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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1258**

State of Minnesota,
Respondent,

vs.

Donald Jay Bell,
Appellant.

**Filed May 11, 2020
Reversed and remanded
Reilly, Judge**

Ramsey County District Court
File No. 62-CR-18-78

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Catherine Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Hooten, Judge.

UNPUBLISHED OPINION

REILLY, Judge

In this direct appeal from judgment of conviction for assault and unlawful possession of a firearm, appellant argues that his sentences must be reversed because the

district court improperly calculated his criminal-history score. We reverse appellant's sentences and remand for resentencing.

FACTS

In November 2017, appellant Donald Jay Bell went to a gas station in St. Paul carrying a gun. Appellant followed a gas station employee, J.A.L.G., inside the gas station, took out the gun, and told J.A.L.G. to get all of the money from the cash register. When J.A.L.G. went through a door to the area where the cash register was located, appellant saw that there was another man, J.G., in the gas station. While J.A.L.G. was getting money out of the cash register, J.G. moved toward appellant and reached for appellant's gun. A struggle for the gun followed and appellant, whose finger was on the trigger when the struggle began, fired the gun between four and six times. One of the bullets struck J.G.'s shoulder and traveled to his neck. J.A.L.G. punched appellant and appellant left the gas station.

The state charged appellant with first-degree assault in violation of Minn. Stat. § 609.221, subd. 1 (2016), two counts of possession of a firearm or ammunition by an ineligible person in violation of Minn. Stat. § 624.713, subd. 2(b) (2016), and second-degree assault with a dangerous weapon in violation of Minn. Stat. § 609.222, subd. 1 (2016). As part of a plea agreement with the state, appellant pleaded guilty to first-degree and second-degree assault and unlawful possession of a firearm and the state dismissed the remaining charge. The parties did not reach an agreement regarding sentencing.

At sentencing, the district court relied on the sentencing worksheets which assigned appellant a criminal-history score of six with respect to the second-degree assault crime

and a criminal-history score of seven with respect to the first-degree assault crime. Appellant did not object to his criminal-history score calculation at sentencing. The district court sentenced appellant to 60-months' imprisonment for possession of a firearm as an ineligible person, a concurrent 60 months' imprisonment for second-degree assault, and a concurrent 138 months' imprisonment for first-degree assault. This appeal follows.

DECISION

In this appeal, appellant only challenges his sentences for the first- and second-degree assault convictions. He argues that his sentences must be reversed because the district court erroneously calculated his criminal-history score by including a felony half point for his first drug conviction, one custody-status point, and a half point for a fleeing conviction that had decayed.

“[B]ecause a sentence based on an incorrect criminal history score is an illegal sentence—and therefore . . . correctable at any time—a defendant may not waive review of his criminal history score calculation.” *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) (quotation omitted); see Minn. R. Crim. P. 27.03, subd. 9 (“The court may at any time correct a sentence not authorized by law.”). At sentencing, the state bears the burden of proof to show “that a prior conviction qualifies for inclusion within the criminal-history score.” *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). A district court’s calculation of a defendant’s criminal-history score 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).

I. The district court erroneously included a felony half point for a fifth-degree drug possession conviction in appellant’s criminal-history score.

Appellant contends that the district court erred when it calculated his criminal-history score. We agree.

Appellant relies on *State v. Strobel*, 932 N.W.2d 303 (Minn. 2019), to argue that he should not have a felony half point for a prior conviction for a first-time fifth-degree drug possession conviction because the state did not prove that he possessed the requisite amount of drugs to make him guilty of felony fifth-degree drug possession, rather than a gross misdemeanor. Strobel was convicted of two controlled-substance crimes, including a prior offense from 2012, and a subsequent offense which occurred in 2016. *Id.* at 305. Strobel’s criminal-history score at the time he was sentenced for the 2016 offense included a felony half point for the prior offense from 2012. *Id.* On appeal, Strobel argued that the district court improperly included the felony half point for the 2012 offense. *Id.* at 306. Relying on the 2016 Drug Sentencing Reform Act (DSRA), Strobel argued that “because his prior offense would be a gross misdemeanor after the effective date of the DSRA, the district court erred in classifying it as a felony” for purposes of his criminal-history score, without the state proving that his prior offense should be classified as a felony. *Id.*

The Minnesota Supreme Court agreed. It noted that four years after Strobel’s 2012 conviction and sentence, the legislature enacted the 2016 DSRA. *Id.* at 305. Under the DSRA, “fifth-degree *sale* of a controlled substance remains a felony, but some first-time fifth-degree *possession* offenses are now classified as gross misdemeanors.” *Id.* (citing 2016 Minn. Laws ch. 160, § 7, at 576, 583-85 (codified at Minn. Stat. § 152.025 (2016))).

The supreme court explained further that the Minnesota Sentencing Guidelines provide that “[t]he classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions (see Minn. Stat. § 609.02, subds. 2-4a) and sentencing policies.” *Strobel*, 932 N.W.2d at 307. Applying the rules of statutory interpretation, the supreme court determined that “offense definitions” as used in the sentencing guidelines, refers to “the element-based definitions of crimes” found in Minnesota statutes, and that “the classification of a prior offense [as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony] is determined by reference to the statute setting forth the elements of the crime.” *Id.* at 304, 309-10.

Here, the district court sentenced appellant based on a criminal-history score of six or more for his first- and second-degree assault offenses which occurred in 2017—after the DSRA went into effect on August 1, 2016. The district court included a felony half point for appellant’s previous first-time fifth-degree drug possession conviction from 2003. However, the state did not offer any evidence to prove that appellant possessed the requisite amount of drugs to qualify as a felony under the DSRA. As such, under *Strobel*, the district court erred in including a felony half point for the previous fifth-degree possession conviction in appellant’s criminal-history score without the state first proving that the offense qualified as a felony under the amended DSRA statute.

The state argues that *Strobel* does not entitle appellant to relief because the DSRA applies only to offenses committed on or after August 1, 2016. This, according to the state, means that appellant’s prior offense, which occurred in 2003, remains a felony. More specifically, the state contends that under the elements-based approach taken in *Strobel*,

the date of the prior offense must be considered because it is an element of the crime that must be proved by the state. And, if the prior offense occurred before August 1, 2016, the DSRA's offense definitions do not apply. We are not persuaded.

While the DSRA applies only to offenses committed on or after August 1, 2016, the sentencing guidelines provide that “[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. (Supp. 2017); *see also* 2.B.7.a (Supp. 2017) (“The classification of a prior offense as a petty misdemeanor, misdemeanor, gross misdemeanor, or felony is determined by current Minnesota offense definitions . . . and sentencing policies (citation omitted)). As such, the sentencing guidelines in place at the time appellant committed the current offense on November 23, 2017, determine how the criminal-history score should be calculated. And, under *Strobel*, whether a prior first-time fifth-degree drug possession crime receives a criminal-history point depends on whether it qualifies now as a felony or gross misdemeanor under the DSRA. Accordingly, we reject the state's argument. We reverse and remand for resentencing in accordance with *Strobel*.

II. The district court erroneously included a custody-status point and a felony half point for a decayed fleeing conviction in appellant's criminal-history score.

Appellant next argues that under modifications to the sentencing guidelines, which took effect on August 1, 2019, he should not have received a custody-status point or a felony half point for his 2000 conviction of fleeing a police officer. And, appellant argues, because the modifications took effect before his case became final, he is “entitled to the

benefit of the changes” under the amelioration doctrine.¹ Accordingly, appellant’s presumptive sentence for first-degree assault would be reduced from 158 months to 146 months. Likewise, appellant’s presumptive sentence for second-degree assault would be reduced from 57 months to 51 months. The state takes no position on these arguments.

A. Custody-Status Point

We first address appellant’s contention that he should not have received a custody-status point due to modifications to the 2019 sentencing guidelines. Prior to the 2019 modifications, an offender received a custody-status point if the offender was discharged from probation but committed an offense within the initial period of probation pronounced by the court. See Minn. Sent. Guidelines 2.B.2.a(4) (Supp. 2017). The sentencing guidelines commission removed that provision in 2019. Currently, a custody-status point can only be assigned if the offender was on probation when he committed the current offense. Minn. Sent. Guidelines 2.B.2 (Supp. 2019).

Appellant argues that under the amelioration doctrine, this court must reverse and remand for resentencing. Three requirements must be met for the amelioration doctrine to apply: “(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.” *Kirby*, 899 N.W.2d at 490.

¹ “The amelioration doctrine applies to cases that are not yet final when [a] change in law takes effect.” *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017) (emphasis omitted).

We recently addressed whether there is a statement by the legislature establishing its intent to abrogate the amelioration doctrine with respect to the modifications previously discussed. In *State v. Robinette*, we determined that the amelioration doctrine applies in this context and that there is no statement by the legislature clearly establishing its intent to abrogate the amelioration doctrine. __ N.W.2d __, __, 2020 WL 1909348, at *6 (Minn. App. April 20, 2020). In reaching this conclusion, we explained that the guidelines commission proposed a modification to Minn. Sent. Guidelines 2.B.2, which was submitted to the legislature. *Id.* at *5. The legislature did not act and the new guidelines took effect on August 1, 2019, pursuant to Minn. Stat. § 244.09, subd. 11, *id.*, which provides:

Any modification which amends the Sentencing Guidelines grid, including severity levels and criminal history scores, or which would result in the reduction of any sentence or in the early release of any inmate . . . shall be submitted to the legislature by January 15 of any year . . . and shall be effective on August 1 of that year, unless the legislature by law provides otherwise. All other modifications shall take effect according to the procedural rules of the commission.

We noted that in addition to the proposed guidelines changes, the commission also proposed modifications to its policies, including Minn. Sent. Guidelines 3.G.1. *Id.* at *6. The policy modification states that “[m]odifications to sections 1 through 8 of the Minnesota Sentencing Guidelines . . . apply to offenders whose date of offense is on or after the specified modification date.” *Id.* Again, the legislature took no action on these changes. *Id.* We concluded that the legislature’s inaction with respect to 3.G.1 “does not operate as a statement by the legislature establishing its intent to abrogate the amelioration

doctrine because Minn. Stat. § 244.09, subd. 11, does not provide for legislative adoption of modifications that do not amend the sentencing guidelines grid or result in the reduction of any sentence or in the early release of any inmate.” *Id.* And, because we could discern no statement by the legislature establishing its intent to abrogate the amelioration doctrine with respect to Minn. Sent. Guidelines 2.B.2, we determined the amelioration doctrine applies. *Id.*

Here, appellant contends that the state assigned him a custody-status point under the 2017 sentencing guidelines provision which allowed a point to be assigned if the offender committed an offense within the original period of probation pronounced by the court. Appellant points to his presentence investigation, which indicates that on October 22, 2009, he was placed on probation for 30 years but was discharged early on February 20, 2013. Based on the record that is available to this court, appellant is entitled to resentencing in accordance with the amended sentencing guidelines.

B. Half point for a decayed felony fleeing conviction

We now turn to appellant’s contention that he should not have received a felony half point for a conviction for fleeing a police officer from 2000. As noted by appellant, the decay² provision that existed at the time he committed his current offense excluded prior convictions if 15 years had passed from the time the sentence expired or the offender was

² “The Commission established a ‘decay factor’ for the consideration of prior felony offenses in computing criminal history scores The Commission decided that the presence of old felony sentences . . . should not be considered in computing criminal history scores after a significant period of time has elapsed.” Minn. Sent. Guidelines cmt. 2.B.113 (Supp. 2019).

discharged from the sentence to the date of the current offense. Minn. Sent. Guidelines 2.B.1.c. (Supp. 2017). However, the 2019 sentencing guidelines provide that:

In computing the criminal history score, a prior felony sentence or stay of imposition following a felony conviction must not be used, if all the following, to the extent applicable, occurred before the date of the current offense: (1) the prior felony sentence or stay of imposition expired or was discharged; (2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and (3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

Minn. Sent. Guidelines 2.B.1.c (Supp. 2019). Like the modifications to 2.B.2, the legislature did not act on the commission’s modifications to Minn. Sent. Guidelines 2.B.1, and the modifications went into effect on August 1, 2019, per Minn. Stat. § 244.09, subd. 11. And, because we have already concluded that “legislative inaction on the proposed modification to 3.G.1 does not operate as a statement by the legislature establishing its intent to abrogate the amelioration doctrine” under the language in Minn. Stat. § 244.09, subd. 11, we conclude there is no statement by the legislature establishing its intent to abrogate the amelioration doctrine with respect to Minn. Sent. Guidelines 2.B.1. *Robinette*, 2020 WL 1909347, at *6.

Here, appellant’s presentence investigation indicates that he pleaded guilty to the fleeing charge on August 3, 2000, was “committed to the Commissioner of Corrections for 15 months,” then “suspended to probation for 3 years with conditions” with an expiration date of August 3, 2003. Thus, under the 2019 sentencing guidelines provision, appellant should not have received a felony half point for his fleeing conviction because his sentence expired in 2003, 15 years elapsed since his August 3, 2000 sentencing, and his sentence

was never executed. Based on the record that is available to this court, appellant is entitled to resentencing in accordance with the amended sentencing guidelines.

Reversed and Remanded.