

*This opinion is nonprecedential except as provided by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
A21-0411**

State of Minnesota,
Respondent,

vs.

Mathew Timothy Scully,
Appellant.

**Filed October 4, 2021
Affirmed in part, reversed in part, and remanded
Jesson, Judge**

Polk County District Court
File Nos. 60-CR-17-578, 60-CR-17-1790, 60-CR-18-1417, 60-CR-18-1983

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

Gregory Widseth, Polk County Attorney, Crookston, Minnesota (for respondent)

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

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and
Bratvold, Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Mathew Scully was convicted of third-degree controlled-substance crime
and three counts of failure to appear after pleading guilty to those offenses. Scully now
challenges his sentences, asserting that four North Dakota convictions—obtained after he

was charged with third-degree controlled-substance crime but before he was sentenced—were erroneously included in his criminal-history score. He also contends that the district court erred by assigning him two misdemeanor points when sentencing him for his final failure-to-appear conviction. Because the North Dakota offenses are “prior convictions” within the meaning of the Minnesota Sentencing Guidelines, we affirm in part. But because the district court could only assign a maximum of one misdemeanor point for Scully’s third failure-to-appear sentence we reverse in part and remand to the district court for resentencing.

FACTS

Mathew Scully was driving through East Grand Forks early one morning when a police officer stopped him on suspicion of driving with a suspended license. When the officer approached and asked for Scully’s license and proof of insurance, he produced neither document. Instead, he claimed to have a North Dakota license and falsely identified himself as his brother. But when questioned further about his identity, Scully relented and gave the officer his real name. The officer then searched the car, and found a pipe, two butane tanks, and a scale with residue that tested positive for methamphetamine. The state charged Scully with one count of third-degree controlled-substance crime and one count of giving a false name to a peace officer.¹

¹ Minn. Stat. §§ 152.023, subd. 2(a)(6) (third-degree controlled substance crime), 609.506, subd. 2 (giving a false name to a peace officer) (2016).

But over the next year and a half, Scully failed to appear on these charges four times. For his absences, the state charged him with two felony counts of failure to appear.² During that time Scully also committed, was convicted of, and was sentenced for four crimes in North Dakota: fifth-degree possession of a controlled substance (gross misdemeanor); domestic violence (misdemeanor); threats of violence (gross misdemeanor); and violation of a no-contact order (gross misdemeanor).³

Pursuant to a plea agreement with the state, Scully pleaded guilty to third-degree possession of a controlled substance, giving a false name to a peace officer, and two of the four failure-to-appear charges. In exchange, the state dismissed the additional charges from the original incident and agreed not to charge Scully for the remaining failures to appear. The parties also agreed that the state would seek the presumptive sentences under the Minnesota Sentencing Guidelines. The district court accepted Scully's plea, ordered a summary presentence investigation, and scheduled a sentencing hearing for the following month. But when Scully did not show up for sentencing, the state charged him with another count of failure to appear. Scully later pleaded guilty, and the conviction was then incorporated into the previous global plea agreement—including the provision that Scully be given the presumptive sentence under the guidelines.

² Minn. Stat. § 609.49, subd. 1(a) (2016).

³ These are the Minnesota equivalencies for the crimes Scully committed in North Dakota. Scully does not challenge their accuracy on appeal.

Consistent with the plea agreement, the district court sentenced Scully to the presumptive sentences for each conviction: 27 months' imprisonment for third-degree controlled-substance crime and 15 months' imprisonment for the third failure to appear.⁴

Scully appeals.⁵

DECISION

Although Scully did not object to his criminal-history score at sentencing, he may challenge his score for the first time on appeal. *See* Minn. R. Crim. P. 27.03, subd. 9; *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). Here, Scully assigns two errors. First, he argues that four of the seven misdemeanor units assigned for his third-degree controlled-substance conviction were not “prior misdemeanors” under the Minnesota Sentencing Guidelines. Second, Scully asserts that the district court erred by assigning two misdemeanor points—instead of one point—towards his overall criminal-history score when sentencing him for his third failure-to-appear conviction.

Generally, the district court's calculation of a defendant's criminal-history score is discretionary, and we will not reverse that determination absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002). But because the district court's calculation in this instance involves the interpretation of the sentencing guidelines—a

⁴ Scully only challenges these two sentences on appeal, but the district court also sentenced Scully to 12 months and one day for the first failure-to-appear conviction, 15 months for the second failure-to-appear conviction, and 12 months for giving a false name to a peace officer.

⁵ The state did not file a brief in this matter, so we proceed pursuant to Minnesota Rule of Civil Procedure 142.03.

question of law—we review the court’s decision de novo. *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009). We address each argument in turn.

I. The district court did not err by assigning four misdemeanor units for offenses Scully committed after being charged with third-degree possession of a controlled substance, but before sentencing.

Scully argues that the district court erred by assigning him seven misdemeanor units for his third-degree controlled-substance conviction. He contends that four of those units—based on the four North Dakota misdemeanors he committed after the third-degree controlled-substance offense—should not be considered “prior convictions” for the purposes of calculating his criminal-history score. Under the Minnesota Sentencing Guidelines, one full criminal-history point is assigned for every four prior misdemeanor convictions. Minn. Sent. Guidelines 2.B.3 (2016). Without counting the four North Dakota misdemeanors, Scully would have had only three misdemeanor convictions and would not have received a misdemeanor criminal-history point. If Scully did not have this misdemeanor criminal-history point, his presumptive sentence would have been 21 months, rather than the 27 months imposed.

When interpreting the sentencing guidelines, we use “the same principles as when interpreting statutes.” *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018). Therefore, where the language of the guidelines is unambiguous, we give effect to its plain meaning. *Id.* at 554-55. But if the language is “subject to more than one reasonable interpretation,” we may “look to other factors to determine the [Sentencing Guidelines] Commission’s intent.” *Id.* at 555 (quotation omitted).

We begin with the purpose of the Minnesota Sentencing Guidelines, which is to “establish rational and consistent sentencing standards.” Minn. Sent. Guidelines 1.A (2016). To that end, the guidelines provide instructions for determining a defendant’s presumptive sentence based on the severity level of the crime for which he is being sentenced and his criminal-history score. Minn. Sent. Guidelines 2.C.1 (2016). Because Scully only challenges the district court’s calculation of his criminal-history score, that is the focus of our analysis.

To calculate an offender’s criminal-history score, the district court assigns points for eligible prior felonies, prior misdemeanors and gross misdemeanors, prior juvenile adjudications, and the defendant’s custody status at the time of the offense. Minn. Sent. Guidelines 2.B (2016). At issue here is the method for assigning points for prior misdemeanors and gross misdemeanors, which is outlined in Minnesota Sentencing Guideline 2.B.3.a . Section 2.B.3.a states in relevant part:

If the current conviction is for an offense other than criminal vehicular homicide or operation or felony driving while impaired (DWI), assign the offender one unit for each *prior conviction* . . . provided the offender received a stayed or imposed sentence or stay of imposition for the conviction before the current sentencing.

(Emphasis added.)⁶ Scully asserts that this section is unambiguous and that the phrase “prior conviction” only includes a conviction that occurred *prior* to the commission of the current offence for which the defendant is being sentenced.

⁶ The offenses contemplated in the guidelines include, among others, misdemeanor domestic assault and non-traffic gross misdemeanors. Scully’s North Dakota misdemeanor convictions fit squarely into those categories and he does not argue otherwise.

Although we agree that the guidelines are unambiguous, we disagree with Scully's interpretation. Section 2.B.3.a plainly states that when an offender has received a conviction and sentence (or stay) for an offense *before the current sentencing*, that conviction will be included for the purpose of calculating the offender's criminal-history score for the current conviction. Scully's interpretation ignores the last phrase of the guideline. And caselaw supports our interpretation. In *State v. Best*, we determined that the district court properly assigned the defendant an additional felony point for an offense he was convicted of and sentenced for prior to being sentenced in the case at hand. 370 N.W.2d 691, 696 (Minn. App. 1985). And we reiterated our position in *State v. Mondry*, holding that the defendant's North Dakota offenses could be included in his criminal-history score because he was sentenced for those convictions *before* being sentenced for the Minnesota offenses at issue. 682 N.W.2d 183, 184 (Minn. App. 2004) (“[A]n offender’s conviction of an offense committed subsequent to the current offense, but sentenced prior to the current sentencing, is properly included in the defendant’s criminal-history score.”).⁷

Here, Scully not only *committed* the four offenses in question after being charged with third-degree controlled-substance crime, he was also *convicted of and sentenced for*

⁷ Scully attempts to distinguish *Mondry*, where the defendant's criminal-history score was based on prior felonies, unlike Scully, whose priors are gross misdemeanors and misdemeanors. 682 N.W.2d at 183-84. Scully is correct that felonies are treated differently under the guidelines, but that does not change the unambiguous meaning of “prior conviction” in section 2.B.3.a. See Minn. Sent. Guidelines cmt. 2.B.301 (2016) (weighing prior convictions differently based on severity but providing identical method of counting prior convictions).

each one before the current sentencing. Applying the unambiguous language of the guidelines, Scully's North Dakota offenses are "prior convictions" and can be included in the calculation of his overall criminal-history score. As such, the district court did not err by assigning one misdemeanor point for his seven misdemeanor units.

II. The district court erred by assigning two misdemeanor points for a conviction that was neither a felony DWI nor a criminal vehicular operation offense.

Scully argues that the district court erred by assigning him two misdemeanor criminal-history points when the court sentenced him on his third failure-to-appear offense. Recall that we review *de novo* the district court's interpretation of the sentencing guidelines. *Williams*, 771 N.W.2d at 520. Where the language of the sentencing guidelines is plain and unambiguous, we presume the guidelines manifest the intent of the Minnesota Sentencing Guidelines Commission. *Scovel*, 916 N.W.2d at 554-55. We will only look to other factors when the language of the guidelines is ambiguous. *Id.*

At issue are Minnesota Sentencing Guidelines sections 2.B.3.f-g. Section 2.B.3.f states that "except as provided in [section 2.B.3.g], an offender cannot receive more than one point for prior misdemeanor or gross misdemeanor convictions" toward his criminal-history score. The exception to this general rule is then listed in Section 2.B.3.g: "There is no limit to the total number of misdemeanor points that can be included in the offender's criminal history score due to criminal vehicular homicide or operation or DWI offenses" when the offense being sentenced is either criminal vehicular homicide, criminal vehicular operation, or felony DWI.

Scully argues that these sections unambiguously establish that district courts may only assign a maximum of one misdemeanor point unless the defendant is currently being sentenced for a felony DWI or criminal vehicular homicide or operation offense. We agree. The guidelines plainly state that district courts may assign a *maximum* of one point for prior misdemeanors and gross misdemeanors. Additional points may only be assigned when the defendant is receiving a sentence for a felony DWI, a criminal vehicular homicide, or criminal vehicular operation.

Here, the district court calculated Scully's criminal-history score to be four when it sentenced him for his third failure-to-appear offense. In determining this score, the district court assigned Scully two misdemeanor points and two felony points. Scully's failure-to-appear conviction is not one of the offenses to which the misdemeanor-point exception applies. Because the guidelines explicitly prohibit assigning more than one misdemeanor point unless the above exception applies, the district court erred by assigning Scully two misdemeanor points for his third failure-to-appear conviction.

In sum, Scully committed and was convicted of and sentenced for his four North Dakota offenses *before* he was sentenced for his third-degree possession conviction. Under the plain meaning of the Minnesota Sentencing Guidelines, the North Dakota offenses are "prior convictions" that were properly included in Scully's criminal-history score. The district court did not err in assigning one misdemeanor point for those prior convictions. But because Scully's failure-to-appear conviction is not a criminal vehicular homicide or operation or felony DWI, the district court erred in assigning him two misdemeanor points

when it sentenced him on that conviction. As such, we reverse in part and remand to the district court for resentencing on Scully's third failure-to-appear conviction.

Affirmed in part, reversed in part, and remanded.