

*This opinion will be unpublished and  
may not be cited except as provided by  
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A17-1299**

State of Minnesota,  
Respondent,

vs.

Terran Marie Stukey,  
Appellant.

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

Itasca County District Court  
File No. 31-CR-17-175

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

John J. Muhar, Itasca County Attorney, Todd S. Webb, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

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

Considered and decided by Bratvold, Presiding Judge; Cleary, Chief Judge; and Florey, Judge.

**UNPUBLISHED OPINION**

**CLEARY**, Chief Judge

Appellant Terran Marie Stukey challenges the district court's calculation of her criminal-history score, arguing that her first fifth-degree drug conviction should be counted

as a gross misdemeanor under the laws and sentencing guidelines in effect at the time of her offense. We reverse and remand for a determination of whether appellant's offense qualifies as a gross misdemeanor.

### **FACTS**

Appellant sold 15.47 grams of methamphetamine to a police informant on September 19, 2016. She was charged with second-degree sale of a controlled substance on January 18, 2017. The complaint noted appellant's multiple prior convictions, including three prior felony drug convictions, and an additional pending felony drug charge. The district court calculated appellant's criminal-history score, assigning her one and one-half criminal-history points for a third-degree drug sale conviction from 2010 and one-half of a criminal-history point for each of her fifth-degree drug possession convictions—two 2010 convictions and one 2013 conviction—for a total of three criminal-history points.

Appellant's criminal-history score of three and the offense-severity level of seven set the range for a presumptive sentence between 67 and 93 months. Appellant pleaded guilty to the charge against her on May 22, 2017. Per the parties' agreement, appellant received a bottom-of-the-box sentence of 67 months. This appeal follows.

### **DECISION**

Appellant argues that her first fifth-degree drug possession conviction from 2010 meets the criteria to be punished as a gross misdemeanor under the laws in effect at the time of the offense and sentencing guidelines, and therefore the district court erred in assigning her one-half of a criminal-history point for that offense. It is unclear whether

this conviction was properly categorized as a felony or whether it should have been counted as a gross misdemeanor.

Construction of the sentencing guidelines is a question of law we review de novo. *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005). A sentence based on an incorrect criminal-history score is an illegal sentence correctable at any time. *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007) (citing Minn. R. Crim. P. 27.03, subd. 9). “The presumptive sentence . . . is determined by the Sentencing Guidelines in effect on the date of the conviction offense . . . to ensure that the Guidelines abide by the federal and state Ex Post Facto Clauses.” *State v. Kirby*, 899 N.W.2d 485, 493 (Minn. 2017) (quotation omitted). The guidelines in effect at the time of appellant’s offense were the pre-November 17, 2016 version of the 2016 Minnesota Sentencing Guidelines.

The 2016 Drug Sentencing Reform Act (DSRA) made large-scale changes to Minnesota’s drug laws, including amendments to certain statutory provisions that establish the threshold quantities of drugs for certain crimes. See 2016 Minn. Laws ch. 160, §§ 3-7, at 577-85. The DSRA created a new category of fifth-degree drug possession punishable as a gross misdemeanor. Minn. Stat. § 152.025, subd. 4(a) (2016) now provides that offenders who have “not been previously convicted of a violation of this chapter or a similar offense in another jurisdiction” and who possess “less than 0.25 grams or one dosage unit or less” of drugs other than heroin or “less than 0.05 grams” of heroin are guilty of a gross misdemeanor. All other violations of Minn. Stat. § 152.025 (2016) that do not

meet the criteria described in subdivision 4(a) are punished as felonies. Minn. Stat. § 152.025, subd. 4(b).

The Minnesota Sentencing Guidelines are clear: “[t]he severity level ranking in effect at the time the current offense was committed determines the weight assigned to the prior offense.” Minn. Sent. Guidelines 2.B.1 (2016). At the time of appellant’s instant offense, the DSRA provisions were in full effect and *felony* fifth-degree drug possession in violation of Minn. Stat. § 152.025, subd. 4(b) was assigned a severity level of two, meaning that prior convictions for felony fifth-degree possession would earn an offender one-half of a criminal-history point. Minn. Sent. Guidelines 2.B.1.a; 5.B (2016). There is no express provision addressing the newly created offense of gross misdemeanor fifth-degree drug possession, but all prior gross misdemeanor convictions “count as units comprising criminal history points” and “[f]our units equal one criminal history point” with no partial credit given for less than four units. Minn. Sent. Guidelines 2.B.3.a. (2016). Accordingly, appellant was entitled to have her 2010 conviction counted as either a gross misdemeanor worth one “unit” under the newly amended Minn. Stat. § 152.025, subd. 4(a) or as a severity level two felony under Minn. Stat. § 152.025, subd. 4(b) depending on the specific facts underlying her 2010 conviction.<sup>1</sup>

---

<sup>1</sup> The state argues that recalculation is not necessary and relies in part on a comment to the sentencing guidelines enacted after the date of appellant’s current offense. The comments to the sentencing guidelines are “only advisory and not binding on the courts.” *Asfaha v. State*, 665 N.W.2d 523, 526 (Minn. 2003). The comments, as part of the guidelines, are subject to the same ex post facto considerations as the guidelines themselves. *See Kirby*, 899 N.W.2d at 493-94. Only the comments in effect on the date of a defendant’s offense serve their advisory function.

The record lacks specific information about appellant's 2010 conviction. Her first offense occurred on May 8, 2008, and she was convicted on January 27, 2010. At the time, all fifth-degree drug crimes were punished as felonies. There is no information in the record regarding the type or amount of controlled substance that appellant possessed nor does appellant expressly claim that she possessed less than 0.25 grams of a controlled substance at the time of her 2010 conviction. On this record, whether appellant's 2010 conviction meets the criteria to be counted as a gross misdemeanor for purposes of calculating her criminal-history score is unclear.

The state bears the burden of proving a defendant's criminal history for the purposes of the sentencing guidelines. *State v. Edmison*, 379 N.W.2d 85, 87 n.1 (Minn. 1985). Where the state fails to meet its burden of proving prior convictions and the convictions were considered by the district court, the proper remedy is reversal of the sentence and remand for resentencing. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). On remand, the state is permitted to "further develop the sentencing record so that the district court can appropriately make its determination" where the defendant did not object to the district court's initial determination. *Id.*

Because the record lacks information about the type or amount of controlled substances that appellant was convicted of possessing in 2010, we reverse and remand for a determination of whether appellant's prior crime was properly weighted as a prior felony conviction or should have been counted as a gross misdemeanor. And because appellant did not object to the district court's determination that her 2010 conviction was a felony,

the state is permitted to further develop the sentencing record with information about appellant's prior conviction so that the district court can make the proper determination on the weight assigned to appellant's 2010 conviction.

**Reversed and remanded.**