

*This opinion is nonprecedential except as provided by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
A23-1510**

State of Minnesota,
Respondent,

vs.

David Wokeph Natee,
Appellant.

**Filed September 16, 2024
Affirmed in part, reversed in part, and remanded
Cochran, Judge**

Hennepin County District Court
File No. 27-CR-21-19503

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 Ede, Presiding Judge; Cochran, Judge; and Wheelock, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

In this appeal from the final judgment of conviction for third-degree drug possession, appellant argues that the district court abused its discretion by declining to grant his oral plea-withdrawal motion. Alternatively, appellant contends that the district

court sentenced him based on an incorrect criminal-history score. For the reasons set forth below, we conclude that the district court did not abuse its discretion when it declined to consider the oral plea-withdrawal motion but did abuse its discretion when it calculated appellant's criminal-history score. We therefore affirm in part, reverse in part, and remand for resentencing.

FACTS

In October 2021, respondent State of Minnesota charged appellant David Wokeph Natee with one count of third-degree drug possession and one count of fifth-degree drug possession. Natee entered into a global plea agreement with the state to resolve the October 2021 charges as well as probation violations in another matter.¹

Under the terms of the agreement, Natee agreed to plead guilty to the third-degree drug possession charge and admit to probation violations in the other matter. In return, the state agreed to dismiss the fifth-degree drug possession charge. The parties also agreed that Natee would receive a sentence of 41 months' imprisonment for the drug-possession charge and that "no action" would be taken on the probation violations, provided Natee appeared at the agreed-upon sentencing hearing. But, if Natee did not appear at the sentencing hearing, the parties agreed that Natee would receive a sentence of 60 months' imprisonment for the drug-possession charge and his 111-month sentence in the probation-violation matter would be executed. Natee signed a written plea agreement specifying these terms.

¹ The state also agreed not to charge Natee with other potential offenses of which it was aware.

In December 2022, the parties appeared in district court and defense counsel presented the plea agreement. Defense counsel explained that Natee agreed to plead guilty to the third-degree drug-possession charge, be released pending sentencing, and be sentenced on January 10, 2023. Defense counsel also explained that Natee would admit to the probation violations. When discussing the sentencing aspects of the global plea agreement, defense counsel specifically stated:

[I]f Mr. Natee appears for his sentencing date, he will receive a sentence of 41 months [for the drug-possession charge], executed to the department of corrections. If he does not appear, he will agree that the sentence will then be 60 months.

Additionally, there's a tagged probation violation matter. . . . The parties have agreed that if Mr. Natee appears for his sentencing that there will be no action taken on that probation violation file. And probation is actually set to expire on January 13th, so functionally just discharge him and close out that file. However, *if Mr. Natee does not return for his sentencing date, the parties have agreed that he will execute that sentence which is 111 months.*

(Emphasis added.) Following defense counsel's description of the plea agreement, the district court judge asked Natee: "[I]s that your understanding of the terms of this plea negotiation?" He responded: "Yes, ma'am." Natee also stated that he had enough time to discuss the plea agreement with his counsel and did not have any questions about the plea agreement.

Natee then entered a guilty plea to the drug-possession charge and waived his trial rights. After defense counsel established a sufficient factual basis for the plea, the district court told Natee that the court would accept his plea at the sentencing hearing on January 10. The district court also reminded Natee that if he did not appear for sentencing

on January 10, it could sentence him “to that higher sentence . . . *including even executing that probation violation.*” (Emphasis added.) Natee responded: “Yes ma’am.” The district court then put Natee’s admission to the probation violations on the record and stated it would address “sanctions” for the probation violations at sentencing. Just before adjourning, the district court again reminded Natee: “[I]f you return, you’ll get the benefit [of the plea agreement]. And if you don’t, you know those consequences could be dire.” Natee again responded: “Yes, Your Honor.”

Following the plea hearing, a probation officer submitted a sentencing worksheet. The worksheet indicated that Natee’s presumptive sentence for the drug-possession charge was 60 months. The presumptive sentence was based on a criminal-history score of eight and included a custody enhancement of three months.

On January 10, Natee did not appear at the scheduled sentencing hearing. Natee was subsequently arrested and appeared at a rescheduled sentencing hearing in April. Given Natee’s failure to appear for sentencing on January 10, the state asked the district court to sentence Natee according to the terms of the plea agreement—60 months’ imprisonment for the drug offense and execution of the 111-month sentence in the probation matter. Defense counsel did not agree to the request. Defense counsel stated that Natee wished to withdraw his plea instead of being sentenced. According to defense counsel, Natee “did not understand . . . the part of the plea that involved probation and the 111 months.” In response, the district court judge indicated that her memory of the plea hearing is that she “very strongly warned” Natee to “show up or [he] could be going to prison for 111 months.” The district court then told the parties that the court needed “a

proper motion” with legal arguments and the transcript so that it could “look at” what happened at the plea hearing and consider Natee’s request. After Natee personally tried to explain why he did not understand the plea agreement, the district court explained that Natee should communicate his reasons to his attorney “who’s going to write a motion to withdraw [the] plea.” The district court concluded by continuing the hearing to July 10 and stated that Natee’s counsel could present legal arguments on the plea-withdrawal request at the rescheduled sentencing hearing.

As of July 10, a transcript of the plea hearing was prepared, but Natee’s counsel had not filed a written motion to withdraw Natee’s plea or any legal memorandum in support of his oral motion. Notwithstanding the absence of a written motion by Natee, the state filed a legal memorandum opposing the oral plea-withdrawal motion, arguing that Natee did not meet the standard for plea withdrawal.

At the start of the July 10 sentencing hearing, the district court noted that it had delayed the April sentencing hearing to give Natee’s counsel an opportunity to file a written plea-withdrawal motion, but none was filed. As a result, the district court considered Natee’s oral motion “withdrawn.” The district court then indicated that it was “prepared to proceed with sentencing” and asked Natee’s counsel if he had “any argument [he would] like to make before proceeding with sentencing.” In response, Natee’s counsel did not renew the oral plea-withdrawal motion or argue that the district court erred when it found that the oral motion was withdrawn. Instead, defense counsel stated that he understood that the 111-month executed sentence “was the agreement of the parties” as the disposition for the probation violations and he had “no further argument on that.” Natee himself then

addressed the court, apologizing for being irresponsible and stating that he would “face whatever it is . . . [and] leave it up to the court.”

The district court sentenced Natee pursuant to the plea agreement. Natee received 60 months’ imprisonment for the third-degree drug-possession charge and the fifth-degree drug-possession charge was dismissed. The district court also executed the 111-month sentence in the case involving the probation violations, to run concurrently with the drug-possession sentence.

This appeal follows.

DECISION

Natee argues that the district court abused its discretion by declining to consider his oral plea-withdrawal motion. Natee also contends that the district court erroneously calculated his criminal-history score and that he is entitled to be resentenced. We address Natee’s arguments in turn.

I. The district court did not abuse its discretion by declining to consider Natee’s motion for plea withdrawal.

“A defendant does not have an absolute right to withdraw a valid guilty plea.” *State v. Theis*, 742 N.W.2d 643, 646 (Minn. 2007). But a district court “[i]n its discretion . . . may allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so.” Minn. R. Crim. P. 15.05, subd. 2. When considering whether to grant a presentence plea-withdrawal motion, the district court must “give due consideration” to “the reasons a defendant advances to support withdrawal” and the

“prejudice granting the motion would cause the [s]tate given reliance on the plea.” *State v. Raleigh*, 778 N.W.2d 90, 97 (Minn. 2010) (quotation omitted).

We review a district court’s decision on a plea-withdrawal motion for “abuse of discretion, reversing only in the rare case.”² *Id.* (quotation omitted). “A district 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.” *State v. Hallmark*, 927 N.W.2d 281, 291 (Minn. 2019) (quotation omitted). We will not set aside a district court’s factual finding unless we are “left with the definite and firm conviction that a mistake has been made.” *State v. Evans*, 756 N.W.2d 854, 870 (Minn. 2008) (quotation omitted). With these legal concepts in mind, we turn to Natee’s arguments on appeal.

Natee argues that he made an oral plea-withdrawal motion at the April 2023 sentencing hearing and the district court abused its discretion by considering the motion to be withdrawn. In essence, Natee contends that the district court was required to decide his oral plea-withdrawal motion and did not have the discretion to require Natee’s attorney to file a written motion with legal argument based on the plea-hearing transcript. He further contends that he demonstrated that it would be fair and just to allow him to withdraw his plea under rule 15.05, subdivision 2. We are not persuaded.

² We question whether the abuse-of-discretion standard is appropriate here. Natee did not object to the district court’s statement that it considered Natee’s oral plea-withdrawal motion “withdrawn.” Ordinarily, we review unobjected-to errors under the plain-error standard. *See State v. Epps*, 964 N.W.2d 419, 422-23 (Minn. 2021). But because the parties both contend that the abuse-of-discretion standard applies here, we will apply this standard in considering the district court’s determination of Natee’s motion.

While rule 15.05 provides that a defendant may move to withdraw his plea before sentencing and the district court “may” grant the motion when it is fair and just to do so, the Minnesota Rules of Criminal Procedure do not preclude a district court from requesting that the defendant provide support for a plea-withdrawal motion in writing and a transcript of the plea hearing before deciding the motion. *See* Minn. R. Crim. P. 15.05. And we are aware of no precedential caselaw requiring a district court to hear an oral plea-withdrawal motion rather than requiring a written motion with legal and factual support.

A recent nonprecedential decision of this court, while not controlling, addressed a similar situation and concluded that the district court did not abuse its discretion when it declined to hear an oral plea-withdrawal motion. *State v. Erickson*, A17-1836, 2018 WL 3826318 (Minn. App. Aug. 13, 2018), *rev. denied* (Minn. Oct. 24, 2018). In that case, Erickson requested a continuance at sentencing so he could hire private counsel to represent him and file a plea-withdrawal motion. *Id.* at *1. At the continued hearing one month later, the district court noted that Erickson had not filed a written motion to withdraw his plea or secured counsel. *Id.* Erickson responded, “If I have to enter a motion, *I do that verbally today.*” *Id.* (emphasis added) (quotation omitted). The district court told Erickson that it would not allow him to orally move to withdraw his plea because it had already granted a continuance to allow for a written motion. *Id.* At that point, Erickson requested another continuance. *Id.* The district court denied the continuance request and sentenced Erickson. *Id.*

On appeal, we rejected Erickson’s argument that the district court abused its discretion by not allowing Erickson to make an oral motion to withdraw his guilty plea.

Id. at *3. In addressing the issue, we recognized that Minnesota Rule of Criminal Procedure 32 provides that “[a] motion other than one made during a trial or hearing must be in writing, unless the court or these rules permit it to be made orally.” *Id.* (quoting Minn. R. Crim. P. 32) (quotation marks omitted). But we noted that rule 32 “does not mandate that the district court entertain any oral motion made during any hearing.” *Id.* And we emphasized that the district court granted Erickson’s request for a continuance “in order to give [Erickson’s private counsel] sufficient time to file the motion that would be required if he was requesting withdrawal of a plea,” but no such motion was filed. *Id.* (alteration in original). Accordingly, we concluded that the district court did not abuse its discretion by not allowing Erickson to make an oral plea-withdrawal motion. While not precedential, we find the reasoning in *Erickson* persuasive.³

Here, similar to *Erickson*, we discern no abuse of discretion in the district court’s decision to decline to hear Natee’s oral plea-withdrawal motion and to instead require a written plea-withdrawal motion. Like in *Erickson*, the district court continued the sentencing hearing so that defense counsel could file a written motion rather than consider an oral plea-withdrawal motion. The district court in this case noted that a written motion along with a transcript of the hearing were necessary for the district court to “look at” and “weigh” Natee’s argument that he misunderstood the plea agreement. But Natee’s attorney never filed the requested written plea-withdrawal motion. Nor did the attorney renew the oral plea-withdrawal motion at the next sentencing hearing. Instead, at the July sentencing

³ Unpublished opinions are not binding authority and are cited only for their persuasive value. Minn. R. Civ. App. P. 136.01, subd. 1(c).

hearing, Natee’s attorney acknowledged, based on his review of the transcript, that the 111-month executed sentence “was the agreement of the parties.” Natee did not disagree. Rather, Natee said, “I respect what’s going on . . . I get it” and “I made my decision. I’ll embrace what comes with it.” When considered as a whole, the record reflects that Natee did not intend to pursue his oral plea-withdrawal motion at the July sentencing hearing. Accordingly, the district court did not abuse its discretion by considering the motion withdrawn and declining to address Natee’s motion on the merits.⁴

II. The district court abused its discretion in its calculation of Natee’s criminal-history score and remand is necessary for further development of the sentencing record.

In the alternative, Natee argues for the first time on appeal that his sentence must be reversed because the district court sentenced him using an incorrect criminal-history score. Natee contends that his criminal-history score was incorrect because it included points for two felony drug-possession charges that Natee alleges arose out of the same behavioral incident. He seeks to be resentenced based on a reduced score that includes points for only one of the two convictions. The state agrees that Natee’s criminal-history score is incorrect

⁴ We also note that, even if the district court had considered the motion on the merits, the record is clear that the district court would have denied Natee’s plea-withdrawal motion because Natee did not demonstrate that withdrawal would be fair and just. Natee’s motion was supported only by his oral assertion that he did not understand the plea. The district court had a different recollection. The district court recalled “very strongly warning” Natee about the consequences of not appearing at the sentencing hearing. The record supports the district court’s recollection. Thus, we have no doubt that the district court would have determined that Natee failed to demonstrate that withdrawal of his guilty plea would be fair and just if it had ruled on the merits. Accordingly, even assuming the district court abused its discretion by not deciding the oral motion on the merits, the alleged abuse of discretion was harmless and “must be disregarded.” *See* Minn. R. Crim. P. 31.01 (requiring courts to disregard “[a]ny error that does not affect substantial rights”).

and that he should be resentenced based on a corrected score. Because this court has “an obligation to decide cases in accordance with the law even when the parties agree on an issue,” we must independently review Natee’s legal argument. *State v. Brown*, 937 N.W.2d 146, 157 (Minn. App. 2019) (quotation omitted), *rev. denied* (Minn. Feb. 18, 2020). Based on our independent review, we agree that the sentencing record does not support the district court’s inclusion of points for the two felony drug-possession charges, but we disagree with Natee’s contention that the record reflects that the two felony drug-possession charges arose out of the same behavioral incident. Instead, we conclude that the case must be remanded to the district court to allow the state to further develop the sentencing record on that issue.

The Minnesota Sentencing Guidelines establish presumptive sentences for offenders for whom imprisonment is proper. Minn. Stat. § 244.09, subd. 5 (2020). Under the guidelines, the presumptive sentence is based on the severity of the present offense and the defendant’s criminal-history score. Minn. Sent’g Guidelines 2.C.1 (2020). A defendant’s criminal history is the sum of points assigned from, among other things, prior felonies and custody-status points. Minn. Sent’g Guidelines 2.B (2020). Generally, “the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing.” Minn. Sent’g Guidelines 2.B.1 & cmt. 2.B.101 (2020).⁵ But if an offender has “multiple offenses occurring in a

⁵ The comments to the Minnesota Sentencing Guidelines are advisory—not binding—but appellate courts “strive for an interpretation that is consistent with the comments.” *State v. Scovel*, 916 N.W.2d 550, 555 (Minn. 2018).

single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.” Minn. Sent’g Guidelines cmt. 2.B.107 (2020); *see also* Minn. Stat. § 609.035, subd. 1 (2020). The phrase “single course of conduct” has the same meaning as the phrase “single behavioral incident.” *State v. Drljic*, 876 N.W.2d 350, 353 n.1 (Minn. App. 2016) (quoting Minn. Sent’g Guidelines cmt. 2.B.116 (Supp. 2013)) (quotation marks omitted). The state has the burden at sentencing to prove “facts which establish” that two offenses are not part of the same course of conduct for purposes of calculating a defendant’s criminal-history score. *See State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). “We review the district court’s determination of a defendant’s criminal-history score for an abuse of discretion.” *Brown*, 937 N.W.2d at 157.

Here, the district court calculated Natee’s criminal-history score as eight points. The score included three points for two felony drug-possession offenses (one and one-half points for each) that have the same 2020 disposition date. On the sentencing worksheet, these offenses are titled “ct. I Drugs - 2nd Degree - Possess 6 grams or more heroin (15.4 grams)” and “ct. II Drugs - 3rd Degree - Possess 10 grams or more (11.116 grams crack-cocaine).” No additional information is provided on the sentencing worksheet regarding these offenses.

Natee argues that the district court erred when it included points for both 2020 drug offenses in his criminal-history score because “Natee’s conduct was a single behavioral

incident, and so only one sentence can properly be counted in his criminal-history score.”⁶ And Natee emphasizes that, if the district court had included only one of the 2020 drug offenses in his criminal-history score, his presumptive sentence would be reduced from 60 months to 57 months. Although Natee objects to his criminal-history score for the first time on appeal, we consider his argument because a sentence based on an incorrect criminal-history score is correctible at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

After independently reviewing the record, we agree with Natee that the record does not establish that the state met its burden at sentencing to prove that the two 2020 drug offenses with the same disposition date were not part of the same behavioral incident. For that reason, we conclude that the district court abused its discretion when it included points for both of the 2020 offenses in its calculation of Natee’s criminal-history score. But we disagree that the record shows that the two 2020 drug offenses arose from a single behavioral incident as the parties assert. Instead, for the reasons discussed below, we conclude that the record is insufficient in that regard and remand is necessary.

To determine whether two offenses were committed during a single behavioral incident, courts examine “(1) whether the offenses occurred at substantially the same time

⁶ Natee posits that our standard of review for reviewing his criminal-history score is *de novo*. The authority Natee relies upon to reach this conclusion concerns “[i]nterpreting the Minnesota Sentencing Guidelines.” *Scovel*, 916 N.W.2d at 554. But Natee does not argue that the district court erred in its interpretation of the sentencing guidelines. Rather, Natee asks us to review “the district court’s determination of [Natee’s] criminal-history score.” *See Brown*, 937 N.W.2d at 157. We review such claims for an abuse of discretion. *Id.*

and place, and (2) whether the conduct was motivated by an effort to obtain a single criminal objective.” *State v. Barthman*, 938 N.W.2d 257, 265 (Minn. 2020) (quotations and citation omitted). The single-behavioral-incident test presents a “mixed question of law and fact,” *id.* (quotation omitted), and “depends on the facts and circumstances of [a] particular case.” *State v. Longo*, 909 N.W.2d 599, 611 (Minn. App. 2018) (quoting *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995)). In his brief, Natee points only to the sentencing worksheet to support his contention that the offenses are part of the same behavioral incident. The sentencing worksheet, however, does not reveal any information regarding the underlying offenses other than the specific drugs involved. There is no indication on the sentencing worksheet whether the offenses occurred at substantially the same time and place or whether the conduct was motivated by a single criminal objective. *See Barthman*, 938 N.W.2d at 265. Therefore, the sentencing worksheet is not sufficient to support Natee’s argument that the two 2020 drug offenses were committed as part of the same behavioral incident.

In its brief, the state suggests that certain documents from the 2020 drug cases—a criminal complaint and transcripts from a plea hearing—demonstrate that the two offenses are part of the same behavioral incident. The documents cited by the state, however, are not part of the record before us on appeal. Consequently, we cannot consider those documents when analyzing the issue before us. *See Minn. R. Civ. App. P. 110.01; State v. Carlson*, 161 N.W.2d 38, 40 (Minn. 1968) (“It is elementary that a party seeking review has a duty to see that the appellate court is presented with a record which is sufficient to show the alleged errors and all matters necessary to consider the questions

presented.”) Under these circumstances, and because Natee did not challenge his criminal-history score at the time of sentencing, we conclude that we must reverse Natee’s sentence for the drug-possession offense and remand to allow the state to further develop the sentencing record regarding whether Natee’s prior drug offenses should be included in the district court’s calculation of his criminal-history score. *See State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008) (reversing and remanding for the state to develop the sentencing record, which lacked proof that defendant’s out-of-state prior convictions could support an aggravated sentence), *rev. denied* (Minn. July 15, 2008).

In sum, we conclude that the district court did not abuse its discretion by declining to rule on Natee’s oral plea-withdrawal motion. But the district court abused its discretion when it calculated Natee’s criminal-history score because the record does not demonstrate that the state proved that Natee’s two prior felony drug offenses from 2020 arose from separate behavioral incidents, and therefore remand is necessary to further develop the sentencing record by the state prior to resentencing.

Affirmed in part, reversed in part, and remanded.