and wielding a gun, encountered Lovitt. Lopez hit Lovitt in the head with the gun to make the robbery look real, and entered the restaurant, where he pointed the gun at the manager and ordered her to give him the money from the safe. She did so. Lopez instructed Lovitt and the manager to lie on the floor and fasten themselves to a broiler with zip ties. Lopez then fled in the manager's car.

Lovitt initially claimed to have been a victim of the robbery, but later confessed to his involvement when the police confronted him about inconsistencies in his statements.

The state charged Lovitt with one count of aiding and abetting first-degree aggravated robbery and one count of conspiracy to commit that crime. In exchange for the dismissal of the conspiracy count, Lovitt pleaded guilty to the charge of aiding and abetting first-degree aggravated robbery. The plea agreement left Lovitt free to move for a dispositional departure from the presumptively executed sentence.

Lovitt did move for a dispositional departure, citing his “minor culpability” as a mitigating factor and his amenability to probation. The district court denied the motion and imposed the low range of the presumptive sentence—an executed term of 41 months. Lovitt appeals.

D E C I S I O N

The sentence to be imposed for a felony conviction in Minnesota is governed by the Minnesota Sentencing Guidelines. *Ballweber v. State*, 457 N.W.2d 215, 218 (Minn. App. 1990). For nearly all felonies, including the crime at issue here, the guidelines provide “presumptive” sentences. Minn. Sent. Guidelines IV-VI (2008). A presumptive sentence is deemed to be the appropriate sentence considering the severity of the crime and the offender’s criminal history. *State v. Jackson*, 749 N.W.2d 353, 357 (Minn. 2008) (citing Minn. Sent. Guidelines I).

The district court may in its discretion “depart” from the presumptive sentence and impose a different sentence if it can identify substantial and compelling circumstances that would make a different sentence—of lesser or greater duration, or stayed or

executed—more appropriate than the presumptive sentence. *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). The existence of such circumstances and the appropriateness of a departure because of such circumstances are matters within the sound discretion of the district court. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The appellate courts will not disturb the district court’s sentencing decision except upon a showing of a clear abuse of that discretion. *State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Because the presumptive sentence is deemed to be the appropriate sentence, only in a “rare case” will the appellate court reverse the district court’s denial of a motion to depart from the presumptive guidelines sentence. *Kindem*, 313 N.W.2d at 7.

When a departure motion is made, thereby implicating the district court’s discretion, it is not the sense of the sentencing guidelines that the court may act perfunctorily. Rather, the court must consider, weigh, and assess the plausibility and credibility of the reasons offered for the departure motion before making its discretionary decision. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002); *State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984).

Lovitt urges that his culpability in the aggravated robbery is mitigated by his minor or passive role in the crime. The sentencing guidelines recognize as a potentially mitigating factor that the “offender played a minor or passive role in the crime” Minn. Sent. Guidelines II.D.2.a.(2) 2008). But the mere presence of a mitigating factor does “not obligate the court to place defendant on probation or impose a shorter term

than the presumptive term.” *Oberg*, 627 N.W.2d at 724 (quoting *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984)).

Lovitt also argues that he is amenable to probation and that a dispositional departure will allow him to obtain treatment. He does not indicate what it is he would receive treatment for, although he concedes his “struggle with chemical addiction.” A dispositional departure may be supported by offender-related factors or offense-related factors. *See State v. Chaklos*, 528 N.W.2d 225, 228 (Minn. 1995).

As to his allegedly minor and passive role in the aggravated robbery, Lovitt blames Lopez for orchestrating the plan to rob Lovitt’s place of employment. Lovitt agrees that he “gave Lopez some information about the restaurant and its employees and cash flow,” but he “did not realize Lopez actually intended to go through with the crime.” Lovitt states that he was surprised when Lopez showed up with a gun, although Lovitt knew his roommate owned a 9-millimeter semiautomatic handgun and a 12-gauge shotgun. Lovitt points out that Lopez hit him with the gun and that, in the end, Lopez did not give him any money.

It is difficult to view Lovitt’s role in the aggravated robbery as either minor or passive. He was fully active in revealing the cash flow and the managerial shifts, and in identifying the shift on which the most vulnerable manager would be working. It was Lovitt’s valuable information that set the stage for the robbery and that ensured its success. The record does show that Lovitt was passive during the actual commission of the robbery, but this is the sole particular in which his passivity is evident. Furthermore, during the commission of the robbery, Lovitt’s role was minor because he had already

played his major part in facilitating the crime and he merely yielded to the accomplice with the gun. The district court did not abuse its discretion in rejecting Lovitt's argument that his role was a mitigating factor.

As to Lovitt's amenability to probation, the record shows that probation was tried twice previously with downward dispositional departures on two separate offenses. It is indisputable that neither probation was sufficient to induce Lovitt to remain law abiding. Additionally, Lovitt was not truthful with his probation officer and he failed to follow through with chemical-dependency treatment. Although he argues that he has the support of family and friends, he told the presentence investigator that he does not have any friends who do not use drugs or participate in illegal activity. And even though Lovitt protested that he is remorseful and that he cooperated with authorities, the district court would be completely justified in concluding that his remorse and cooperation were products of being caught rather than sincere expressions of contrition.

Affirmed.