

*This opinion is nonprecedential except as provided by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
A23-0171**

State of Minnesota,
Respondent,

vs.

Ger Vang,
Appellant.

**Filed July 17, 2023
Affirmed
Larkin, Judge**

Scott County District Court
File No. 70-CR-21-11073

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

Ronald Hovevar, Scott County Attorney, Todd P. Zettler, Assistant County Attorney,
Shakopee, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Eva F. Wailes, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Kirk,
Judge.*

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

NONPRECEDENTIAL OPINION

LARKIN, Judge

Appellant challenges the district court's denial of his request for a downward durational departure. We affirm.

FACTS

Respondent State of Minnesota charged appellant Ger Vang with one count of first-degree possession of a controlled substance after the police found more than 50 grams of a substance containing methamphetamine in a vehicle searched during a traffic stop. Vang was a passenger in the vehicle, and he told the police that the methamphetamine belonged to him, and not the driver. On October 21, 2021, Vang pleaded guilty to the sole count with no agreement on sentencing. During the plea colloquy, the state asked Vang if he understood that the presumptive sentence range for the offense was between 107 and 150 months, and Vang responded, "Yes. It's pretty serious." Vang acknowledged that he had rejected the state's offer of 107 months' imprisonment and stated he would argue for a departure at sentencing.

On December 27, 2021, Vang posted a \$100,000 bond and was released from jail. On March 11, 2022, Vang's attorney filed a motion for a downward sentencing departure. On March 14, 2022, Vang failed to appear for his scheduled sentencing hearing. The district court issued a warrant for Vang's arrest. Vang was not arrested on the warrant until October 26, 2022, more than seven months after he failed to appear for sentencing. The district court ordered him to remain in custody pending sentencing.

On November 7, 2022, the parties appeared for the rescheduled sentencing hearing. The presentence investigation report noted that Vang was at high risk to reoffend and recommended a presumptive sentence of 125 months in prison. Vang requested a downward durational departure and a 95-month prison sentence, arguing that the offense was less severe than typical. The district court denied Vang’s request and imposed a 107-month prison sentence, which was at the low end of the presumptive sentence range.

Vang appeals.

DECISION

We afford the district court “great discretion in the imposition of sentences” and review sentencing decisions only for an abuse of that discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). The district court must pronounce a sentence of the applicable disposition and within the applicable range set forth in the Minnesota Sentencing Guidelines, unless “identifiable, substantial, and compelling circumstances” support a departure. Minn. Sent’g Guidelines 2.D.1 (2020).

Even if substantial and compelling circumstances exist, the district court is not required to depart from the presumptive sentence. *Wells v. State*, 839 N.W.2d 775, 781 (Minn. App. 2013), *rev. denied* (Minn. Feb. 18, 2014). And although a district court is required to give reasons for granting a departure, it need not explain its decision to impose a presumptive sentence, so long as it considered reasons for and against departure. *State v. Curtiss*, 353 N.W.2d 262, 263 (Minn. App. 1984).

“[D]epartures from the guidelines are discouraged and are intended to apply to a small number of cases.” *State v. Solberg*, 882 N.W.2d 618, 623 (Minn. 2016). Thus, we

will reverse the district court's refusal to depart from a presumptive sentence only in a "rare" case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981).

Vang argues that the district court abused its discretion for two reasons. First, he argues that substantial and compelling reasons supported a departure because his offense was "less serious than typical based on the lack of accompanying criminal behavior, the brevity of the law enforcement investigation, and because [his] remorse sheds light on the seriousness of his conduct." Second, he argues that the district court "failed to analyze any of the factors supporting a departure." We address each argument in turn.

Substantial and Compelling Reasons to Depart

A durational departure is a sentence that departs in length from the presumptive guidelines range. Minn. Sent'g Guidelines 1.B.5.b (2020). A durational departure focuses on offense-related factors and may be appropriate if an offense is "significantly less serious than that typically involved in the commission of the offense." *Solberg*, 882 N.W.2d at 623-24 (quotation omitted).

Vang argues that a departure was appropriate here because "[n]o violent or other criminal activity accompanied" the police's discovery of his methamphetamine, "whereas many first-degree drug possession cases also involve possession of firearms, criminal driving conduct, fleeing from police, or other such activity." Vang does not cite, and we are not aware of, any authority suggesting that the absence of such circumstances make a first-degree possession charge less serious than typical for the purposes of establishing a valid departure ground.

Vang also argues that “the unusual factor of remorse can and should be used” as a basis to depart in this case because “his remorse provides evidence of his remediation.” As to whether an offender’s remorse may justify a downward durational departure, the Minnesota Supreme Court has explained:

Durational departures must be based on the nature of the *offense*, not the individual characteristics of the offender. Thus, a defendant’s remorse generally does not bear on a decision to reduce the length of a sentence.

To be sure, our past decisions do not entirely foreclose consideration of remorse in the context of durational departures. . . . [C]ases may exist in which the defendant’s remorse could relate back and be considered as evidence of remediation that makes the conduct significantly less serious than the typical conduct underlying the offense of conviction.

But we have suggested that showing the relevance of remorse to a durational departure will not be an easy task: a durational departure may be granted only if a defendant’s remorse—or lack of remorse—bears on a determination of the cruelty or seriousness of the conduct on which the conviction was based. In other words, unless a defendant can show that his demonstrated remorse is directly related to the criminal conduct at issue and made that conduct significantly less serious than the typical conduct underlying the offense of conviction, remorse cannot justify a downward *durational* departure.

Id. at 625-26 (citations omitted).

Vang argues that his remorse

made his conduct significantly less serious than typical in that it shows that his conduct was essentially a cry for help—he knew he suffered from an addiction, he knew he needed treatment, he was simply powerless to make a change until something happened to force that change. The encounter with police became the agent for change. Vang owned his actions immediately, he did not engage in deceptive or risky maneuvers nor was he the subject of a lengthy police investigation requiring a plethora of resources. And following

that encounter and his arrest, his remorse demonstrated his remediation.

We fail to see how Vang's response to the criminal charges demonstrates remorse supporting a reduced sentence. He failed to appear for his sentencing hearing. He had an active warrant for his arrest for seven months based on his failure to appear. And he only appeared for sentencing as a result of his arrest on that warrant. Again, "showing the relevance of remorse to a durational departure will not be an easy task." *Id.* at 626. Vang has not accomplished that task.

District Court's Analysis of Factors Supporting Departure

"In exercising sentencing discretion . . . the [district] court must consider circumstances supporting a downward durational departure from the presumptive sentence." *Curtiss*, 353 N.W.2d at 262. Vang assigns error to the district court's sentencing decision based on *Curtiss*, arguing that "the district court failed to perform any sort of meaningful analysis regarding the reasons to support a departure."

In *Curtiss*, the district court denied a request for a downward durational departure and sentenced the defendant to a term of imprisonment that was at the low end of the presumptive sentence range under the Minnesota Sentencing Guidelines. *Id.* at 263. This court "remanded for a hearing on sentencing and for reconsideration of the departure question." *Id.* at 264. In doing so, we explained:

The record suggests factors for departure which should be deliberately considered. The court erred in putting aside arguments for departure rather than considering them alongside "valid reasons" for non-departure. This is not that rare case where we interfere with the exercise of discretion, but a case where the exercise of discretion has not occurred.

Consideration of compelling circumstances is central to the scheme of the sentencing guidelines, and the practice will avoid sentencing that is either mechanical or callous.

Id. (citation omitted).

Our decision in *Curtiss* was based on the existence of *valid* reasons to depart. We explained:

Legitimate reasons for departure did exist. In fact, they were significant. The defendant was 18 years of age. He faced his first sentence to an adult correctional facility. His offense involved taking 16 bottles of beer from the breezeway of an occupied house, without other intrusion, barely within the scope of the serious charge of burglary in the first degree. His prior felony involved driving an older model pickup until it was out of gas. The trial judge noted: “I personally feel . . . that 34 [sic] months may be too much.”

Id. at 263.

The circumstances here are very different from those in *Curtiss*. Vang’s first-degree possession charge was a subsequent offense requiring a mandatory minimum commitment. The district court noted that Vang had been “going round and round” in the court system for ten years without a successful intervention. The district court also noted that “meth alters people’s brains” and that “sometimes a longer period of incarceration helps because it clears it out of your system because it takes a long time to regrow that brain.” Finally, the district court noted Vang’s criminal history, stated that he had “earned [his] points under the Guidelines,” and stated that it would adhere to the guidelines.

Unlike the circumstances in *Curtiss*, “legitimate” and “significant” reasons for a downward durational departure are not apparent in this case. Moreover, the record shows that the district court reviewed the presentence investigation report and that the court was

aware of Vang’s pending criminal matters in other counties, Vang’s criminal history, and Vang’s significant chemical-dependency history. The district court’s remarks indicate that it considered all of that information, as well as Vang’s remarks at sentencing, before denying Vang’s request for a departure. Indeed, the district court’s imposition of a prison term at the low end of the presumptive range—18 months less than the recommended sentence in the presentence investigation report—shows that the district court considered the arguments for departure.

In sum, this is not a “rare” case in which we would reverse the district court’s imposition of a presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Affirmed.