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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-633**

State of Minnesota,
Respondent,

vs.

Carlos Silva,
Appellant

**Filed January 30, 2012
Affirmed
Klaphake, Judge**

Stearns County District Court
File Nos. 73-CR-09-7744, 73-CR-09-7763, 73-CR-09-8048

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

Michael Jevon Lieberg, Stearns County Attorney's Office, St. Cloud, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Young Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

KLAPHAKE, Judge

Appellant Carlos Silva challenges the sentences he received for three convictions of first-degree controlled substance crimes involving sale and possession with intent to

sell 10 grams or more of methamphetamine within a 90-day period under Minn. Stat. § 152.021 (2008). Appellant claims that the district court abused its discretion by denying his motion for downward durational and dispositional departures because there were mitigating factors supporting the departures and because the imposed concurrent sentences of 98, 122, and 138 months, were disproportionate to the offenses. Because we conclude that in the exercise of its discretion at sentencing the district court was not required to depart either durationally or dispositionally, we affirm.

D E C I S I O N

At sentencing, the district court must impose the presumptive guidelines sentence unless “substantial and compelling circumstances” warrant departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008); Minn. Sent. Guidelines II.D. The district court’s sentencing decision is discretionary, and this court will reverse only for a clear abuse of discretion. *State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). Even when reasons for departing downward from the presumptive guidelines exist, this court ordinarily will not alter the district court’s sentencing decision. *State v. Bertsch*, 707 N.W. 2d 660, 668 (Minn. 2006). Only in a rare case will an appellate court reverse the imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

1. Dispositional Departure

In weighing whether to impose a downward dispositional departure from the presumptive sentence, a district court considers “the defendant as an individual and [focuses] on whether the presumptive sentence would be best for [the defendant] and for

society.” *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). One factor to consider is the defendant’s amenability to probation. *Id.* Other relevant factors include the defendant’s age, prior criminal history, remorse, cooperation, attitude while in court, and support from family and friends. *Id.* (citing *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982)).

Appellant claims that the district court abused its discretion by denying his request to be placed on probation, rather than being imprisoned, because he met all of the *Trog* factors and because the district court improperly focused on the large amounts of methamphetamine involved in his offenses, which were elements of the offenses. The record shows, however, that the district court did consider the *Trog* factors because it mentioned two—appellant’s age and criminal record. While some of the other *Trog* factors may have supported appellant’s request for a probationary sentence, the district court was not required to give weight to each of those factors in making its decision. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (stating that when district court “considers reasons for departure but elects to impose the presumptive sentence,” the court does not need to offer an explanation for denying a departure). And the mere presence of a mitigating factor does not mandate that the district court place a defendant on probation. *State v. Wall*, 343 N.W.2d 22, 25 (Minn. 1984).

Further, the record also shows that some of the *Trog* factors do not support appellant’s request to the extent that he claims. With regard to family support, appellant does not maintain a relationship with the mother of his children, and he has only recently reunited with his mother, who lives in North Carolina. In addition, appellant has a

criminal history, although, as noted, it does not involve serious offenses. We conclude that the district court did not abuse its discretion by denying appellant's request for a downward dispositional departure.

2. *Durational Departure*

Appellant seeks a downward durational departure for two reasons: (1) because he is a first-time controlled substances offender and (2) because his offenses occurred within a 90-day period, and in the case of the second and third offenses, on the same day, so that his sentences exaggerated the criminality of his conduct.

There is no merit to appellant's first claim. The sentencing guidelines take into account the criminal history as well as an offender's conduct in establishing presumptive sentences for criminal conduct. Appellant's status of being a first-time controlled substance offender does not demonstrate a mitigating circumstance that would warrant a downward durational departure.

Appellant's claim that he was prejudiced by the prosecutor's decision to charge him with three separate offenses rather than charge him with one aggregate offense that occurred three times in a 90-day period, which is a permissible charge under Minn. Stat. § 152.021, has some logic, but lacks authoritative support. Because of the prosecutor's decision to charge appellant with three separate offenses, appellant was subject to an aggregate 138-month sentence rather than a presumptive 90-month sentence. Thus, the prosecutor's charging decision played a part in increasing the duration of appellant's sentence.

However, the prosecutor's decision to charge the case as he did was permissible under Minn. Stat. § 152.021, and appellant does not allege any abuse of the prosecutor's exercise of the charging function. *See State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996) ("Generally, a prosecutor has broad discretion in the exercise of the charging function and ordinarily, under the separation-of-powers doctrine, a court should not interfere with the prosecutor's exercise of that discretion."); *State v. Krotzer*, 548 N.W.2d 252, 254 (Minn. 1996) ("Under established separation of powers rules, absent evidence of selective or discriminatory prosecutorial intent, or an abuse of prosecutorial discretion, the judiciary is powerless to interfere with the prosecutor's charging authority."). Further, appellant has offered no facts showing that his offenses were less serious than the typical offense. *See State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985) (stating that a downward durational departure is justified when "the defendant's conduct is significantly *less serious*" than the typical offense) (emphasis added)). The district court did not abuse its discretion by denying appellant's motion for a downward durational departure from the presumptive sentence.

Affirmed.