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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0227**

State of Minnesota,
Respondent,

vs.

Robert Clem Kibble,
Appellant.

**Filed January 2, 2018
Reversed and remanded
Cleary, Chief Judge**

Redwood County District Court
File No. 64-CR-16-553

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

Jenna M. Peterson, Redwood County Attorney, Redwood Falls, Minnesota (for
respondent)

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

Considered and decided by Jesson, Presiding Judge; Cleary, Chief Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

Appellant Robert Kibble challenges his 94-month sentence, arguing that he is
entitled to be resentenced in accordance with the provisions of the Drug Sentencing Reform

Act (DSRA). 2016 Minn. Laws ch. 160. Appellant also requests clarification on the effect of the mandatory minimum provision of Minn. Stat. § 609.11, subd. 4 (2014) on his sentence. Because appellant is entitled to resentencing under the amelioration doctrine, and because the effect of the mandatory minimum provision of Minn. Stat. § 609.11, subd. 4 is unclear, we reverse and remand for further findings and resentencing.

FACTS

On July 26, 2016, police found 10.92 grams of heroin, two pellet guns, and other evidence of the sale of drugs in appellant's residence. In October 2016, appellant was charged with eight counts of controlled-substance crime, with reference to Minn. Stat. § 609.11, subd. 5 (2014), a sentencing provision that triggers a mandatory minimum penalty for offenders who possess or use a firearm during the commission of the underlying offense. At a pretrial hearing, the parties notified the district court that they had reached a plea agreement. The district court inquired about the effect of *State v. Haywood*, 886 N.W.2d 485 (Minn. 2016) on the charges against appellant. In *Haywood*, the supreme court held that the plain meaning of the word "firearm" does not include pellet guns like the two alleged to be in appellant's possession at the time. 886 N.W.2d at 490. The parties agreed to continue the hearing and conduct further research on the potential effect of *Haywood* on the charges against appellant. To account for *Haywood*, the state amended the charges against appellant to include one count of first-degree controlled substance crime in violation of Minn. Stat. § 152.021, subd. 1(1) (2014), with reference to Minn. Stat. § 609.11, subd. 4. Minn. Stat. § 609.11, subd. 4, imposes a mandatory minimum sentence

of one year and one day for offenders convicted of certain offenses who use or otherwise employ a dangerous weapon other than a firearm during their offense. On November 14, 2016, appellant pleaded guilty to the amended charge and received a 94-month sentence. At the time, appellant's criminal-history score of two and offense-severity level of nine made the range of his presumptive sentence between 94 and 132 months. Minn. Sent. Guidelines 4.A. (2014). The district court established the factual basis for the guilty plea. Appellant admitted to possessing the 10.92 grams of heroin found during the execution of the search warrant with the intent to sell to other individuals. Appellant also admitted that the pellet guns were in his possession at the time of the offense. After these facts were established, the district court found appellant guilty of "count number eleven" and sentenced him to 94 months. This appeal follows.

D E C I S I O N

I. Appellant is entitled to resentencing under the 2016 Drug Sentencing Reform Act.

Appellant asserts that he is entitled to the ameliorative effects of the DSRA. We agree.

We review questions of statutory construction and interpretation of the sentencing guidelines de novo. *State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012). "We apply the rules of statutory construction to our interpretation of the sentencing guidelines." *Id.* The DSRA made significant changes to Minnesota's drug laws, including changes to the threshold weight requirements for first-degree drug crimes and amendments to the sentencing guidelines for drug crimes. 2016 Minn. Laws ch. 160. The majority of the

DSRA's provisions became effective on August 1, 2016. 2016 Minn. Laws ch. 160, §§ 1-13, at 576-77, 579, 581-83, 585-88; 15-17, at 589-90; 22, at 592. Section 18 of the DSRA reduced the presumptive sentencing ranges for first-degree drug crimes and became effective on May 23, 2016, the day following final enactment. 2016 Minn. Laws ch. 160, § 18(b)(4)-(5), at 591; *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017).

The common-law amelioration doctrine allows for the application of an amended statute to a nonfinal conviction. *Kirby*, 899 N.W.2d at 488. In *Kirby*, the supreme court concluded that the amelioration doctrine applies 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.

Id. at 490. The supreme court held that: (1) the legislature did not intend to abrogate the amelioration doctrine with respect to the DSRA; (2) section 18 and the DSRA as a whole mitigate punishment; and (3) a defendant whose conviction was not yet final on May 23, 2016, the effective date of section 18, is entitled to resentencing under the amended sentencing guidelines. *Id.* at 496.

Here, as in *Kirby*, all three requirements are satisfied and appellant is entitled to resentencing. The legislature made no clear statement regarding its intent to abrogate the amelioration doctrine with respect to section 18. And the section 18 amendments to the sentencing guidelines for first-degree drug crimes clearly mitigate appellant's punishment, reducing the presumptive sentencing range for an offender convicted of the same crime

with a criminal-history score of two from 94-132 months to 73-102 months. *Compare* Minn. Sent. Guidelines 4.A. (2014) *with* Minn. Sent. Guidelines 4.C. (2016). Finally, appellant's conviction was not yet final on the effective date of section 18. Appellant's crime was committed on July 26, 2016—two months after section 18 became effective, and he was not sentenced until November of 2016—almost six months after section 18 became effective. Accordingly, the amelioration doctrine applies to appellant and he is entitled to resentencing under the DSRA amended sentencing guidelines.

Appellant contends that, because the parties agreed that he should receive a bottom-of-the-box sentence, his sentence should be reduced to 73 months. But the district court is in the best position to weigh sentencing options. *See Massey v. State*, 352 N.W.2d 487, 489 (Minn. App. 1984), *review denied* (Minn. Oct. 16, 1984). And the only restriction on resentencing is that a district court cannot impose a longer sentence than the one originally imposed. *See State v. Prudhomme*, 303 Minn. 376, 380, 228 N.W.2d 243, 246 (1975). The district court is not required to adhere to the parties' agreement on remand and remains in the best position to weigh sentencing options. We reverse appellant's sentence and remand for resentencing in accordance with the DSRA amended sentencing guidelines.

II. The district court must clarify the effect of Minn. Stat. § 609.11, subd. 4, on appellant's sentence.

Appellant requests clarification regarding what effect, if any, the dangerous weapon provision of Minn. Stat. § 609.11, subd. 4, has on his sentence. We agree that clarification is necessary.

Minn. Stat. § 609.11 governs mandatory minimum sentences of imprisonment. Offenders sentenced under provisions of Minn. Stat. § 609.11 are not eligible for early release programs and must serve the full term of their sentence. Minn. Stat. § 609.11, subd. 6 (2014). Subdivision 4 provides that offenders who “used, . . . or otherwise employ[ed], a dangerous weapon other than a firearm” be committed to the commissioner of corrections for “not less than one year plus one day.” Minn. Stat. § 609.11, subd. 4. The state amended the charges against appellant in response to the *Haywood* ruling but failed to allege that appellant “used” or otherwise employed the pellet guns. At the plea hearing, the district court conducted the inquiry into the factual basis for the plea and established that appellant had the pellet guns “in the residence or in [appellant’s] possession or within [the] area that [he] could uh, use.” But there was no finding or admission that appellant used or otherwise employed the pellet guns during the offense. Because the state failed to allege that appellant “used” the pellet guns and because there was no finding or admission that established appellant’s use of the pellet guns during the offense, there is insufficient evidence to support the Minn. Stat. § 609.11, subd. 4, sentencing provision.

However, it is unclear whether the district court imposed the mandatory minimum provision on appellant. The district court found appellant guilty of “count number eleven” of “controlled substance crime in the first degree” but made no reference to Minn. Stat. § 609.11, subd. 4. The warrant of commitment contains a reference to Minn. Stat. § 609.11, subd. 4, but classifies it as “not chargeable” and the terms of disposition or sentence portion does not include a reference to the mandatory minimum provision. On this record, there is

insufficient evidence to support the mandatory minimum provision and it is unclear whether it was actually imposed on appellant. We remand for further findings on the applicability of Minn. Stat. § 609.11, subd. 4, to appellant.

Reversed and remanded.