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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1032**

State of Minnesota,
Respondent,

vs.

Anthony Terrell Hemphill,
Appellant.

**Filed May 18, 2020
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge**

Hennepin County District Court
File No. 27-CR-18-29022

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Lydia Maria Villalva Lijó, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Ross, Judge; and Cochran, Judge.

U N P U B L I S H E D O P I N I O N

SEGAL, Chief Judge

In this appeal from the judgment of conviction of first-degree burglary, appellant argues that (1) the district court abused its discretion in denying his motion for a downward durational sentencing departure, and (2) he is entitled to resentencing pursuant to a recent

sentencing-guidelines amendment that would reduce his criminal-history score and the presumptive sentence. We affirm the district court's denial of a downward durational departure, but we reverse his sentence and remand to allow for recalculation of his criminal-history score pursuant to the 2019 revisions to the sentencing guidelines.

FACTS

In November 2018, appellant Anthony Terrell Hemphill was driving in Hennepin County when an officer pulled him over because he was speeding and the registered owner of the vehicle had a suspended license. The officer asked Hemphill if he was the vehicle owner, and Hemphill replied, "Yes, sir." After the officer stated that the owner of the vehicle had a suspended license, Hemphill said that the car belonged to a relative. When the officer asked Hemphill for his identification, he did not provide a license, and he identified himself with a false name and a false birthdate. The officer searched the records, but found no match.

The officer told Hemphill he would have to take him into custody if he could not identify him. The officer attempted to identify Hemphill with a fingerprint device, but it was not operating properly. The officer again asked Hemphill his date of birth. This time, he told the officer a different date of birth and provided two different middle names. When the officer still could not identify Hemphill, he told him that he would have to take him into custody. The officer asked Hemphill to turn around and put his hands behind his back. Hemphill fled on foot and the officer followed.

The officer told Hemphill to stop multiple times during the pursuit and shouted that he was under arrest. Hemphill eventually ran into a home through an open garage door.

The officer warned the homeowner to leave the house and ordered Hemphill to come out. The homeowner advised the officer that he had a gun in the house. The officer radioed for backup and spent an hour urging Hemphill to come out. When the officers entered the house, they found Hemphill in a storage room. They arrested Hemphill and the state charged him with first-degree burglary under Minn. Stat. § 609.582, subd. (1)(a) (2018).

At a bench trial, Hemphill was found guilty of first-degree burglary while fleeing a police officer. At sentencing, Hemphill moved for a downward durational departure. The district court imposed a prison sentence of 34 months, the shortest term within the presumptive guidelines range for the offense based on a criminal-history score of three. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion in denying Hemphill’s motion for a downward durational sentencing departure.

A guidelines sentence is presumed to be appropriate unless “identifiable, substantial, and compelling circumstances” justify a downward departure. *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013) (quotation omitted), *review denied* (Minn. Sept. 17, 2013); *see also* Minn. Sent. Guidelines 2.D.1 (2018). The sentencing court has “broad discretion” and the supreme court has noted in dicta that it anticipates an appellate court will reverse a sentencing court’s refusal to depart only in a “rare” case. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). We generally will not disturb a presumptive sentence when “the record shows that the sentencing court carefully evaluated

all the testimony and information presented” before imposing a sentence. *Johnson*, 831 N.W.2d at 925 (quotation omitted).

A district court may grant a downward durational departure “if the defendant’s conduct is significantly less serious than that typically involved in the commission of the offense.” *State v. Mattson*, 376 N.W.2d 413, 415 (Minn. 1985). The appropriateness of a durational departure depends on the nature of the offense rather than offender-related factors. *State v. Behl*, 573 N.W.2d 711, 713 (Minn. App. 1998), *review denied* (Minn. Mar. 19, 1998). We review the district court’s refusal to depart from the sentencing guidelines for an abuse of discretion. *Id.* at 714.

At the sentencing hearing, Hemphill moved for a downward durational departure, arguing that as a matter of equity the district court should depart downward to 27 months in line with a criminal-history score of two. Hemphill claimed he believed he had a criminal-history score of two, not three. Hemphill received the third criminal-history point because he had recently pleaded guilty to a felony offense in Olmsted County. The original presentence investigation in the present case noted the pendency of the Olmsted case, but it did not add any points for that case. Hemphill argued, had he known that an additional criminal-history point would be added, he might have handled the Olmsted case differently. He argued to the district court that the grounds for the departure “could be a misapprehension of his criminal history score in [Olmsted County], it also could be this offense was less onerous than a typical residential burglary,” but he did not provide the district court with much additional detail.

The district court considered all the arguments over the criminal-history score and determined that Hemphill's claim did not provide a sufficient basis for a downward durational departure. The district court noted that "[w]hatever expectations [Hemphill] had I don't think really weigh in to what a fair sentence is in this case. He's got three criminal history points and the presumptive is a 39-month commit." After listening to the arguments and a statement from Hemphill, the district court imposed a sentence of 34 months, a "bottom-of-the-box" sentence (the shortest term within the presumptive guidelines range for the offense), instead of the presumptive sentence of 39 months that the district court initially stated it was going to impose. We find no abuse of discretion and affirm the district court's denial of a downward durational departure.

II. Hemphill is entitled to be resentenced pursuant to a recent amendment to the Minnesota Sentencing Guidelines.

Hemphill argues that he is entitled to be resentenced because a change in the sentencing guidelines reduced his criminal-history score from three to two. At the time of sentencing, the Minnesota Sentencing Guidelines assigned a criminal-history point if an "offender is discharged from probation but commits an offense within the initial period of probation pronounced by the court." Minn. Sent. Guidelines 2.B.2.a(4) (2018).¹ In 2019, during the pendency of this appeal, the guidelines were revised to eliminate the extra point for offenders who were discharged early from probation but who were still within the initial period of probation pronounced by the court. Minn. Sent. Guidelines 2, subd. B.2 (Supp.

¹ The 2018 Minnesota Sentencing Guidelines can be accessed at <http://mn.gov/msgc-stat/documents/Guidelines/2018/Guidelines.pdf>.

2019).² Hemphill was sentenced under the prior version of the guidelines and, because the current offense occurred within the time frame of the initial probation period imposed for a prior offense, a custody-status point was added to his criminal-history score even though he had been discharged early from probation for that offense. He argues that, under the amelioration doctrine, he qualifies for resentencing because he should have a criminal-history score of two and not three. The state does not oppose this conclusion and we agree.

The amelioration doctrine provides that changes in a law that serve to mitigate punishment should be applied to acts committed before the law's effective date, so long as no final judgment has been reached and the legislature has not explicitly expressed contrary intent. *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017). Amendments to the sentencing guidelines are treated as statutory amendments for the purposes of the amelioration doctrine. *Id.* at 492. To determine whether an amended statute applies to mitigate the level of punishment for crimes committed before the effective date of the amendment, the court looks to see if the following three factors are present: “(1) there is no statement by the Legislature that clearly establishes the Legislature’s intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect.” *Id.* at 490. We review the applicability of the amelioration doctrine de novo. *Cf. State v. Campbell*, 814 N.W.2d 1, 4 (Minn. 2012) (interpretation of the sentencing guidelines is subject to de novo review). This court recently decided *State v. Robinette*, holding that the amelioration doctrine applies to the

² The 2019 Minnesota Sentencing Guidelines can be accessed at: <http://mn.gov/msgc-stat/documents/Guidelines/2019/MinnSentencingGuidelinesCommentary.pdf>.

same amendment of the sentencing guidelines. ___ N.W.2d ___, ___, 2020 WL 1909348, at *6 (Minn. App. Apr. 20, 2020). We concluded that the legislature did not intend to abrogate the application of the amelioration doctrine to the 2019 guidelines amendment and that the amendment served to mitigate punishment, thus satisfying factors one and two of the test. *Id.* at *5-6. Because the amendment became effective August 1, 2019, while this appeal was pending, the amelioration doctrine applies here. We reverse and remand for the district court to resentence Hemphill consistent with the 2019 change in the sentencing guidelines.

Affirmed in part, reversed in part, and remanded.