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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0196**

State of Minnesota,
Respondent,

vs.

Eric Walter Braunig,
Appellant.

**Filed February 3, 2020
Affirmed
Bratvold, Judge**

Beltrami County District Court
File No. 04-CR-18-1943

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

David L. Hanson, Beltrami County Attorney, Michael V. Mahlen, Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sara L. Martin, Assistant Public Defender, Andrew Nelson (certified student attorney), St. Paul, Minnesota (for appellant)

Considered and decided by Cleary, Chief Judge; Worke, Judge; and Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

In this direct appeal from the judgment of conviction for being a felon in possession of a firearm, appellant argues that his conviction must be reversed for two reasons. First,

appellant argues that his 2012 conviction for fifth-degree controlled-substance possession cannot serve as the predicate “crime of violence” for his felon-in-possession conviction based on changes adopted by the 2016 Drug Sentencing Reform Act (DSRA). Second, appellant argues that the felon-in-possession statute violates equal protection as applied to him because he is treated differently from similarly situated post-DSRA controlled-substance offenders based on the date of his 2012 conviction offense. We affirm.

FACTS

On June 9, 2018, Sergeant Petrie stopped a car in Bemidji after observing that the vehicle had no front license plate and was missing its front bumper. As Petrie approached the car and its four occupants, he saw a passenger in the back seat making furtive movements with both hands. He later identified the passenger as appellant Eric Walter Braunig. Petrie questioned Braunig about his movements, and suspected that Braunig may have a knife. Petrie asked Braunig to exit the car, patted him down, found a methamphetamine pipe in his pocket, and placed him in the squad car. Police later searched the stopped car and found an unloaded 12-gauge shotgun with a shortened barrel in the trunk. Petrie arrested Braunig. After a *Miranda* warning, Braunig admitted to handling the shotgun, stating that he took the gun from a friend who owed him money.

On June 12, 2018, the state charged Braunig by complaint with one count of being a felon in possession of a firearm under Minn. Stat. § 609.165, subd. 1b(a) (2016). The complaint alleged that Braunig was a felon because he had a 2012 felony conviction for

fifth-degree controlled-substance possession (2012 felony conviction) under Minn. Stat. § 152.025, subd. 2(a)(1) (2010).

Braunig moved to dismiss, arguing the complaint lacked probable cause. Braunig asserted that his 2012 felony conviction “would be a gross misdemeanor conviction under the present version of Minn. Stat. § 152.025,” and so would not render him ineligible to possess a firearm. In a written order, the district court denied Braunig’s motion, reasoning that “[t]he Drug Sentencing Reform Act had not been enacted at the time of [Braunig’s] conviction of fifth-degree controlled substance possession in violation of Minn. Stat. § 152.025.” Relying on a Minnesota Supreme Court decision, the district court concluded that the DSRA does not apply to Braunig because his case was final before any DSRA amendments became effective. *See State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). The district court concluded that Braunig’s “conviction remains a felony” because he was not “entitled to resentencing under the [DSRA].”

The parties agreed to a stipulated-facts trial under Minn. R. Crim. P. 26.01, subd. 3. A week later, the district court found Braunig guilty of being a felon in possession of a firearm. The district court committed Braunig to the commissioner of corrections for 60 months. Braunig appeals.

D E C I S I O N

I. The district court did not err by convicting Braunig of being a felon in possession of a firearm.

Braunig contends that the district court erred by determining that his 2012 felony conviction was the “predicate offense” for his felon-in-possession conviction, making two

arguments. First, he argues that his 2012 felony conviction was for an offense that became a gross misdemeanor after the DSRA was enacted and that a predicate felony must be “determined based on current statutory definitions.” Braunig contends that there is no “predicate felony crime of violence” to support his felon-in-possession conviction. Second, Braunig argues that the state is treating him “differently than other offenders based solely on the date of his prior conviction [which] violates equal protection.” We discuss Braunig’s arguments in turn.

Statutory interpretation is a matter of law that this court reviews de novo. *State v. Tomlin*, 622 N.W.2d 546, 548 (Minn. 2001). This court also reviews constitutional issues de novo. *State v. Frazier*, 649 N.W.2d 828, 832 (Minn. 2002).

A. Braunig’s 2012 felony conviction is a “crime of violence” under the felon-in-possession statute.

The felon-in-possession statute provides that “[a]ny person who has been convicted of a crime of violence, as defined in section 624.712, subdivision 5, and who ships, transports, possesses, or receives a firearm or ammunition, commits a felony.” Minn. Stat. § 609.165, subd. 1b(a). A “crime of violence” means felony convictions for several offenses, including fifth-degree controlled-substance possession. Minn. Stat. § 624.712, subd. 5 (2016).

In 2016, the legislature adopted the DSRA, which generally “amended criminal drug-possession statutes and specific corresponding portions of the drug-offender sentencing grid.” *Kirby*, 899 N.W.2d at 491. Relevant here, the DSRA amended the fifth-degree controlled-substance-possession statute, lowering the severity of the offense

to a gross misdemeanor under certain circumstances. *Compare* Minn. Stat. § 152.025, subd. 2 (2014), *with* 2016 Minn. Laws ch. 160, § 7, at 583 (codified at Minn. Stat. § 152.025, subds. 2, 4 (2016)). The DSRA provides that fifth-degree controlled-substance possession is a gross misdemeanor when a person with no previous controlled-substance convictions possesses less than “0.25 grams or one dosage unit” of a non-heroin controlled substance. Minn. Stat. § 152.025, subds. 2, 4. And the DSRA provides that fifth-degree controlled-substance possession is a felony when a person possesses amounts equal to or greater than 0.25 grams or one dosage unit. *See id.* The DSRA also amended the presumptive sentences for controlled-substance convictions under the Minnesota Sentencing Guidelines. 2016 Minn. Laws ch. 160, § 18, at 591.

In *State v. Otto*, the supreme court held that the DSRA amendments to weight thresholds only apply to controlled-substance offenses committed “on or after” the effective date of the amendments—August 1, 2016. 899 N.W.2d 501, 503 (Minn. 2017) (citing 2016 Minn. Laws ch. 160, §§ 3-4, at 577-81). In *State v. Kirby*, the supreme court held that the DSRA amendments to the presumptive sentences for controlled-substance convictions applied to “defendants with non-final convictions” as of the DSRA’s effective date. 899 N.W.2d at 490, 496; *see also* 2016 Minn. Laws, ch. 160, § 18, at 591; Minn. Sent. Guidelines 4.C (2016).

Recognizing *Kirby* and *Otto*, Braunig concedes “that the DSRA is not retroactive” and that he does not qualify for resentencing or modification of his 2012 felony conviction, which received final judgment well before the DSRA became effective. Braunig instead contends that the predicate offense supporting a felon-in-possession conviction must be a

“crime of violence” at the time of the felon-in-possession offense. Braunig asserts that this is a question of first impression for Minnesota courts.

Braunig’s argument fails for two reasons. First, Braunig assumes that his 2012 felony conviction involved possession of a controlled substance that was within the DSRA’s weight threshold for a gross misdemeanor—under 0.25 grams or one dosage unit of a non-heroin controlled substance. But nothing in the record supports this assumption.¹ Braunig claims that the state conceded during his sentencing hearing that his 2012 felony conviction “would be a gross misdemeanor if charged today because the legislature determined the conduct of first-time possession of a *trace amount* is no longer a felony.” (Emphasis added).

But the state did not concede that Braunig’s 2012 felony conviction involved a “trace amount” of a controlled substance. During Braunig’s 2018 sentencing hearing, the prosecutor stated, for criminal-history-score purposes, that it had “no grounds to object” to Braunig’s assertion that his 2012 felony conviction would be a gross misdemeanor if committed in 2018. Criminal-history scores are based on “current Minnesota offense definitions.” Minn. Sent. Guidelines 2.B.7.a (2018). And the “state has the burden of proof in establishing a defendant’s criminal history [score] for Sentencing Guidelines purposes.” *State v. Edmison*, 379 N.W.2d 85, 87 n.1 (Minn. 1985). Because the state could not prove

¹ Braunig’s warrant of commitment for fifth-degree controlled-substance possession does not state the amount he possessed. The warrant of commitment cites Minn. Stat. § 152.025, subd. 2(a)(1) and includes the description “Drugs—5th Degree—Possess Schedule 1,2,3,4—Not Small Amount Marijuana.” Braunig offered no other evidence regarding his 2012 felony conviction.

at Braunig’s 2018 sentencing hearing that his 2012 conviction involved an amount equal to or greater than 0.25 grams or one dosage unit, the state conceded Braunig’s position on his criminal-history score. Still, there is no record evidence that the amount of drugs Braunig possessed for his 2012 conviction was *less* than 0.25 grams or one dosage unit. As the appellant, it is Braunig’s burden to provide an adequate record on appeal. *State v. Heithecker*, 395 N.W.2d 382, 383 (Minn. App. 1986). Braunig has failed to meet this burden.

Second, even assuming that Braunig’s 2012 felony conviction would be a gross misdemeanor if committed in 2018, Minnesota caselaw does not support Braunig’s claim that “prior conviction classifications” that are used “as a predicate felony . . . should be determined based on current statutory definitions.” Braunig relies on two primary cases, which we consider in turn.

In *State v. Moon*, the district court convicted appellant of felony theft and stayed his sentence for five years. 463 N.W.2d 517, 518-19 (Minn. 1990). The district court discharged appellant from probation two years later, “deemed Moon’s offense to be for a misdemeanor” under Minn. Stat. § 609.13 (1990), and included a firearms restriction because Moon had been convicted of a “crime of violence.” *Id.* at 519. Appellant moved to strike the firearms restriction, but the district court denied the motion. *Id.* at 517. We reversed because misdemeanor theft was not a “crime of violence” under the relevant statute. *Id.* at 518. The supreme court reversed, holding that “the definitions of the offenses listed as crimes of violence in section 624.712, subdivision 5, relate to the elements of the

offense for which the defendant was originally convicted rather than the disposition subsequently imposed by the trial judge.” *Id.* at 521.

Moon held only that the reduction of a felony to a misdemeanor under Minn. Stat. § 609.13 did not alter the elements of the conviction offense, which in *Moon*’s case satisfied the definition of a “crime of violence” and supported the firearms restriction. *See id.* *Moon* does not support Braunig’s argument because the district court did not deem Braunig’s 2012 felony conviction to be a gross misdemeanor under Minn. Stat. § 609.13. And Braunig’s argument is based on a *change in the law*, which is an issue that *Moon* did not address.

In *State v. Strobel*, appellant argued that the district court miscalculated his criminal-history score because it failed to apply the current, post-DSRA classification of his prior offense in determining the score. 932 N.W.2d 303, 306 (Minn. 2019). We agreed with appellant and reversed. *Id.* The supreme court affirmed, holding that when calculating a criminal-history score, the sentencing guidelines provide that “classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by *current* Minnesota offense definitions . . . and sentencing policies.” *Id.* at 307 (quoting Minn. Sent. Guidelines 2.B.7.a (emphasis added)).

Unlike the appellant in *Strobel*, Braunig is not challenging his criminal-history score. Also, *Strobel*’s holding turned on the “plain language” of the sentencing guidelines, which are not at issue here. Thus, we conclude that *Strobel* does not support Braunig’s position that courts should apply “current statutory definitions” to a prior offense that is

later used as a predicate offense for another crime.² *See id.* at 309-10 (holding “offense definitions” for calculating criminal-history scores under the sentencing guidelines refers to “element-based definitions of crimes”).

Because Minnesota caselaw is clear that the DSRA’s weight-threshold amendments under section 152.025 apply to offenses committed “on or after” August 1, 2016, and no caselaw supports Braunig’s claim that a predicate felony is determined by current statutory definitions, we conclude that the district court did not err. When Braunig committed his 2012 conviction offense, it was a felony. Thus, Braunig’s 2012 felony conviction is a predicate “crime of violence” for his felon-in-possession conviction.

B. Braunig is not “similarly situated” with post-DSRA defendants.

Braunig argues that he is similarly situated with persons convicted of fifth-degree controlled-substance-possession crimes after the DSRA was enacted. Relying on this premise, Braunig argues that because a person convicted today of fifth-degree controlled-substance possession would not have committed a predicate “crime of violence offense,” his 2018 conviction for being a felon in possession “treats similarly situated persons differently” under the Equal Protection Clause.

² Braunig also cites *State v. Scovel*, which held that, when calculating a defendant’s criminal-history score under the sentencing guidelines, courts must apply the “Minnesota offense definitions and sentencing policies in effect when the defendant committed the current crime.” 916 N.W.2d 550, 559 (Minn. 2018) (citing Minn. Sent. Guidelines 2.B.7.a (2015)). *Scovel* based its holding on the meaning of “current” under the guidelines, which it determined was ambiguous, and resolved this ambiguity by relying on legislative history. *Id.* at 556-57. *Scovel* does not apply here because the sentencing guidelines are not at issue.

At the outset, we observe that Braunig raises an equal-protection argument for the first time on appeal, and the district court did not address the issue. We generally will not consider matters not argued to and considered by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).³ But appellate courts can “deviate from this rule when the interests of justice require consideration of such issues and doing so would not unfairly surprise a party to the appeal.” *Id.*; *see also State v. Benniefield*, 678 N.W.2d 42, 45 (Minn. 2004) (considering equal-protection claim “in the interests of justice”); Minn. R. Crim. P. 28.02, subd. 11. Because the state fully briefed Braunig’s equal-protection argument and had “no objection” at oral argument to this court deciding the issue, we proceed to address the merits. *See Roby*, 547 N.W.2d at 357.

The state and federal constitutions guarantee equal protection of the laws to all persons within their respective jurisdictions. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. “The equal protection clause guarantees that similarly situated individuals receive equal treatment.” *Frazier*, 649 N.W.2d at 837. “A statute violates the equal protection clause when it prescribes different punishments or different degrees of punishment for the *same conduct committed under the same circumstances* by persons similarly situated.” *Id.* (emphasis added). The threshold question in an equal-protection

³ We understand Braunig to be making an as-applied challenge to the felon-in-possession statute, because he does not ask this court to strike down the statute. We also note that the state is a party to this case. Therefore, no notice to the attorney general was required. *See Minn. R. Civ. App. P. 144* (requiring notice to the Minnesota Attorney General in appellate proceedings where neither the state nor any of its agencies, officers, or employees is a party in an official capacity”); *see also Welsh v. Johnson*, 508 N.W.2d 212, 215 n.1 (Minn. App. 1993) (notice to the attorney general not required for as-applied constitutional challenges).

claim is determining whether two groups are similarly situated “in all relevant respects.” *State v. Holloway*, 916 N.W.2d 338, 347 (Minn. 2018).

Braunig’s equal-protection claim fails for three reasons. First, the felon-in-possession statute does not divide “the universe of defendants into two classes.” *Id.* The statute applies to “[a]ny person *who has been convicted of a crime of violence*, as defined in section 624.712, subdivision 5, and who ships, transports, possesses, or receives a firearm or ammunition, commits a felony.” Minn. Stat. § 609.165, subd. 1b(a) (emphasis added). The fact that, after the DSRA was enacted, some offenses ceased to be a “crime of violence” did not create two “classes” under the felon-in-possession statute. The “universe of defendants” is still one: individuals who have “been convicted of a crime of violence” and who possessed a firearm.

Second, even assuming that the felon-in-possession statute creates two classes of defendants—pre-DSRA defendants and post-DSRA defendants—they are not “alike in all relevant respects.” *See State v. Cox*, 798 N.W.2d 517, 522 (Minn. 2011). Braunig’s “class” committed controlled-substance offenses before the DSRA became effective, and the other class committed controlled-substance offenses after the DSRA became effective. *Compare* Minn. Stat. § 152.025, subd. 2(a)(1) (2010), *with* Minn. Stat. § 152.025, subd. 2(1) (2016). The two classes are not “similarly situated” because the defendants in each respective class violated *different* laws at *different* times—thus, their conduct was not “committed under the same circumstances.” *See generally Frazier*, 649 N.W.2d at 837; *see also Otto*, 899 N.W.2d at 503 (holding that the DSRA’s weight-threshold amendments for

controlled-substance offenses only apply to crimes committed on or after the effective date of the amendments).

Third, even assuming that the felon-in-possession statute creates two classes that are similar in all relevant respects, Braunig cannot show that he is part of the differently treated class. This is because, for reasons already noted, he cannot show that his 2012 felony conviction involved controlled substances within the weight threshold for a gross misdemeanor under the DSRA.

Because we conclude that Braunig has not demonstrated that he is treated differently from persons who are similarly situated, we do not reach Braunig's arguments regarding what level of constitutional scrutiny applies to his equal-protection challenge. See *Holloway*, 916 N.W.2d at 347.

Affirmed.