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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1301**

State of Minnesota,
Respondent,

vs.

Connie Lynn Kitterman,
Appellant.

**Filed April 20, 2010
Affirmed
Worke, Judge**

Pine County District Court
File No. 58-CR-08-1249

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

John Carlson, Pine County Attorney, Steven C. Cundy, Assistant County Attorney, Pine
City, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Richard Schmitz, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Lansing, Presiding Judge; Worke, Judge; and Crippen,
Judge.*

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

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by denying her motion for a downward dispositional departure. We affirm.

DECISION

A district court may depart from the presumptive guideline sentence only when “substantial and compelling circumstances are present.” *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). “Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case.” *State v. Peake*, 366 N.W.2d 299, 301 (Minn. 1985). Whether to depart from the guidelines rests within the district court’s discretion, and this court will not reverse the district court absent an abuse of that discretion. *Id.* Only in a “rare” case will a reviewing court reverse a district court’s refusal to depart. *Kindem*, 313 N.W.2d at 7.

Appellant Connie Lynn Kitterman pleaded guilty to first-degree assault, in violation of Minn. Stat. § 609.221, subd. 1 (2008), stemming from an incident in which she shot a man during a money dispute between the victim and her boyfriend. Appellant argues that the district court abused its discretion in denying her departure motion by (1) failing to properly consider and make a record of the *Trog* factors as applied to her case and (2) overemphasizing her culpability. Each argument fails.

First, appellant argues that the district court abused its discretion by failing to consider the *Trog* factors. In *State v. Trog*, the supreme court stated that “[n]umerous factors, including the defendant’s age, [] prior record, [] remorse, [] cooperation, []

attitude while in court, and the support of friends and/or family, are relevant to a determination [of] whether a defendant is particularly suitable to individualized treatment in a probationary setting.” 323 N.W.2d 28, 31 (Minn. 1982).

Here, the district court made a record of its thorough review of appellant’s submissions in support of a departure at the beginning of the hearing. This record supports imposition of the presumptive sentence. *See State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985) (stating that “an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence”); *see also State v. Nash*, 342 N.W.2d 177, 180-81 (Minn. App. 1984) (concluding that imposition of the presumptive sentence was not an abuse of discretion when the district court considered appellant’s remorse argument and denial of any involvement in the crime), *review denied* (Minn. Mar. 15, 1984).

Nevertheless, appellant asserts that the district court abused its discretion by not “deliberately comparing reasons for and against departure.” *State v. Curtiss*, 353 N.W.2d 262, 263-64 (Minn. App. 1984). Appellant relies on our reversals in *Curtiss* and *State v. Mendoza* to support this contention. *Id.* at 264; 638 N.W.2d 480, 486 (Minn. App. 2002), *review denied* (Minn. Apr. 16, 2002). In *Curtiss*, the district court issued a blanket conclusion that “there is no justifiable reason to deviate” from the presumptive sentence and refused to further consider a departure. 353 N.W.2d at 263. We concluded that the district court did not exercise discretion in sentencing and remanded because the record reflected several reasons justifying departure that needed to be considered in resentencing. *Id.* at 264. In *Mendoza*, the district court refused to consider a departure

because the defendants might be deported. 638 N.W.2d at 482. We determined that it was improper to consider the defendants' immigration status and that there were legitimate reasons for a departure; we remanded the case for the district court to weigh departure considerations. *Id.* at 484.

Appellant's case is readily distinguishable from *Curtiss* and *Mendoza*. First, the district court never resolutely concluded that there are no factors supporting departure, as did the district court in *Curtiss*, nor did the court refuse to engage in analysis, as did the court in *Mendoza*. Conversely, the district court here acknowledged appellant's substance-abuse problems and discussed the court's experience with ordering participation in the Teen Challenge probationary program in lieu of incarceration. Second, the supporting documents advanced by appellant as justification for a departure were expressly considered by the court. For instance, appellant cites to the PSI as evidence of the following factors supporting a departure purportedly ignored by the district court: age and prior record, remorse, and support of family and friends. The district court explicitly noted that it reviewed appellant's PSI, however. This information was therefore considered by the court; apparently it was not persuasive. Appellant also cites to psychological analyses and letters of support from community members as justification for a departure. The court reviewed these materials and, moreover, even delayed the proceedings to ensure that all of the submitted letters were received by the court. Thus, unlike *Curtiss* and *Mendoza*, there is no evidence that the district court refused to consider factors or otherwise failed to exercise its discretion.

Finally, appellant asserts that the district court denied her motion solely because the court concluded that “there was [not] anything accidental about [appellant’s] conduct,” and repeated this conclusion immediately before imposing the presumptive sentence. Appellant fails to mention, however, that the hearing was delayed due to the court’s concern that letters referenced within appellant’s psychological assessment were missing from the file. When the hearing finally began, the court explained that the delay was due to the need to ensure that “all of the information that was supposed to be [provided]” was available and that the court had reviewed “everything that [it was] supposed to see.” The court then proceeded to note the extensive list of submitted reports and letters considered by the court in preparation for the proceeding. The court’s denial of appellant’s motion was more reasoned and informed than appellant argues. Accordingly, the district court did not abuse its discretion in denying appellant’s motion for a downward departure.

Affirmed.