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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1034**

State of Minnesota,
Respondent,

vs.

George Allen Machen,
Appellant.

**Filed June 4, 2012
Affirmed
Halbrooks, Judge**

Mille Lacs County District Court
File No. 48-CR-10-199

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

Janice Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney,
Heather Eller, Special Prosecutor, Milaca, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and
Ross, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges the district court's refusal to grant a downward sentencing departure. Because we conclude that the district court acted within its discretion, we affirm.

FACTS

On January 8, 2010, probation officer, Jerome Shear, visited appellant George Machen's home to conduct a drug test pursuant to the conditions of his probation. During the home visit, Shear observed a rifle-style BB gun. When Shear inquired about the gun, appellant picked it up and handed it to him. Shear confiscated the gun. Because appellant has a previous felony-assault conviction that prohibits him from possessing a firearm, the state charged him with one count of felon in possession of a firearm in violation of Minn. Stat. § 624.713, subds. 1(2), 2(b) (2008 & Supp. 2009).

Appellant pleaded guilty to the charge. At the sentencing hearing, he moved for both a downward dispositional and a durational departure. In support of his motion, appellant called Jennifer Melby as a witness. Melby has a degree in applied psychology and has been appellant's independent-living-skills worker since January 2007. Melby helped appellant learn to meet his basic needs and care for his seven-year-old son.¹ Melby testified that appellant needed assistance because he suffered a stroke in about 2005, has severe diabetes, and is a vulnerable adult. Expanding on what she meant by a vulnerable adult, Melby explained, "I work with both [appellant] and his son, [and]

¹ Appellant has sole physical custody of his son.

they're about at the same age level as far as capacity. I'm not a psychologist so I can only go by what I see." On cross-examination, the prosecutor established that while appellant was receiving help from Melby, he committed a felony for fleeing the police in a motor vehicle and was an ongoing threat to the community. Following the hearing, the district court denied appellant's motion for a downward dispositional or durational departure and imposed the mandatory minimum sentence of 60 months in prison. This appeal follows.

D E C I S I O N

Appellant contends that there are substantial and compelling reasons to depart from the mandatory minimum sentence in his case. When the district court imposes a sentence within the range provided by the guidelines, it is presumed to be the appropriate sentence. Minn. Sent. Guidelines II.D (2010). The district court may only depart from the guidelines when there are "identifiable, substantial, and compelling circumstances" to do so. *Id.* On appeal, this court may dismiss, affirm, vacate, or set aside the sentence imposed if we find the sentence to be unreasonable or inappropriate. Minn. Stat. § 244.11, subd. 2(b) (2010). But generally, this court will not "interfere with a sentence falling within the presumptive sentence range, either dispositionally or durationally, even if there are grounds that would justify departure." *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quotation omitted). Only in the rare case will this court reverse the district court for refusing to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We review the district court's decision on sentencing for a clear abuse of discretion. *State v. Pegel*, 795 N.W.2d 251, 253 (Minn. App. 2011).

A. Departure under guidelines

Appellant argues that his diminished physical condition and vulnerability as a result of the stroke and severe diabetes constitute substantial grounds that mitigate his culpability under the sentencing guidelines. The sentencing guidelines provide that the district court may impose a downward departure when “[t]he offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was committed.” Minn. Sent. Guidelines II.D.2.a.(3).

The district court found that none of appellant’s physical ailments impaired his capacity for judgment at the time that he had the BB gun and imposed the presumptive sentence. While the district court is required to explain its reasoning when it departs, there is no requirement for the district court to explain its reasons for imposing the presumptive sentence. *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). All that is required is the district court’s careful examination of all of the testimony and information presented at the hearing. *Id.* at 80-81. Because the district court here carefully considered all of the circumstances, it did not abuse its discretion by imposing the presumptive sentence.

Appellant further contends that the circumstances of the offense mitigate his culpability. The district court may grant a downward departure when “[o]ther substantial grounds exist which tend to excuse or mitigate the offender’s culpability, although not amounting to a defense.” Minn. Sent. Guidelines II.D.2.a.(5). Appellant argues that the following alleged facts amount to substantial grounds that require a downward departure:

he only intended to use the BB gun to chase away squirrels, not to assault another person, and he cooperated with the authorities when surrendering the BB gun.

Minn. Stat. § 624.713, subd. 1(2), provides, “The following persons shall not be entitled to possess a pistol or semiautomatic military-style assault weapon or . . . any other firearm: . . . a person who has been convicted of . . . in this state or elsewhere, a crime of violence.” Under section 624.713, subdivision 1, a BB gun is included in the phrase “any other firearm.” *State v. Fleming*, 724 N.W.2d 537, 541 (Minn. App. 2006). The only exceptions to section 624.713, subdivision 1, are provided in clause 1, which appellant does not satisfy. *See* Minn. Stat. § 624.713, subd. 1(1) (Supp. 2009). While appellant’s cooperation in surrendering the BB gun is commendable, it does not serve as a reason to mitigate his culpability. Because the district court carefully considered all of the circumstances and the implications to public safety, it did not abuse its discretion in refusing to grant a downward sentencing departure based on substantial grounds.

B. Departure under statute

Appellant asserts that although the district court had the discretion to depart, it never considered this possibility. Appellant argues that this court should vacate and remand the sentence to give the district court the chance to exercise its discretion to depart. Whether the district court complied with the statute is a question of statutory construction, which this court reviews de novo. *State v. Bluhm*, 676 N.W.2d 649, 651 (Minn. 2004).

The statute provides, “Any defendant convicted of violating section 609.165 or 624.713, subdivision 1, clause (2), 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) (2008). But, “[w]hen presented with the motion [from the prosecutor], or on its own motion, the court may sentence the defendant without regard to the mandatory minimum sentences established by this section if the court finds substantial and compelling reasons to do so,” which would be a sentencing departure under the guidelines. *Id.*, subd. 8(a) (2008).

The language of the statute is permissive, not mandatory. *Id.*; *see also* Minn. Stat. § 645.44, subd. 15 (2008) (defining “may” as permissive). The district court here concluded that there were no substantial and compelling reasons to depart. There was no error.

Affirmed.