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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1989**

State of Minnesota,
Respondent,

vs.

Dustin Anthony Wittern,
Appellant.

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

Washington County District Court
File No. 82-CR-15-2683

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

Pete Orput, Washington County Attorney, Nicholas A. Hydukovich, Assistant County Attorney, Stillwater, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Florey, Presiding Judge; Rodenberg, Judge; and Kirk, Judge.

UNPUBLISHED OPINION

RODENBERG, Judge

Appellant Dustin Anthony Wittern challenges his sentence after his conviction of first-degree controlled substance crime, arguing that the district court should have applied

the Minnesota Sentencing Guidelines, as amended by Section 18 of the 2016 Drug Sentencing Reform Act (DSRA), because his conviction was not final at the time the statute took effect. Because the amelioration doctrine applies here, we reverse and remand to the district court for resentencing.

FACTS

Appellant Dustin Anthony Wittern was charged with first-degree controlled substance crime in violation of Minn. Stat. § 152.021, subd. 2(a)(1) (2014). He pleaded guilty on May 23, 2016. The district court followed the 2015 Minnesota Sentencing Guidelines for a severity-level nine offense and a criminal history score of five points, and sentenced appellant to 146 months in prison on September 15, 2016. Minn. Sent. Guidelines 4.A (Supp. 2015).

This appeal followed.

DECISION

Appellant argues on appeal that the amelioration doctrine requires the 2016 DSRA-amended sentencing grids to be applied to his conviction, which was not yet final when the DSRA went into effect. 2016 Minn. Laws ch. 160 §§ 1-18, at 576; 22 at 592. “[I]nterpretation of the sentencing guidelines [is] subject to de novo review. . . . We apply the rules of statutory construction to our interpretation of the sentencing guidelines.” *State v. Campbell*, 814 N.W.2d 1, 3 (Minn. 2012) (citation omitted).

The Minnesota Sentencing Guidelines provide presumptive sentences for criminal offenders. Minn. Sent. Guidelines (2016). The guidelines were amended by the DSRA, which was signed into law on May 22, 2016. 2016 Minn. Laws ch. 160 § 22 at 592. The

majority of the act's provisions became effective on August 1, 2016, while Section 18 (amending the sentencing grids) went into effect on May 23, 2016. 2016 Minn. Laws ch. 160 §§ 1-18, at 591; 22 at 592. Section 18 of the DSRA reduced the severity level of first-degree controlled substance crimes from a severity level 9 to a D8 on the newly created Drug Offender Grid. *Compare* Minn. Sent. Guidelines 4.A (Supp. 2015), *with* Minn. Sent. Guidelines 4.C. (2016) (demonstrating the changes made to the sentencing grids pursuant to the DSRA). Under the revised guidelines, the presumptive sentence for a first-degree controlled substance crime where the offender has a criminal history score of five is 115 months, with a range from 98 to 138 months. Minn. Sent. Guidelines 4.C (2016).

Appellant challenges the district court's sentence, which applied the pre-DSRA sentencing grid. The common law amelioration doctrine allows for the application of an amended statute to a nonfinal conviction. *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017). The doctrine was applied by the Minnesota Supreme Court in *State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979) ("[A] statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached."). The supreme court most recently applied the doctrine to the DSRA sentencing-guideline amendments in *Kirby*.

In *Kirby*, the Minnesota Supreme Court set out the rule regarding the applicability of the amelioration doctrine:

An amended statute applies to crimes committed before its effective date if: (1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates

punishment; and (3) final judgment has not been entered as of the date the amendment takes effect.

Kirby, 899 N.W.2d at 490. The supreme court held that: (1) the Legislature did not intend to “abrogate” the amelioration doctrine as it pertained to the statute; (2) Section 18 of the DSRA, and the DSRA as a whole, mitigates punishment; and (3) a defendant whose conviction was not final when Section 18 of the DSRA became effective on May 23, 2016 is entitled to resentencing under the sentencing grids as amended. *Id.* at 496. The supreme court vacated Kirby’s first-degree controlled substance sentence and remanded to the district court for resentencing in accordance with the amended sentencing grids. *Id.*

The outcome in *Kirby* guides our decision here. *Kirby* holds that the amelioration doctrine applies to the DSRA, and that the DSRA mitigates punishment for first-degree drug offenders whose convictions were not yet final. *Id.* at 496. As was the case in *Kirby*, appellant’s conviction was not final when Section 18 took effect. Appellant pleaded guilty to one count of first-degree controlled substance crime. Section 18 of the DSRA, amending the sentencing grids to provide a lower presumptive sentence for appellant’s crime, became effective the same day appellant’s guilty plea was entered. 2016 Minn. Laws ch. 160 §§ 18, at 591; 22 at 592. The availability of appeal in appellant’s case was not exhausted at the time the statute went into effect. *See Hutchinson v. State*, 679 N.W.2d 160, 162 (Minn. 2004) (finding a conviction to be final when “judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or . . . finally denied” (quotation omitted)). Appellant was sentenced on September 15, 2016, nearly four months after Section 18 became effective. As in *Kirby*, the amended sentencing

grids should also apply in appellant's case to determine his presumptive sentence. *Kirby*, 899 N.W.2d at 496.

Because the supreme court's reasoning in *Kirby* controls in this case, we reverse appellant's sentence and remand to the district court for resentencing.

Reversed and remanded.