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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1325**

State of Minnesota,
Respondent,

vs.

Christopher Michael Loving,
Appellant.

**Filed May 26, 2020
Affirmed
Johnson, Judge**

Mower County District Court
File No. 50-CR-18-2121

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

Kristen M. Nelsen, Mower County Attorney, Megan A. Burroughs, Assistant County Attorney, Austin, Minnesota (for respondent)

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

Considered and decided by Bjorkman, Presiding Judge; Johnson, Judge; and Reilly, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Christopher Michael Loving pleaded guilty to a charge of failure to register as a predatory offender. The district court sentenced him to 46 months of imprisonment, which

is the longest sentence within the presumptive sentencing range. On appeal, Loving argues that the district court should have sentenced him to 39 months of imprisonment, which is the mid-point of the presumptive sentencing range. We affirm.

FACTS

On October 4, 2018, a Mower County Sheriff's Deputy stopped a vehicle because its taillights and license-plate lights were not working. The deputy identified the driver as Loving, whom the deputy knew to be a predatory offender. The deputy arrested Loving because he had not included the vehicle in his predatory-offender registration. Deputies searched Loving and his vehicle incident to his arrest. They found marijuana in his vehicle and marijuana, methamphetamine, and heroin on his person.

The state charged Loving with one count of the felony offense of failure to register as a predatory offender, in violation of Minn. Stat. § 243.166, subd. 5(a) (2018); two counts of fifth-degree possession of controlled substances, in violation of Minn. Stat. § 152.025, subd. 2(1) (2018); one count of possession of marijuana in a motor vehicle, in violation of Minn. Stat. § 152.027, subd. 3 (2018); and one count of possession of drug paraphernalia, in violation of Minn. Stat. § 152.092(a) (2018).

In December 2018, Loving and the state entered into a plea agreement. Loving agreed to plead guilty to failure to register as a predatory offender, and the state agreed to dismiss the remaining charges and to recommend a downward durational departure to a sentence of 24 months of imprisonment, "as long as Mr. Loving's of good behavior, law abiding, completes and complies with the PSI process, [and] returns for sentencing." Loving's attorney informed the district court that, "[i]n the event that there is a violation,

the State then will be requesting a top-of-the-box sentence.” The district court released Loving pending sentencing.

In February 2019, before sentencing, Loving was arrested for another registration violation. In addition, the state alleged that Loving violated the terms of his release by refusing to submit to chemical testing, by failing to remain law abiding, and by failing to comply with his predatory-offender requirements. The district court revoked Loving’s conditional release. He later was released again, with conditions.

In May 2019, Loving failed to appear for sentencing. At a subsequent hearing, the state informed the district court that it would request a sentence within the presumptive range, instead of a downward durational departure, because Loving had failed to remain law abiding and had violated the terms of his release. At the rescheduled sentencing hearing, Loving requested an executed sentence of 39 months of imprisonment, which is the mid-point of the presumptive range of 34 to 46 months. The state requested an executed sentence of 46 months of imprisonment, the top of the presumptive range. *See* Minn. Sent. Guidelines 2.B.2.c, 4.B (2018). The district court imposed an executed sentence of 46 months of imprisonment. Loving appeals.

D E C I S I O N

Loving argues that the district court erred by imposing a sentence at the top of the presumptive range instead of the middle of the presumptive range. The state did not file a responsive brief. “If the respondent fails or neglects to serve and file its brief, the case shall be determined on the merits.” Minn. R. Civ. App. P. 142.03.

The Minnesota Sentencing Guidelines prescribe presumptive sentences for felony offenses. Minn. Sent. Guidelines 2.C (2018). For any particular offense, the presumptive sentence is “presumed to be appropriate for all typical cases sharing criminal history and offense severity characteristics.” Minn. Sent. Guidelines 1.B.13 (2018). The applicable cell in the applicable grid typically states a “presumptive range,” which spans durations that are “15 percent lower and 20 percent higher than the fixed duration displayed in each cell.” Minn. Sent. Guidelines 1.B.13.c. A defendant’s presumptive sentencing range is subject to a three-month custody enhancement if the defendant receives a custody status point and has a criminal-history score that exceeds the maximum score on the applicable grid. Minn. Sent. Guidelines 2.B.2.c. A district court may depart from the presumptive range only if “there exist identifiable, substantial, and compelling circumstances to support a departure.” Minn. Sent. Guidelines 2.D.1 (2018).

This court has stated that “any sentence within the presumptive range . . . constitutes a presumptive sentence.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010). We “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.” *Id.* We may modify a presumptive sentence but only in “rare” cases and only if modification is supported by “compelling circumstances.” *Id.* (quotations omitted).

Loving contends that the parties’ earlier agreement that the state would recommend a downward durational departure (which he concedes is no longer enforceable) implies that the parties believed that his offense was “less serious than a typical failure-to-register

offense” and, thus, that there were compelling circumstances justifying a downward durational departure. He contends further that the agreed-upon compelling circumstances should cause this court to modify the sentence imposed by the district court.

The district court did not state any reasons for imposing a sentence of 46 months. But a district court is not required to state reasons for imposing a presumptive sentence. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013); *State v. Van Ruler*, 378 N.W.2d 77, 80 (Minn. App. 1985). Similarly, the parties did not identify the reasons why the state agreed to recommend a downward durational departure. Loving’s appellate brief also does not identify the mitigating factors that might have justified a downward durational departure. In the absence of such information, this court is not in a position to second-guess the district court’s broad discretion to impose a presumptive sentence. *See Delk*, 781 N.W.2d at 428.

Thus, the district court did not err by imposing a sentence at the top of the presumptive range instead of the middle of the presumptive range.

Affirmed.