

*This opinion is nonprecedential except as provided by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
A20-0877**

State of Minnesota,
Respondent,

vs.

Chad Allen Gustafson,
Appellant.

**Filed May 10, 2021
Reversed and remanded
Jesson, Judge**

Polk County District Court
File No. 60-CR-19-2570

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

Greg Widseth, Polk County Attorney, Clifford Wardlaw, Assistant County Attorney,
Crookston, Minnesota (for respondent)

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

Considered and decided by Reyes, Presiding Judge; Worke, Judge; and
Jesson, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Pursuant to a plea agreement with the state, appellant Chad Gustafson pleaded guilty to third-degree possession of a controlled substance.¹ The district court accepted the plea and sentenced Gustafson to 46 months' imprisonment, consistent with the state's request for a sentence at the top of the applicable sentencing guidelines range with Gustafson's assumed criminal-history score of three. Gustafson appeals, arguing that his criminal-history score was incorrectly calculated. Because recent amendments to the sentencing guidelines must be applied to Gustafson's case and the state failed to prove that Gustafson's previous North Dakota convictions should be included in his criminal-history score, we reverse and remand.

FACTS

After a state trooper discovered a pipe and methamphetamine in appellant Chad Gustafson's car, the state charged Gustafson with first-degree sale of a controlled substance weighing more than 17 grams, third-degree possession of a controlled substance weighing more than ten grams, and failure to affix a tax stamp.² The state then offered Gustafson a plea agreement: in exchange for a plea of guilty to third-degree possession of a controlled substance and a sentence at the "top of the appropriate guidelines range," the state would dismiss Gustafson's remaining charges. The agreement further indicated that because the

¹ Minn. Stat. § 152.023, subd. 2(a)(1) (2018).

² Minn. Stat. §§ 152.021, subd. 1(1), .023, subd. 2(a)(1), 279D.09, subd. 1a (2018).

parties assumed Gustafson’s criminal-history score was three, his anticipated sentence was 46 months’ imprisonment.

Gustafson accepted the state’s offer and submitted a plea petition to enter a plea of guilty to third-degree possession of a controlled substance. In doing so, Gustafson agreed to “receive[] a guidelines sentence, high end of the box. *Parties believe criminal history score is III* which results in 46 month executed sentence. Other charges to be dismissed at sentencing.” (Emphasis added.)

At the combined plea and sentencing hearing, the parties reiterated their understanding of the terms of the plea agreement:

THE DEFENSE: Your Honor, consistent with the letter offer you have before you and the plea petition, Mr. Gustafson will be entering a plea of guilty to Count 2. Counts 1 and 3 will be dismissed. The parties anticipate a 46-month sentence. *We have a criminal history score of three, as calculated by Corrections. . . .*

THE STATE: Yes, your Honor. We’ve had a chance to have a sentencing worksheet done. *We took the defendant’s criminal history category off that worksheet.* We applied it to a controlled substance crime third degree . . . and the top of the box is 46 months. So the offer that I’ve made to the defendant is a plea to Count 3, dismiss the remaining counts at sentencing. The defendant would receive a sentence at the top of the applicable guideline box, which is 46 months.

(Emphasis added.) The parties based their assumption about Gustafson’s criminal-history score—and his corresponding anticipated sentence—on a sentencing worksheet that

assigned Gustafson a criminal-history score of three. The worksheet assigned two-and-a-half felony points for Gustafson's three prior convictions from North Dakota—harassment, manufacture of a controlled substance (methamphetamine), and unlawful possession of methamphetamine.³ An additional custody-status point was assigned because Gustafson was on probation for the North Dakota harassment charge at the time of his arrest in the present case.

After accepting Gustafson's plea, the district court sentenced him to 46 months' imprisonment, consistent with the parties' agreement for a sentence at the top of the applicable guidelines range for a third-degree possession conviction and Gustafson's assumed criminal-history score of three.

Gustafson appeals.

DECISION

Gustafson challenges his sentence, arguing that the district court erred in assigning him a criminal-history score of three. He identifies two errors in the district court's calculation of this score. First, because of the 2019 amendments to the Minnesota Sentencing Guidelines, Gustafson asserts that he should not have been assigned a full custody-status point, but rather only one-half point. Second, Gustafson claims that the state did not satisfy its burden of proof to show that his prior drug convictions from North Dakota could be properly considered as part of his criminal-history score. In sum, Gustafson argues that his criminal-history score is actually two, and requests resentencing according

³ N.D. Cent. Code §§ 12.1-17-07(1), 19-03.1-23(1), (7) (2016).

to that score. We address these issues below. But before we address Gustafson’s two claims, we consider the state’s argument that we should deny Gustafson the relief he seeks in a direct appeal and require him to either seek relief by filing a petition for postconviction relief or move to correct his sentence in the district court.

I. Gustafson’s appeal may be considered on its merits.

The state urges us to deny Gustafson’s requested relief and instead instruct him to file a petition for postconviction relief to withdraw his guilty plea. It is improper to hear his appeal now, the state contends, because Gustafson did not raise these issues before the district court and granting his request to modify his sentence would contradict the plea agreement between Gustafson and the state. The state’s argument presents a question of interpretation of a procedural rule and a statute, which we review de novo. *State v. Coles*, 862 N.W.2d 477, 479 (Minn. 2015).

Our de novo review begins with an overview of the methods available to a defendant to appeal a conviction. The first is a sentencing appeal under Minnesota Rule of Criminal Procedure 28.05. *State v. Thomas*, 371 N.W.2d 533, 534 (Minn. 1985). The second is a direct appeal from the district court’s final judgment of conviction under Minnesota Rule of Criminal Procedure 28.02, subdivision 2. *Id.* at 535. Third, after the time for filing a direct appeal has passed, a defendant may file a petition for postconviction relief, which is a broader statutory remedy. *Id.*; *see also* Minn. Stat. § 590.01 (2020). Finally, the district court may “at any time correct a sentence not authorized by law.” Minn. R. Crim. P. 27.03, subd. 9.

Here, Gustafson seeks review via a direct appeal pursuant to rule 28.02, subdivision 2(3), which allows defendants to “appeal as of right from any sentence imposed or stayed in a felony case.” Defendants may use this method to challenge their sentence even when other avenues of appeal may be available, because “a defendant cannot forfeit appellate review of his criminal history score.” *State v. Scovel*, 916 N.W.2d 550, 553 n.5 (Minn. 2018) (quoting *State v. Maurstad*, 733 N.W.2d 141, 148 (Minn. 2007)); see also *State v. Strobel*, 921 N.W.2d 563, 573 n.1 (Minn. App. 2018) (“[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.”), *aff’d*, 932 N.W.2d 303 (Minn. 2019). As such, even though Gustafson did not challenge his criminal-history score in district court, or via a petition for postconviction relief, he has not waived appellate review of this issue, and we may consider the merits of his argument here.

The state attempts to persuade us otherwise, arguing that because Gustafson seeks to “unilaterally” modify the plea agreement he must challenge his sentence via a petition for postconviction relief, not a rule 28.02 direct appeal. We are not persuaded. As explained above, Minnesota appellate courts have repeatedly concluded that defendants may seek a direct appeal of their sentence under rule 28.02, as Gustafson does here. *Scovel*, 916 N.W.2d at 553 n.5; *Maurstad*, 733 N.W.2d at 147; *Strobel*, 921 N.W.2d at 573 n.1.

Nor are we persuaded by the state’s substantive claim. Typically, where a defendant’s challenge to his or her sentence implicates a plea agreement, a petition for postconviction relief is the proper avenue for review. *Coles*, 862 N.W.2d at 482. An appeal to reduce a sentence implicates a plea agreement when, if granted, the reduction would

disrupt the balance of the plea bargain struck by the defendant and the state. *Id.* at 481-82. But the cases the state relies on to urge us to apply this general rule are distinguishable from Gustafson's case.

In *Johnson v. State*, the supreme court determined that because reducing the defendant's sentence would allow him to retain the benefits of the plea deal—dismissal of a kidnapping charge and the avoidance of a life sentence—but deprive the state of its benefit—no less than a 30-year sentence—the defendant's challenge to his sentence was too integral to his plea agreement to allow for relief under rule 27.03. 877 N.W.2d 776, 779 (Minn. 2016). And in *Coles*, because the defendant's sentence and conviction “were part of a negotiated package in which both [defendant] and the state received a significant benefit,” the supreme court held that defendant's challenge implicated the plea agreement and should be properly considered as a petition for postconviction relief, not a rule 27.03 motion to correct a sentence. 862 N.W.2d at 481-82.

In *State v. Lewis*, the supreme court addressed whether a district court may, on remand, reconsider the conviction portion of a plea agreement if it finds that there is no support for a departure from the sentencing guidelines for the sentencing component of the plea agreement. 656 N.W.2d 535, 538-39 (Minn. 2003). The supreme court held that because the conviction and sentence in such cases are interrelated, a district court “may consider motions to vacate the conviction and the plea agreement.” *Id.* As for *State v. DeZeler*, the question before the court in that case was whether a defendant may withdraw his or her guilty plea after the district court rejects the proposed sentence in the plea agreement. 427 N.W.2d 231, 234-35 (Minn. 1988). Finally, in *State v. Misquadace*,

we remanded to the district court—rather than modifying the defendant’s sentence—because the plea agreement was “intricate.” 629 N.W.2d 487, 491 (Minn. App. 2001), *aff’d*, 644 N.W.2d 65 (Minn. 2002).

The facts in this case are distinct from those cases cited by the state. Here, Gustafson does not challenge the underlying validity of his conviction. The plea agreement signed by Gustafson provided that he would plead guilty to third-degree possession of a controlled substance and “receive[] a guideline sentence, high end of the box.” The state’s position on sentencing was the same at the plea hearing: “So the offer that I’ve made to the defendant is a plea to Count 2, dismiss the remaining counts at sentencing. The defendant *would receive a sentence at the top of the applicable guideline box*, which is 46 months.” (Emphasis added.)

Given these statements regarding the plea agreement, we discern that the parties did not explicitly agree to a 46-month sentence. Rather, the agreement was for a guidelines sentence as determined by Gustafson’s criminal-history score. As such, while modification of his criminal-history score might change the exact sentence he would receive, it would not change the foundation of the plea agreement. Accordingly, Gustafson’s challenge does not implicate his plea agreement with the state.

In sum, because Gustafson challenges his criminal-history score pursuant to rule 28.02, we may consider the merits of his claim. And, despite the state’s arguments otherwise, we need not consider whether Gustafson’s challenge to his criminal-history score implicates the plea agreement. Moreover, Gustafson’s request does not in fact implicate the plea agreement. If granted, the request would only modify Gustafson’s

sentence and would not result in the state losing its benefit from entering into the plea deal. The state may still seek a top-of-the-box sentence. The only change to the state's benefit would be *which* guideline box to apply.

II. The district court erred by assigning Gustafson a criminal-history score of three.

Gustafson further alleges that the district court erred by assigning him a criminal-history score of three. Because the Minnesota Sentencing Guidelines were amended in 2019, Gustafson urges us to apply the amelioration doctrine to mitigate his sentence in accordance with the amended guidelines. He also argues that the state failed to prove that his prior convictions from North Dakota could be included in his criminal-history score. Because interpretation of the Minnesota Sentencing Guidelines is a question of law, we apply a de novo standard of review. *Scovel*, 916 N.W.2d at 554.

Gustafson's Custody-Status Point

Gustafson argues that we should apply the amelioration doctrine to his sentence because the 2019 amendments to the Minnesota Sentencing Guidelines, if applied to his case, would result in a reduced sentence. The amelioration doctrine establishes that an amendment to a statute applies to an offense committed before the effective date of the amendment if: (1) there is no clear legislative intent to abrogate the amelioration doctrine; (2) the amendment mitigates the punishment; and (3) final judgment had not been entered before the effective date of the amendment. *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). Because there is no dispute that the 2019 amendments mitigated

Gustafson's punishment or that final judgment had not been entered before the amendments went into effect, we focus only on the first element.

Gustafson was initially charged, convicted, and sentenced according to the 2018 Minnesota Sentencing Guidelines. Under those guidelines, one custody-status point was assigned where: (1) the defendant was on probation at the time of the offense; (2) after entry of a guilty plea, guilty verdict, or conviction; and (3) for a felony, extended juvenile jurisdiction conviction, non-traffic gross misdemeanor, gross misdemeanor driving while impaired, refusal to submit to a chemical test, reckless driving, or targeted misdemeanor. Minn. Sent. Guidelines 2.B.2a (2018). But in 2019, modification of the guidelines resulted in the assignment of one full custody-status point only when: (1) the defendant was on probation at the time of the offense; (2) after entry of a guilty plea, guilty verdict, or conviction; and (3) for *any felony* other than a felony with a severity level of 1, 2, D1, or D2. Minn. Sent. Guidelines 2.B.2.a (2019). In any other case, only one-half of a custody-status point would be assigned. *Id.* Under the 2019 guidelines, Gustafson would only be assigned one-half point, because he was on probation for a *misdemeanor* at the time of his offense, not a felony.

To clearly abrogate the amelioration doctrine, the legislature must make an express statement, such as: "crimes committed prior to the effective date of this act are not affected by its provisions." *Kirby*, 899 N.W.2d at 491, 499. As we held in *State v. Robinette*, the legislature did not do so with regard to the 2019 amendments to the calculation of custody-status points. 944 N.W.2d 242, 249-50 (Minn. App. 2020), *review granted* (Minn. June 30, 2020). Without such a clear statement of intent, we assume that the amelioration

doctrine applies. *Id.* at 249 n.1. Accordingly, Gustafson is entitled to resentencing under the 2019 guidelines for a reduced custody-status score of one-half point.

Gustafson's Prior Convictions in North Dakota

Gustafson also claims that the district court erred by assigning him two felony points for his prior North Dakota convictions because the state failed to show that those convictions could properly be considered as prior convictions. In conducting our de novo review, we first look to the language of the sentencing guidelines to determine when prior out-of-state convictions may be included in a defendant's criminal-history score. *Scovel*, 916 N.W.2d at 554-55.

Under the Minnesota Sentencing Guidelines, prior convictions from out-of-state jurisdictions may be included in a defendant's criminal-history score only if the offense "would both be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b (2018). The state bears the burden of proof to "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." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). If the state fails to meet its burden of proof and the defendant does not object to the calculation of his or her criminal-history score, we remand to allow the state "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

Here, the state failed to meet its burden. The state did not provide any evidence to show that Gustafson’s prior convictions would be defined as felonies in Minnesota or that Gustafson received felony-level sentences for those convictions. Minn. Sent. Guidelines 2.B.5.b. And our review of the record shows that the North Dakota convictions are not equivalent to their Minnesota counterparts.

Gustafson was previously convicted of manufacture of a controlled substance and the unlawful possession of methamphetamine. N.D. Cent. Code § 19-03.1-23(1), (7). Under North Dakota law, the manufacture of a controlled substance includes manufacturing, delivering, possessing with the intent to manufacture or deliver, and delivering, distributing, or dispensing via the internet a controlled substance (in this case, methamphetamine). *Id.* at (1). Possessing the precursor ingredients to manufacture methamphetamine also violates the statute. *State v. Stensaker*, 725 N.W.2d 883, 890 (N.D. 2007). But in Minnesota, the manufacture of methamphetamine and the possession of the precursors to manufacture methamphetamine are separate crimes. Under Minnesota Statutes section 152.021, subdivision 2a (2018), “a person is guilty of a controlled substance crime in the first degree if the person manufactures any amount of methamphetamine.” And under Minnesota Statutes section 152.0262, subdivision 1(a) (2018), “a person is guilty of a crime if the person possesses any chemical reagents or precursors with the intent to manufacture methamphetamine.”

North Dakota and Minnesota also differ in their punishment of possession crimes. In North Dakota, a person is guilty of a class A misdemeanor for possessing *any* amount of methamphetamine. N.D. Cent. Code § 19-03.1-23(7). But in Minnesota, the severity

of the offense depends on the weight of the methamphetamine in the person's possession and whether they have been previously found with methamphetamine in their possession. A person is guilty of a first-degree controlled substance crime if they unlawfully possess "one or more mixtures of a total weight of 25 grams or more" containing methamphetamine. Minn. Stat. § 152.021, subd. 2(a)(1). But a person is guilty of a third-degree controlled substance crime if they unlawfully possess "on one or more occasions within a 90-day period . . . one or more mixtures of a total weight of ten grams or more containing a narcotic drug other than heroin." Minn. Stat. § 152.023, subd. 2(a)(1).

In short, North Dakota criminal statutes for the manufacture and possession of methamphetamine cover a much broader range of conduct than their Minnesota counterparts. As such, Gustafson's actions in North Dakota may not meet the standard to be included in his criminal-history score. Minn. Sent. Guidelines 2.B.5.b. Because the state did not produce any evidence to support its assertion that Gustafson's prior North Dakota convictions could be included in his criminal-history score, the district court erred in assigning Gustafson two-and-a-half felony points for those convictions. But because there is no record for us to review to determine whether Gustafson's criminal-history score was correct and Gustafson did not object to the calculation of his criminal-history score in district court, the state must have the opportunity "to further develop the sentencing record so that the district court can appropriately make its determination." *Outlaw*, 748 N.W.2d at 356.

In sum, Gustafson's criminal-history score must be modified to accurately reflect both the 2019 sentencing guidelines amendments and the appropriate felony points for his

prior convictions from North Dakota. The district court erred by sentencing Gustafson based on his assumed criminal-history score of three without confirming the validity of that score. As such, we reverse and remand to allow the state the opportunity to further develop the record and for subsequent resentencing as appropriate. *Id.*

Reversed and remanded.