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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1426**

State of Minnesota,
Respondent,

vs.

Jennifer Marie Johnson, petitioner,
Appellant.

**Filed April 3, 2017
Affirmed
Connolly, Judge**

Washington County District Court
File No. 82-CR-14-329

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County
Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges the denial of her petition for postconviction relief following her guilty plea to a charge of third-degree murder, arguing that the postconviction court, like the district court, abused its discretion by denying her request for a downward durational departure in her sentence and by awarding restitution to the victim's family. Because we see no abuse of discretion, we affirm.

FACTS

In March 2013, appellant Jennifer Johnson gave her husband, D.P., methadone that had been prescribed only for her, which he consumed. At some point after he began exhibiting symptoms, appellant called 911. He was taken to a hospital, but resuscitation efforts failed, and he died of mixed-drug toxicity. Appellant was charged with third-degree murder and pleaded guilty. She was given a furlough to go to an inpatient treatment facility to treat her addiction to pain relievers.

Following a sentencing hearing, appellant's motions for a downward dispositional or durational departure were denied and she was sentenced to 74 months in prison, the low end of the presumptive range under the sentencing guidelines.

D.P.'s body was returned to Kenya. His sister A.P., a resident of Canada, and his mother J.P., a resident of Kenya, sought reimbursement for transportation of his body within Kenya, burial costs, and counselling expenses for the mother. Following a restitution hearing, the district court ordered restitution of \$8,500.

Appellant’s petition for postconviction relief was denied. She challenges the denial, arguing that both her sentence and the restitution award were an abuse of discretion.

D E C I S I O N

1. Sentence

Appellant was sentenced to the lower end of the presumptive guideline range. “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). “[A] sentencing court has no discretion to depart from the sentencing guidelines unless aggravating or mitigating factors are present.” *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). A district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves “substantial and compelling circumstances” to warrant a downward departure. *State v. Kidem*, 313 N.W.2d 6, 7 (Minn. 1981).

Appellant’s attorney sought a dispositional departure.¹ Her attorney told the district court that: (1) appellant is 42 and her criminal history is limited to “three noncriminal offenses”; (2) appellant has family support—a mother, a sister, and a son—to help her on probation and in treatment; (3) appellant lost her husband, with whom she had a good relationship; (4) appellant’s remorse is demonstrated by the facts that (a) after the offense, she began using alcohol and methamphetamines extensively and (b) when she was released prior to trial, she attempted suicide by overdosing on her medications; (5) appellant

¹ The denial of the dispositional departure is not challenged on appeal.

accepted responsibility for her acts and cooperated with the investigation; and (6) appellant's amenability to probation is shown by the facts that (a) when the offense occurred, she was going to a methadone clinic to treat her dependence on pain medication and had reduced her use and (b) when she was furloughed for treatment prior to trial, she met most of her goals before she was discharged because she was found in bed with a male in violation of house rules and tested positive for benzodiazepine.

Appellant's attorney requested in the alternative a durational departure, telling the district court that: (1) the case was less serious than typical because appellant is not a drug dealer, did not benefit financially from giving her husband her methadone, called 911 "when she realized there was a problem," did not attempt to destroy evidence, and pleaded guilty; (2) appellant lost her husband and "fell into depression, alcohol use and drug use"; and (3) appellant was not a drug dealer trying to get money from a victim who died from the drugs but "a wife trying to aid her husband."

The state argued for a top-of-the-box prison sentence, telling the district court that: (1) appellant was old enough to know that providing another person with methadone could kill that person; (2) the effect of D.P.'s murder on his family had to be considered in the interest of equity; (3) although the district court had told appellant when she was furloughed prior to sentencing that this was her chance to prove she was amenable to treatment, appellant was discharged from treatment with a prognosis of "poor" after testing positive for benzodiazepine and being found in bed with a male in violation of house rules; (4) appellant said she was using methadone to address her addiction to pain medication, but did not explain why she was also using alcohol and methamphetamine; (5) appellant

and D.P. were not in a loving relationship at the time of his murder, since D.P. had plans to move to North Dakota with his new significant other and appellant had a new boyfriend; and (6) appellant did not show remorse by immediately calling 911 for D.P.

The district court said:

Based on my review of all the materials, . . . all the letters [sent as attachments to appellant's pro se memorandum], everything provided to me, I am unable to make the substantial and compelling findings necessary for a departure. It is clear to me that what [appellant] did . . . is what she's pled guilty to and what the offense is. This is a serious offense. It has lasting repercussions to everyone.

The district court carefully considered reasons to depart and therefore did not abuse its discretion by declining to find mitigating circumstances that would justify a downward durational departure.

2. Restitution

“[District] courts are given broad discretion in awarding restitution.” *State v. Tenerelli*, 598 N.W.2d 668, 671 (Minn. 1999). Unless that discretion is abused, a restitution order will not be reversed. *State v. Andersen*, 871 N.W.2d 910, 913 (Minn. 2015).

D.P.'s sister, A.P., who lives in Canada, filed an affidavit for restitution in the amount of \$21,044, supported by receipts from Kenya indicating expenses paid by J.P. in that country: \$4,444 for a headstone and preparation of the burial site, \$5,000 for bus transportation of the body, and \$11,600 for counseling for D.P.'s mother, J.P. The parties agreed to keep restitution open for 60 days so the results of a fundraiser that might offset some of the requested funds could be calculated, and the district court agreed.

Appellant sought a contested hearing on restitution, stating that the amount sought was in dispute because: (1) the restitution affiant, A.P., had not suffered any losses because the receipts from Kenya indicated that J.P. had paid the expenses, and (2) there was insufficient documentation for the counseling expense, which was not an appropriate loss for restitution.

At that hearing, testimony indicated that the fundraiser produced \$10,000, which had been used for expenses in Minnesota, and the amount sought in restitution was therefore reduced to \$11,044 (\$21,044 - \$10,000). The district court issued an order providing that:

4. Minn. Stat. § 611A.01 provides that the term “victim” includes family members of the deceased person. Both [A.P.] and [J.P.] qualify under the statute. The Affidavit was filed by [A.P.] and the receipts indicate [J.P.], so it is appropriate that the judgment entered herein be joint and several.
5. The court has reviewed the Affidavit for Restitution and the supporting documentation. . . . The court has receipts totaling \$8,500 for the purchase of a headstone, the preparation of the burial site and the transportation of the body to Kenya for burial. The court finds that these expenses were reasonable and necessary and [they] will be allowed.
6. . . . The court finds that there is insufficient documentation regarding the claimed value of the counseling services and therefore denies the request for restitution above the \$8,500 ordered herein.

Appellant challenged this order in her petition for postconviction relief, arguing that it was an abuse of discretion because (1) the victims sustained no loss because they raised \$10,000 and claimed expenses were \$8,500; (2) A.P. claimed no expenses and there was insufficient documentation for the losses sustained by J.P., and (3) the district court did not

consider appellant's inability to pay when ordering restitution. The postconviction court rejected these arguments:

Payment of restitution was ordered to be joint and several as [A.P.] was handling expenses for the family. Both [A.P.] and [J.P.] were victims of the crime, as family members of the deceased person, under Minn. Stat. § 611A.01 and there will be no double recovery. Although many expenses were paid through fundraising . . . , the[district] court found \$8,500 to be an appropriate amount of restitution. The \$8,500 was ordered for expenses in Kenya and differed from the fundraising efforts in Minnesota. The court exercised its discretion in making the award of restitution but left open to the family how the bills were to be paid.

[Appellant] also alleges that the court did not consider her ability to pay the restitution. . . . [T]he court was aware of her financial circumstances, having reviewed the PSI before sentencing. This is reflected when the court imposed only the \$50 minimum fine plus surcharges and fees at the time of sentencing. Furthermore, a court ordering restitution need not make specific findings regarding a defendant's ability to pay. *See State v. Miller*, 842 N.W.2d 474[, 478] (Minn. App. 2014).

On appeal, appellant argues that the evidence was insufficient because there was no proof of the expenses paid with the \$10,000 the fundraiser produced and no proof that A.P. and/or J.P. actually experienced an economic loss. But the results of the fundraising were used for expenses incurred here, namely preparing the body for transport to Kenya and transporting it, and J.P. submitted documentation for the burial expenses in Kenya. The district court agreed with appellant that J.P.'s claimed counseling expense of \$11,600 was not adequately supported and disallowed it. Neither the award of \$8,500 for documented expenses nor the decision to permit the family to determine how the bills would be paid was an abuse of discretion.

Affirmed.