

*This opinion is nonprecedential except as provided by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
A22-0117**

State of Minnesota,
Respondent

vs

Jason Peter Bird,
Appellant.

**Filed September 6, 2022
Affirmed
Cochran, Judge**

Crow Wing County District Court
File No. 18-CR-18-3068

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

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota (for respondent)

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

Considered and decided by Gaïtas, Presiding Judge; Cochran, Judge; and
Bryan, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this appeal from a probation-revocation decision, appellant argues that the district court erred by revoking probation and granting appellant's request to execute his sentence because the terms of his probation were not more onerous than his executed prison

sentence. In the alternative, appellant argues that the district court abused its discretion at sentencing by assigning appellant three felony points for out-of-state convictions. We affirm.

FACTS

In July 2018, respondent State of Minnesota charged appellant Jason Bird with one count of felony stalking, in violation of Minn. Stat. § 609.749, subd. 4(b) (2016). In August 2018, the district court held a plea hearing. Bird agreed to plead guilty to the charged offense with the understanding that he would be released to a treatment program pending sentencing. The district court accepted Bird's plea and released him to treatment.

In May 2019, a sentencing worksheet was prepared for Bird. The worksheet assigned Bird a total of four criminal-history points: one custody-status point and three felony points. The felony points were comprised of two felony points for a conviction of assault causing serious injury in 2009, one half-point for a controlled-substance violation in 2006, and one-half point for failure to affix a tax stamp in 2006.

In August 2020, Bird appeared for sentencing. Based on his amenability to treatment and probation, the parties agreed to a downward dispositional departure of a 38-month prison sentence and stayed execution for five years. The parties also agreed that the state would support a defense-initiated petition for early discharge from probation if Bird did not have any violations after a year on supervised probation. The district court imposed the agreed-upon sentence. Bird did not object to the calculation of his criminal-history score at sentencing.

The terms of Bird's probation required, among other things, that he remain law abiding, follow the recommendations of his chemical-use assessment, refrain from possessing or consuming alcohol or intoxicants unless prescribed, remain subject to random drug testing, and notify his probation officer of any contact with law enforcement.

On June 28, 2021, Bird's probation officer filed a probation-violation report. The report alleged that Bird had been cited for driving-related offenses and theft, failed to report this law-enforcement contact to his probation officer, failed to meet with his probation officer, and failed to appear for urine testing. At a probation-violation hearing on September 8, 2021, Bird admitted to all of these violations except for failing to appear for urine testing. The district court reinstated him on probation, imposed 60 days of jail time, and allowed him to be released from the jail sentence early if there was a recommendation in the chemical-use assessment for inpatient or outpatient treatment.

On October 8, 2021, Bird's probation officer filed a second probation-violation report. The report alleged that Bird had used methamphetamine, been arrested for motor-vehicle theft, failed to submit to urine testing, and failed to go to outpatient treatment after he was released early from jail according to the district court's order at the first probation-violation hearing. At a probation-violation hearing on October 13, 2021, Bird's attorney informed the court that Bird was "prepared to execute his sentence" with the state's agreement that he would first be released from custody for one week to attend to personal matters before needing to report. The district court continued the matter and ordered Bird released until the next hearing. Bird failed to appear at the next hearing, resulting in the district court issuing a warrant for his arrest.

Bird next appeared before the district court on November 2, 2021. The district court asked Bird: “[I]s it your request that . . . the remainder of that unexecuted jail sentence be executed?” Bird replied, “Yes.” The district court informed Bird that, because he was demanding that his sentence be executed, he did not need to admit to the most recent probation violations. The district court then stated that it would issue an amended sentencing order with a warrant of commitment “consistent with [Bird’s] demand for execution.” When the district court asked Bird if he wished to proceed in that manner, Bird referenced his prior agreement with the state and suggested that he felt that he had no choice but to demand execution of his sentence. But, after further discussion, he agreed that he was making an execution demand. The district court then revoked probation and executed Bird’s prison sentence.

Bird appeals the district court’s probation-revocation decision.

DECISION

Bird challenges the district court’s execution of his prison sentence, arguing that the district court erred by revoking probation and accepting Bird’s execution demand without expressly finding that the conditions of Bird’s probation were more onerous than the executed prison sentence. In the alternative, Bird argues that his sentence must be reversed and the matter remanded for resentencing because the district court abused its discretion by assigning Bird three felony points for convictions that Bird claims he sustained in Iowa. We address each issue in turn.

I. The district court did not err by revoking probation and accepting Bird's execution demand.

Bird argues that the district court erred as a matter of law by revoking probation and accepting his execution demand without first making a finding that the terms of his probation were more onerous than prison. Bird makes this argument for the first time on appeal. Before the district court, Bird did not object when the district court granted his request and executed his sentence without making such a finding. Generally, “[u]nder the invited error doctrine, a party cannot assert on appeal an error that he invited or that could have been prevented at the district court.” *State v. Carridine*, 812 N.W.2d 130, 142 (Minn. 2012); *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (noting that “a defendant cannot on appeal raise his own trial strategy as a basis for reversal”). But the invited-error doctrine does not apply if an error meets the plain-error test. *Carridine*, 812 N.W.2d at 142. Therefore, because Bird requested execution of his sentence and did not object to the district court accepting his request, we review the revocation of probation and execution of Bird’s sentence for plain error.

To meet the plain-error standard, a defendant “must show that (1) there was an error, (2) the error was plain, and (3) the error affected the defendant’s substantial rights.” *State v. Myhre*, 875 N.W.2d 799, 804 (Minn. 2016). “An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct.” *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). Based on our review of the applicable law, we conclude that Bird has failed to demonstrate an error that is plain.

When sentencing a criminal defendant, a district court may stay execution of a prison sentence and place the defendant on probation. Minn. Stat. § 609.135, subd. 1(a)(2) (2020). But a defendant with a stayed sentence has the right to request execution of that sentence “when the conditions of probation make probation more onerous than prison.” *State v. Rasinski*, 472 N.W.2d 645, 650 (Minn. 1991) (clarifying the standard established in *State v. Randolph*, 316 N.W.2d 508, 510 (Minn. 1982)).

Bird argues that the district court erred by failing to make any findings to support a determination that probation was more onerous than prison before granting Bird’s execution request. To support his position, Bird relies on *Rasinski* and its predecessor, *Randolph*. In *Randolph*, the supreme court held that a defendant has the right to request execution of a stayed sentence when the conditions of probation are more onerous than prison. 316 N.W.2d at 510. In *Rasinski*, the supreme court reaffirmed this principle and specified that the relative onerousness of a probationary sentence is measured by “the cumulative effect of the probationary conditions imposed.” 472 N.W.2d at 651. Both cases emphasized the supreme court’s underlying concern that a probationary sentence that is more onerous than the presumptive prison sentence constitutes a de facto departure from the spirit, if not the letter, of the Minnesota Sentencing Guidelines. *Id.*; *Randolph*, 316 N.W.2d at 510. Importantly, in both cases, the supreme court analyzed whether the district court erred by *denying* a defendant’s request to execute their sentence. *Rasinski*, 472 N.W.2d at 650; *Randolph*, 316 N.W.2d at 509. And, in both cases, the supreme court remanded to the district court to consider modifying the conditions of probation to make them less onerous than prison, with instructions that execution of the sentence should be

ordered if the defendant continued to refuse probation. *Rasinski*, 472 N.W.2d at 651; *Randolph*, 316 N.W.2d at 510-11.

Here, by contrast, Bird made an explicit request for the district court to execute his sentence and the district court *granted* that request. Bird cites no case law or rule, and we are aware of none, that requires a district court to make a finding that probation is more onerous than prison before *granting* a defendant's execution request. Because there is no clear legal requirement that a district court make such a finding before granting a request to execute a sentence (as opposed to denying a request), we conclude that the district court did not plainly err. Accordingly, we decline to reverse the district court's acceptance of Bird's demand to execute his sentence.

II. The record is insufficient to address Bird's argument regarding his criminal-history score.

In the alternative, Bird contends that we must reverse his sentence and remand for resentencing because he was sentenced with an incorrect criminal-history score. He argues that the district court abused its discretion in determining his criminal-history score by assigning him three felony points for out-of-state convictions. Though Bird did not object to the criminal-history score at his sentencing hearing, a defendant cannot waive or forfeit review of the criminal-history score on which the district court based their sentence. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

Under the Minnesota Sentencing Guidelines, a defendant's presumptive sentence is determined by the severity of the offense and the defendant's prior criminal history. Minn. Sent. Guidelines 2.C (Supp. 2017). The defendant's prior criminal history is reflected in a

criminal-history score, which is the sum of points assigned based on the defendant's custody status at the time of the offense and any eligible prior felonies, misdemeanors, and juvenile adjudications. Minn. Sent. Guidelines 2.B (Supp. 2017). The sentencing guidelines also direct courts to determine "whether and how a prior non-Minnesota conviction should be counted in the criminal history score" by determining how the offender would have been sentenced for the non-Minnesota conviction if it had occurred in Minnesota. Minn. Sent. Guidelines 2.B.5; *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). We review a district court's determination of a defendant's criminal-history score for an abuse of discretion. *State v. Morgan*, 953 N.W.2d 729, 734 (Minn. App. 2020), *aff'd*, 968 N.W.2d 25 (Minn. 2021).

Bird argues that the district court abused its discretion in its calculation of his criminal-history score by miscalculating the number of points attributable to his out-of-state convictions and erroneously assigning him three felony points for these out-of-state convictions. The record reflects that the district court did in fact assign Bird three felony points for his prior convictions, but there is no evidence in the record to support Bird's contention that the three felony points were based on out-of-state convictions. The only evidence in the record related to these convictions is the sentencing worksheet. The worksheet lists the three prior offenses along with the disposition date for each offense. It also lists the points attributable to each offense. But the sentencing worksheet does not indicate that any of the convictions are out-of-state convictions, as Bird alleges. In addition, the record does not include a presentencing investigation report or any other information related to these convictions. There is simply no evidence in the record to

support Bird’s contention that the three felony points included in his criminal-history score are attributable to out-of-state convictions.

Because the record is insufficient for us to determine whether the three felony points included in Bird’s criminal-history score are based on out-of-state convictions (as Bird alleges) or whether the district court properly assigned felony points for any out-of-state convictions, we are unable to determine whether the district court abused its discretion in its calculation of Bird’s criminal-history score. Accordingly, we decline to decide the merits of the arguments raised by Bird related to the three felony points.¹ Bird may raise these same arguments if he chooses in a motion to correct his sentence filed with the district court. *See* Minn. R. Crim P. 27.03, subd. 9 (providing that the district court “may at any time correct a sentence not authorized by law”); *cf. State v. Gustafson*, 610 N.W.2d 314, 321 (Minn. 2000) (declining to review claim of ineffective assistance of counsel due to insufficient record but preserving the issue for postconviction review).

Affirmed.

¹ We also decline to remand this case to the district court as we did in *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (remanding to the district court to allow the state to further develop the sentencing record and meet its burden to establish the defendant’s criminal-history score where the defendant did not object to his criminal-history score), *rev. denied* (Minn. Jul. 15, 2008). Unlike *Outlaw*, which was a direct appeal, Bird challenges his criminal-history score in a probation-revocation appeal. This distinction has implications for the relevant burden of proof. Under *Williams v. State*, the state bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within a criminal-history score. 910 N.W.2d 736, 740 (Minn. 2018). But after the time for a direct appeal has passed, the burden shifts to the defendant to prove that the sentence was based on an incorrect criminal-history score. *Id.* at 743. Here, therefore, Bird has the burden to prove that his criminal-history score is incorrect. Because he cannot develop the record himself at this procedural stage, we conclude that a remand to develop the record further is not appropriate.