

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A09-1524**

Stephans Tillman Wilburn, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed June 1, 2010  
Affirmed  
Peterson, Judge**

Hennepin County District Court  
File No. 27-CR-07-044255

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant public  
Defender, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, Assistant County  
Attorney, Minneapolis, Minnesota (for respondent)

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

**UNPUBLISHED OPINION**

**PETERSON, Judge**

In this appeal from an order denying his petition for postconviction relief,  
appellant argues that (1) he was improperly sentenced under a mandatory-minimum

statute despite a guilty plea premised on an agreement that the statute would not be used to determine his sentence and (2) his conviction is illegal because it is based on an invalid delinquency adjudication for a predicate offense. We affirm.

## **FACTS**

In 2003, appellant Stephans Tillman-Louis Wilburn IV pleaded guilty to charges of aiding an offender after the fact in violation of Minn. Stat. § 609.495, subd. 3 (2002), and crime committed for the benefit of a gang in violation of Minn. Stat. § 609.229, subd. 2 (2002), and was adjudicated delinquent. On October 29, 2007, appellant pleaded guilty to a charge of prohibited person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). Appellant's Petition to Enter Plea, which appellant signed on each page, states that the plea is a straight plea. At the beginning of the plea hearing, the prosecutor stated that appellant's plea is a straight plea with "no negotiation." At the end of the plea hearing, the judge told appellant:

If I'm going to give you a sentence less than the 60 months called for by the statute, the grounds I have for doing that are that you are showing acceptance of responsibility. Part of how I'm going to be able to justify that and see this is by what you do [prior to sentencing].

At the sentencing hearing, appellant's attorney requested a downward durational departure to 30 months, "which would be the equivalent of an attempt." In support of a departure, appellant testified that between his plea and sentencing, he worked to earn money toward restitution, which he deposited with the court at the hearing. The district court granted a downward durational departure of 12 months and sentenced appellant to a 48-month executed sentence. The judge stated the following grounds for departing:

I'm going to depart from the guidelines. I'm doing this because you did some of the things I asked you to. I do think that you accepted responsibility and you are entitled to some credit for that. You did come in here and make an effort to pay restitution and I'm giving you credit for that as well.

I can't go down to the half level that your lawyer asked for, but I am going to take a year off the sentence that the law would require me to give because I think you are doing some good things, and I want to let you know that at least we are going to reward you when we can.

In 2009, appellant brought a “pro se motion for modification or reduction of sentence,” arguing that his sentence must be modified or reduced because (1) the 48-month sentence represented an illegal upward durational departure and (2) his 2003 juvenile adjudication was illegal. The postconviction court denied appellant’s petition, stating that (1) the district court had actually imposed a downward departure, not an upward departure and (2) the legality of appellant’s 2003 juvenile adjudication was not properly before the court. This appeal followed.

## **DECISION**

We review the decision of the postconviction court to determine whether there is sufficient evidence to support the postconviction court’s findings, and we will not disturb the postconviction court’s decision absent an abuse of discretion. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). But we review issues of law de novo. *Id.*

### *Durational Departure*

A person who has been adjudicated delinquent for committing a crime of violence is not entitled to possess a firearm. Minn. Stat. § 624.713, subd. 1(b). For purposes of section 624.713, “crime of violence” includes a crime committed for the benefit of a gang

in violation of Minn. Stat. § 609.229. Minn. Stat. § 624.712, subd. 5 (2006). “Any defendant convicted of violating section . . . 624.713, subdivision 1, clause (b), shall be committed to the commissioner of corrections for not less than five years, nor more than the maximum sentence provided by law.” Minn. Stat. § 609.11, subd. 5(b) (2006).

When an offender has been convicted of an offense with a mandatory minimum sentence under Minn. Stat. § 609.11, which would otherwise be a presumptive stayed sentence under the sentencing guidelines, the court on its own motion or on the motion of the prosecutor may sentence without regard to the mandatory minimum sentence. The presumptive disposition, however, is commitment to the Commissioner.

Minn. Sent. Guidelines II.E (2006).

Appellant argues that because his guilty plea was premised on an agreement that Minn. Stat. § 609.11 would not be used to enhance his sentence, the district court should have departed downward from the minimum sentence under Minn. Stat. § 609.11, subd. 5(b), and imposed a presumptive sentence of 21 months, based on his criminal-history score of zero. But appellant has not cited any evidence in the record to support his claim that his guilty plea was premised on an agreement that Minn. Stat. § 609.11 would not be used to enhance his sentence.

Furthermore, evidence in the record refutes his claim. Appellant’s Petition to Enter Plea of Guilty, which appellant signed on each page, states that his guilty plea is a “straight plea” and does not refer to any agreement or negotiation. At appellant’s plea hearing, the prosecutor stated that the guilty plea was not premised on any negotiation. At the sentencing hearing, appellant’s attorney impliedly acknowledged the 60-month

presumptive sentence for appellant's crime when she requested a departure to 30 months, "which would be the equivalent of an attempt." *See* Minn. Stat. § 609.17, subd. 4 (2006) (limiting penalties for attempt crimes to one-half of the maximum imprisonment for the crime attempted). And while discussing the possibility of departure during both the plea hearing and the sentencing hearing, the district court referred to the 60-month presumptive sentence. We, therefore, conclude that appellant's claim is without merit.

### *2003 Adjudication*

Appellant argues that because he was wrongfully adjudicated delinquent for committing a crime for the benefit of a gang in 2003, his conviction in 2007 for being a prohibited person in possession of a firearm is illegal because it is premised on the invalid 2003 adjudication. But appellant has not successfully challenged his 2003 delinquency adjudication, and he has not cited any authority that allows him to obtain relief from his 2007 conviction based on a claim that the underlying 2003 adjudication was wrongful without first obtaining relief from the 2003 adjudication. Allegations of error based on "mere assertion" without legal argument or authority to support them are deemed waived unless prejudicial error is obvious on mere inspection. *State v. Ouellette*, 740 N.W.2d 355, 361 (Minn. App. 2007), *review denied* (Minn. Dec. 19, 2007). Because appellant's allegation of error is not supported by legal argument or authority and prejudicial error is not obvious on mere inspection of the record, we deem appellant's allegations of error to be waived.

We conclude that there is sufficient evidence to support the postconviction court's findings and that the postconviction court did not abuse its discretion in denying appellant's petition for postconviction relief.

**Affirmed.**