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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0377**

State of Minnesota,
Respondent,

vs.

Jose Armando Padilla,
Appellant.

**Filed August 2, 2021
Affirmed
Worke, Judge**

Kandiyohi County District Court
File No. 34-CR-05-1276

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

Shane D. Baker, Kandiyohi County Attorney, Willmar, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant
Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Gaïtas, Presiding Judge; Worke, Judge; and Johnson,
Judge.

NONPRECEDENTIAL OPINION

WORKE, Judge

Appellant argues that the district court erroneously reduced his sentence by only
three months after vacating his conviction for receiving stolen property. We affirm.

FACTS

In 2005, appellant Jose Armando Padilla was convicted of two counts of attempted second-degree murder by drive-by shooting, first-degree assault, drive-by shooting of an occupied building, drive-by shooting of an unoccupied building, and receiving stolen property. He appealed, and we reversed his attempted second-degree murder convictions and remanded for vacation of those convictions and resentencing. On remand, the district court sentenced Padilla in the following order: 27 months in prison for receiving stolen property, a concurrent 36 months for drive-by shooting of an unoccupied building, a concurrent 166 months for first-degree assault, and a consecutive 52 months for drive-by shooting of an occupied building. This resulted in an aggregate sentence of 218 months. The district court also added a restitution award.

Padilla again appealed, challenging restitution and the two sentences for drive-by shooting of an occupied building and first-degree assault, claiming that he should have received one sentence because the offenses were part of the same behavioral incident. We affirmed the sentences under the multiple-victim exception, but we reversed the restitution that was added on remand.

In 2014, Padilla moved to correct his sentence, claiming that the offenses had been sentenced in the incorrect order. The district court corrected Padilla's aggregate sentence to 206 months in prison. Padilla appealed, arguing that the district court imposed a longer sentence for drive-by shooting of an occupied building and that he received ineffective assistance of counsel. We affirmed Padilla's sentence and concluded that his ineffective-assistance-of-counsel claim failed.

In 2018, Padilla again moved to correct his sentence, arguing that the district court erroneously applied the multiple-victim exception in imposing sentences for both drive-by shooting of an occupied building and first-degree assault. He also argued that he could not be sentenced for receiving stolen property because it was part of the same behavioral incident as his other convictions. The district court denied Padilla relief, concluding that his claims were procedurally barred.

Padilla again appealed. We affirmed the district court's conclusion that Padilla's multiple-victim-exception claim was barred by prior litigation, but we reversed for the district court to address Padilla's argument related to his receiving-stolen-property conviction.

On remand, the district court determined that Padilla's conviction for receiving stolen property involved the receipt of a firearm, which was used in the drive-by shootings. Because the offenses were part of the same behavioral incident, the district court vacated the receiving-stolen-property conviction. The district court sentenced Padilla to 36 months in prison for drive-by shooting of an unoccupied building, a concurrent 112 months for drive-by shooting of an occupied building, and a consecutive 91 months for first-degree assault. This reduced Padilla's aggregate sentence by three months to 203 months. This appeal followed.

DECISION

Padilla argues that the district court erroneously reduced his sentence by only three months after vacating the receiving-stolen-property conviction and removing the corresponding one point from his criminal history score.

“We afford the [district] court great discretion in the imposition of sentences and reverse sentencing decisions only for an abuse of that discretion.” *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014) (quotation omitted). “A court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Ouk v. State*, 847 N.W.2d 698, 701 (Minn. 2014) (quotation omitted). “This court will not generally review a district court’s exercise of its discretion to sentence a defendant when the sentence imposed is within the presumptive guidelines range.” *State v. Delk*, 781 N.W.2d 426, 428 (Minn. App. 2010), *review denied* (Minn. July 20, 2010).

A sentence based on an incorrect criminal history score is illegal and correctable at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). “[N]ot every defendant who receives a sentence at the top or bottom end of the presumptive range when sentenced with an incorrect criminal history score need necessarily receive a similarly situated sentence within the presumptive range when resentenced with a correct criminal history score.” *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). But a district court must resentence a defendant if their sentence was based on an incorrect criminal history score. *Id.*

Padilla’s 2015 sentence was 206 months. When resentencing Padilla in 2020, the district court stated that it intended to “sentence Padilla consistently with the previous sentencing . . . regarding the order of sentencing, the top of the box dispositions and concurrent/consecutive nature of the sentence for the various counts.” The two differences between the 2015 and 2020 sentences are the removal of the concurrent 27 months for receiving stolen property and a decrease from 115 to 112 months for drive-by shooting of

an occupied building. This resulted in a three-month reduction in Padilla’s aggregate sentence—from 206 months in 2015 to 203 months in 2020.

The three-month reduction is the result of the application of Minn. Sent. Guidelines II.B.2c. (2004), which adds three months when there are seven criminal history points and one of the points is a custody status point. Vacating Padilla’s receipt-of-stolen-property conviction reduced his criminal history score from seven to six.

The rest of the sentence properly remained the same despite dropping one point on the criminal history score. The district court stated that it wanted to maintain top-of-the-box sentencing, which it did. Removing the criminal history point from the vacated conviction, Padilla’s sentence for drive-by shooting of an unoccupied building is still 36 months because that is the statutory minimum for a sentence with a firearm. *See* Minn. Stat. § 609.11, subd. 5 (2004). With Hernandizing, Padilla had six criminal history points for drive-by shooting of an occupied building, which is a severity level eight offense. *See* Minn. Sent. Guidelines V.A (2004). That puts the presumptive sentencing range between 104-112 months, with 108 months being the presumptive sentence. Minn. Sent. Guidelines IV (2004). Again, this was three months less due to the removal of the three-month extension. *See* Minn. Sent. Guidelines II.B.2c.

Padilla argues that this three-month reduction is “not in line with the principles of fairness and equity in sentencing or the controlling caselaw.” Padilla cites two cases to support this assertion. He first cites *Molina-Martinez v. United States* for the principle that the guidelines serve as the anchor for sentencing, and “when a [g]uidelines range moves up or down, offenders’ sentences [tend to] move with it.” 136 S. Ct. 1338, 1346 (2016)

(quotation omitted). Padilla's sentence did move down proportionally with the guidelines. He also cites *Provost* for the principle that a district court must resentence a defendant previously sentenced with an incorrect criminal history score even if the sentence is still within the presumptive range. 901 N.W.2d at 202. But the district court did resentence Padilla. *Provost* addressed the district court's refusal to resentence the defendant after sentencing him with an incorrect criminal history score. *Id.* at 201. That did not take place here. Padilla fails to show that the district court abused its discretion by reducing his sentence by only three months after vacating his conviction for receiving stolen property.

Affirmed.