

*This opinion is nonprecedential except as provided by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
A21-0591**

State of Minnesota,
Respondent,

vs.

Tywan George Christopher, Jr.,
Appellant.

**Filed February 22, 2022
Reversed and remanded
Florey, Judge**

Dakota County District Court
File No. 19HA-CR-19-778

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

Kathryn M. Keena, Dakota County Attorney, Anna Light, Assistant County Attorney,
Hastings, Minnesota (for respondent)

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

Considered and decided by Florey, Presiding Judge; Slieter, Judge; and Gaïtas,
Judge.

NONPRECEDENTIAL OPINION

FLOREY, Judge

Appellant challenges his 29-month sentence for felony assault, arguing that the sentence was calculated with an incorrect criminal-history score. We reverse and remand for resentencing.

FACTS

In October 2020, appellant Tywan George Christopher, Jr., entered an *Alford* plea to one count of felony fifth-degree assault in violation of Minn. Stat. § 609.224, subd. 4(b) (2018). Prior to sentencing, appellant's criminal-history score was calculated using the 2018 Minnesota Sentencing Guidelines. The presentence-investigation (PSI) report assigned appellant seven-and-one-half felony points and one custody-status point. Because appellant's felony-point total involved a partial point, it was rounded down to seven before being added to the custody-status point. The district court imposed an executed bottom-of-the-box sentence of 29 months, which included a three-month sentence enhancement based on appellant's criminal-history score of eight. This appeal follows.

DECISION

The parties agree that appellant's sentence was based on an incorrect criminal-history score and that he is entitled to remand for resentencing. A sentence based on an incorrect criminal-history score is an illegal sentence that may be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). When a defendant's sentence is based on an incorrect criminal-history score, his case must be remanded for resentencing. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). The proper calculation of a defendant's criminal-history score is a question of law that we review de novo. *State v. Strobel*, 932 N.W.2d 303, 306 (Minn. 2019).

In 2019, the Minnesota Sentencing Guidelines Commission made several revisions to Minnesota's sentencing guidelines. Because appellant's case was not yet final on August 1, 2019, appellant was entitled to have his criminal-history score calculated

pursuant to the 2019 revisions. *See State v. Robinette*, 964 N.W.2d 143, 151 (Minn. 2021) (concluding that the amelioration doctrine applied to the 2019 revisions of the guidelines and that the revisions apply to cases not yet final on August 1, 2019). Two revisions are relevant here.

First, under the revised guidelines, a person on probation for a gross-misdemeanor offense receives only a partial custody-status point. *Compare* Minn. Sent. Guidelines 2.B.2.a.3.iv (2019) (assigning a partial custody-status point if the person was on probation for a gross-misdemeanor offense), *with* Minn. Sent. Guidelines 2.B.2.a.3.iii (2018) (assigning a full custody-status point if the person was on probation for a gross-misdemeanor offense). But appellant received one full custody-status point for being on gross-misdemeanor probation. Appellant should have been assigned a partial custody-status point, instead of one full point, for being on gross-misdemeanor probation at the time the current offense was committed.

Second, under the 2019 revisions, “a prior felony sentence or stay of imposition following a felony conviction must not be used if . . . fifteen years [have] elapsed after the date of the initial sentence.” Minn. Sent. Guidelines 2.B.1.c. (2019). Appellant received a stayed felony sentence for first-degree criminal damage to property on March 20, 2001. Appellant was erroneously assigned a partial felony point for that conviction, which has decayed under the 2019 revisions.

Appellant also argues that he was erroneously assigned a partial criminal-history point for a 2007 fifth-degree drug-possession conviction. The district court assigned appellant one-and-one-half criminal-history points for his 2007 convictions for violating

an order for protection (OFP) and for fifth-degree drug possession. Appellant argues that the partial point was error because (1) his drug possession and violation of the OFP were part of a single behavioral incident and (2) the record does not demonstrate that his drug-possession offense would constitute a felony offense under the Drug Sentencing Reform Act (DSRA).

Prior to the enactment of the DSRA, all fifth-degree controlled-substance offenses were felonies. *See* Minn. Stat. § 152.025, subd. 2 (2014). However, since its enactment in 2016, the DSRA classifies some first-time fifth-degree-possession offenses as gross misdemeanors. *See* Minn. Stat. § 152.025, subd. 4(a) (2018) (providing that a person without a prior qualifying controlled-substance offense is guilty of a gross misdemeanor if he possesses less than 0.25 grams of heroin). The parties agree that appellant was erroneously assigned a partial felony point for his 2007 fifth-degree drug-possession conviction because the record does not demonstrate that his conviction would constitute a felony at the time the current offense was committed. Because appellant should not have received the partial felony point for the fifth-degree drug-possession offense, we need not reach whether the 2007 sentences for drug possession and violating an OFP were part of a single behavioral incident.

At the time the parties submitted their briefing to this court, they agreed that appellant should have been sentenced based on a criminal-history score of seven, which appears to be based on adding the partial custody-status point to the six-and-one-half felony points. But that is incorrect. The Minnesota Sentencing Guidelines instruct that the felony point total is rounded down before adding the custody-status points. Minn. Sent.

Guidelines 2.B.1.i (2019). And the Minnesota Sentencing Guidelines Commission has issued the following interim guidance on how to address partial custody-status points: “[w]henver the criminal history point total contains a partial point (*i.e.*, ends in ‘0.5’) due to custody status, the partial point must be disregarded when determining the presumptive sentence.” Minn. Sent. Guidelines Comm’n, *Half Custody Status Point Problem – Interim Guidance* (Jan. 15, 2022), https://mn.gov/sentencing-guidelines/assets/20220115-MSGC-PartialPointsinCriminalHistory_tcm30-515455.pdf. The Commission also directs courts to follow *State v. Eubanks* in the absence of Sentencing Guidelines policy. *Id.* (citing No. A19-2042, 2021 WL 318260 at *6 (Minn. App. Feb. 1, 2021) (disregarding a partial custody-status point in determining appellant’s criminal-history score)). Considering this guidance, appellant’s correct criminal-history score is calculated as follows. His six-and-one-half felony points are rounded down to six under Minn. Sent. Guidelines 2.B.1.i (2019). Adding his partial custody-status point to his score yields a criminal-history-point total containing a partial point (*i.e.*, ends in “0.5”) due to custody status. Thus, the partial point is disregarded, resulting in a correct criminal-history score of six.

Because appellant’s sentence was calculated using an incorrect criminal-history score, he is entitled to remand for a resentencing hearing with a corrected criminal-history score of six.

Reversed and remanded.