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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-216**

State of Minnesota,
Respondent,

vs.

Nicholas Thomas Stroeder,
Appellant.

**Filed December 8, 2009
Affirmed
Lansing, Judge**

St. Louis County District Court
File No. 69-DU-CR-07-5753

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Melanie S. Ford, St. Louis County Attorney, James T. Nephew, Assistant County Attorney, Suite 501, 100 North Fifth Avenue West, Duluth, MN 55802-1298 (for respondent)

Marie L. Wolf, Interim Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

LANSING, Judge

The district court accepted Nicholas Stroeder's guilty plea to criminal sexual predatory conduct based on an underlying offense of attempted first-degree, aggravated robbery and imposed a sentence within the presumptive guidelines range. Stroeder appeals, asserting that the district court abused its discretion by refusing to grant his motion for a downward dispositional departure. Because the district court acted within its discretion, we affirm.

FACTS

Nicholas Stroeder was on intense supervised release for attempted third-degree, criminal sexual conduct in the third degree when he signed out of his residence to look for work at the Government Services Center building in Duluth, Minnesota. Once in the building, he waited near the women's restroom on the first floor and then followed a woman inside. Stroeder pushed open the door to her stall, put his hands around her neck, and choked her. He covered her mouth to stop her from screaming and told her, "I [am] going to kill you." The woman escaped, and Stroeder entered the men's restroom where he was eventually arrested. Stroeder told police that he was intending to take the woman's bag.

Stroeder pleaded guilty to criminal sexual predatory conduct based on an underlying offense of attempted first-degree, aggravated robbery. The prosecution agreed to request a sentence within the guidelines range. With Stroeder's criminal-history score, the presentence investigation indicated that the guidelines sentence for his

offense would be forty-three to sixty months imposed and executed. *See* Minn. Sent. Guidelines II.G, IV & cmt. II.A.03 (2006). Stroeder moved for a downward dispositional departure, proposing that the district court stay the presumptive sentence and impose fifteen years of probation, during which Stroeder would serve two years in a correctional facility and undergo sexual-offender treatment and mental-health therapy.

At the sentencing hearing, the woman Stroeder attacked testified about her permanent neck injuries and the emotional and financial toll resulting from the attack. Stroeder's attorney read letters Stroeder had written to the district court and the woman he had attacked, expressing his remorse. The prosecution requested the maximum sentence in the presumptive range, and the presentence-investigation recommended a sentence of fifty-one months. The district court noted several comments in the confidential portion of the presentence investigation and psychosexual evaluation, including reports of Stroeder's conduct at the St. Louis County Jail while this charge was pending. The district court concluded that staying Stroeder's sentence would jeopardize community safety and imposed an executed sixty-month sentence, which is at the upper end of the presumptive range.

Stroeder appealed and, in response to Stroeder's request to file a supplemental pro se brief, we granted an extension of our nonoral consideration date. We did not receive a submission from Stroeder. Consequently, we review the only issue raised in his initial appeal brief: whether the district court abused its discretion when denying Stroeder's motion for a downward dispositional departure.

DECISION

A district court has broad discretion in imposing a sentence. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). The discretion is bounded by the guidelines requirement that a departure be supported by the presence of aggravating or mitigating factors. *State v. Spain*, 590 N.W.2d 85, 88 (Minn. 1999). A downward departure requires the presence of “substantial and compelling circumstances.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). But the presence of a mitigating factor does not require departure from the guidelines sentence. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). For these reasons, only in rare cases will we reverse a district court’s imposition of a sentence in the presumptive guidelines range. *Kindem*, 313 N.W.2d at 7.

In exercising its discretion, the district court must consider reasons for and against departure. *State v. Mendoza*, 638 N.W.2d 480, 483 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002); *State v. Curtiss*, 353 N.W.2d 262, 264 (Minn. App. 1984). We have previously recognized that the district court’s withholding the exercise of its discretion or relying on an improper factor may present the rare circumstance that warrants reversal. In *Mendoza*, for instance, the district court refused to grant a departure for probation because of the defendants’ immigration status. 638 N.W.2d at 482. We concluded that it was improper to consider the defendants’ immigration status and that the record contained evidence that could support a departure. *Id.* at 484. We therefore remanded to give the district court an opportunity to exercise its discretion based on appropriate factors. *Id.* Similarly, in *Curtiss*, the district court concluded that “there is

no justifiable reason to deviate” and refused to give further consideration to a downward departure. 353 N.W.2d at 263. Because we found that the district court did not consider the reasons in favor of a departure, we remanded to permit the district court to exercise its discretion. *Id.* at 264.

Stroeder argues on appeal that the district court abused its discretion because Stroeder demonstrated that he was amenable to a probationary sentence through his expressions of remorse and desire to participate in sexual-offender treatment. A defendant’s amenability to treatment in a probationary setting can be a reason for departure. *State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982). The district court considered Stroeder’s amenability to probation and treatment when it discussed the contents of the presentence investigation and psychosexual evaluation, and, in light of those reports, it found that a downward dispositional departure was inappropriate.

Additionally, Stroeder claims that the fact that he committed this crime while on supervised release as a level-III sex offender indicates that he is unamenable to incarceration, and, therefore, a lengthy period of probation while participating in a sexual-offender treatment program would be more appropriate. We find this argument unpersuasive. The fact that Stroeder committed criminal sexual predatory conduct while on supervised release for another sexual offense is not suggested as a “substantial and compelling” circumstance in the list of factors justifying a downward dispositional departure. *See* Minn. Sent. Guidelines cmt. II.D.03 & cmt. II.D.103 (providing nonexclusive list of circumstances in which departure from guidelines sentence is

permitted). The district court did not abuse its discretion in rejecting the argument that this circumstance makes Stroeder's further incarceration inappropriate.

Unlike the circumstances in *Mendoza* or *Curtiss*, the district court did not consider improper factors or fail to exercise its discretion. The record establishes that the district court did not abuse its discretion in denying Stroeder's motion for a downward dispositional departure.

Affirmed.