

*This opinion is nonprecedential except as provided by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
A20-0667**

State of Minnesota,
Respondent,

vs.

Tyler Douglas Flantz,
Appellant.

**Filed March 15, 2021
Affirmed
Frisch, Judge**

Anoka County District Court
File No. 02-CR-18-5482

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

Anthony C. Palumbo, Anoka County Attorney, Robert I. Yount, Assistant County Attorney, Anoka, Minnesota (for respondent)

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

Considered and decided by Florey, Presiding Judge; Reilly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

In this direct appeal from his convictions for possession of child pornography, appellant challenges the calculation of his criminal-history score and argues that he must

be resentenced because (1) the state failed to establish the offense dates for two of the four counts to which he pleaded guilty—facts necessary to determine the assignment of multiple custody-status points for those offenses and (2) the district court imposed his sentences in the wrong order. We affirm.

FACTS

In January 2012, appellant Tyler Douglas Flantz was convicted of felony possession of pornographic work involving a minor and received a stay of imposition with a five-year probationary period extending from January 10, 2012, through January 10, 2017.

In December 2016, the Minnesota Bureau of Criminal Apprehension (BCA) received a tip from the National Center for Missing and Exploited Children that a Yahoo! Inc. user had uploaded images of pornographic work involving minors to an online account. A subsequent investigation revealed that, on November 15, 2016, the user had uploaded three explicit images containing child pornography to a Yahoo! Inc. account that was associated with Flantz's phone number and email address.

In May 2017, the BCA executed a search warrant for Flantz's residence and seized his cell phone. In a statement to BCA agents, Flantz admitted that he had used torrent software to download child pornography onto his cell phone, but he had later deleted the images. He estimated downloading and deleting child pornography approximately 20 times, with his last download occurring four days prior. BCA agents reviewed records associated with Flantz's email address and found in those records illegal pornographic images, including two of known child victims, downloaded during the period November 1, 2016, through May 2, 2017.

In August 2018, the state charged Flantz with five counts of possession of pornographic work involving minors—second or subsequent offense—in violation of Minn. Stat. § 617.247, subd. 4(a) (2016). Count 1 related to possession on November 22, 2016. Counts 2 and 3 related to possession on November 15, 2016. Counts 4 and 5 related to possession on or about November 1, 2016, through May 2, 2017. The images uploaded to Flantz’s Yahoo! Inc. account formed the basis for counts 1, 2, and 3, but counts 4 and 5 were based on the images found in his email records.

Flantz ultimately pleaded guilty to counts 2, 3, 4, and 5 in exchange for the state’s agreement to dismiss count 1. During the plea colloquy, the following exchange occurred between the prosecutor and Flantz:

Q: And tell the Court—well, it’s my understanding that what you told the BCA was that you were regularly downloading and deleting child pornography on that cell phone; is that right?

A: Yes.

Q: And you were accessing that child pornography on that cell phone through your e-mail account; is that accurate?

A: Yes.

Q: And during the period between—I believe it was November—November of 2016 until May of 2017, you continued to download images of child pornography and delete those images, right?

A: Yes.

The district court accepted Flantz’s pleas.

Before sentencing, county corrections prepared sentencing worksheets for the district court. The sentencing worksheets indicated that Flantz was assigned two custody-status points on each count because his current offenses were qualifying offenses on the

sex-offender grid and because he committed the offenses while on probation. The sentencing worksheet also assigned the following felony points: 1 felony point on count 4; 2 felony points on count 5; 3 felony points on count 2; and 4 felony points on count 3.

At sentencing, Flantz did not contest the calculation of his criminal-history score. The district court adopted the criminal-history-score calculations on the sentencing worksheets and imposed the following concurrent sentences in the order listed: 45 months on count 4; 59 months on count 5; 77 months on count 2; and 93 months on count 3. Flantz appeals.

DECISION

Flantz challenges his sentences, arguing that the district court erred in calculating his criminal-history score because it (1) assigned two custody-status points to his criminal-history score for counts 4 and 5 based on its determination that he committed the offenses while on probation and (2) imposed sentences for convictions in the wrong order.

We observe that Flantz did not raise either of these issues to the district court at sentencing. Generally, the failure to raise an issue before the district court results in a forfeiture on appeal. *See State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). But review of a defendant's criminal-history score may not be forfeited, *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007), because "a sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected on direct appeal, regardless of whether the defendant objected to the score at sentencing," *State v. Strobel*, 921 N.W.2d 563, 573 n.1 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019). This court reviews "determinations of a defendant's criminal-history score

for abuse of discretion.” *Id.* at 573. We review the interpretation of sentencing guidelines de novo. *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005).

I. The district court did not err by assigning two custody-status points to Flantz’s criminal-history score for counts 4 and 5.

An offender’s criminal-history score and the severity level of the offense are “the two dimensions most important in sentencing decisions,” together establishing a presumptive sentencing range for a given offense under Minnesota’s sentencing guidelines. Minn. Sent. Guidelines 2 (2016). “Minnesota’s Sentencing Guidelines provide uniform standards for the inclusion and weighting of criminal[-]history information that are intended to increase the fairness and equity in determining a defendant’s criminal-history score.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006) (quotation omitted). Under the guidelines, an offender’s criminal-history score is computed from eligible prior offenses and juvenile adjudications, plus any custody-status points. Minn. Sent. Guidelines 2.B.

Flantz was sentenced for counts 4 and 5 under the 2016 version of the sentencing guidelines. Minn. Sent. Guidelines 2.B.2.b provides that two custody-status points may be assigned if (1) the current conviction offense is a qualifying offense on the sex-offender grid and (2) the offender also qualifies for one custody-status point described in Minn. Sent. Guidelines 2.B.2.a for a qualifying offense on the sex-offender grid. A defendant qualifies for a custody-status point under Minn. Sent. Guidelines 2.B.2.a.(1)(i) when the offender was on probation at the time of the current offense. This custody status must follow the entry of a guilty plea, a guilty verdict, or a conviction. Minn. Sent. Guidelines

2.B.2.a.(2). Also, the offender's qualifying custody status must be for a qualifying offense, which includes a felony. Minn. Sent. Guidelines 2.B.2.a.(3)(i) & cmt. 2.B.205.

In this case, Flantz was assigned two custody-status points for counts 4 and 5 because (1) his offenses were qualifying offenses on the sex-offender grid, and (2) he was found to have been on probation, or within the original term of probation, for a qualifying offense at the time he committed the present offenses. See Minn. Sent. Guidelines 2.B.2.a, 4.B (2016).

The parties do not dispute that Flantz was on probation from January 10, 2012, through January 10, 2017, for felony possession of pornographic works involving minors. Nor do they dispute that Flantz should be assigned custody-status points for any offenses he committed while on probation. The only dispute is when the offenses giving rise to counts 4 and 5 legally "occurred" and whether the offenses occurred while he was on probation. Flantz argues that the record does not establish that possession offenses occurred while he was on probation.

To resolve this dispute, we consider whether the acts of possessing pornographic images on or about November 1, 2016, through May 2, 2017, and downloading and deleting those pornographic images approximately 20 times during that time period amount to a continuing offense. When calculating a criminal-history score, "the entire range of dates over which a continuing crime is committed constitutes the date of the current offense." *State v. Washington*, 908 N.W.2d 601, 608 (Minn. 2018) (quotation omitted). We determine whether an offense is "continuing" based on whether the language of the statute defining the offense imposes a "continuing obligation" on the offender. *Id.* at 606.

The use of the word “possessing” in a criminal statute is intended to “denote a continuing offense.” *State v. Lawrence*, 312 N.W.2d 251, 253 (Minn. 1981). A continuing offense is “one offense that occurs each and every day until the violation ceases.” *Washington*, 908 N.W.2d at 608.

In *Washington*, the supreme court considered when the offense of failing to register as a predatory offender legally “occurred” for purposes of calculating a criminal-history score. *Id.* at 606-08. There, the defendant failed to register for a period of time between June 2013 to August 2015 and, during that period, a prior felony conviction decayed, in September 2014. *Id.* at 604-05. The defendant challenged the inclusion of the decayed conviction in his criminal-history score, arguing that the decay occurred before the “date of his current offense,” which he argued was in August 2015, the last day of the date range during which he failed to register. *Id.* at 607. The supreme court rejected the argument that the offense occurred only on the last date the defendant violated the statute. *Id.* at 608. In so doing, the court first concluded that the failure-to-register statute imposed continuing obligations on those subject to its provisions and that each failure to comply with those statutory obligations amounted to a continuing offense. *Id.* at 606. The court then held that when the offense is a continuing one, the “date of the current offense” comprises the *entire* period of time over which the offender commits the continuing offense. *Id.* at 608. Because the conviction had not decayed at the time the offense began, the supreme court held that the criminal-history score was correct. *Id.*

The same principle applies here. In his plea colloquy for counts 4 and 5, Flantz admitted that between the date range of November 1, 2016, and May 2, 2017, he committed

the continuing offenses of possession of pornographic work involving minors during the entire range of dates. He specifically admitted that he “continued to download images of child pornography” during the “period between . . . November of 2016 until May of 2017.” That he alternatively uploaded and deleted prohibited images during this entire time frame does not impact the continuing nature of his actions in violation of the statute criminalizing the possession of such pornographic material. Because Flantz admitted to possession of pornography during the same period of time he remained on probation, his criminal-history score properly included two custody-status points as to counts 4 and 5.

II. The district court did not err by imposing sentences for counts 4 and 5 before the sentences for counts 2 and 3.

“Multiple offenses sentenced at the same time before the same court must be sentenced in the order in which they occurred.” Minn. Sent. Guidelines 2.B.1.e; *see also State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009).

Flantz argues that the district court erred by imposing his sentences in the wrong order, which increased his sentences on counts 2 and 3 as a result. Specifically, he contends that the record does not establish that the date of offense for counts 4 and 5 occurred before the date of offense for counts 2 and 3.

Because Flantz pleaded guilty to continuing offenses on counts 4 and 5 occurring during “entire range of dates” spanning on or about November 1, 2016, through May 2, 2017, and because the “the entire range of dates over which a continuing crime is committed constitutes the date of the current offense,” *Washington*, 908 N.W.2d at 608 (quotation omitted), the record establishes that counts 4 and 5 occurred—at least in part—

before November 15, 2016—the date of offense for counts 2 and 3. Therefore, the district court did not err by imposing Flantz’s sentences for counts 4 and 5 before his sentences for counts 2 and 3.

Affirmed.