**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A13-0306**

State of Minnesota,
Respondent,

vs.

Jose Amador Lopez,
Appellant.

**Filed December 23, 2013**
**Affirmed**
**Stauber, Judge**

Dakota County District Court
File No. 19HACR122130

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

James C. Backstrom, Dakota County Attorney, Kevin J. Golden, Assistant County Attorney, Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Sharon E. Jacks, Assistant Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Worke, Judge; and Bjorkman, Judge.

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

**STAUBER**, Judge

Appellant argues that the district court erred by denying his motion for a downward dispositional departure and sentencing him to 74 months in prison after

appellant pleaded guilty to first-degree controlled substance crime for the sale of cocaine. Appellant argues that he demonstrated that he was amenable to probation and that most similarly situated offenders received a probationary sentence. We affirm.

## FACTS

In October 2011, a confidential informant (CI) working for agents of the Federal Bureau of Investigation's Safe Streets Violent Gangs Task Force arranged to meet appellant Jose Amador Lopez to purchase cocaine. On November 3, 2011, the CI purchased an ounce of cocaine from appellant for $1,200 using government money. Appellant sold an additional ounce of cocaine to the CI in December 2011.

In June 2012, appellant was charged with one count of first-degree controlled substance crime under Minn. Stat. § 152.021, subd. 1(1) (2010), for the November sale. The December sale was charged separately, and appellant was subsequently acquitted of that charge.

On September 10, 2012, appellant pleaded guilty to first-degree controlled substance crime for the November 2011 sale. The prosecution did not agree to a sentencing deal in exchange for appellant's plea.

A presentence investigation (PSI) report was prepared by a probation officer. The report stated that appellant, age 45, was born in Mexico and came to Minnesota illegally in 1999. Appellant has two children from a prior marriage in Mexico, two children from a prior relationship in Mexico, and one child born in Minnesota who is now ten years old. Appellant is apparently no longer involved with the mother of his American-born son; records indicate that the mother filed an order for protection against appellant in 2006.

Appellant had been regularly employed as an auto mechanic. A rule 25 evaluation recommended that appellant receive treatment in jail for alcohol abuse, and appellant was "doing very well in the program."

The PSI recommended that the district court sentence appellant to the presumptive sentence of 86 months in prison. The report identified "several risk factors" indicating that appellant was at "risk to re-offend in a similar manner." "He is surrounded by anti-social companions . . . [h]is behavior demonstrates anti-social attitudes, as he is dealing illegal drugs in the community . . . [and he has] no pro-social leisure activities." Appellant "failed to express any concern about his alcohol use, and even denied any use, despite being in the jail treatment program." Appellant also "significantly downplayed his involvement with illegal drugs . . . [and] [h]is account of the offense is inconsistent with that contained in the official complaint." The probation officer did not find "substantial []or compelling reasons to depart from the presumptive sentence." The officer also concluded that "an executed prison term is the most appropriate means of holding [appellant] accountable."

At sentencing, the state called Officer Sayareth Vixayvong of the St. Paul Police Department as a witness. Officer Vixayvong testified that he observed appellant's behavior during the controlled buys in November and December and that appellant appeared to "act normal" and "wasn't nervous" while he was conducting the drug sales. He also testified that the price appellant named was the "going street rate" for an ounce of cocaine. On cross-examination, Officer Vixayvong admitted that the CI was convicted in federal court for selling three ounces of cocaine and that he did not give the CI any

guidance as to what he could or could not offer appellant in exchange for participating in the drug deal. He added that the police did not supervise the negotiations between appellant and the CI leading up to the drug deals. He also testified that until the CI identified appellant, appellant was not a known drug dealer to any of the officers on the task force. Officer Vixayvong did not know whether, as appellant claimed, the CI offered appellant a green card in exchange for making the sale.

The state recommended a top-of-the-box sentence of 103 months. Appellant urged the court for probation, arguing that he was amenable to probation and that most similarly situated individuals receive probation instead of an executed sentence. Appellant read a letter to the court expressing remorse and apologizing for his "poor decision in December and November." After considering the PSI and the "specific crime," reviewing the departure request and the statistics cited by appellant, the district court sentenced appellant to 74 months in prison, which was the bottom-of-the-box sentence. This appeal followed.

**D E C I S I O N**

A district court may depart from the sentencing guidelines if substantial and compelling circumstances are present. Minn. Sent. Guidelines 2.D. (Supp. 2011). "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), *review denied* (Minn. July 20, 2010). A district court's discretion is broad, and only a "rare case" warrants reversal of a refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). This court reviews the

decision whether to grant a dispositional departure for abuse of discretion. *State v. Leja*, 684 N.W.2d 442, 448 (Minn. 2004).

Appellant argues that the district court abused its discretion by denying his downward departure request because this was his first felony conviction, he accepted responsibility and expressed remorse, and he was making good progress in treatment and taking classes in jail. Although these factors may support a district court's determination that a dispositional departure was warranted, the presence of mitigating factors does not require the district court to depart from the sentencing guidelines. *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). Because the district court expressly considered these mitigating factors, we conclude it was not an abuse of discretion to deny appellant's motion for a downward dispositional departure. *See id.* ("While it is true that a district court errs when it fails to consider valid departure factors . . . in this case, the district court explicitly addressed the reasons for a dispositional departure before exercising its discretion to deny the departure.").

Appellant also argues that he was entitled to a downward dispositional departure because most first-time first-degree drug offenders received a downward dispositional departure in 2011. He argues that the purpose of the sentencing guidelines requires that appellant be given the same sentence as the majority of similarly situated offenders. *See* Minn. Sent. Guidelines 1 (Supp. 2011) ("The purpose of the sentencing guidelines is to establish rational and consistent sentencing standards that reduce sentencing disparity . . . ."). The guidelines state that "use of incarcerative sanctions should be limited to those convicted of more serious offenses or those who have longer criminal

histories." *Id.* 1.3. But it also states that "[t]he sentence ranges provided in the [s]entencing [g]uidelines [g]rid are presumed to be appropriate for the crimes to which they apply," and that "the judge shall pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a sentence outside the range." *Id.* 2.D.

We conclude that the circumstances of appellant's case do not demonstrate that the district court abused its discretion by declining to impose a probationary sentence, even if this places appellant among the minority of first-time drug offenders. First, we observe that a dispositional departure is based upon offender-related factors, and because each offender is unique it is irrelevant how other offenders are treated. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (listing offender-related factors to consider); *see also State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998) (stating that offender-related factors, as opposed to offense-related factors, are used to justify a dispositional departure). As the district court stated, "this was a large quantity of cocaine. [Appellant] seriously endangered our community. [Appellant] knew what [he was] doing." And as the PSI reported, appellant blamed the informant who offered him a falsified green card, birth certificate, and social security card, even though appellant knew that obtaining such documents was illegal. Appellant also provided different accounts of what happened, and downplayed his problems with alcohol abuse. On these facts, we conclude that this case does not present a rare circumstance in which it is necessary to reverse the district court's imposition of a guideline sentence. *Cf. State v. Hennum*, 441 N.W.2d 793, 800-01 (Minn. 1989) (reversing imposition of guideline

sentence where the PSI recommended a downward departure and where the defendant was the victim of "severe physical and mental abuse").

Finally, appellant argues that the district court should not have considered evidence of the December 2011 sale for which he was acquitted to make a sentencing decision. Although the district court may not consider crimes for which appellant was acquitted or not charged when considering an upward departure, the district court may consider the defendant's other behaviors when considering whether to grant a downward departure. *See State v. Jones*, 745 N.W.2d 845, 849 (Minn. 2008) (overturning an upward departure, concluding that "[d]epartures cannot be based on uncharged or dismissed offenses . . . . [or] based on conduct underlying an offense of which the defendant was acquitted"); *see also State v. Givens*, 332 N.W.2d 187, 190 (Minn. 1983) (holding that court not permitted to "equalize" defendant's sentence with his co-defendants who were convicted of worse crimes). Specifically, the district court may consider evidence tending to show that appellant was not amenable to probation. *See Trog*, 323 N.W.2d at 31. The prosecution used evidence of appellant's other drug transaction to demonstrate that appellant was not coerced to sell drugs but did so willingly and with an air of casual professionalism, demonstrating an ingrained criminal attitude that would make appellant unlikely to succeed on probation. Because evidence of other crimes was not used to support a departure from the guideline sentence, we conclude that the district court did not abuse its discretion by considering it.

**Affirmed.**