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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0416**

State of Minnesota,
Respondent,

vs.

Josi Ann Adelman,
Appellant.

**Filed March 16, 2020
Affirmed
Smith, Tracy M., Judge**

Stearns County District Court
File No. 73-CR-18-2030

Keith Ellison, Attorney General, St. Paul, Minnesota; and

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

Melissa Sheridan, Eagan, Minnesota (for appellant)

Considered and decided by Rodenberg, Presiding Judge; Jesson, Judge; and Smith,
Tracy M., Judge.

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

SMITH, TRACY M., Judge

On a direct appeal from her conviction for first-degree controlled-substance crime,
appellant Josi Ann Adelman challenges the district court's decision to deny her motion for
a downward durational sentencing departure. We affirm.

FACTS

Based on admissions made at her plea hearing, Adelman sold methamphetamine to a police informant twice in February 2018. Adelman admitted that on the first occasion she sold an ounce, or about 28 grams, of methamphetamine for \$800 and that on the second occasion she sold half an ounce, or about 15 grams, for \$425.

Adelman was charged with two counts of first- and one count of second-degree sale of a controlled substance. Pursuant to a plea agreement, Adelman pleaded guilty to the first count of first-degree sale and the state dismissed the other two counts. The plea agreement further specified that the state would recommend a sentence of 98 months' imprisonment, which was at the bottom of the sentencing guidelines range, and that the state would not seek an upward durational departure. The district court accepted Adelman's plea and ordered a presentence investigation (PSI).

Almost two months later, Adelman moved to withdraw her guilty plea. She stated that she had agreed to the plea deal because she thought that, upon being sentenced, she would be eligible to participate in the Minnesota Department of Corrections Challenge Incarceration Program and that completing the program would have reduced the time she would have had to spend in prison. But Adelman learned that she would not be eligible for the program, and she claimed that, had she known that, she would have sought a different resolution for her case. The state did not oppose Adelman withdrawing her guilty plea, so the district court permitted Adelman to withdraw her plea and set the case on for an omnibus hearing.

After a number of additional hearings in the case, Adelman decided to enter another plea agreement with the state. She again pleaded guilty to the first count of first-degree sale, and the state dismissed the other two counts. As part of the plea, the parties agreed that Adelman would argue for a downward durational departure and the state would not seek an upward departure from the presumptive sentence of 115 months' imprisonment. The district court accepted Adelman's plea and ordered an update to the earlier PSI.

At the sentencing hearing, Adelman argued, through her attorney, for both a downward dispositional departure and a downward durational departure. With respect to the downward durational departure, she argued that she "was homeless, unemployed, [and] without a vehicle." She asserted that the informant was her cousin and that she had agreed to sell the drugs in exchange for help getting a place to stay. Adelman also claimed that she was originally working with the state as part of a larger investigation and that she was not the "big fish in this case."

The district court denied both of Adelman's motions for a downward departure. Regarding durational departure, the district court determined that Adelman's offense was not less serious than other first-degree sale offenses.¹ The district court then sentenced Adelman to the presumptive sentence of 115 months' imprisonment.

This appeal follows.

¹ Adelman does not appeal the district court's denial of her motion for a downward dispositional departure.

DECISION

I. The district court acted within its discretion when it denied Adelman’s motion for a downward durational departure.

Appellate courts “afford the [district] 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) (quotation omitted). A district court “abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Riley v. State*, 792 N.W.2d 831, 833 (Minn. 2011). When the district court imposes a presumptive sentence, appellate courts will not interfere “as long as the record shows the sentencing court carefully evaluated all the testimony and information presented before making a determination.” *State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011) (quotation omitted). Appellate courts will reverse a district court’s refusal to depart from a presumptive sentence only in a “rare” case. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

A sentence or range of sentences prescribed under the Minnesota Sentencing Guidelines “is presumed to be appropriate.” *Soto*, 855 N.W.2d at 308 (quotation omitted). To maintain uniformity and proportionality in sentencing, departures from the guidelines sentence are discouraged. *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017). A district court may depart from the presumptively appropriate guidelines sentence only if “identifiable, substantial, and compelling circumstances” warrant doing so. *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016) (quotation omitted).

Even if grounds exist to justify departure, the district court does not need to depart from the guidelines. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006). And, “[a]lthough the [district] 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.” *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985).

For durational departures, substantial and compelling circumstances “are those which demonstrate that the defendant’s conduct was significantly more or less serious than that typically involved in the commission of the crime in question.” *Rund*, 896 N.W.2d at 532 (quotations omitted). “Durational departures may be justified by offense-related reasons only.” *Id.* at 533.

Adelman argues that her conduct was significantly less serious than that typically involved in the commission of first-degree controlled-substance crime. She claims that she was not the mastermind of the larger drug organization and that she sold the drugs because she was homeless and a drug addict and believed that her cousin, the informant, could help her get out of her situation. She also asserts that she took full responsibility for her actions and was remorseful.

Many of Adelman’s arguments walk the line between offense-related and offender-related reasons for departure. In particular, courts generally view remorse and acceptance of responsibility as offender-related reasons for departure and thus do not consider them in the context of a durational departure. *See Rund*, 896 N.W.2d at 533; *Solberg*, 882 N.W.2d at 625. But a court may consider remorse if it “relates back to” or bears on the seriousness of the conduct of the offense. *Solberg*, 882 N.W.2d at 625-26. Even assuming that

Adelman's remorse relates back to her offense, however, nothing suggests that Adelman's case is the type of rare case that warrants reversing the district court's imposition of a presumptive sentence.

The district court heard and considered the same arguments that Adelman now makes on appeal. The district court also considered the PSI report, a report from a dispositional advisor, the results of a rule 25 assessment, and the programming that Adelman completed. It gave the parties a chance to correct any factual errors or omissions in the record. The district court even took a recess during the sentencing hearing to make sure it had an opportunity to fully consider letters written in support of Adelman that Adelman's counsel had received the day of the hearing. The record shows that the district court gave serious consideration to Adelman's request for a departure and determined that a presumptive sentence was appropriate. No further explanation was required. *See Van Ruler*, 378 N.W.2d at 80.

While no explanation was required, the district court did explain that it was imposing a presumptive sentence because, based on the quantity of methamphetamine sold, Adelman's conduct was not less serious than other first-degree sales. The district court also indicated that it was persuaded by the state's argument that, even though Adelman was an addict, she was still victimizing other people by distributing that quantity of drugs.

Given the court's consideration of the entire record, as well as its reasonable conclusion that Adelman's conduct was not significantly less serious than the typical first-degree sale, the district court did not abuse its discretion by denying Adelman's motion for a downward durational departure.

II. Adelman's pro se arguments lack merit.

Adelman raises several arguments in her pro se supplemental brief. We address each in turn.

A. The district court did not participate in the plea agreement.

Adelman claims the district court inappropriately participated in her plea agreement and had made up its mind that it would not grant her a durational departure. "A district court judge must not participate in plea negotiations." Minn. R. Crim. P. 15.04, subd. 3.

Adelman claims that the judge inappropriately participated in plea negotiations by meeting with the parties in her chambers before Adelman's plea withdrawal. The judge explained on the record that the meeting was to make sure Adelman understood that her withdrawal would mean that she was giving up the state's offer of a bottom-of-the-box sentence. Nothing in the record suggests that the judge did more than verify that Adelman understood the implications of her plea withdrawal and that she would not necessarily receive the same offer from the state again.

Adelman also argues that the district court judge's statement that she is "not known to give people the bottom of the box regardless of whether or not they go to trial" reveals that the judge never intended to grant Adelman a downward durational departure. But the judge immediately clarified that she does depart and takes each matter case-by-case. As discussed above, the record shows that the district court considered the individual merits of Adelman's motion for a downward durational departure. This single comment, immediately clarified, does not establish that the judge in Adelman's case had made up her mind about Adelman's sentence.

B. The district court judge showed no bias against Adelman.

Adelman claims that the district court judge exhibited unfair bias towards her, which led to the judge denying her motion for a downward departure. Criminal defendants have a constitutional right to a fair and impartial judge. *Hannon v. State*, 752 N.W.2d 518, 522 (Minn. 2008). Appellate courts presume that judges approach cases with a neutral and objective disposition. *State v. Burrell*, 743 N.W.2d 596, 603 (Minn. 2008).

Adelman points to a statement by the judge at her plea-withdrawal hearing that she (the judge) had to prepare a departure report for another case in which she departed from a presumptive sentence. Adelman claims that this statement shows that the judge “had no interest in the exhaustion that would come over her in the event [the judge] would also need to prepare one for [Adelman].” Adelman’s claim has no basis in the record. Nothing in the judge’s statement implied that the judge viewed preparing a departure report as onerous or burdensome.

Next, Adelman questions the judge’s use of first-person statements in her ruling on Adelman’s motion for a downward departure.² She claims that these statements show that the judge was making her decision based on personal opinions rather than based on facts. But our examination of the record assures us that the use of first-person statements did not reflect any inappropriate personal opinion on which the judge was relying to reach a decision. Instead, it simply reflected a recognition by the district court judge that she was

² Adelman highlights phrases that the judge used, such as “[d]o I believe,” “[d]o I think,” and “I’m not so sure.”

deciding, not someone else. As discussed above, the record shows that the district court appropriately considered the facts and arguments of both parties.

Adelman also notes that the judge made comments about how the judge was older than Adelman and argues that the judge was inappropriately considering age in determining Adelman's sentence. The judge, however, was only making a comment about how Adelman's age did not weigh in Adelman's favor under an analysis of the *Trog* factors. *See State v. Trog*, 323 N.W.2d 28, 31 (Minn. 1982) (holding that a defendant's age was relevant to whether a downward dispositional departure was appropriate). These comments reflect no inappropriate bias against Adelman.

Lastly, Adelman claims that the judge inappropriately insinuated that Adelman was a bad mother. But the district court did not conclude that Adelman was a bad mother. The district court was simply explaining why it concluded that the reports saying Adelman was a good mother were "a little misleading." The district court determined that the reports did not weigh strongly in Adelman's favor for a downward departure because her minor children were living in California, not with Adelman. This reasoning does not show that the district court judge was biased against Adelman.

In sum, the record shows that the district court judge exhibited no bias against Adelman.

C. There is insufficient evidence to conclude that Adelman received ineffective assistance of counsel.

Adelman next claims that her lawyer misinformed her about information relevant to her plea agreement and pressured her to take the agreement. To prevail on an ineffective-

assistance-of-counsel claim, an appellant must show that their “counsel’s performance fell below an objective standard of reasonableness, and that a reasonable probability exists that the outcome would have been different but for counsel’s errors.” *State v. Rhodes*, 657 N.W.2d 823, 842 (Minn. 2003) (quotation omitted) (applying the test from *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984)). These two prongs are known as the performance and prejudice prongs, and appellate courts need not address both prongs if one is determinative. *Id.*

Adelman claims that her lawyer made “untrue statements” to get her to accept the original plea agreement. Adelman claims that her attorney told her that she would immediately be eligible for the Challenge Incarceration Program, which was incorrect. Adelman then describes several conversations that she had with her lawyer about their legal strategy. She claims that, in these conversations, her attorney pressured her to take the plea agreement and discouraged her from requesting the judge remove herself for bias. None of these conversations or evidence of these conversations appears in the record. “An appellate court may not base its decision on matters outside the record on appeal.” *State v. Taylor*, 650 N.W.2d 190, 204 n.12 (Minn. 2002).

Generally, “[o]nce a party takes a direct appeal, any claim raised in that appeal will not be considered in a petition for postconviction relief.” *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001) (citing *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976)). But if a party raises an ineffective-assistance-of-counsel claim that relies on evidence not in the record, an appellate court may decline to reach the merits of the claim and permit the party to raise the issue in a postconviction petition. *See State v. Gustafson*, 610 N.W.2d 314, 321

(Minn. 2000). To the extent that Adelman’s claims rely on discussions that took place outside the record, we decline to reach the merits of the issue, without prejudice to Adelman’s ability to bring those claims in a timely petition for postconviction relief. *See id.*

Adelman also claims that the transcript of a scheduling hearing misquotes her³ and that she had tried to inform the district court that she wanted another attorney. She claims that the district court’s response that it does not “get involved in court-appointed lawyers” denied her the opportunity to different and adequate representation. But Adelman only raised the issue when the district court was trying to schedule an omnibus hearing. After the district court scheduled the omnibus hearing, Adelman did not again state she was unhappy with her attorney or move for substitute counsel, even though she had three additional hearings in which to do so.

Even assuming Adelman asked for substitute counsel, she did not have an unqualified right to receive it. “[T]he right of an indigent to have counsel does not give him the unbridled right to be represented by counsel of his own choosing.” *State v. Reed*, 737 N.W.2d 572, 587 (Minn. 2007) (quotation omitted). Adelman gave no reasons to the district court on why she wanted substitute counsel. A defendant’s request for substitute counsel “will be granted only if exceptional circumstances exist and the demand seems reasonable.” *Id.* (quotation omitted). So, while the district court’s statement that it does not

³ The transcript shows that Adelman said she was “in approval of [her] public defender.” She asserts that she said “disapproval.” Based on the district court’s response, we assume that, for purposes of this analysis, Adelman did say “disapproval.”

“get involved in court-appointed lawyers” was imprecise or even inaccurate, it did not rise to the level of reversible error.

Affirmed.