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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1797**

State of Minnesota,
Respondent,

vs.

Joshua Marvin Duncan,
Appellant.

**Filed October 23, 2017
Reversed and remanded
Kalitowski, Judge***

Stearns County District Court
File Nos. 73-CR-16-2215, 73-CR-16-6060

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

Janelle P. Kendall, Stearns County Attorney, Hannah J. Prokopowicz, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

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

Considered and decided by Schellhas, Presiding Judge; Ross, Judge; and
Kalitowski, Judge.

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant challenges his sentences for third-degree assault and for two domestic abuse no contact (DANCO) violations, arguing that (1) a decayed 1996 conviction was erroneously included in his criminal history score (CHS) for the third-degree assault sentence; (2) he did not have the requisite two prior qualifying convictions for his DANCO violations to be sentenced as felonies because he had not been convicted of the third-degree assault at the time he committed the DANCO violations; and (3) even if the DANCO violations were felonies, a custody status point should not have been included in his CHS when they were sentenced because, at the time he committed the DANCO violations, he was not in custody. We conclude that (1) the decayed conviction was erroneously included in appellant's CHS when he was sentenced for third degree assault; (2) the DANCO violations were appropriately sentenced as felonies; and (3) a custody point was appropriately included in those sentences. Because the error in computing appellant's CHS affected all his sentences, we reverse and remand for resentencing.

DECISION

The district court's determination of a defendant's CHS will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Appellant Joshua Duncan was convicted of felonies in 1996, 2001, 2002, and 2010; his 2010 conviction was for second-degree assault. In March 2016, following an incident involving appellant's wife and another male, appellant was charged with third-degree

assault and gross misdemeanor domestic assault. A DANCO was issued prohibiting appellant from having any contact with his wife.

The state agreed to dismiss the gross-misdemeanor domestic assault charge in exchange for appellant's guilty plea to third-degree assault. At the plea hearing, appellant's attorney questioned him.

- Q. [W]e talked about the fact that assault charges are something that can be considered over the next ten years to enhance or make any future charges higher level. You understand that?
- A. Yes.
- Q. So that if nine years from being sentenced in this matter, there was something that normally might be a misdemeanor assault charge and this is still on your record because of the ten-year period, there's a factor that that could be enhanced to a higher level, gross misdemeanor, or depending on what comes in between, possibly a felony. Do you understand that?
- A. Yes.
- Q. And now, at the very end of this [petition] is your signature, correct?
- A. Yes.
- Q. You signed that understanding what the agreement was and understanding your rights, is that correct?
- A. Yes.

The district court also questioned appellant:

- Q. Sir, are you pleading guilty because you are guilty?
- A. Yes.
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- Q. Are you making any claim that you are innocent of third-degree assault?
- A. No.
- Q. Last question, sir, this is your signature on the last page of this petition that I'm holding, correct?
- A. Yes.
- Q. This Court finds that this defendant has knowingly and voluntarily waived his rights, he understands the

enhanceability of this offense, and factual basis exists to accept his guilty plea to the third-degree assault.

Because the state had agreed to dismiss the domestic-abuse charge, appellant's attorney asked that the DANCO be removed, saying "there really isn't a jurisdiction for a [DANCO] in this case any longer." The district court denied the request: "Since the Court has not officially dismissed the domestic abuse charge at this time, I believe I do have the jurisdiction to keep the DANCO in place, and it is my intention to do so until the time of sentencing."

In June 2016, appellant, while in custody for the third-degree assault, violated the DANCO by using a third person to make three phone calls to his wife. Based on a second-degree assault conviction in 2010 and his third-degree assault conviction in March 2016, appellant was charged with three felonies. See Minn. Stat. § 629.75, subd. 2 (d) (2016) ("A person is guilty of a felony. . . if the person violates this subdivision: (1) within ten years of the first of two or more previous qualified domestic violation-related offense convictions . . ."). In July 2016, appellant pleaded guilty to two felony charges; the third DANCO charge was dismissed.

A sentencing hearing was held on both the third-degree assault and the DANCO violations. Based on his convictions in 1996, 2001, 2002, and 2010, appellant's CHS was determined to be a four when he was sentenced for the third-degree assault. The presumptive sentence for third-degree assault with a CHS of four is 24 months in prison, executed, and that sentence was imposed. But, as the parties now agree, appellant's CHS when sentenced for the third-degree assault should have been three, because the decayed

1996 conviction should not have been included. The presumptive sentence for third-degree assault with a CHS of three is 21 months in prison, stayed. We therefore reverse and remand appellant's third-degree assault sentence for imposition of the presumptive 21 months, stayed.

Appellant's third-degree assault conviction increased his CHS for the first DANCO violation from three to four and the second DANCO violation from four to five. *See State v. Murphy*, 545 N.W.2d 909, 917 (Minn. 1996) (citing *State v. Hernandez*, 311 N.W.2d 478, 479 (Minn. 1981), to hold that, when sentencing a defendant on the same day for multiple offenses not part of a single behavioral incident, occurring at different times, and involving different victims, a district court may assign one criminal history point for each previous felony conviction); *see also State v. VanRuler*, 378 N.W.2d 77, 80 (Minn. 1985) (affirming use of the *Hernandez* method in sentencing multiple convictions against the same victim).

But appellant argues that the DANCO violations should not have been sentenced as felonies because, at the time he committed them in June 2016, he had not yet been convicted of third-degree assault for his May 2016 offense. He asserts that it was not until the August 2016 sentencing hearing that the district court adjudicated him guilty of third degree assault.

We agree that it would have been preferable for the district court to have explicitly stated that appellant was convicted at the plea hearing. But “a ‘conviction’ [within the meaning of Minn. Stat. § 609.02, subd. 5, (2016)] occurs when the district court accepts the guilty plea and the acceptance is on the record.” *State v. Nodes*, 863 N.W.2d 77, 81

(Minn. 2015). Here, at the plea hearing, the district court asked appellant, “Sir, knowing that the assault conviction can be used to make any future assault charges more serious, do you still want me to accept your guilty plea today?” and appellant answered, “Yes.” The district court also stated “that this defendant has knowingly and voluntarily waived his rights, he understands the enhanceability of this offense, and a factual basis exists to accept his guilty plea to the third-degree assault.” Thus, we conclude that appellant was convicted of third-degree assault at the plea hearing, prior to committing the DANCO violations, which were properly sentenced as felonies. *See* Minn. Stat. § 629.75, subd. 2 (d); *see also In re Peer Review Action*, 749 N.W.2d 822, 829 (Minn. App. 2008) (noting that magic words such as convict “are not required for an appellate court to conclude that a district court made a legally appropriate determination, when that determination can be inferred from the district court’s actions”).

Finally, appellant argues that a custody points should not have been added to his CHS for the DANCO violations because he was not in custody when they occurred. But a custody-status point is assigned when an offender is in “confinement in a jail, workhouse, or prison pending or after sentencing.” Minn. Sent. Guidelines 2.B.2.a.(1)(vi). Appellant, having violated the conditions of his conditional release, had been returned to jail pending sentencing following his conviction of third-degree assault when he committed the DANCO violations. Thus, the custody status points were properly added, giving him a CHS of five for the first DANCO violation and six for the second DANCO violation. This resulted in sentencing ranges of 23 to 32 months and 26 to 36 months in prison, executed,

for the two DANCO violations and presumptive middle-of-the-box sentences of 27 and 30 months in prison, executed.

In conclusion, because the error in including the 1996 conviction in appellant's CHS resulted in an erroneous sentence for the third-degree assault and affected his sentences on the DANCO violations, we reverse all three sentences and remand for resentencing consistent with this opinion.

Reversed and remanded.