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**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-600**

Charles Edward Rogers, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 11, 2011
Affirmed
Stauber, Judge**

Ramsey County District Court
File No. 62KX074502

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

John J. Choi, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Wright, Presiding Judge; Larkin, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

On appeal from denial of a postconviction petition challenging his sentence for possession of a firearm by an ineligible person, appellant argues that (1) the

postconviction court erred in denying his petition for postconviction relief because substantial and compelling reasons justify departure and (2) the postconviction court mistakenly believed it did not have authority to modify his 2008 sentence. We affirm.

FACTS

In December 2007, appellant Charles Edward Rogers was charged with possession of a firearm by an ineligible person in violation of Minn. Stat. §§ 609.11, subd. 5(b), 624.713, subds. 1(b), 2(b) (2006). The complaint alleged that a confidential reliable informant (CRI) arranged to purchase a firearm from appellant for \$600 on November 25, 2007. The complaint further alleged that appellant arrived at an agreed-upon location with two other men and entered the CRI's car. The two men handed appellant a firearm, and he then sold it to the CRI. The police officers arrested appellant and recovered \$600 in recorded bills from him.

In September 2008, appellant pleaded guilty to the charge of possession of a firearm by an ineligible person. Appellant subsequently moved for a downward dispositional departure, but the district court denied the motion and sentenced appellant to the presumptive 60-month sentence. Appellant then began serving his sentence. In December 2009, appellant filed a petition for postconviction relief on grounds that there were "substantial and compelling reasons for the downward departure." Appellant claimed that the district court failed to consider these reasons when it denied his original motion. The postconviction court denied the petition, finding no substantial or compelling reasons to depart from the presumptive 60-month sentence. The postconviction court also found that it was without discretion to modify appellant's

sentence of imprisonment because he had already began serving his sentence. This appeal followed.

DECISION

I.

Appellant argues that the postconviction court erred by denying his petition for postconviction relief. Appellate courts “review a postconviction court’s findings to determine whether there is sufficient evidentiary support in the record.” *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001). We “afford great deference to a district court’s findings of fact and will not reverse the findings unless they are clearly erroneous. The decisions of a postconviction court will not be disturbed unless the court abused its discretion.” *Id.* But issues of law are reviewed de novo. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

A district court may depart from the presumptive guideline sentence only when “substantial and compelling circumstances are present.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Whether to depart from the sentencing guidelines rests within the district court’s discretion, and we will not reverse the district court absent an abuse of that discretion. *Id.* (citation omitted). Only in a “rare case” will we reverse a district court’s refusal to depart. *Id.*

The Minnesota Sentencing Guidelines provide a nonexclusive list of factors that may be used as reasons for departure. Minn. Sent. Guidelines II.D.2.a. Specifically, the list provides that courts may grant departure if the “offender, because of physical or mental impairment, lacked substantial capacity for judgment when the offense was

committed.” *Id.* at II.D.2.a(3). The district court may also consider any other substantial grounds that “tend to excuse or mitigate the offender’s culpability.” *Id.* at II.D.2.a(5). Although not listed in the sentencing guidelines, a defendant’s amenability to probation is also a sufficient basis for downward dispositional departure. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). The supreme court has identified factors that are relevant to amenability to probation. These include the defendant’s age, his prior record, his remorse, his cooperation, his attitude while in court, and the support of his friends and family. *State v. Hickman*, 666 N.W.2d 729, 732 (Minn. App. 2003) (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)). However, this court recently held that a district court is not required to dispositionally depart even if there is evidence in the record that the defendant would be amenable to probation. *State v. Olson*, 765 N.W.2d 662, 665 (Minn. App. 2009).

Appellant argues that the district court abused its discretion by denying his motion for downward departure because substantial and compelling reasons justify such relief. Appellant states numerous reasons that he believes entitle him to downward departure, including: (1) he was acutely psychotic at the time of the crime; (2) he is a slow learner, illiterate, and schizophrenic; (3) he has proven himself amenable to treatment and supervision; and (4) he was cooperative and respectful during various court hearings. Appellant argues that because the district court found no reason to depart despite these substantial and compelling reasons, it must not have conducted a full and complete analysis.

We disagree. Although the district court felt “great sympathy for [appellant’s] situation,” it concluded that appellant is a “serious threat to the community.” Moreover, the court considered appellant’s claim that he is currently taking medication to treat his mental illness and that he now has the support of family and friends. While this convinced the district court that appellant might be working in the right direction, the district court found no basis for departure. The district court stated: “whether the gun involved was owned by [appellant] or [appellant] had access to it, it’s an alarming kind of weapon to hear about being available in the community.” The district court also addressed appellant’s mental health issues and found that appellant understood the consequences of his plea agreement. Further, the district court considered appellant’s criminal history (nine felonies within the past 15 years), the nature of the offense, and the fact that the firearm was a loaded, semi-automatic weapon. Based on these considerations, the district court found that while there may have been arguments for departing downward, there were also compelling reasons for not doing so. Therefore, because the district court adequately and carefully considered the departure factors promulgated in our sentencing guidelines and apposite case law, we conclude that this is not the “rare case” where the district court abused its discretion by refusing to depart from the presumptive sentence. *See Kindem*, 313 N.W.2d at 7; *cf. State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984) (remanding because sentencing court denied downward departure before even exercising its discretion by “comparing reasons for and against departure”).

Appellant also argues that the district court mistakenly found that it did not have discretion to modify his sentence. But the only claimed impropriety in sentencing was the district court's refusal to grant the downward departure motion. On this record, the postconviction court did not abuse its discretion in concluding that the district court did not abuse its discretion in refusing to depart downward. Thus, appellant has not established that his sentence is unlawful. Because the sentence was lawful and it had been executed, the postconviction court was without authority to modify it. *See State v. Hockensmith*, 417 N.W.2d 630, 633 (Minn. 1988) (stating that a district court does not have "discretion to modify—that is, reduce—a sentence after the defendant has begun serving it."). Accordingly, the postconviction court did not abuse its discretion by denying relief.

Affirmed.