

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0983**

Joseph Milton Barnes, petitioner
Respondent,

vs.

State of Minnesota,
Appellant.

**Filed May 1, 2017
Affirmed
Reyes, Judge**

Nobles County District Court
File No. 53-CR-13-971

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

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

Kathleen A. Kusz, Nobles County Attorney, Matthew Loeffler, Assistant County Attorney, Worthington, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Reyes, Judge.

UNPUBLISHED OPINION

REYES, Judge

In this postconviction appeal by the state, the state argues that the postconviction court (1) clearly erred in finding that the parties agreed to a bottom-of-the-box sentence;

(2) “erred” in determining that respondent’s criminal-history score was three instead of five; and (3) “erred” in finding that respondent’s sentence was illegal and then modifying the sentence in accordance with a bottom-of-the-box plea agreement. We conclude that the postconviction court did not abuse its discretion and affirm.

FACTS

On January 27, 2014, pursuant to a written plea agreement, respondent Joseph Milton Barnes pleaded guilty to first-degree driving while impaired under Minn. Stat. § 169A.20, subd. 1(5) (2012). According to the written plea agreement, Barnes agreed to plead guilty to first-degree driving while impaired, serve a 57-month sentence concurrently with a pending Iowa prison sentence, and, in return, appellant State of Minnesota would dismiss all the other pending charges against him.

At the time of the plea, the parties agreed that Barnes’s criminal-history score was five. Based on that understanding, the state offered Barnes “a sentence at the low end of the box – 57 months” in exchange for a plea. The criminal-history score calculation included one point for a 1996 third-degree burglary conviction in Iowa, and one point for a 1996 second-degree robbery conviction in Iowa.

At the plea hearing, Barnes waived a presentence investigation (PSI) and asked to be sentenced immediately pursuant to the plea agreement. The district court sentenced Barnes to 57 months and ordered that probation file a post-sentencing Minnesota

Sentencing Guidelines worksheet. The worksheet later filed indicated that Barnes had a criminal-history score of five.¹

Barnes filed a postconviction petition on January 27, 2016, arguing that he received the wrong sentence when he was sentenced to 57 months based on an incorrectly calculated criminal-history score, and that his sentence should be reduced to 46 months because his plea agreement was for a bottom-of-the-box sentence. Specifically, Barnes argued that his two prior juvenile Iowa convictions from 1996 should not have counted toward his criminal-history score. As part of his postconviction petition addendum, Barnes included a print out from the Iowa state court website with information about his prior juvenile convictions from 1996.

At the evidentiary hearing, the state argued that the postconviction court should deny an evidentiary hearing and dismiss Barnes's petition. The state argued that Barnes is not entitled to relief because his 57-month sentence was not illegal as that was the sentence the parties agreed to, regardless of his correct criminal-history score. The state also argued that the burden was on Barnes to advance facts to show that his criminal-history score was incorrect, which he had not done. Notably, the state did not challenge Barnes's assertion that his criminal-history score was three.

The parties stipulated (1) that Barnes had two convictions from Iowa and both occurred before he was 16 years old and (2) to the introduction of email exchanges between Barnes's former attorney and the former prosecutor on the case.

¹ The convictions listed in the sentencing worksheet were the same convictions listed above.

The postconviction court granted Barnes’s petition, reducing his sentence to 46 months and ordering probation to prepare a PSI that shows Barnes’s correct criminal-history score of three. The district court determined that Barnes’s two previous 1996 juvenile convictions from Iowa were erroneously included in the computation of his criminal-history score because Barnes had “shown by a preponderance of the evidence that the juvenile convictions would not have been felonies under Minnesota law.” The postconviction court further found that Barnes “bargained for a sentence at the low end of the sentencing guidelines range.” The state appeals.

D E C I S I O N

“This court reviews a postconviction proceeding to determine only whether sufficient evidence exists to support the postconviction court’s findings.” *Russell v. State*, 562 N.W.2d 670, 672 (Minn. 1997). This court will uphold a postconviction court’s decision absent an abuse of discretion. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). A postconviction court abuses its discretion only when it has “exercised its discretion in an arbitrary or capricious manner, based its ruling on an erroneous view of the law, or made clearly erroneous factual findings.” *Rhodes v. State*, 875 N.W.2d 779, 786 (Minn. 2016) (quotation omitted). “Findings of fact are clearly erroneous if, on the entire evidence, we are left with the definite and firm conviction that a mistake occurred.” *State v. Diede*, 795 N.W.2d. 836, 846-47 (Minn. 2011) (quotation omitted). The petitioner bears “the burden of establishing, by a preponderance of the evidence, facts that would warrant relief.” *Wilson v. State*, 726 N.W.2d 103, 106 (Minn. 2007). To

meet this burden, allegations must be more than argumentative assertions. *Schleicher v. State*, 718 N.W.2d 440, 444 (Minn. 2006).

I. The postconviction court’s finding that the parties agreed to a bottom-of-the-box sentence was not clearly erroneous.

The state argues that the postconviction court’s finding that the parties agreed to a bottom-of-the-box sentence was clearly erroneous because the parties agreed to a 57-month sentence. We disagree.

“Determining what the parties agreed to in a plea bargain is a factual inquiry for the postconviction court to resolve.” *James v. State*, 699 N.W.2d 723, 728 (Minn. 2005) (quotation omitted). The interpretation and enforcement of plea agreements, however, present legal issues that we review de novo. *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000).

In an email from the former prosecutor to the former public defender, the state presented an offer for “a sentence at the low end of the box – 57 months.” Later at the plea and sentencing hearing, the state, in informing the district court what the presumptive guidelines were, told the court that “fifty-seven months is the bottom of the box” but could not recall what the middle-of-the-box or top-of-the-box sentences were. Also, the district court sentenced Barnes to the “lower end of the presumptive sentence” range, 57 months. Based on this record, sufficient evidence exists to support the postconviction court’s finding that Barnes was offered a “low end” of the box sentence in exchange for a guilty plea. *Russell*, 562 N.W.2d at 672 (noting that postconviction court’s decision will be upheld so long as sufficient evidence exists). Even if we were

inclined to disagree with the district court's finding, it would exceed the scope of our review to substitute our judgment for that of the district court's. *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 779 (Minn. 1989) ("An appellate court exceeds its proper scope of review when it bases its conclusions on its own interpretation of the evidence and, in effect tries the issues anew and substitutes its own findings for those of the trial judge."); *see also Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 102 (Minn. 1999) ("An appellate court may not reverse a trial court due to mere disagreement with its findings."); *Gjovik v. Strobe*, 401 N.W.2d 664, 668 (Minn. 1987) (appellate court "should not substitute its findings for that of the trial court merely because it feels that the case was wrongly decided").

The state argues that the written plea petition indicates that the agreed-upon sentence was for 57 months without any mention of a bottom-of-the-box offer. We are not persuaded. The plea petition only allows for the inclusion of a numerical value so it makes sense that only 57 months is listed.

Ultimately, the postconviction court's factual finding that the parties agreed to a bottom-of-the-box sentence is not clearly erroneous because we are not left with the definite and firm conviction, based on the entirety of the evidence, that a mistake occurred. *Diede*, 795 N.W.2d. at 846-47 (quotation omitted).

II. The postconviction court did not abuse its discretion in determining that Barnes's criminal-history score was three.

Next, the state argues that the postconviction court “erred” in finding that Barnes’s criminal-history score was three and not five because it is not supported by the record. We disagree.

The state has the burden of establishing a defendant’s criminal-history score. *Bolstad v. State*, 439 N.W.2d 50, 53 (Minn. App. 1989). We will not disturb a determination of a defendant’s criminal-history score absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

We first note that, while Barnes never challenged the computation of his criminal-history score at the sentencing hearing or on direct appeal, a review of a person’s criminal-history score is nonwaivable. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). Second, the state has forfeited the opportunity to contest Barnes’s criminal-history score. *See State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (noting forfeiture “is a failure to make a timely assertion of a right”). In responding to Barnes’s postconviction petition, the state noted that it took no position on Barnes’s criminal-history score because “this fact is immaterial.” Because the state never challenged Barnes’s assertion that his criminal-history score was three, it cannot now argue that it was error for the postconviction court to find that Barnes’s score was three. *See id.*

The state's forfeiture notwithstanding, the record supports the postconviction court's determination that the two prior Iowa juvenile convictions should not have been included in Barnes's criminal-history score. A prior out-of-state juvenile conviction "can be included in the adult history section only if the factfinder determines that it is an offense for which the offender would have been certified to adult court if it had occurred in Minnesota." Minn. Sent. Guidelines 2.B.5.e (2012). Certification of a juvenile to adult court may occur through three procedures: (1) presumptive certification; (2) prior certification; or (3) non-presumptive certification. Minn. Stat. § 260B.125, subds. 3-5 (2012); Minn. R. Juv. Delinq. P. 18.06, subds. 1-2, 4.

Here, there is simply no evidence in the record that would have allowed the postconviction court to determine that Barnes's prior out-of-state juvenile convictions were certifiable under Minnesota law. As the state concedes, Barnes could not have been presumptively certified because Barnes was only 15 years old when the offenses were committed. Minn. Stat. § 260B.125, subd. 3. Moreover, Barnes provided a print-out from the Iowa state court website with information about his prior juvenile convictions from 1996. Furthermore, the postconviction court did not have any evidence that would have allowed it to determine that Barnes could have been certified under the prior certification or the non-presumptive certification standard. Consequently, the postconviction court determined that those two prior out-of-state juvenile convictions could not be counted towards Barnes's criminal-history score. Accordingly, the postconviction court did not abuse its discretion because the evidence in the record

supports a determination that Barnes’s criminal-history score was three. *See Stillday*, 646 N.W.2d at 561.

III. The postconviction court did not abuse its discretion in resentencing Barnes.

Finally, the state argues that the postconviction court “erred” because, by resentencing Barnes from 57 months to 46 months to reflect the new bottom-of-the-box sentence based on a criminal-history score of three, the postconviction court was, in effect, rejecting the terms of the plea agreement. We disagree.

“[W]hen a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.” *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 499 (1971). “On demonstration that a plea agreement has been breached, the court may allow withdrawal of the plea, order specific performance, or alter the sentence if appropriate.” *Brown*, 606 N.W.2d at 674. Because the parties bargained for a bottom-of-the-box sentence and Barnes’s criminal-history score of three, his 57-month sentence breached the plea agreement. Therefore, it was appropriate for the postconviction court to alter Barnes’s sentence in accordance with the plea agreement. *See id.*

The state’s reliance on *State v. Coles*, 862 N.W.2d 477 (Minn. 2015), is misguided. In *Coles*, the supreme court noted that when a district court imposes a sentence as part of a negotiated plea agreement, a subsequent sentence modification, in effect, rejects the terms of the plea agreement reached by the parties. *Id.* at 480 (citing Minn. R. Crim. P. 15.04, subd. 3(1)). But here, in modifying the sentence, the postconviction court was not rejecting the terms of the plea; instead, the postconviction

court was giving effect to the terms of the plea. Furthermore, the state's suggestion that prior to modifying the sentence, the postconviction court was under an obligation to request plea withdrawal from Barnes is not supported by *Coles* or other controlling precedent. As the supreme court noted in *Brown*, the postconviction court can consider more than just plea withdrawal, including altering a sentence, upon a finding that a plea agreement has been breached. 606 N.W.2d at 674. Accordingly, the postconviction court did not abuse its discretion by modifying Barnes's sentence to conform to a bottom-of-the-box sentence with a correct criminal-history score of three, which is 46 months.

Affirmed.