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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1083

State of Minnesota,
Respondent,

vs.

Gregory Gregory Clemons,
Appellant.

Filed May 8, 2017
Affirmed
Connolly, Judge

Lake County District Court
File No. 38-CR-15-8

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

Laura M. Auron, Lake County Attorney, Two Harbors, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Bradford W. Colbert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his career-offender sentence of the statutory maximum 60 months in prison after he pleaded guilty to financial-transaction-card fraud. Because we see no abuse of discretion in the sentence, we affirm.

FACTS

Appellant Gregory Clemons, 56, pleaded guilty to financial-transaction-card fraud–use–no consent and to misdemeanor theft. At the plea hearing, he was questioned by his attorney as to his prior convictions.

> Q: Would you also agree that . . . the transaction-card fraud that you [pleaded] guilty to just a couple minutes ago . . . that that's a felony offense?
> A: Yes.
> . . . .
> Q: And would you also agree that that financial transaction card fraud charge is . . . a theft-related offense?
> A: Yes, sir.
> Q: And you've got a number of prior theft-related offenses on your . . . record, correct?
> A: Unfortunately. Yes, sir.
> Q: And would you . . . agree that—that transaction card fraud charge was committed as a pattern of criminal behavior?
> A: Yes, sir.
> Q: And you and I have discussed the definition of pattern of criminal conduct in the past.
> A: Um, yes sir.
> Q: . . . [I]t's not identical conduct, but similar in motive, participants, results?
> A: It's the same.
> Q: . . . [A]ll the theft-related behavior, you would agree that . . . at least under the career offender statute that that is a pattern of criminal conduct?
> A: *You bet it is.*

(Emphasis added).

Appellant also said he understood that five prior felony convictions were required for career-offender sentencing, that he had 12 prior felony convictions, and that his sentence was likely to be in the presumptive range, 18 to 60 months, and was "up to the judge."

Appellant's presentence investigation (PSI) stated that, between 1993 and 2012, appellant had committed nine felonies in Minnesota: (1) aiding and abetting simple robbery; (2) receiving stolen property, (3) offering a forged check, (4) attempted theft of property, (5) burglary, (6) burglary, (7) third-degree burglary, (8) third-degree burglary, and (9) felony theft from a person–indifferent to owner rights, resulting in a criminal-history score of eight. The PSI also noted that the presumptive sentence for the offense on which appellant was being sentenced was 18 to 25 months but recommended an increased sentence of 60 months based on appellant's previous felony convictions and on the fact that his offense was part of a pattern of criminal conduct.

At the sentencing hearing, the victim of the financial-transaction-card fraud testified that she had employed appellant as a handyman, he had been a good worker, he did not get the help he needed to handle his mother's death, and she thought counseling would be more effective than prison in helping him.

The state's attorney testified that appellant (1) had been in prison at least ten times, (2) had never successfully completed supervised release, (3) had 78 write-ups while incarcerated, (4) had a pattern of criminal behavior for almost 40 years, (5) had 41 convictions, (6) habitually reoffended soon after release from incarceration, (7) has been eligible for sentencing as a career offender since 1990, and (8) was sentenced as a career offender in 1994.

Appellant's attorney testified that appellant's previous offenses were already factored into his sentence through his criminal-history score; his fraudulent use of another's financial-transaction card amounted to only $476.66, near the low end of the $250 to $2,500 range for that crime; he suffered from a traumatic brain disorder resulting from his attempt to hang himself in prison in 1994; he relapsed into drug use to deal with the shock of his mother's death; although he has no drug offenses, his financial crimes were committed to obtain financing for his drug habit; and an aggravated sentence would be preventative detention.

The district court said:

> [I]t's not about the fact that you stole $500. It's about the fact that you have been committing crimes for over 35 years. . . .
>
> . . . .
>
> You have such a lengthy history of criminal activity in this matter that I have no problem at all granting . . . an upward departure in the sentencing of this matter because that's what the . . . [career] offender statute is for. You have clearly demonstrated that you are a . . . [career] offender. You have a . . . lengthy criminal history, and despite the fact that your most recent crime spree may be viewed [as] small, . . . when viewed in light of the total history of your case, it's a lengthy history. It's a substantial history, and it justifies substantial punishment in your case.
>
> You [yourself] and through your attorney have made arguments that much of what happened has been the result of substance abuse. There's . . . very little independent evidence of that – or that your problems have been the result of perhaps mental illness as a result of the traumatic brain injury.

The district court sentenced appellant to 60 months, finding that he was "eligible for that sentence pursuant to the career offender statute."

Appellant challenges his sentence, arguing that there was not a sufficient factual basis to sentence him as a career offender and that imposing the statutory-maximum sentence was an abuse of discretion.

D E C I S I O N

1. Career-Offender Determination

Appellant argues that he was incorrectly determined to be a career offender because he had only one prior conviction of transaction-card fraud and that was many years ago, so his present offense was not part of "a pattern of criminal conduct." *See* Minn. Stat. § 609.1095, subd. 4 (2014) (providing for an upward durational departure if an offender has five or more prior felony convictions and the present offense was part of a pattern of criminal conduct).

In reviewing a challenge to the sufficiency of the evidence to establish a pattern of criminal conduct, an appellate court is "limited to determining whether the evidence was sufficient to support the conclusion reached by the [factfinder]" and the record is reviewed "in the light most favorable to the [factfinder's] determination." *State v. Outlaw*, 748 N.W.2d 349, 357 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

"A pattern of criminal conduct is established upon proof of criminal conduct similar, but not identical, in motive, purpose, results, participants, victims or other shared characteristics." *Id.* (quotations omitted). Appellant's list of prior convictions on his PSI reads:

1. Felony Simple Robbery count 3 . . .

. . . .

4. Felony Financial [transaction] Card Fraud
5. Felony Receiving Stolen Property
6. Felony Simple Robbery (Aid/Abet)
7. Felony Attempt[ed] Theft of Property
8. Felony Receiving Stolen Goods
9. Felony Offering a Forged Check

. . . .

12. . . . Felony Theft from a Person

All these crimes had as their motive obtaining others' property. In addition, there are five counts of felony burglary, all of which involved theft. It was not necessary that appellant have five prior financial-transaction-card-fraud offenses to conclude that his most recent offense was part of a pattern of criminal conduct. *See id.* ("[C]onduct similar, but not identical, in motive" is sufficient to establish a pattern of criminal conduct).

Moreover, appellant himself admitted he met the requirements for a career-offender sentence at the plea hearing when he was questioned by his attorney. When asked, "[A]ll the theft-related behavior, you would agree that . . . at least under the career offender statute that that is a pattern of criminal conduct?" appellant answered, "You bet it is." Appellant does not explain the contradiction between his answers at the plea hearing and his argument on appeal.

When a defendant "admitted at his guilty-plea hearing he 'had five or more prior felonies' and 'that this particular offense forms a pattern with those offenses,'" those admissions "[could] be used to increase the sentence above the presumptive guidelines sentence." *Vickla v. State*, 793 N.W.2d 265, 269 (Minn. 2011). Appellant's admissions and his criminal record provided a sufficient factual basis for the district court's determination that appellant was a career offender.

2. The Sentence

> [An appellate court reviews] a district court's decision to depart from the presumptive guidelines sentence for an abuse of discretion. If the reasons given are legally permissible and factually supported in the record, then [it] will affirm the departure.
>
> . . . [The career-offender] statute does not limit the [district] court's discretion and does not require any additional findings before sentencing a defendant to the statutory maximum.

Id. (quotations and citations omitted). Appellant argues that his statutory-maximum sentence was excessive and an abuse of discretion. We disagree. Contrary to appellant's argument, the fact that he charged less than $500 to another person's credit card did not make him guilty of only a misdemeanor; Minn. Stat. § 609.821 (2014), under which he was convicted, provides that financial-transaction-card fraud is a felony. Appellant offers no support for the implication that a reviewing court may disregard the statute under which an offender was convicted and consider another statute when reviewing the sentence. Moreover, the district court made it clear that the sentence was not based exclusively on appellant's current offense but rather on the fact that appellant has "been committing crimes for over 35 years." When sentencing under the career-offender statute, a district court is entitled "to consider a defendant's entire criminal history to determine . . . the length of the sentence that will be imposed." *Id.* at 271.

"If the reasons given [for departing from the presumptive guidelines sentence] are legally permissible and factually supported in the record, then [this court] will affirm the departure." *Id.* at 269 (quotations omitted). The district court's reasons meet both those criteria.

Affirmed.