

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0681**

James Eugene Love, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 11, 2021
Affirmed
Klaphake, Judge***

Hennepin County District Court
File No. 27-CR-17-10676

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

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

Michael O. Freeman, Hennepin County Attorney, Kelly O'Neill Moller, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Bryan, Judge; and Klaphake, Judge.

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

NONPRECEDENTIAL OPINION

KLAPHAKE, Judge

Appellant James Eugene Love argues that the postconviction judge abused her discretion by relying on the complaint as opposed to the parties' agreement at trial regarding the weight of heroin he intended to sell. Because the postconviction judge relied on appellant's on-the-record admission to attempting to sell more than twice the amount of drugs required for conviction, we conclude that the postconviction judge appropriately exercised her discretion by denying appellant's motion to reconsider the sentencing departure in his postconviction petition. We affirm.

DECISION

Appellant was convicted of first-degree sale of heroin after admitting that he possessed and intended to sell more than ten grams of heroin. He moved for a downward durational departure, which the sentencing judge denied, citing aggravating factors and a weight of drugs significantly higher than the statutory requirement. The postconviction judge agreed.

We review a postconviction judge's denial of a postconviction-relief petition for an abuse of discretion. *See Pearson v. State*, 891 N.W.2d 590, 596 (Minn. 2017). A postconviction judge abuses her discretion when her decision is arbitrary, capricious, based on an erroneous legal interpretation, or based on clearly erroneous findings of fact. *Id.* A finding of fact is clearly erroneous if it leaves us "with the definite and firm conviction that a mistake has been made." *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008).

The Minnesota Sentencing Guidelines provides sentences within a presumptively appropriate range. Minn. Sent. Guidelines 2.D.1 (2016). “A sentencing [judge] must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances that distinguish a case.” *State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (quotation omitted). A sentencing judge therefore may grant a downward durational departure only if the defendant acted “significantly . . . less serious[ly] than [someone] typically involved in the commission of the crime.” *State v. Rund*, 896 N.W.2d 527, 532 (Minn. 2017) (quotation omitted). If the sentencing judge carefully considered all of the testimony and information before making her determination, we will not interfere with her decision to impose a presumptive sentence, as was the case here. *See State v. Pegel*, 795 N.W.2d 251, 255 (Minn. App. 2011). We rarely reverse a sentencing judge’s refusal to grant a departure. *State v. Walker*, 913 N.W.2d 463, 468 (Minn. App. 2018).

Appellant’s contention that the postconviction judge relied on the figure of 50 grams as opposed to 25 grams when upholding the sentencing judge’s decision is inaccurate. The postconviction judge acknowledged that “the 25.6 grams that Mr. Love admitted possessing at the plea hearing is still over twice the amount required for charging a first-degree sale offense” (emphasis added) and determined that “[t]he [sentencing judge’s] determination that Mr. Love’s offense was not less serious than a typical first-degree sale offense is just as appropriate given that Mr. Love admitted possessing more than twice as much heroin required by the statute.” *See* Minn. Stat. § 152.021, subd. 1(3) (2016) (providing that a person is guilty of first-degree sale of a controlled substance if he “sells one or more mixtures of a total weight of ten grams or more containing heroin”). The

postconviction judge therefore relied on the correct figure of 25.6 grams when declining to grant appellant's motion to reconsider the sentencing departure in his postconviction petition for a conviction of selling 10 or more grams of heroin. Moreover, appellant does not point to a single mitigating factor which might justify a downward durational departure. *See State v. Solberg*, 882 N.W.2d 618, 624-25 (Minn. 2016) (holding that a single mitigating factor may warrant downward durational departure). And because the record suggests that the postconviction judge considered the testimony and information before it, including the aggravating factors that appellant possessed heroin packaged into individual baggies ready for sale and more than three thousand dollars in cash, resisted arrest and attempted to flee, the postconviction judge did not abuse her discretion by denying appellant's postconviction petition. *See Pegel*, 795 N.W.2d at 255.

Caselaw further supports the postconviction judge's denial of appellant's motion to reconsider the sentencing departure in his postconviction petition. In *State v. Bauerly*, 520 N.W.2d 760, 763 (Minn. App. 1994), *review denied* (Minn. Oct. 27, 1994), we determined that a postconviction judge properly resolved an appellant's departure motion from a conviction for a crime involving a quantity by assessing whether the quantity was relatively low or high based on the amount listed in the statute. The district court in *Bauerly* granted a downward durational departure in a felony-theft case where the defendant stole an amount that "barely exceeded" the statutory threshold. *Id.* at 762. We determined that, because the defendant stole such a small amount, she had committed a significantly less serious crime than the typical offense. *Id.* at 763. Appellant's possession of 25.6 grams of heroin, conversely, more than doubles the statutory requirement of ten grams. *See Minn.*

Stat. § 152.021, subd. 1(3). *Bauerly* therefore supports the denial of a downward durational departure for a person who, without mitigating factors, possessed and intended to sell an amount of drugs that significantly exceeds the statutory requirement. *See also State v. Trulson*, 2016 WL 4421560, at *3 (Minn. App. Aug. 22, 2106) (reversing district court's downward durational departure because defendant stole twice the minimum amount required for conviction and because of other aggravating factors), *review denied* (Minn. Nov. 15, 2016).

We need not reach appellant's argument that the postconviction judge abused her discretion by determining that a sentencing court may consider facts in a complaint to resolve a departure motion. The postconviction judge, whose actions we are reviewing, relied on the correct weight of drugs when denying appellant's motion to reconsider the sentencing departure in his postconviction petition. Moreover, appellant forfeited this argument by failing to provide supporting authority. *See Brodsky v. Brodsky*, 733 N.W.2d 471, 479 (Minn. App. 2007) (recognizing that inadequately briefed arguments are forfeited).

Affirmed.