

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0431**

State of Minnesota,
Respondent,

vs.

Nicole Lee Baker,
Appellant.

**Filed March 8, 2021
Reversed and remanded
Slieter, Judge**

Pennington County District Court
File No. 57-CR-18-102

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

Seamus P. Duffy, Pennington County Attorney, Max W. LaCoursiere, Assistant County Attorney, Thief River Falls, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Jesson, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

SLIETER, Judge

In this direct appeal, appellant challenges her aggravated sentence for a conviction of a second-degree controlled-substance offense. Appellant argues that the district court erred in its application of the relevant aggravating factor. Appellant separately challenges

the district court's calculation of her criminal-history score, arguing that the state failed to adequately prove that her out-of-state drug conviction properly results in a criminal-history weight of 1.5 points.

Because we conclude the district court improperly based its departure upon facts of a dismissed count and because the state did not produce evidence supporting the district court's calculation of appellant's criminal-history score, we reverse and remand.

FACTS

Respondent State of Minnesota charged appellant Nicole Lee Baker with one count of third-degree murder. The complaint alleged that on or about February 8, 2018, appellant "proximately caused the death of [another]" through her sale of a mixture containing heroin, which was later discovered to contain fentanyl. Appellant later pleaded guilty to amended charges of second-degree controlled-substance crime, in violation of Minn. Stat. § 152.022, subd. 1(7) (2016) (sale of controlled substance in a school or park zone), and third-degree controlled-substance crime, in violation of Minn. Stat. § 152.023, subd. 2(a)(2) (2016) (possession of three or more grams of heroin).

During the plea hearing, appellant testified that she had purchased an amount of heroin (which had been, without her knowledge, laced with fentanyl) from R.B. in Bemidji. N.M. was present during this transaction. After returning to her Thief River Falls home, appellant sold N.M. some of the heroin.¹ A portion of the heroin sold to N.M. was

¹ Appellant admitted that her home was within 300 feet of Northrup Park in Thief River Falls, and that she had possessed at least three grams of heroin at that location.

eventually conveyed to S.C., either by N.M. or another individual. S.C. ingested the fentanyl-laced heroin and died of an overdose.

Respondent sought an aggravated upward sentence departure on the ground that appellant “committed the charged offenses as a part of a group of three or more offenders who all actively participated in the crime.” Appellant waived her right to a jury trial on the existence of the aggravating factor. The state relied on appellant’s guilty plea testimony to support its argument for an upward departure.

The district court imposed 105 months’ imprisonment, an upward durational departure from the presumptive sentence range of 67 to 93 months for the second-degree controlled-substance crime based on there being “three or more people . . . involved in th[e] transaction.” The court imposed a concurrent guidelines sentence of 51 months’ imprisonment for the third-degree controlled-substance crime. The district court found that appellant had a criminal-history score of 3, which included 1.5 points for an out-of-state controlled-substance conviction. Appellant did not object to this criminal-history score.

On appeal, appellant challenges both the imposition of the upward durational departure and the district court’s calculation of her criminal-history score.

DECISION

I. Upward Departure—Aggravating Factor

A sentencing court may depart from the presumptive sentences set forth in the Minnesota Sentencing Guidelines only if “substantial and compelling circumstances justify[] the departure.” *State v. Edwards*, 774 N.W.2d 596, 601 (Minn. 2009) (quotation omitted). Such circumstances exist if “the defendant’s conduct was significantly more or

less serious than that typically involved in the commission of the offense in question.” *Id.* To help courts make this determination, the guidelines provide a “nonexclusive list of factors that may be used as reasons for departure.” Minn. Sent. Guidelines 2.D.3 (2018).

Appellate courts “review[] a district court’s decision to depart from the presumptive guidelines sentence for an abuse of discretion.” *See Edwards*, 774 N.W.2d at 601. However, we first review *de novo* whether the particular grounds for an upward departure were permissible. *State v. Rabold*, 935 N.W.2d 902, 906 (Minn. App. 2019). Then, once we determine that the grounds were permissible, we review the ultimate decision of whether to depart for an abuse of discretion. *Id.*

As to the existence of an aggravating factor, the district court found:

[B]ased upon the evidence presented and [appellant]’s own testimony at the plea hearing . . . the Court does find beyond a reasonable doubt that there were three or more persons involved in the transactions which resulted in the death of the victims [T]he Court does find that that factor has been proven beyond a reasonable doubt.

The complete text of the aggravating factor that the district court relied on in imposing an upward departure states: “The offender committed the crime as part of a group of three or more offenders who all actively participated in *the crime*.” Minn. Sent. Guidelines 2.D.3.b.10 (emphasis added). Because the district court relied on the involvement of multiple people in a crime which had been dismissed, the district court erred by basing the sentencing departure on this factor.

The Minnesota Supreme Court has delineated facts which cannot be considered in deciding whether an upward departure is warranted. Specifically, the court may not base

an upward departure on (1) “facts necessary to prove an element of the offense,” (2) facts “contemplated by the legislature when it set out the punishment for the offense being sentenced,” (3) “facts underlying an uncharged separate” incident unless they show that the offense being sentenced was committed in a particularly serious way, or (4) facts underlying a separate conviction that was part of the same behavioral incident. *Edwards*, 774 N.W.2d at 602-03. It is the third example which here prohibits the use of this aggravating factor.

The aggravating factor identified by the district court relates only to the third-degree murder offense originally charged but not included in the amended complaint and not admitted to by appellant. As the Minnesota Supreme Court further explained:

Our restrictions on the use of facts underlying separate offenses to depart upward originated in *State v. Ott*, where we considered whether the district court could base a decision to impose consecutive sentences, which was a departure under the sentencing guidelines, on facts underlying an uncharged separate incident. *State v. Ott*, 341 N.W.2d 883, 884 (Minn. 1984). We concluded that facts underlying an uncharged separate incident are an impermissible basis for departure because those facts do not show that the offense being sentenced was committed in a particularly serious way. *Id.*

...

If evidence only supports defendant’s guilt of some other offense but does not support the conclusion that the defendant committed the instant offense for which he is being sentenced in a particularly serious way, then it cannot be relied upon as a ground for departure.”

Edwards, 774 N.W.2d at 602 (quotation omitted).

The offense of conviction to which the aggravating factor was applied by the district court was the sale of heroin by appellant to N.M. in her home in Thief River Falls. Any

other acts are clearly “separate uncharged incident[s].” *Id.* Those incidents occurred in separate locations at separate times, and fail to show that the crime itself for which appellant was being sentenced was “committed in a particularly serious way.” *Id.*

In summary, the district court erred in its application of the aggravating factor and thereby erred by imposing an upward durational departure which was solely based on this improperly applied factor. Pursuant to the holding of the Minnesota Supreme Court in *Williams v. State*, 361 N.W.2d 840, 844 (Minn. 1985) (“If the reasons [for departure] are improper or inadequate and there is insufficient evidence of record to justify the departure, the departure will be reversed.”), we reverse and remand for resentencing within the range of the sentencing guidelines.

II. Criminal-History Score—Out-of-State Conviction

Appellant challenges the district court’s calculation of her criminal-history score regarding her prior out-of-state conviction. The district court calculated appellant’s criminal-history score based on the inclusion of an out-of-state controlled-substance conviction which was given a criminal-history weight of 1.5 points. We review the district court’s calculation for an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006).

For a district court to use an out-of-state conviction to calculate a defendant’s criminal-history score, the state must “establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.” *Id.* Additionally, the proper weight given to a foreign conviction “must be based on the severity level of the equivalent Minnesota felony

offense.” Minn. Sent. Guidelines 2.B.5.c (2018). In doing so, the “sentencing court should compare the definition of the foreign offense with the definitions of comparable Minnesota offenses” but also may consider “the nature of the foreign offense[] and sentence received by offender for the offense.” *Hill v. State*, 483 N.W.2d 57, 58 (Minn. 1992). For foreign controlled-substance convictions, “the amount and type of the controlled substance should be considered in the determination of the appropriate weight to be assigned to a prior felony sentence for a controlled substance offense.” Minn. Sent. Guidelines cmt. 2.B.503 (2018).

Appellant was convicted in 2017 in Wisconsin for possession of methamphetamine, in violation of Wis. Stat. § 961.41(3g)(g) (2016), a class I felony under Wisconsin law. That statute requires that the defendant “possesses or attempts to possess methamphetamine or a controlled substance analog of methamphetamine.” Appellant correctly notes that a defendant may violate the Wisconsin statute by possession of any amount of methamphetamine. As such, this could have constituted the equivalent of a fifth-degree controlled-substance crime in Minnesota, which does not require possession of a specific amount of controlled substance, and carries a criminal-history weight of 0.5 points. Minn. Stat. § 152.025, subd. 2 (2016); Minn. Sent. Guidelines 4.C (2016) (fifth-degree controlled substance crimes are D2 severity level); Minn. Sent. Guidelines 2.B.1.a (2016) (D2 crimes assigned weight of 0.5 points).

However, appellant’s prior out-of-state drug conviction was assigned a criminal-history weight of 1.5 points. The Minnesota controlled-substance-possession offenses to which a criminal-history weight of 1.5 points is given are second- and third-degree controlled-substance possession. Minn. Sent. Guidelines 4.C (second- and third-degree

controlled substance crimes are D7 and D6, respectively); Minn. Sent. Guidelines 2.B.1.a (D7 and D6 crimes assigned criminal-history weight of 1.5 points). These two offenses require evidence of a prescribed amount of controlled substance. Minn. Stat. § 152.022, subd. 2 (2016); Minn. Stat. § 152.023, subd. 2 (2016). Because respondent introduced no evidence indicating the quantity of methamphetamine appellant possessed while committing the violation of Wisconsin law, insufficient evidence exists to justify a criminal-history weight of 1.5 points. *Maley*, 714 N.W.2d at 711.

We therefore remand to allow respondent to present evidence of appellant's criminal-history score.² Following a redetermination of appellant's criminal-history score, the district court will resentence appellant consistent with this opinion.

Reversed and remanded.

² Pursuant to *State v. Outlaw*, as here, when a defendant fails to object to inclusion of foreign convictions in his criminal-history score and later challenges the score on appeal, it is appropriate for the district court to allow the state, on remand, to present additional evidence regarding the out-of-state offense. 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. Jul. 15, 2008). Because appellant did not object to the calculation of her criminal-history score at sentencing, we remand on this issue to allow the state to “further develop the sentencing record so that the district court can appropriately make its determination.” *Id.*