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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0702**

State of Minnesota,
Respondent,

vs.

James Irving Dale,
Appellant.

**Filed February 26, 2018
Remanded
Florey, Judge**

Sherburne County District Court
File No. 71-CR-16-1588

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

Kathleen A. Heaney, Sherburne County Attorney, Samuel Wertheimer II, Assistant County Attorney, Elk River, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Larkin, Presiding Judge; Bratvold, Judge; and Florey, Judge.

UNPUBLISHED OPINION

FLOREY, Judge

Appellant challenges the district court's calculation of his criminal-history score, arguing that two of his previous felony convictions arose out of a single course of conduct

and should only count as one criminal-history point. We remand for a determination of whether appellant's offenses were part of a single course of conduct.

FACTS

In March 2002, appellant James Irving Dale pleaded guilty to third-degree burglary and possession of burglary tools in a South Dakota court. These convictions resulted from an incident where Dale broke into a golf course clubhouse.

On November 9, 2016, Dale was charged with two counts of third-degree burglary and one count of misdemeanor fleeing a peace officer for a burglary in Sherburne County, Minnesota. Dale took the case to trial and was convicted by a jury of one count of attempted third-degree burglary and the misdemeanor fleeing charge.

Both before and after his trial, Dale objected to how his South Dakota convictions were being used to compute his criminal-history score. Dale argued that his South Dakota convictions should only count as one point because they arose from a single course of conduct. The district court disagreed and assigned a point for each conviction, reasoning that if these crimes had occurred in Minnesota they would be two separate felony convictions. On February 1, 2017, the district court sentenced Dale to a year and a day for the attempted third-degree burglary charge and to a concurrent 90-day sentence for the misdemeanor fleeing a peace officer.¹ Dale appealed. While his appeal was pending, his sentence expired.²

¹ Dale was given 86 days of jail credit.

² Dale is currently serving a 25-month sentence on a different case that is not part of this appeal.

DECISION

Dale argues that the district court erred in computing his criminal-history score. More specifically, Dale argues that his previous convictions in South Dakota for burglary and possession of burglary tools should only count for one criminal-history point, not two as the district court determined, because both crimes arose from a single course of conduct.

Before reaching the merits of Dale's claim, we first address the state's argument that Dale served his full sentence and, therefore, this issue is moot under *State v. Shotley*, 305 Minn. 384, 233 N.W.2d 755 (1975). In *Shotley*, the Minnesota Supreme Court determined that a defendant's sentencing irregularity was moot since the defendant had finished serving the sentence. 305 Minn. at 389-90, 233 N.W.2d at 759. But the sentence in *Shotley* involved a mere procedural irregularity in handing down the sentence; the claim did not affect the legality of the sentence itself. *See id.* That is not true here. Here, Dale is claiming that his sentence was illegal, and the Minnesota Supreme Court has held that an illegal sentence may be corrected "at any time." *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) (citing Minn. R. Crim. P. 27.03, subd. 9). We conclude that Dale's claim is not moot.

The state also argues that Dale waived his right to protest his criminal-history calculation when he entered into a plea agreement with the state. For support, the state cites to *Johnson v. State*, which states that if a sentence results from a plea agreement, and if both sides retain some benefit from that agreement, reviewing courts should not reduce the sentence because that could allow the defendant to retain the benefits of the agreement while undermining the benefit to the state. 877 N.W.2d 776, 779 (Minn. 2016).

But *Johnson* is inapplicable because this case does not involve a plea agreement. The state admits that Dale took this case to trial and was convicted by a jury of attempted third-degree burglary and misdemeanor fleeing a peace officer. At no point in this case was a plea agreement reached, and neither side retained any benefit that would be undermined by possibly reducing Dale’s sentence. We also reiterate the holding in *Maurstad* that a sentence resulting from an improperly computed criminal-history score is an “illegal sentence” which may be corrected “at any time” and cannot be waived by the defendant. 733 N.W.2d at 147 (quotation omitted). For these reasons, we conclude that Dale did not—and could not—waive his criminal-history-score issue.

We now turn to the question of whether the district court incorrectly computed Dale’s criminal-history score. We will not reverse a district court’s criminal-history-score calculation absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). The question of whether multiple offenses were committed as part of a single course of conduct involves factual determinations that we review for clear error. *See State v. O’Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). But when the facts are not disputed, whether multiple offenses arose from a single course of conduct presents a question of law, which we review de novo. *See State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

Typically, calculating a defendant’s criminal-history score involves matching each prior felony to a severity level and adding up the corresponding point totals. Minn. Sent. Guidelines 2.B.1.a (2016). However, there is an exception to this rule where multiple sentences were imposed for crimes committed during a single course of conduct. In that

case, only the points from the most severe crime arising out of a single course of conduct should be used. *Id.* at 2.B.1.d.(1). The full rule states:

Assigning Felony Weights – Previous Court Appearances Resulting in Multiple Sentences. Following are exceptions to including prior felonies in criminal history when multiple felony sentences were imposed in a previous court appearance:

(1) Single Course of Conduct / Multiple Sentences. When multiple sentences for a single course of conduct were imposed under Minn. Stats. §§ 152.137, 609.585 or 609.251, include in criminal history only the weight from the offense at the highest severity level.

*Id.*³ And in cases like Dale’s, where the prior felony convictions come from outside of Minnesota, the guidelines state that the court must make the final determination as to whether and how those convictions are computed in the criminal-history score. *Id.* at 2.B.5.a.

The district court in this case found that Dale’s South Dakota convictions for third-degree burglary and possession of burglary tools were analogous to convictions in Minnesota under Minnesota Statutes section 609.582 (2016) and Minnesota Statutes section 609.59 (2016) respectively. The district court then decided that both convictions

³ We briefly note a possible discrepancy between this provision in the sentencing guidelines and Minn. Sent. Guidelines cmt. 2.B.107 which states, “[i]n cases of multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.” Since Minn. Stat. § 609.585 (2016) allows multiple convictions and sentences for burglary and “any other crime committed on entering or while in the building entered,” it seems that comment 2.B.107 would not apply while section 2.B.1.d.(1) would. We are also mindful that “[c]omments to the sentencing guidelines . . . are advisory and are not binding on the courts,” and therefore, this note is only intended to remark on a possible conflict. *State v. Jones*, 848 N.W.2d 528, 537 (Minn. 2014).

could count for a total of two criminal-history points because, under Minnesota Statutes section 609.585, each of these crimes would be a separate felony conviction under Minnesota law. *See* Minn. Stat. § 609.585 (“Notwithstanding section 609.04, a prosecution for or conviction of the crime of burglary is not a bar to conviction of or punishment for any other crime committed on entering or while in the building entered.”).

However, the question is not whether each of these South Dakota convictions could be separately recorded in Minnesota. Instead, the question is whether the two convictions arose out of a single course of conduct as understood by the Minnesota Sentencing Guidelines. *See* Minn. Sent. Guidelines 2.B.1.d.(1). In considering whether multiple offenses constitute a single course of conduct, we look at factors such as “time, place, and whether the offenses were motivated by a desire to obtain a single criminal objective.” *State v. Gould*, 562 N.W.2d 518, 521 (Minn. 1997). This is not a mechanical test but rather an analysis of all the facts and circumstances. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). The state must prove by a preponderance of the evidence that the offenses did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

In Dale’s case, the district court did not analyze whether his South Dakota convictions arose out of a single course of conduct, and in this court’s attempt to make that determination, we observe that the record below is limited. From what we can glean, Dale’s South Dakota convictions resulted from entering a golf-course clubhouse to steal cash and other personal property, but there is not much else beyond this rough factual sketch. The lean record prevents us from determining whether the district court abused its

discretion in awarding Dale two criminal-history points. For this reason, we remand this case to the district court for a determination of whether Dale's South Dakota convictions arose from a single course of conduct and, if so, to correct Dale's criminal-history score and sentencing worksheet by recording a criminal-history point from only the more serious offense.⁴ See *State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (stating that appellate courts may remand for findings when necessary to review the district court's order).

Remanded.

⁴ Reversal is not warranted as Dale was sentenced to the minimum felony sentence of a year and a day, so Dale's relief, if any, is limited to a correction of his criminal-history score on the sentencing worksheet for the attempted third-degree burglary conviction.