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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-0463**

State of Minnesota,  
Respondent,

vs.

Brandon Deshawn Wilkes,  
Appellant.

**Filed January 29, 2018  
Affirmed  
Rodenberg, Judge**

Stearns County District Court  
File No. 73-CR-16-2385

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney,  
St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, John Donovan, Assistant Public  
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Worke, Judge; and Rodenberg,  
Judge.

**UNPUBLISHED OPINION**

**RODENBERG, Judge**

Appellant Brandon Deshawn Wilkes appeals from his concurrent 84-month and 95-  
month sentences for aggravated robbery and aiding and abetting first-degree aggravated

robbery, after pleading guilty as part of a plea agreement. He argues that the district court erred by denying his requests for a downward dispositional departure and a sentence to alternative placement under Minn. Stat. § 609.1055 (2014). We affirm.

## **FACTS**

After an incident occurring on March 12, 2016, appellant Brian Deshawn Wilkes was charged with one count of first-degree aggravated robbery, one count of aiding and abetting first-degree aggravated robbery, and one count of aiding and abetting a person previously convicted of a violent crime in possessing a firearm. Appellant pleaded guilty to first-degree aggravated robbery and aiding and abetting first-degree aggravated robbery in exchange for the dismissal of the remaining count and an agreement from the state that it would request a sentence of no more than 95 months in prison. Appellant admitted under oath that, on March 12, 2016, he and another person, B.D., robbed a couple. B.D. pointed a pellet gun at the female's face and took her purse. Appellant took the purse and put the woman's property in his pocket. Appellant threatened the male with a taser<sup>1</sup> and took the male's phone. Appellant testified that he did not think that he used the taser on the male, but he also said that he would not disagree with the male's claim that he did so.

At sentencing, appellant's probation officer, Thomas Hayden, testified that, because of appellant's "severe and persistent mental health issues," he would be concerned for appellant's personal safety if appellant went back to prison. Hayden opined that the only

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<sup>1</sup> While it is unclear whether appellant had a Taser-branded device or another handheld stun gun, we refer to the device used by appellant as a "taser" to be consistent with the record below.

alternative to prison would be a long-term evaluation at a state hospital to stabilize appellant on medication. Hayden further opined that if appellant had a positive support system, it would enable him to be successful in the community and treatment. However, Hayden agreed that it would be hard for him to say whether a prison sentence is appropriate because he did not know the facts of this specific offense.

In response to questioning by the district court, Hayden testified that appellant had attempted a number of treatment programs, but was “unsuccessfully discharged” from each because he stopped taking his medications. Although Hayden said he was unfamiliar with an incident, identified by the district court as one wherein appellant had thrown a chair at someone at treatment, Hayden “still believe[s] that [appellant] is a good person” and thought that “stabilization of [appellant] . . . on medication would help him long-term.” Hayden added that “[w]hether [the stabilization] be in a treatment program, in a prison setting, or in a community setting . . . is up to the Court.” The district court asked Hayden how it could incorporate his recommendations in a probationary sentence. Hayden was unsure. Hayden stated that the Anoka state hospital has worked with patients like appellant in the past, but he added that “everybody that [he] deal[s] with already comes with an order to go there.”

Appellant’s attorney requested that the district court dispositionally depart from the presumptive sentence under the Minnesota Sentencing Guidelines and instead sentence appellant to probation, but added that “[i]f the Court’s not inclined to depart in this matter, the plea agreement does call for [appellant] to serve no more than 95 months.” The state argued for a prison sentence of 95 months, noting that this was appellant’s third aggravated

robbery and that appellant had committed multiple offenses while under supervision. The district court found no substantial and compelling circumstances to warrant a departure from the guidelines. It stated that it did not “have a lot of viable options as to how to get [appellant] the help that [he] need[s]” and noted the absence of any testimony or evidence that appellant could not receive the needed medications if he was imprisoned. The district court sentenced appellant to 84 months in prison for aggravated robbery and 95 months in prison for aiding and abetting aggravated robbery, with the sentences to be served concurrently.

This appeal followed.

## D E C I S I O N

In this appeal from a final judgment of conviction, appellant requests that his sentence be reversed and that the case be remanded with instructions that the district court must dispositionally depart from the sentencing guidelines and order alternative placement under Minn. Stat. § 609.1055.

“We afford the trial court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (internal quotation omitted). “[W]e will not ordinarily interfere with a sentence falling within the presumptive sentence range, either dispositionally or durationally, even if there are grounds that would justify departure.” *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006) (quotation and alteration omitted). We “may not interfere with the sentencing court’s exercise of discretion, as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before

making a determination.” *State v. Van Ruler*, 378 N.W.2d 77, 80-81 (Minn. App. 1985). Only in rare cases does a refusal to depart warrant reversal. *Bertsch*, 707 N.W.2d at 668.

Appellant argues that the district court abused its discretion when it denied the requested departure. First, he argues that the district court failed to consider whether an alternative placement was consistent with public safety. Second, appellant argues that the district court abused its discretion by denying the departure “in part because it appeared to believe that it needed to affirmatively know where [appellant]’s placement would be.” Third, appellant argues that Minn. Stat. § 609.1055 itself is a substantial and compelling circumstance justifying a departure.

Appellant’s first and third arguments concern the application of section 609.1055. When sentencing “an offender with a serious and persistent mental illness,” the statute allows the district court, “when consistent with public safety, [to] instead [of a prison sentence] place the offender on probation or continue the offender’s probation and require as a condition of the probation that the offender successfully complete an appropriate supervised alternative living program having a mental health treatment component.” Minn. Stat. § 609.1055. Even when Minn. Stat. § 609.1055 applies to a particular case, the decision of whether to place “a mentally ill offender on probation conditioned on completion of a supervised alternative-living program is discretionary with the district court.” *State v. Abdi*, 855 N.W.2d 546, 548 (Minn. App. 2014).

Appellant faced a presumptive prison sentence under the sentencing guidelines for these convictions. The sentencing worksheets indicate that, based on appellant’s criminal-history score and the severity level of his offenses, the presumptive sentence for the

aggravated-robbery conviction was a 111-month prison term, with a sentencing range from 95 to 132 months. Additionally, the record shows that appellant has a serious and persistent mental illness. A serious and persistent mental illness includes a diagnosed mental illness that significantly impairs the person's functioning and is confirmed by a written opinion from a mental health professional stating that future episodes requiring treatment are likely. Minn. Stat. § 245.462, subd. 20(c)(4) (2014). Hayden's un rebutted testimony is that appellant's mental health state constitutes a serious and persistent mental illness.

However, appellant's argument that the district court erred in denying the requested departure seems to be based on the faulty premise that Minn. Stat. § 609.1055 required the district court to order an alternative placement if certain conditions were met. Specifically, appellant identifies three statutory conditions: "(1) the district court would be committing the defendant to the commissioner of corrections . . . ; (2) the defendant has a serious and persistent mental illness; and (3) the placement is consistent with public safety." But even under those conditions, Minn. Stat. § 609.1055 states that the district court *may* order the offender to alternative placement. Likewise, the Minnesota Sentencing Guidelines states that "[t]he court . . . ordering an alternative placement under Minnesota Statutes section 609.1055 for an offender with a serious and persistent mental illness" may be used as a reason for a departure. Minn. Sent. Guidelines 2.D.3(a)(6) (2016). As we stated in *Abdi*, "In construing statutes, [m]ay is permissive." 855 N.W.2d at 548 (citing Minn. Stat. § 645.44, subd. 15 (2012)) (quotation marks omitted) (alteration in original). As such, Minn. Stat. § 609.1055 gives the district court the authority to order alternative placement instead of imprisoning a defendant with a serious and persistent mental illness, but the

statute does not *require* such a result, even if alternative placement would be consistent with public safety.

Regardless, *Abdi* stated that Minn. Stat. § 609.1055 “specifically provides that [public safety] is to be considered” by the district court in determining whether to order a defendant with a serious and persistent mental illness to alternative placement. *Id.* at 550. Appellant contends that the district court erred by not discussing public safety as part of its explanation for denying the departure at the sentencing hearing. Essentially, appellant argues that the district court erred by not using the specific words “public safety” when it sentenced him. This, appellant argues, amounts to the district court “fail[ing] to exercise its discretion.”

We have held that “[a]lthough the trial court is required to give reasons for departure, an explanation is not required when the court considers reasons for departure but elects to impose the presumptive sentence.” *Van Ruler*, 378 N.W.2d at 80. The district court chose not to depart from the guidelines and instead imposed a sentence within the presumptive guidelines range. As such, the district court was required to consider the reasons proposed for the departure but it was not required to provide a detailed explanation of its reasons for not departing.

The record shows that the district court considered the reasons proposed in support of the departure. The district court heard arguments from appellant’s attorney, and appellant had the opportunity to personally address the district court. The district court reviewed the Presentence Investigation Report (PSI), sentencing worksheets, and two letters that appellant had written to the district court regarding his departure request before

the sentencing hearing. The PSI listed appellant's unsuccessful past attempts at treatment programs and appellant's criminal record, which contained "numerous offenses that are violent and serious in nature." The PSI also pointed out that appellant committed a felony-level drug offense while on supervised release, and that this aggravated robbery occurred only four months after appellant was released from prison and while he was still on supervised release. Further, the PSI explained that appellant was discharged from a treatment program after he "became angry and threw a chair," and that during treatment, appellant "was not attending appointments, was not taking his medications as prescribed, was confrontational, angry, defensive, hearing voices, and did not cooperate when he was interviewed."

After reviewing and considering all of this, and considering the arguments of counsel, the district court found that there were no substantial and compelling circumstances warranting a departure, that there did not appear to be many viable options to get appellant the treatment that he needed as part of a probationary sentence, and that there was no evidence that appellant could not receive the medications he needed in a prison setting. The district court implicitly found that the interests of public safety disfavored a departure from the guidelines that would place appellant on probation. It considered the evidence of appellant's failures to complete treatment in the past and the fact that he had previously committed two offenses while on supervised release. While *Abdi* requires that the district court consider public safety as a factor, which the district court did here, the district court was not required to explain in detail why it rejected the proposed departure. *Van Ruler*, 378 N.W.2d at 80.

Finally, appellant’s argument that the district court impermissibly denied the departure by reading a requirement of an immediately available placement into the statute is not supported by the record. The district court stated that there did not seem to be “a lot of *viable* options” (emphasis added) where appellant could receive treatment. One of those options, as acknowledged by both Hayden and appellant’s attorney, was prison. The record shows that the district court considered the options presented to it. The district court asked Hayden how to get appellant into an intensive residential program under a probationary sentence, and Hayden was unsure. Hayden had testified that appellant was “unsuccessfully discharged” from treatment because appellant would stop taking his medications when he thought things were going well. The district court considered evidence of appellant’s previous failed treatment attempts and repeated failure to fully participate in treatment programs. The record supports the district court’s determination that treatment programs—whether immediately available or not—were ineffective for appellant.

The district court acted within its discretion. This is not one of the “rare” cases where the district court’s sentence consistent with the sentencing guidelines warrants reversal. *See Bertsch*, 707 N.W.2d at 668.

**Affirmed.**