

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1873**

State of Minnesota,
Respondent,

vs.

Miguel Villa Lorenzano
a/k/a Miguel Lorenzanovilla,
Appellant.

**Filed January 6, 2014
Reversed and remanded
Smith, Judge**

Ramsey County District Court
File No. 62-CR-12-546

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
St. Paul, Minnesota (for respondent)

Ira W. Whitlock, Whitlock Law Office, LLC, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Smith, Judge; and Minge,
Judge.*

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

UNPUBLISHED OPINION

SMITH, Judge

We reverse appellant's upward-departure sentence because the district court's adoption of appellant's admissions do not provide an adequate basis to support the upward departure, and we remand to the district court for further proceedings consistent with this decision.

FACTS

Police officers conducted a traffic stop as the result of a narcotics investigation on January 17, 2012, finding appellant Miguel Villa Lorenzano in possession of six pounds of methamphetamine, 30 pounds of marijuana, and a firearm. Three days later, the state charged Lorenzano with conspiracy to commit a felony, in violation of Minn. Stat. §§ 152.096, subd. 1, 609.175, subd. 2(3) (2010); aiding and abetting first-degree violation of controlled substance law (sale of methamphetamine), in violation of Minn. Stat. §§ 152.021, subd. 1(1), 609.05, subd. 1 (2010); and first-degree violation of controlled substance law (possession of methamphetamine), in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (Supp. 2011).

Lorenzano pleaded guilty to the first-degree possession count on May 29, 2012. The plea agreement called for dismissal of the remaining counts and a sentence of 120 months' imprisonment, a 17-month upward durational departure from the sentencing guidelines. During the plea hearing, Lorenzano waived his right to a trial and admitted possessing a large quantity of methamphetamine (more than 100 times the threshold for violation of first-degree possession), that he intended to dispose of the drugs or deliver

them elsewhere at a later date, and that he was in possession of a firearm during the commission of the crime. He agreed to the upward durational departure based on the quantity of drugs that he intended to deliver or dispose of later and the involvement of a firearm, and in exchange for the dismissal of the remaining counts. During the sentencing hearing, the district court noted that the amount of methamphetamine Lorenzано possessed was “in order of 100-and-some times over the threshold for first degree possession.” It accepted Lorenzано’s plea based on the “aggravating factors that were taken at the time of the plea,” and sentenced him in accordance with the plea agreement.

D E C I S I O N

Generally, we review an upward departure from a presumptive guidelines sentence for an abuse of discretion. *State v. Jackson*, 749 N.W.2d 353, 356–57 (Minn. 2008). However, the question of whether the district court’s reason for departure is proper is a legal issue, which we review de novo. *Dillon v. State*, 781 N.W.2d 588, 595 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). If reasons supporting the departure are stated and justify the departure, the departure will be allowed. *State v. Losh*, 721 N.W.2d 886, 895 (Minn. 2006).

Lorenzано agreed to a sentence of 120 months, a 17-month upward departure, based upon two aggravating factors: (1) his possession of a firearm, and (2) his possession of six pounds of methamphetamine that he intended to deliver or dispose of elsewhere. The district court adopted those factors without modification. Lorenzано does not dispute the factual basis for his admissions. Instead, he argues that the district

court's reliance on his possession of six pounds of methamphetamine as an aggravating factor was impermissible because the amount of methamphetamine was an element of the offense to which he pled guilty. See Minn. Stat. § 152.021, subd. 2(a)(1) (requiring a total weight of 25 grams or more); *State v. Edwards*, 774 N.W.2d 596, 602 (Minn. 2009) (“[T]he district court may not base an upward departure on facts necessary to prove elements of the offense being sentenced.”). He also argues that the district court committed reversible error on the form documenting its reasons for his sentence.

The legislature has authorized upward-departure sentences when “the offense was a major controlled substance offense . . . [and] two or more of the circumstances listed below are aggravating factors,” including when “the offense involved an attempted or actual sale or transfer of controlled substances in quantities substantially larger than for personal use,” and when the offender “knowingly possessed a firearm during the commission of the offense.” Minn. Stat. § 244.10, subd. 5a(a)(5) (2010). The state asserts that these two factors support Lorenzano’s sentence. But although Lorenzano admitted possessing a firearm and more than six pounds of methamphetamine, he did not admit that his possession involved an “attempted or actual sale or transfer.” And although a more specific and complete record might have supported a finding that possession of such a large quantity of methamphetamine indicated that Lorenzano was engaged in an “attempted or actual sale or transfer,” the district court’s factual findings are limited solely to adopting Lorenzano’s admissions on the record. Because this is not an adequate basis for an upward departure, we reverse Lorenzano’s sentence and remand for the district court to conduct further proceedings consistent with this decision.

On remand, the district court may apply its discretion to consider a range of possible remedies. When the district court has failed to state reasons for a departure, a departure will not be allowed on remand. *State v. Geller*, 665 N.W.2d 514, 517 (Minn. 2003). But when, as here, the district court’s error is facilitated by the defendant’s plea agreement (by which the defendant benefitted from the dismissal of additional charges), the district court on remand is “‘free to consider the effect that changes in the sentence have on the entire plea agreement’ and could entertain motions to vacate the conviction and the plea agreement.” *State v. Montermini*, 819 N.W.2d 447, 455 (Minn. App. 2012) (quoting *State v. Lewis*, 656 N.W.2d 535, 539 (Minn. 2003)); *see also State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (holding that defendant cannot obtain relief on the basis of an error that he “‘invited or could have prevented”).

Because we reverse Lorenzo’s sentence based on the lack of two articulated aggravating factors to support an upward departure, we need not address his challenge to the sentencing departure form.

Reversed and remanded.