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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A11-1161**

State of Minnesota,  
Respondent,

vs.

Vicente Roberto Colunga,  
Appellant.

**Filed June 18, 2012  
Affirmed  
Peterson, Judge**

Ramsey County District Court  
File No. 62-CR-10-5465

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

John Choi, Ramsey County Attorney, Thomas Rolf Ragatz, Mark Nathan Lystig,  
Assistant County Attorneys, St. Paul, Minnesota (for respondent)

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

Considered and decided by Larkin, Presiding Judge; Peterson, Judge; and Collins,  
Judge.\*

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

## UNPUBLISHED OPINION

**PETERSON**, Judge

Appellant pleaded guilty to aiding and abetting first-degree controlled-substance crime pursuant to a plea agreement that provided for a sentence at the low end of the presumptive-sentence range. Appellant breached the plea agreement, and the district court imposed a sentence at the top of the presumptive range. Appellant argues that the district court abused its discretion because the sentence unfairly exaggerates both the severity of the underlying offense and appellant's conduct that breached the plea agreement. We affirm.

### FACTS

In July 2010, appellant sold methamphetamine to an undercover police officer. The state charged appellant in Ramsey County with one count of aiding and abetting first-degree controlled-substance crime, in violation of Minn. Stat. §§ 152.021, subd. 1(1), 609.05, subd. 1 (2008).

In October 2010, appellant pleaded guilty pursuant to a plea agreement. According to the plea agreement, the state would recommend that appellant's sentence be at the low end of the presumptive-sentence range,<sup>1</sup> no additional charges would be filed in Dakota County, and appellant remained free to move for a downward durational departure at sentencing. Appellant agreed to remain law abiding, cooperate with the

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<sup>1</sup> At a hearing on September 2, 2010, counsel for appellant noted that he had calculated that appellant had six criminal-history points and believed that the low end of the presumptive range was 135 months. Appellant, however, had five criminal-history points, so the low end of the presumptive-sentence range was 125 months.

presentence investigation, and appear for sentencing. Appellant's attorney explained to appellant that, if he breached the agreement in any way, the district court would not be bound to impose a sentence at the low end of the presumptive range.

Appellant appeared for sentencing on January 10, 2011, but his attorney was not available, and the court continued the sentencing until January 31. The state noted that appellant had breached the plea agreement by failing to appear for the presentence investigation and raised the issue whether appellant should be taken into custody. The court did not take appellant into custody but stated that, if appellant failed to appear for sentencing, it would impose the strictest sentence possible. Appellant acknowledged that he understood. On January 31, appellant did not appear for sentencing. The district court issued a bench warrant, and on February 17, officers arrested appellant.

At a February 28 sentencing hearing, appellant's counsel did not dispute that appellant breached the plea agreement and requested that the court impose a sentence at the middle of the presumptive range on the basis that appellant has a drug addiction. The state asked the court to impose a sentence at the upper end of the presumptive range. The court acknowledged that appellant has a serious drug problem but noted that appellant breached the plea agreement by failing to cooperate with the presentence investigation and by failing to appear for sentencing. The court sentenced appellant to 175 months'

imprisonment, the maximum sentence within the presumptive range.<sup>2</sup> This appeal follows.

## DECISION

The district court has broad discretion when sentencing, and this court “generally will not interfere with the exercise of that discretion.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The guidelines sentences are presumed to be appropriate for every case. Minn. Sent. Guidelines II.D (2008). “This court will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (July 20, 2010). Only in a “rare” case will a reviewing court reverse a district court’s imposition of the presumptive sentence. *Kindem*, 313 N.W.2d at 7. “This court will generally not exercise its authority to modify a sentence within the presumptive range ‘absent compelling circumstances.’” *Delk*, 781 N.W.2d at 428 (quoting *State v. Freyer*, 328 N.W.2d 140, 142 (Minn. 1982)).

Citing *State v. Schantzen*, 308 N.W.2d 484, 487 (Minn. 1981), and *State v. Vazquez*, 330 N.W.2d 110, 112 (Minn. 1983), appellant argues that this court may interfere with a district court’s sentencing discretion if we have a strong feeling that the sentence imposed exceeds the severity of the conviction offense and the offender’s criminal history and that this court has discretion to modify a sentence if modification appears to be in the interests of fairness and uniformity. *Schantzen* and *Vazquez*,

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<sup>2</sup> First-degree controlled-substance crime is a severity level IX offense, and the presumptive range for an offender with appellant’s criminal-history score of five was 125-175 months. Minn. Sent. Guidelines IV-V (2008).

however, involved challenges to upward durational sentencing departures, rather than to sentences within the presumptive-sentence range. *Vazquez*, 330 N.W.2d at 111; *Schantzen*, 308 N.W.2d at 487. Accordingly, they do not establish our standard of review. Because appellant's sentence is within the presumptive-sentence range, we will not modify the sentence absent compelling circumstances that warrant a modification.

Appellant has not shown that compelling circumstances warrant a sentence modification. Appellant contends that three circumstances related to his offense “suggest[] that the bottom-of-the-box sentence” would have been appropriate: (1) he was charged with aiding and abetting a sale, not with the sale of a controlled substance; (2) the quantity of methamphetamine involved was “an atypically small amount—crossing the threshold for first-degree sale by less than the weight of a paperclip”; and, (3) “his role in this matter was one of a facilitator.” These are not compelling circumstances; they are facts that satisfy elements of first-degree aiding and abetting the sale of a controlled substance.

Based on the premise that a bottom-of-the-box sentence was appropriate, appellant argues that it was not “fair and equitable to add more than four years to this term merely because [he] failed to appear at sentencing and to complete a presentence investigation.” The record shows that the district court warned appellant that if he failed to appear, it would sentence him to the upper end of the presumptive range, and appellant acknowledged that he understood. Appellant does not dispute that he breached his plea agreement by failing to cooperate with the presentence investigation and by failing to appear at his sentencing hearing. Appellant had an opportunity to receive a sentence at

the low end of the presumptive range if he did not breach the plea agreement. When he breached the agreement, the district court imposed the sentence that it had warned appellant it would impose. These are not compelling circumstances that warrant a modification of his sentence.

**Affirmed.**