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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1160**

Gabriel Joseph Heinsch, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 17, 2012
Affirmed
Stauber, Judge**

Dakota County District Court
File No. 19K308000542

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

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

James C. Backstrom, Dakota County Attorney, Helen R. Brosnahan, Assistant County
Attorney, Hastings, Minnesota (for respondent)

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

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges the district court's denial of his petition for postconviction relief in which he sought a downward dispositional departure from his 156-month prison sentence. We affirm.

FACTS

On August 12, 2008, appellant Gabriel Joseph Heinsch pleaded guilty to one count of first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(a) (2006). The charge arose out of appellant's multiple acts of criminal sexual conduct with the twelve-year-old daughter of appellant's live-in girlfriend. The guidelines sentence for the offense was 156 months. Minn. Sent. Guidelines IV (Supp. 2007) (sex-offender grid). No agreement was reached with the state as to sentencing at the plea hearing.

Prior to sentencing, appellant moved for a downward dispositional departure on the basis that he was particularly amenable to probation. The state argued for a 234-month sentence, based on the presence of aggravating factors. The district court denied both motions and sentenced appellant to the presumptive 156-month guidelines sentence. Appellant did not file a direct appeal.

Almost two years after sentencing, appellant petitioned for postconviction relief, asking the district court to reverse the denial of his downward-departure motion and re-sentence him to a probationary disposition. The argument for relief in the postconviction petition was substantively the same as the argument offered in support of the earlier

departure motion. The postconviction court denied appellant’s petition without a hearing. This appeal follows.

D E C I S I O N

A person who is convicted of a crime and who claims that the sentence violated his or her “rights under the Constitution or laws of the United States or of the state” may file a petition for postconviction relief. Minn. Stat. § 590.01, subd. 1(1) (2010). “Unless the petition and the files and records of the proceeding conclusively show that the petitioner is entitled to no relief, the court shall promptly set” a hearing. Minn. Stat. § 590.04, subd. 1 (2010). This court generally reviews the district court’s denial of a postconviction petition without a hearing for an abuse of discretion, but issues of law are reviewed de novo. *Chambers v. State*, 769 N.W.2d 762, 764 (Minn. 2009).¹

Appellant is not entitled to relief. The district court must impose the presumptive sentence “unless there exist identifiable, substantial, and compelling circumstances to support” a departure. Minn. Sent. Guidelines II.D (2006). One valid reason for a downward dispositional departure is a defendant’s amenability to probation. *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). But the presence of a mitigating factor does not require departure from the guidelines sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001); *see also State v. Olson*, 765 N.W.2d 662, 664–65 (Minn. App. 2009) (stating downward dispositional departure not required even where there is evidence that defendant would be amenable to

¹ Appellant does not argue that a hearing should have been held. Instead, he argues that the postconviction court erred by affirming the sentencing court’s denial of his motion for a downward departure.

probation). Whether to depart from the guidelines rests within the district court's discretion, and we will not reverse "absent a clear abuse of that discretion." *Oberg*, 627 N.W.2d at 724. Only in a "rare" case will a reviewing court reverse a district court's refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Here, the district court considered whether to depart, deciding that a departure was not warranted based upon appellant's multiple instances of criminal sexual conduct with the twelve-year-old daughter of his live-in girlfriend, over whom he held a position of authority. Furthermore, the order from the postconviction court establishes that the district court did not feel that appellant was amenable to probation, given that the offense was committed while he was on probation for another crime, and that the PSI recommended a guidelines sentence. Appellant has not shown that the sentencing court abused its discretion by denying his motion for a downward dispositional departure or that the postconviction court abused its discretion by denying his petition for postconviction relief.

Affirmed.