

*This opinion is nonprecedential except as provided by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
A22-0396**

State of Minnesota,
Respondent,

vs.

Earl Vincent Grasty,
Appellant.

**Filed January 9, 2023
Reversed and remanded
Bjorkman, Judge**

Hennepin County District Court
File Nos. 27-CR-21-7801, 27-CR-21-7870

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

Mary F. Moriarty, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Reilly, Presiding Judge; Bjorkman, Judge; and Cochran, Judge.

NONPRECEDENTIAL OPINION

BJORKMAN, Judge

In this direct appeal following guilty pleas to violating an order for protection (OFP), appellant challenges his sentence. Because the sentence is based on an incorrect criminal-history score, we reverse and remand.

FACTS

In April 2021, respondent State of Minnesota filed separate complaints charging appellant Earl Grasty with violating an OFP in March 2021 and with violating an OFP and fleeing a police officer in April 2021. After several months of plea negotiations, Grasty pleaded guilty to the two OFP violations in exchange for the state's agreement to (1) dismiss the fleeing charge, (2) not charge him with other protective-order violations "pending for charging," and (3) a "16-month durational departure" for both offenses because of their "less onerous circumstances." The parties understood Grasty would have a criminal-history score of 3 for the March offense, resulting in a presumptive probationary sentence, and a criminal-history score of 4 for the April offense, resulting in a presumptive prison sentence. Because of the anticipated prison sentence for the second offense, Grasty asked the district court to execute his sentence for the first. The district court accepted Grasty's pleas and sentenced him to concurrent terms of 16 months' imprisonment. Grasty appeals.

DECISION

The determination of a defendant's criminal-history score is a question of law, which we review de novo. *State v. Scovel*, 916 N.W.2d 550, 554 (Minn. 2018).

It is undisputed that Grasty has prior felony convictions that yield a total of 2.5 criminal-history points. And he was on probation at the time of the subject offenses, which yields a one-half custody-status point. *See* Minn. Sent'g Guidelines 2.B (2020) (detailing calculation of felony points and custody-status points). The parties and the district court added these values, resulting in a criminal-history score of 3 for the first offense. But this

court subsequently held that a partial custody-status point must be disregarded when determining a presumptive sentence. *State v. Beganovic*, 974 N.W.2d 278, 288 (Minn. App. 2022), *rev. granted on other ground* (Minn. June 29, 2022). Doing so leaves Grasty with a score of 2.5 at the time of the first offense, which must be rounded down. Minn. Sent’g Guidelines 2.B.1.i (2020). Accordingly, Grasty’s criminal-history score for the first offense was 2 points and his score for the second was 3 points.¹

The district court’s use of an incorrect criminal-history score impacts Grasty’s presumptive sentence. Violating an OFP is a severity-level 4 offense. Minn. Sent’g Guidelines 5.A (2020). A criminal-history score of up to 3 carries a presumptive probationary sentence, while a criminal-history score of 4 carries a presumptive prison sentence. Minn. Sent’g Guidelines 4.A (2020). Because Grasty’s criminal-history scores were 2 and 3, both of his sentences were presumptively probationary.

The state concedes that Grasty’s sentence was based on an erroneous criminal-history score, making his prison sentence illegal. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007) (stating that a sentence based on an incorrect criminal-history score is “illegal”). Generally, when a defendant is sentenced based on an incorrect criminal-history score, we will remand for resentencing based on the correct score. *E.g., id.* at 151; *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). But the state urges a different approach, arguing that Grasty must pursue postconviction relief because his sentence is part of a plea agreement as in *State v. Coles*, 862 N.W.2d 477 (Minn. 2015). We agree that correcting a

¹ *See State v. Hernandez*, 311 N.W.2d 478, 481 (Minn. 1981) (allowing the district court to sentence separate and distinct convictions sequentially).

sentence entered as part of a plea agreement is more nuanced because it “involves more than simply the sentence.” *Coles*, 862 N.W.2d at 481 (citing *State v. Lewis*, 656 N.W.2d 535, 539 (Minn. 2003)). But there are two paths to correcting an agreed-to sentence.

The first path applies when, as in *Coles*, the time for direct appeal has passed. Then the defendant may not simply move for sentence correction under Minn. R. Crim. P. 27.03, subd. 9. Rather, the defendant must seek postconviction relief, subject to the timing and other constraints of the postconviction statute. *Id.* at 480-82.

The second path applies when, as here, the defendant files a timely direct appeal. A defendant has the right, as part of that appeal, to challenge “any sentence imposed or stayed in a felony case.” Minn. R. Crim. P. 28.02, subd. 2(3). As noted above, if the defendant demonstrates their sentence is based on an erroneous criminal-history score, we will remand for resentencing. *See Provost*, 901 N.W.2d at 202. The district court then has discretion to determine how, if at all, changing the sentence affects the parties’ plea agreement. *See Lewis*, 656 N.W.2d at 539 (permitting district court to “consider the effect that changes in the sentence have on the entire plea agreement”); *accord State v. Montermini*, 819 N.W.2d 447, 454-55 (Minn. App. 2012) (concluding that district court acted within scope of remand for withdrawal of guilty plea to one offense by also vacating pleas and convictions to related offenses to “allow the prosecution to proceed anew”); *cf. Provost*, 901 N.W.2d at 202 n.1 (observing that in the case of a “bargained-for” sentence, a criminal-history-score error “may be grounds for a defendant to withdraw his plea”).

In sum, because Grasty's prison sentence is illegal, we reverse and remand for resentencing based on the correct criminal-history score. On remand, the district court has discretion to determine whether doing so affects the parties' plea agreement.

Reversed and remanded.