STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1513

Mark Edward Larson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 16, 2011
Affirmed
Schellhas, Judge

Ramsey County District Court
File No. 62-CR-08-5928

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

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

Considered and decided by Schellhas, Presiding Judge; Halbrooks, Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

SCHELLHAS, Judge

Appellant challenges the district court's denial of his postconviction petition in which he sought a downward dispositional departure from his 60-month prison sentence. We affirm.

FACTS

On August 12, 2008, appellant Mark Larson pleaded guilty to one count of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subd. 1(b) (2006), subjecting him to a 60-month mandatory minimum sentence under Minn. Stat. § 609.11, subd. 5(b) (2006). Larson acknowledged during his plea hearing that there was no sentencing agreement in place and that, while he was free to move for a downward departure, there was no guarantee that the court would rule in his favor.

Prior to sentencing, Larson moved for a downward dispositional departure on the basis that he was particularly amenable to probation. The district court denied his motion and sentenced him to the mandatory minimum 60 months' imprisonment pursuant to section 609.11, subdivision 5(b). Larson did not appeal.

Twenty months later, Larson petitioned for postconviction relief, asking the district court to resentence him with a downward dispositional departure for substantially the same reasons set forth in his earlier departure motion. He waived an evidentiary hearing. The postconviction court denied Larson'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) (2008). "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 (2008). 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).

Here, Larson expressly waived a hearing on his postconviction petition, and he does not now 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.

Larson is not entitled to relief. If an offense carries a mandatory minimum sentence, the presumptive sentence is the longer of either the mandatory minimum or the guidelines sentence. Minn. Sent. Guidelines II.E (Supp. 2007). 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 the 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 guideline 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 probation). Whether to depart from the guidelines rests within the district court's discretion, and this court 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). Remand may be appropriate if the district court fails to exercise its discretion by "comparing reasons for and against departure." *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984).

Here, the district court carefully considered whether to depart, continuing Larson's sentencing in order to hear from a representative of the inpatient treatment program that Larson wanted to attend and explaining on the record why it did not believe that the treatment program was more appropriate than prison for Larson. We conclude that Larson did not establish that the sentencing court abused its discretion by denying his motion for a downward departure, and that the postconviction court did not abuse its discretion by denying his petition.

Affirmed.