STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0946

State of Minnesota,
Respondent,

vs.

Donald Albert Strobel,
Appellant.

Filed February 22, 2021
Affirmed
Cochran, Judge

Wabasha County District Court
File No. 79-CR-16-1112

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

Karen Kelly, Wabasha County Attorney, Wabasha, Minnesota (for respondent)

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

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

NONPRECEDENTIAL OPINION

COCHRAN, Judge

Appellant was convicted of a first-degree controlled-substance crime and sentenced to 115-months' imprisonment. This court reversed the sentence and remanded for resentencing because the state did not establish that a prior conviction included in

appellant's criminal-history score as a felony was properly classified as such. *State v. Strobel* (*Strobel I*), 921 N.W.2d 563, 577 (Minn. App. 2018), *aff'd* 932 N.W.2d303 (Minn. 2019). The supreme court affirmed. *State v. Strobel* (*Strobel II*), 932 N.W.2d 303, 310 (Minn. 2019).

This appeal arises from the district court's decision to again impose a 115-month sentence after determining that the state met its burden on remand to prove that the prior offense constituted a felony. Appellant argues that his current sentence must be reversed because the district court (1) erred by allowing the state time to submit additional evidence after an initial hearing on resentencing, (2) violated his Sixth Amendment rights by increasing the sentencing range based on judicial fact-finding, and (3) abused its discretion by concluding that the state proved that his prior conviction is a felony. We conclude that the district court did not err by permitting the state to submit additional evidence, did not engage in impermissible fact finding, and did not abuse its discretion in reaching its conclusion that the state proved that appellant's prior conviction was a felony. Therefore, we affirm.

FACTS

In 2017, a jury found Strobel guilty of first-degree sale of methamphetamine and second-degree possession of methamphetamine. The district court sentenced Strobel to concurrent prison terms of 115 months and 108 months for the first- and second-degree convictions, respectively. The 115-month sentence was the presumptive guidelines sentence based on a criminal-history score of five, as indicated in a sentencing worksheet. The score included a one-half felony point for a 2012 fifth-degree controlled-substance-

possession offense. Had the one-half point not been assigned for the 2012 offense, Strobel would have had a total criminal-history score of four, which would have resulted in a lower presumptive sentence of 105 months. *Strobel I*, 921 N.W.2d at 573-74; *see* Minn. Sent. Guidelines 4.C (2016) (showing a presumptive sentence of 105 months for a severity level D8 offense with a criminal-history score of four).

Strobel appealed from his sentence for the first-degree offense,[1] arguing that the state did not prove that his 2012 offense should be classified as a felony when calculating his criminal-history score. *Strobel I*, 921 N.W.2d at 574. He relied on the Drug Sentencing Reform Act (DSRA), which made substantial changes to Minnesota's drug statutes. *Id.* He maintained that the state had the burden to show that his 2012 offense would be considered a felony under the changes made by the DSRA, which it failed to do. *Id.* at 575.

We agreed with Strobel. *Id.* at 577. We first noted that a "defendant's prior offense may be classified as a felony only if the prior offense would constitute a felony under Minnesota law at the time the current offense was committed." *Id.* at 574. We then determined that Strobel committed the current, first-degree offense after the effective date of the DSRA, which created a new category of fifth-degree controlled-substance-possession crime that is punishable as a gross misdemeanor. *Id.* Under the DSRA amendment, a fifth-degree controlled-substance crime is a gross misdemeanor, as opposed

[1] Strobel has not challenged the sentence for his second-degree conviction because the addition or absence of one-half felony point does not change his presumptive sentence for that offense. *Strobel I*, 921 N.W.2d at 574 n.3.

to a felony, where a person who does not have a prior controlled-substance conviction possessed "less than 0.25 grams or one dosage unit or less" of a drug other than heroin, or "less than 0.05 grams of heroin." Minn. Stat. § 152.025, subd. 4(a) (2018). Accordingly, to show that Strobel's 2012 fifth-degree controlled-substance-possession offense was a felony under the DSRA amendment, rather than a gross misdemeanor, the state was required to present evidence about the type and amount of drug that Strobel had possessed. *Strobel I*, 921 N.W.2d at 574-77. Because the state failed to do so, we concluded that the district court erred by assigning the one-half felony point for Strobel's 2012 fifth-degree possession conviction in his criminal-history score, and we remanded the case "with instructions permitting the state to develop the record regarding the type and amount of controlled substance underlying Strobel's 2012 conviction." *Id.* at 577. The supreme court affirmed our decision. *Strobel II*, 832 N.W.2d at 310.

In January 2020, the district court conducted a new sentencing hearing. At the hearing, the state first made a legal argument that it need only establish the place and date of Strobel's 2012 offense to prove that it is a felony. In the alternative, the state provided a copy of the criminal complaint underlying Strobel's 2012 conviction, which showed that Strobel was charged with two counts of fifth-degree possession. The complaint alleged that during a search of Strobel's residence, officers found more than 42.5 grams of marijuana. The complaint also alleged that officers found an unknown crystal-like substance weighing 12.52 ounces in the residence. The state asserted that because the complaint showed the type and amount of drugs that Strobel had possessed, the complaint satisfied the state's burden of proof. The district court did not accept the state's legal

argument and declined to sentence Strobel on the basis of the complaint alone. Instead, the court directed the state to file a transcript of the plea hearing in the 2012 case so that the court could "look at the factual basis to see really what Mr. Strobel admitted to" regarding the type and amount of controlled substance he had possessed. The district court also ordered the parties to file written arguments. Defense counsel objected to the court allowing the state additional time to obtain the plea-hearing transcript.

The state then filed the plea-hearing transcript from the 2012 case. The transcript shows that Strobel entered an *Alford* plea to the charge. The transcript states the following, in relevant part:

> Prosecutor: And, finally, in file ending in 2015, that's the Controlled Substance file, again, can the judge accept this Complaint for a fact basis on that one as well?
>
> Strobel: Yes.
>
> Prosecutor: Now understanding the Alford plea on this one as well, if the State were to present evidence from officers from September 14th of 2011 and they were to testify that they found you in possession of a controlled substance, I believe it was marijuana weighing over 42.5 grams, would a jury have a strong probability of convicting you on that offense?
>
> Defense counsel: If I can inquire?
>
> Defense counsel: You would agree that—that the information contained in the Complaint, it'll allege that you had a controlled substance in your residence?
>
> Strobel: Right.
>
> Defense counsel: And that substance was either methamphetamine or—or some drug that is a schedule narcotic that you weren't allowed to have—

> Strobel: Yeah.
>
> Defense counsel: —correct? And because of that you would agree that it was in your house? That's what they can consider constructive possession?
>
> Strobel: Okay.
>
> Defense counsel: And with that information contained in the Complaint and the police reports, and if that was presented to a jury, there would be a good likelihood that you would be found guilty?
>
> Strobel: Yes.

After reviewing the plea-hearing transcript and complaint, the district court concluded in an order dated March 2020 that "[t]he state has met its burden on remand to show the weight and type of controlled substance associated with [Strobel's] 2012 conviction for fifth-degree controlled-substance possession." The district court noted that the "complaint indicates that 'more than 42.5 grams' of marijuana and an unknown crystal-like substance weighing 12.52 ounces was found in [Strobel's] possession." It determined that Strobel "did not make a responsive admission" about possessing more than 42.5 grams of marijuana, but "did, however, make a responsive admission . . . to illegally possessing the drugs (methamphetamine or some drug that is a schedule narcotic) described in the complaint." The district court accordingly concluded that the complaint and plea-hearing transcript "establish that [Strobel] possessed more than .25 grams of a controlled substance other than heroin" and that the 2012 conviction "is classified as a felony." It therefore determined that Strobel's criminal-history score was five, as

previously determined, and sentenced Strobel to 115 months' imprisonment with credit for time served.

Following the district court's order, Strobel moved for reconsideration. He argued that the district court should reconsider his prior motion for a downward dispositional departure and that the court failed to comply with certain procedural rules at the sentencing hearing. The district court then held a second sentencing hearing, at which it denied Strobel's motion and reaffirmed his 115-month sentence. Strobel appeals.

DECISION

Strobel raises three alternative arguments on appeal. He argues that this court must reverse and remand his case for resentencing on his first-degree conviction because the district court (1) erred by continuing the sentencing hearing to allow the state to file the 2012 plea-hearing transcript, (2) violated his Sixth Amendment right to a jury trial by engaging in impermissible judicial fact-finding, and (3) abused its discretion by finding that the state had met its burden to prove that Strobel's 2012 fifth-degree controlled-substance conviction is a felony offense under current legal definitions. We address these arguments in turn below.

I. The district court did not err by granting the state additional time to file the 2012 plea-hearing transcript.

Strobel argues that the district court erred by "abandoning its role as a neutral magistrate" when it declined to determine Strobel's criminal-history score at the initial sentencing hearing on remand and instead directed the state to submit the plea-hearing transcript. We are not persuaded.

Criminal defendants have a constitutional right to a fair and impartial judge. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006). Judges have the "pervasive responsibility" to avoid "both the reality and the appearance of any impropriety." *State v. Mims*, 235 N.W.2d 381, 387 (Minn. 1975). "A judge's conduct must be fair to both sides." *State v. Dorsey*, 701 N.W.2d 238, 250 (Minn. 2005) (quotation omitted). Deprivation of an impartial judge is a constitutional issue that we review de novo. *Id.* at 249. "[W]hen a defendant has been deprived of an impartial judge, automatic reversal is required." *Id.* at 253. Judicial bias is a structural error that is not subject to harmless error review. *Id.* at 252-53.

In *Strobel I*, we made clear that the state had the burden on remand to establish that Strobel's 2012 fifth-degree possession offense would constitute a felony, not a gross misdemeanor, under the DSRA-amended version of the fifth-degree possession statute. 921 N.W.2d at 574, 577. We also instructed that the district court allow "the state to develop the record regarding the type and amount of controlled substance underlying Strobel's 2012 conviction." *Id.* at 577.

At the initial hearing on remand, the state presented only the complaint underlying Strobel's 2012 offense as evidence of the type and amount of drug involved in that offense. Defense counsel then argued that the complaint was insufficient to meet the state's burden of proof because the complaint merely contained "allegations." Defense counsel asserted that "without either some sort of transcript from that case proving . . . what type of drugs [Strobel] pled to possessing, that any proof offered is insufficient to establish that." The district court responded to defense counsel's argument by asking if proof of the amount

and type of drug possessed would "require a review of the transcript at the time the defendant pled guilty to see what factual basis was put on the record." Defense counsel responded affirmatively. The district court then stated that it was not comfortable sentencing Strobel on the basis of the complaint alone. The court stated that it wanted "to look at the factual basis to see really what Mr. Strobel admitted to" and directed the state to file a transcript of the plea hearing in the 2012 case. The court also ordered both parties to file written arguments to be due two weeks after the state submitted the plea-hearing transcript.

Strobel argues on appeal that the "court relieved the state of its burden, and stopped functioning as a neutral magistrate" when it permitted the state additional time to file the plea-hearing transcript. The record does not support this assertion for several reasons. First, directing the state to file the plea-hearing transcript did not relieve the state of its burden to prove that Strobel's 2012 conviction was a felony under the DSRA-amended version of the fifth-degree possession statute—the burden of proof remained on the state, which the district court expressly recognized in its order. Allowing the state extra time to meet its burden of proof did not relieve the state of that burden.

Furthermore, the district court did not abdicate its role as a neutral adjudicator when it permitted the state to submit the plea-hearing transcript. The court ordered the state to file the transcript following defense counsel's own suggestion that "some sort of transcript" from the 2012 case would be required to prove the amount and type of drugs that Strobel had possessed. Considering the basis for the 2012 plea does not constitute biased conduct. Moreover, the court ordered both parties to submit written arguments and gave them two

weeks to file those arguments following submission of the plea-hearing transcript. The court then considered those arguments before imposing the sentence. We do not discern judicial bias that would require reversal.

Strobel cites multiple cases in an attempt to support his argument that the district court's conduct was biased. However, this case is a far cry from the cases relied on by Strobel. *See State v. Schlienz*, 774 N.W.2d 361, 366-67 (Minn. 2009) (improper ex parte communication); *Dorsey*, 701 N.W.2d at 245 (independent investigation of facts); *Hansen v. St. Paul City Ry. Co.*, 43 N.W.2d 260, 264 (Minn. 1950) (judge "unduly criticize[d] counsel in the presence of the jury"). And we are not aware of any case that holds that the type of conduct at issue here amounts to structural error. We therefore conclude that the district court did not commit reversible error by granting the state additional time to produce the 2012 plea-hearing transcript.

II. The district court's sentencing decision did not involve impermissible judicial fact-finding in violation of the Sixth Amendment.

Strobel next argues that the district court's sentence was made in contravention of the requirements of *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), and the Sixth Amendment because it was based on impermissible judicial fact-finding. Whether a *Blakely* error occurred is a constitutional question that this court reviews de novo. *State v. Dettman*, 719 N.W.2d 644, 648-49 (Minn. 2006).

In *Blakely*, the U.S. Supreme Court applied the rule from *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2362-63 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory

maximum must be submitted to a jury, and proved beyond a reasonable doubt." 542 U.S. at 301, 124 S. Ct. at 2536 (quotation omitted). Minnesota courts have "applied these principles to limit a sentencing court's authority to impose a sentence that is outside of the presumptive range of the Minnesota Sentencing Guidelines." *State v. Her*, 862 N.W.2d 692, 695 (Minn. 2015). Accordingly, an upward departure from the presumptive sentence that is based on fact-finding made by the district court, as opposed to facts reflected in the jury verdict or admitted by the defendant, violates the defendant's Sixth Amendment right to trial by jury. *Id.* Because criminal-history points have the effect of increasing a defendant's presumptive sentence, this court has recognized that district courts may not engage in impermissible fact-finding when assigning criminal-history points based on the defendant's prior convictions. *State v. Edwards*, 900 N.W.2d 722, 728-731 (Minn. App. 2017) (applying *Blakely* to a district court's assignment of criminal-history points because assigning the points "increased appellant's presumptive sentence").

Minnesota and federal case law provide an exception to the *Blakely* rule for prior convictions. *Her*, 862 N.W.2d at 697-98 (citing *Apprendi v. New Jersey*, 530 U.S. at 490, 120 S. Ct. at 2362). Under the prior-conviction exception, a court is permitted to "find the existence of a prior conviction when sentencing a defendant so long as the prior conviction is not itself an element of the current offense." *Id.* "The exception is justified in part by the certainty of procedural safeguards attached to any 'fact' of prior conviction." *Id.* (quotation omitted). The prior-conviction exception is narrow but "the Minnesota Supreme Court has held that it is not strictly limited to whether a prior conviction existed." *Edwards*,

900 N.W.2d at 729 (citing *State v. McFee*, 721 N.W.2d 607, 618 (Minn. 2006) (holding that verifying a juvenile had been adjudicated delinquent does not require a jury), and *State v. Allen*, 706 N.W.2d 40, 48 (Minn. 2005) (holding that finding that a defendant was on probation at the time of the prior conviction does not require a jury)). And this court has held that where a determination relating to a prior conviction involves a legal question rather than a factual question, that determination does not run afoul of *Blakely*. *Id.* at 731.

Here, Strobel argues that the district court violated the proscriptions of *Blakely* when it concluded that his 2012 fifth-degree controlled-substance-possession conviction was a felony and accordingly assigned him a one-half felony point for the conviction. He contends that the district court went beyond recognizing the "fact of the prior conviction," and engaged in fact-finding outside the bounds of the prior-conviction exception, when it determined that the state met its burden to show the type and amount of substance involved in his 2012 conviction. We disagree that the district court engaged in impermissible fact-finding. Rather, the district court's order reflects that the district court made a legal determination based on the undisputed facts in the record.

We reach this conclusion, in large part, because Strobel's 2012 conviction was based on an *Alford* plea. A defendant entering an *Alford* plea maintains his innocence but admits that the state has sufficient evidence to convict him. *State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (citing *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S. Ct. 160, 168 (1970)). Here, as reflected in the 2012 plea-hearing transcript, Strobel expressly accepted the complaint in the 2012 case as the factual basis for his *Alford* plea and admitted that the complaint set forth sufficient evidence to convict him of the charged fifth-degree

controlled-substance-possession offense. In its sentencing order, the district court concluded that Strobel's 2012 fifth-degree possession offense was a felony based on the complaint and the plea-hearing transcript. The district court noted that the "[c]omplaint and transcript establish that [Strobel] possessed more than .25 grams of a controlled substance other than heroin." *See* Minn. Stat. § 152.025, subd. 4(a). No fact-finding was necessary because Strobel entered an *Alford* plea and did not dispute any of the information in the complaint. Case law permits courts to review criminal complaints and plea documents to determine the type of offense involved without violating *Blakely* or *Apprendi*. *See Shepard v. United States*, 544 U.S. 13, 16, 125 S. Ct. 1254, 1257 (2005) (holding that a court determining the character of a prior offense is "generally limited to examining the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented"). We conclude that the district court's examination of the documents underlying Strobel's *Alford* plea fits squarely within the prior-conviction exception to *Blakely*.

Our conclusion is reinforced by comments made by Strobel's own counsel in a February 2020 filing entitled "Memorandum re: Criminal History." This brief was filed after the state submitted the plea-hearing transcript and before the district court issued its March 2020 sentencing order. In the brief, Strobel's attorney stated "that by providing [the plea-hearing] transcript, the [s]tate has now *conclusively established* Mr. Strobel pled guilty to a Controlled Substance Crime in the 5th degree—and that this guilty plea would still be a felony under Minnesota law post Drug Sentencing Reform Act." (Emphasis added.) Strobel's attorney then went on to argue that the plea-hearing transcript should not

be considered in determining whether the state met its burden of proof on remand because the state did not provide the transcript at the initial sentencing hearing on remand. But Strobel's attorney did not claim that there was any fact question regarding whether Strobel's 2012 offense constitutes a felony or that the question needed to be determined by a jury.

On appeal, to support his argument that the district court engaged in fact-finding in violation of *Blakely*, Strobel relies primarily on two U.S. Supreme Court cases. These cases provide that a court, acting in accordance with the prior-conviction exception, "can do no more, consistent with the Sixth Amendment, than determine what crime, with what elements, the defendant was convicted of." *Mathis v. United States*, 136 S. Ct. 2243, 2252 (2016); *see also Descamps v. United States*, 570 U.S. 254, 270, 133 S. Ct. 2276, 2288 (2013) (stating that because a defendant entering a guilty plea "waives his right to a jury determination of only that offense's elements[,] whatever he says, or fails to say, about superfluous facts cannot license a later sentencing court to impose extra punishment"). Strobel contends that because "[t]he amount and type of substance were not elements of Strobel's 2012 offense," the district court engaged in impermissible fact-finding by relying on that information in the complaint and plea transcript to determine that the offense is a felony under the current statutory definition. But, unlike this case, *Mathis* and *Descamps* did not involve an *Alford* plea. *See Mathis*, 136 S. Ct. at 2250 (regular guilty plea); *Descamps*, 570 U.S. at 258, 295, 133 S. Ct. at 2282, 2303 (regular guilty plea). Accordingly, those cases are not controlling here.

In sum, we conclude that because Strobel entered an *Alford* plea in the 2012 case, the district court did not engage in any impermissible fact-finding when it reviewed the 2012 complaint and plea-hearing transcript to determine as a matter of law that the state met its burden to prove that Strobel's prior offense was a felony under the current statutory definition.

III. The district court did not abuse its discretion by concluding that the state met its burden to prove that Strobel's 2012 conviction was a felony.

Strobel next contends that the state failed to meet its burden to show that his 2012 conviction was a felony under the DSRA-amended version of the fifth-degree possession statute. Strobel argues that, because "he entered an *Alford* plea, which does not involve an admission of guilt," the district court could not conclude from the 2012 complaint and plea-hearing transcript that he possessed at least 0.25 grams of a non-heroin controlled substance.

The district court's determination 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). We discern no abuse of discretion here.

As stated above, a defendant taking an *Alford* plea maintains his innocence but admits that the state has sufficient evidence to convict him. *Theis*, 742 N.W.2d at 647 (citing *Alford*, 400 U.S. at 38, 91 S. Ct. at 168). The supreme court has stated that "[a] conviction based upon an *Alford* plea generally carries the same penalties and collateral consequences as a conventional guilty plea." *Doe 136 v. Liebsch*, 872 N.W.2d 875, 880 (Minn. 2015) (citing *Armenakes v. State*, 821 A.2d 239, 242 (R.I. 2003), for the

proposition that "an *Alford* plea 'may be used later for any legitimate purpose, including sentencing factors and enhancement'").

At the 2012 plea hearing, Strobel expressly permitted the complaint in the case to be used as the factual basis for his *Alford* plea. By doing so, Strobel acknowledged that the complaint set forth sufficient evidence to convict him of the fifth-degree controlled-substance-possession charge. That evidence included allegations that Strobel possessed marijuana in an amount greater than 42.5 grams and 12.52 ounces of another controlled substance. The complaint therefore alleged that Strobel possessed types and amounts of substances that satisfy the current statutory definition of a felony fifth-degree controlled-substance-possession offense. *See* Minn. Stat. § 152.025, subds. 2(1), 4(a)-(b) (2018). Because Strobel accepted the information in the complaint as the factual basis for his *Alford* plea, the district court did not err by examining that document and concluding that the state had met its burden to show that the offense is a felony based on the complaint and the plea-hearing transcript. Moreover, given that *Alford* pleas are generally treated the same as conventional guilty pleas, there is no reason, for the purpose of assigning criminal-history points on a prior offense, to treat an admission of "sufficient evidence" under an *Alford* plea any differently than the factual admissions that support a conventional guilty plea. And, as discussed above, Strobel's counsel acknowledged to the district court that the complaint and plea-hearing transcript "conclusively established" that Strobel's 2012 offense was a felony under the DSRA-amended version of the fifth-degree possession statute. Accordingly, we conclude that the district court did not err by concluding that the

state met its burden to prove that Strobel's 2012 conviction was a felony under current legal definitions.

Affirmed.