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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0741**

State of Minnesota,
Respondent,

vs.

Brock Lawrence Altringer,
Appellant.

**Filed March 4, 2019
Reversed and remanded
Smith, Tracy M., Judge**

Polk County District Court
File No. 60-CR-16-64

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney,
Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael McLaughlin, Assistant
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Considered and decided by Smith, Tracy M., Presiding Judge; Ross, Judge; and
Slieter, Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Brock Lawrence Altringer challenges his sentence for first-degree sale of
ten or more grams of methamphetamine, arguing that it is based on an incorrect criminal-

history score. Specifically, Altringer argues that (1) the postconviction court erred by placing the burden on him to prove his criminal-history score while his direct appeal was still pending and (2) the postconviction court clearly erred in finding that his prior convictions for third-degree assault and false imprisonment arose out of separate behavioral incidents and therefore should each be counted in his criminal-history score. We conclude that, on the procedural posture of this case, the state bore the burden of proof regarding Altringer's criminal-history score. We also conclude that the postconviction court erred in finding that the two prior convictions arose out of separate behavioral incidents. We therefore reverse and remand for resentencing based on the correct criminal-history score.

FACTS

In October 2016, Altringer pleaded guilty to one count of first-degree sale of ten or more grams of methamphetamine in exchange for the dismissal of other charges. The parties agreed to a sentence capped at the presumptive sentence under the Minnesota Sentencing Guidelines.

The district court sentenced Altringer to 158 months in prison, which was the presumptive sentence, under the 2015 sentencing guidelines grid, for a first-degree controlled substance conviction for a person with a criminal-history score of six. In determining Altringer's criminal-history score, the district court assigned one point for Altringer's conviction for third-degree assault and one point for his conviction for false imprisonment, both of which were entered following his 2005 guilty plea to charges relating to conduct occurring from July 24 through July 27, 2003, against his then-

girlfriend. Altringer appealed his 158-month sentence in this case but, in September 2017, filed a motion to stay the appeal pending postconviction proceedings, which this court granted.

In October 2017, Altringer filed a petition for postconviction relief, alleging that he was entitled to be resentenced in accordance with the Drug Sentencing Reform Act of 2016 (DSRA). *See State v. Kirby*, 899 N.W.2d 485, 496 (Minn. 2017) (holding that the doctrine of amelioration applies to a defendant whose conviction was not yet final when the DSRA took effect). Altringer also asserted, for the first time, that his criminal-history score was incorrect and should be five, not six, because the 2005 convictions arose out of the same behavioral incident.

In April 2018, the postconviction court denied Altringer’s petition, in part. Placing the burden of proof on Altringer, the postconviction court found that his 2005 convictions for assault and false imprisonment arose from separate behavioral incidents sufficient to justify the two points they added to his score and that his criminal-history score was therefore correct. Because the state conceded that Altringer was entitled to be resentenced under the DSRA, the postconviction court granted that relief, and Altringer was later resentenced to 125 months’ imprisonment.

In June 2018, Altringer’s direct appeal was reinstated.

D E C I S I O N

Appellate courts review the denial of a petition for postconviction relief for an abuse of discretion. *Matakis v. State*, 862 N.W.2d 33, 36 (Minn. 2015). Appellate courts “review legal issues de novo, but on factual issues [the courts’] review is limited to whether there

is sufficient evidence in the record to sustain the postconviction court’s findings.” *Id.* (quotation omitted). A postconviction court abuses its discretion if it misinterprets or misapplies the law. *Johnson v. State*, 733 N.W.2d 834, 836 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

I. The district court erred in placing the burden of proof on Altringer while his timely direct appeal is stayed and pending before this court.

Altringer argues that the district court committed legal error by placing the burden of proof on him during his postconviction challenge to his criminal-history score while his direct appeal was pending. We agree.

At sentencing, the state bears the burden “to show that a prior conviction qualifies for inclusion within the criminal-history score” and that the criminal-history score is calculated correctly. *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). The state argues, however, that the burden of proof shifted to Altringer because he raised the criminal-history-score issue on postconviction review and, under the postconviction statute, the petitioner generally bears the burden of proof. See Minn. Stat. § 590.04, subd. 3 (2016) (“Unless otherwise ordered by the court, the burden of proof of the facts alleged in the petition shall be upon the petitioner to establish the facts by a fair preponderance of the evidence.”).

That general rule, however, does not apply in the procedural posture here. Altringer filed a direct appeal; he sought and obtained a stay of that appeal for purposes of filing a postconviction petition. In that petition, Altringer raised, for the first time, the issue of his criminal-history score. Appellate review of a defendant’s criminal-history score may not

be forfeited, *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007), “because a sentence based on an incorrect criminal history score is an illegal sentence.” *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (quotation omitted), *review denied* (Minn. July 15, 2008).

In *Outlaw*, we reviewed whether the state had met its burden of proving that the defendant’s out-of-state convictions were felonies for purposes of sentencing enhancement and concluded that it had not; but, because the defendant had not objected to the district court’s determinations at sentencing, we remanded for resentencing and permitted the state to further develop the record. *Id.* In other words, the burden of proof on resentencing would remain with the state. What happened here is similar. Altringer did not object to his criminal-history score at the district court but essentially raised the issue on appeal by seeking a stay of the appeal for postconviction review in order to develop the record. The postconviction court should have decided the criminal-history issue with the burden of proof remaining on the state, which we would then review on the reinstated direct appeal. *See State v. Beecroft*, 813 N.W.2d 814, 836 (Minn. 2012) (“When a defendant initially files a direct appeal and then moves for a stay to pursue postconviction relief, we review the postconviction court’s decisions using the same standard that we apply on direct appeal.”).

This process accords with caselaw dealing with a motion to correct sentence filed during the defendant’s direct appeal period. In *State v. Goff*, the appellant filed a motion to correct his sentence, challenging his criminal-history score, during the direct appeal period. 418 N.W.2d 169, 172 (Minn. 1988). The supreme court held that, because “the defendant filed his motion before the time for direct appeal from judgment of conviction had expired,”

he “did not bear the ultimate burden of proof.” *Id.*; see also *State v. Maley*, 714 N.W.2d 708, 714-15 (Minn. App. 2006) (holding that the state has the burden of proof on a motion to correct a sentence filed during the direct appeal period). In contrast, when a defendant files a motion to correct sentence *after* the time for direct appeal has passed, the supreme court held in *State v. Williams*, the defendant bears the burden of proving the criminal-history score was incorrect. 910 N.W.2d at 743.

The state argues that this case is more like *Williams* because Altringer, in reality, is challenging the imposition of two sentences by the district court in 2005, well beyond the direct-appeal period for that case. We disagree. A sentencing court is obligated to calculate a defendant’s correct criminal-history score, including by deciding whether prior convictions were based on conduct that was part of a single behavioral incident. *Bixby v. State*, 344 N.W.2d 390, 394 (Minn. 1984). Altringer is challenging the criminal-history score that was calculated in this case; he is not collaterally challenging the actions of the district court in 2005.

In sum, Altringer timely appealed and then stayed his appeal to pursue postconviction relief. Similar to *Goff*, the state continued to bear the burden to prove that Altringer’s criminal-history score was calculated correctly—specifically, that his two 2005 convictions arose out of separate behavioral incidents sufficient to justify two criminal-history-score points. The district court therefore committed legal error in assigning Altringer the burden of proof on his postconviction petition.

II. The record does not support the finding that Altringer's 2005 convictions arose from separate behavioral incidents.

Altringer further argues that the evidence does not satisfy the state's burden to prove, by a preponderance of the evidence, that his 2005 convictions arose from separate behavioral incidents. We agree.

This court reviews the district court's determination of a defendant's criminal-history score for an abuse of discretion. *See Maley*, 714 N.W.2d at 711. A defendant's criminal-history score includes points for each prior felony conviction. *State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001); Minn. Sent. Guidelines 2.B (2018). In cases where two prior convictions arose from the same behavioral incident, however, only one conviction should be counted towards the defendant's criminal-history score. *See State v. Kutchara*, 350 N.W.2d 924, 928 (Minn. 1984).

To determine whether the crimes were part of a single behavioral incident, a court looks at (1) "whether the offenses occurred at substantially the same time [and place]" and (2) "whether they were motivated by an effort to obtain a single criminal objective." *State v. Bakken*, 883 N.W.2d 264, 270 (Minn. 2016). "Whether the offenses were part of a single behavioral incident is a mixed question of law and fact," so appellate courts "review the district court's findings of fact for clear error and its application of the law to those facts *de novo*." *Id.*

In support of his postconviction petition, Altringer submitted the amended complaint underlying the 2005 convictions. According to that complaint, on July 24, 2003,

Altringer picked up his girlfriend, M.L., from a job interview. He was visibly angry and upset, and accused her of cheating on him. Altringer backhanded M.L. across the face, and threatened to kill her. Fearing for her life, M.L. jumped out of the vehicle and ran away. Altringer followed her, and told her to get back in the car, which she did. The two of them drove home.

The next day, in the early morning of July 25, 2003, Altringer and M.L. were lying in bed. Altringer asked M.L. to have sex with him, and she refused. Altringer became angry, got on top of her, and punched her in the face with a closed fist. Altringer then threw M.L. on the floor, and repeatedly punched and kicked her. From then on, M.L. “begged and pleaded” with Altringer to bring her to the hospital, but he refused. M.L. lay on the bed until the afternoon of July 26, when she moved to the couch. M.L. continued to beg Altringer to bring her to the hospital, but he refused, even as she was urinating blood. M.L. remained on the couch until the afternoon of July 27, when Altringer agreed to bring her to the hospital.

Altringer was charged with a total of eight criminal counts, including one count of third-degree assault for conduct “on or about July 24 through July 27, 2003” (count 6), and two counts of kidnapping—one for conduct “on or about July 24, 2003” (count 2), and one for conduct “on or about July 24 through July 27, 2003” (count 5). The kidnapping and assault charges were all against the same victim. Aside from the identity of the victim and the dates related to each count, the amended complaint does not specify what facts support which charges. In March 2005, Altringer pleaded guilty to third-degree assault and false

imprisonment, and, in November 2005, the district court sentenced him to 13 months for the false-imprisonment conviction and 18 months for the third-degree-assault conviction.

The state argues that the false-imprisonment conviction and the assault conviction occurred in separate behavioral incidents. It contends that the false imprisonment occurred on the first day, July 24, when Altringer forced M.L. to get back in the car, and that the assault occurred on the second day, July 25, when Altringer violently attacked M.L. in their bedroom. The complaint, however, does not so specify. As for the false imprisonment, that offense is not charged in the complaint. To the extent that false imprisonment was, as the state asserts, a lesser-included offense of one of the kidnapping counts, it is unclear whether the relevant kidnapping count is the one that was alleged to have occurred on July 24 (count 2) or the one alleged to have occurred on July 24 through 27 (count 5). The false imprisonment thus could have occurred on the second day, in connection with committing the assault, or after the assault, when Altringer refused to let M.L. go to the hospital. Similarly, the assault could have occurred on the first day, when Altringer struck M.L. in the face while they were in the car.

Without more information, such as the plea colloquy, it is impossible to know what actual facts the convictions correlate to. It is therefore impossible to determine whether the offenses occurred at substantially the same time or place or whether they were motivated by the same criminal objective. Altringer argues that the facts as alleged in the amended complaint could support the determination that he committed false imprisonment in order to facilitate an assault or in order to avoid apprehension for an assault and that, in either case, the offenses would have been part of the same behavioral incident. Without evidence

establishing the factual bases for the convictions, the record does not support findings to the contrary.

The state argues, however, that additional evidence supports the finding that the offenses did not arise from a single behavioral incident. It cites to the fact that Altringer received two sentences in 2005, suggesting that the district court in that case determined that the offenses arose in separate behavioral incidents. *See* Minn. Stat. § 609.035 (2002) (prohibiting multiple sentences for offenses committed as part of a single behavioral incident). The state also cites to the fact that the sentencing worksheets at the time indicated that the false-imprisonment conviction was sentenced first and the third-degree assault was sentenced second. From these facts, the state argues, the postconviction court could infer that the district court in 2005 found that the offenses occurred in the manner the state asserts: the false imprisonment on July 24 and the assault on July 25, in separate behavioral incidents. But the possibility of such an inference is insufficient to satisfy the state's burden of proof; another inference is that the question of the same behavioral incident was simply not raised in the 2005 case. Moreover, even if the district court in 2005 found that the offenses arose from separate behavioral incidents, that finding does not govern the postconviction court here. In *Bixby*, the supreme court explained that the sentencing court for the current offense "is the proper court for deciding" whether prior convictions arose from the same behavioral incident. 344 N.W.2d at 394 (holding, based on trial transcript, that two earlier offenses at issue had been part of same behavioral incident notwithstanding contrary determination by district court at the time).

The state also relies on the district court's probable-cause order in the 2005 case. But that order, which finds probable cause for both the July 24 kidnapping count and the July 24 through 27 kidnapping count, does not establish when the false imprisonment for which Altringer was convicted actually occurred.

In sum, taking into account the state's burden of proof, we conclude that the record evidence does not support the postconviction court's determination that Altringer's 2005 convictions arose from separate behavioral incidents. The inclusion of both convictions in his criminal-history score is therefore an abuse of discretion.

III. The error in Altringer's criminal-history score is not harmless.

The state argues that even if the district court did err when it concluded that Altringer's 2005 convictions arose from separate behavioral incidents, the error was harmless because Altringer would have been sentenced to the same prison term. We disagree.

Citing an updated sentencing worksheet submitted prior to postconviction, the state asserts that Altringer actually had a criminal-history score of seven. Therefore, even if one criminal-history score point was deducted for one of Altringer's 2005 convictions, he would still have a criminal-history score of six. This argument is not persuasive for two reasons: (1) the district court independently calculated Altringer's criminal-history score to be six, regardless of the updated sentencing worksheet, and (2) the state had already conceded that the original sentencing worksheet contained an error in assigning a score of seven instead of six and the updated worksheet merely continued that error.

First, a sentencing worksheet is only a tool that may be considered in calculating a criminal-history score. *See State v. Walsh*, 456 N.W.2d 442, 443 (Minn. App. 1990) (“The sentencing guidelines worksheet is an important tool in the sentencing process, but it is not the sentence.”). Here, while the updated sentencing worksheet did assign Altringer a criminal-history score of seven, the district court at postconviction ultimately found that Altringer’s score was six and imposed the presumptive guideline sentence based on that score. The state’s assertion that Altringer would “still . . . have been sentenced to the same identical prison term,” even if one point was dropped for his 2005 convictions, is simply not accurate, because the district court sentenced Altringer based on a criminal-history score of six, not seven.

Second, at the sentencing hearing, the state acknowledged that Altringer’s criminal-history score should be six instead of seven. The state agreed with defense counsel that the sentencing worksheet erred in assigning 1.5 points for a 2009 drug-related offense from Michigan and confirmed that it should actually be weighted at .5 points, thus dropping Altringer’s score to six. Because the updated sentencing worksheet was submitted only to reflect the new guideline recommendation under the DSRA, it contained the same 1.5 score for the 2009 Michigan offense. In other words, there was nothing new in the updated sentencing worksheet in terms of the calculation of Altringer’s criminal-history score. It can therefore be inferred that the updated sentencing worksheet made the same error as in the original sentencing worksheet, which the state previously confirmed. This is further demonstrated by the fact that the state, in its answer to Altringer’s petition for postconviction relief, did not argue that his criminal-history score was actually seven. In

fact, the state asserted in its postconviction briefing that the score was “properly calculated” by the district court at sentencing. The state cannot now argue that seven is the correct score when it agreed with the score of six at sentencing and never argued otherwise during the postconviction proceedings.

Because the district court sentenced Altringer on a criminal-history score of six instead of five, the error was not harmless. We therefore reverse and remand for resentencing with a criminal-history score of five.

Reversed and remanded.