

*This opinion will be unpublished and  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  
A17-1387**

State of Minnesota,  
Respondent,

vs.

Sylvester Antoine Townsend,  
Appellant.

**Filed May 21, 2018  
Reversed and remanded  
Connolly, Judge**

Dakota County District Court  
File No. 19HA-CR-15-1858

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

James Backstrom, Dakota County Attorney, Chip Granger, Assistant County Attorney,  
Hastings, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael J. McLaughlin, Assistant  
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Connolly, Judge; and Reyes,  
Judge.

## **UNPUBLISHED OPINION**

**CONNOLLY**, Judge

Appellant challenges his sentence for third-degree possession of a controlled substance, arguing that the district court abused its discretion in calculating his criminal-history score (CHS) because his 2014 conviction for fifth-degree controlled-substance crime should not have been counted as half a point. Because the record does not indicate whether appellant's 2014 offense would be classified as a gross misdemeanor under the Minnesota Drug Sentencing Reform Act (DSRA), we reverse and remand his sentence so the state may further develop the record on that conviction.

### **FACTS**

Appellant Sylvester Townsend, who was convicted of fifth-degree controlled-substance crime in 2014, was charged with third-degree controlled-substance crime in June 2015 and with two Domestic Abuse No Contact Order (DANCO) violations, first-degree criminal damage to property, first-degree burglary, and domestic assault in 2016.

Appellant pleaded guilty to the controlled-substance crime and the DANCO violations; other charges were dismissed. He and respondent the State of Minnesota agreed that appellant's CHS was six. For the controlled-substance crime, he was sentenced to 36 months in prison, a downward durational departure of 13 months from the 49-68 month range prescribed by the Sentencing Guidelines; for each of the DANCO violations, he was sentenced to 30 months in prison, concurrent.

He challenges his sentence, arguing that his CHS was miscalculated because, under the DSRA, his fifth-degree controlled-substance crime was not a felony, so his CHS is actually five and therefore the guidelines range is 44-61 months.

## **D E C I S I O N**

The district court's determination of a defendant's CHS will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

When sentencing appellant, the district court said it would accept the plea agreement “with the understanding that [appellant] at the time that this offense occurred and at the time of sentencing here today . . . has a total [CHS] of six points.” Appellant's sentencing worksheet shows a CHS of six derived from one custody status point, one misdemeanor/gross misdemeanor point, and four felony points: one and one-half for drive-by discharge of a firearm; one for theft of a motor vehicle, one for domestic assault, and one-half for fifth-degree possession of a controlled substance.

Appellant now argues that the district court abused its discretion by accepting the parties' agreement as to his CHS of six because, under the DSRA, a fifth-degree possession offense is a gross-misdemeanor, not a felony. This would reduce his number of points to five and one half rather than six and give him a CHS of five. *See* Minn. Sent. Guidelines 2.B.1.i (2016) (providing that partial points are rounded down to the nearest whole number). Appellant's 36-month sentence if his CHS were five instead of six would be a downward durational departure of 8 months instead of 13 months.

But not all fifth-degree possession offenses become gross misdemeanors under the DSRA.<sup>1</sup> Appellant’s sentencing worksheet indicates that the offense resulting in his March 2014 conviction was “Drugs – 5th Degree – Possess Schedule 1,2,3,4 – Not Small Amount Marijuana.” In 2014, prior to the DSRA, fifth-degree controlled-substance crimes included possession of “one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana.” Minn. Stat. § 152.025, subd. 2(a)(1) (2014). On August 1, 2016, under the DSRA, possession became a gross misdemeanor if the amount of a controlled substance other than heroin was less than 0.25 grams or one dosage unit or the amount of heroin was less than 0.05 grams of heroin. See Minn. Stat. § 152.025, subd. 4(a) (2016). Although appellant says his “2014 conviction for fifth-degree possession of a controlled substance is not currently a felony,” he provides no evidence that his 2014 offense was in fact reclassified as a gross misdemeanor. Nothing in the record indicates whether appellant’s March 2014 offense involved less than 0.25 grams or one dosage unit of a non-heroin controlled substance or less than 0.05 grams of heroin, i.e., whether it was a felony or a gross misdemeanor under the DSRA.

When “[the] record [indicated that] the state ha[d] not proved that at least [five] of [the defendant’s] 11 prior [out of state] convictions [were] felonies under Minnesota law,” the sentence based on a determination that the prior convictions were felonies was reversed and remanded. *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied*

---

<sup>1</sup> Appellant is aware of this: he argues in his brief that the DSRA “reduced the severity of *most* fifth-degree controlled-substance crimes” and that “a fifth-degree possession controlled substance is now *generally* a gross misdemeanor offense.” (Emphasis added.)

(Minn. July 15, 2008). On remand, because the defendant “did not object to the district court’s determination that his out-of-state convictions were felonies[,]” the state was “permitted to further develop the sentencing record so that the district court [could] appropriately make its determination.” *Id.* Thus, the appropriate remedy here is to reverse the sentence and remand the case so the state may provide factual details of appellant’s 2014 offense relevant to determining whether it would now be classified as a felony or a gross misdemeanor.<sup>2</sup>

**Reversed and remanded.**

---

<sup>2</sup> Appellant also argues that he is entitled to be resentenced under *State v. Kirby*, 899 N.W.2d 485, 496 (Minn. 2017) (holding that, when the DSRA reduced a defendant’s presumptive sentencing range from 138-192 months to 110-153 months, it “plainly mitigate[d the defendant’s] punishment”). But, as appellant concedes, *Kirby* is distinguishable because the reduction on which appellant relies, i.e., the removal of the mandatory maximum sentence for those with a CHS of one, does not apply to appellant. *See id.* (holding that the reduction invoked must affect the defendant who invokes it).