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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0064

Marlow Shelton McDonald, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed July 30, 2018
Affirmed
Halbrooks, Judge

Blue Earth County District Court
File No. 07-CR-14-1678

Zachary A. Longsdorf, Longsdorf Law Firm, PLC, Inver Grove Heights, Minnesota (for appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent

Considered and decided by Rodenberg, Presiding Judge; Halbrooks, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Appellant challenges a postconviction court's order amending his sentence under the Minnesota Drug Sentencing Reform Act. We affirm.

FACTS

Appellant Marlow Shelton McDonald was arrested after selling approximately 12 grams of methamphetamine to a confidential informant in five separate controlled purchases throughout April 2014. The state charged McDonald with the following: one count of first-degree controlled-substance sale under Minn. Stat. § 152.021, subd. 1(1) (2012); one count of second-degree controlled-substance possession under Minn. Stat. § 152.022, subd. 2(a)(1) (2012); two counts of first-degree assault for using deadly force against a peace officer under Minn. Stat. § 609.221, subd. 2(a) (2012); one count of unlawful possession of a firearm under Minn. Stat. § 624.713, subd. 1(2) (2012); and one count of ineligible person in possession of a firearm (felon convicted of a crime of violence) under Minn. Stat. § 609.165, subd. 1b(a) (2012). The state charged by amended complaint one count of third-degree controlled-substance possession under Minn. Stat. § 152.023, subd. 2(a)(1) (2012), and one count of fleeing a peace officer in a motor-vehicle under Minn. Stat. § 609.487, subd. 3 (2012).

A jury found McDonald guilty of the first-degree controlled-substance crime, second-degree controlled-substance crime, third-degree controlled-substance crime, both unlawful-possession-of-a-firearm crimes, and the fleeing-a-peace-officer crime. The jury acquitted McDonald of the first-degree-assault charges. The district court then held a sentencing trial, and the jury found that McDonald had five or more prior felony convictions and that his present crimes were committed as part of a pattern of criminal conduct.

The district court committed McDonald to the commissioner of corrections for 316 months for the first-degree controlled-substance conviction,[1] 60 months for one of the unlawful-possession-of-a-firearm convictions, and 57 months for the third-degree controlled-substance conviction to be served concurrently, and 12 months and 1 day for the fleeing-a-peace-officer conviction to be served consecutively with his other sentences.

McDonald appealed the district court's judgment and sentence to this court, arguing that (1) the district court committed evidentiary errors; (2) the evidence was insufficient to support the jury's finding that his present offenses were committed as part of a pattern of criminal conduct; (3) the prosecutor engaged in misconduct; (4) the district court abused its discretion by departing upward from the presumptive sentencing guidelines; (5) he was denied his constitutional right to a speedy trial; (6) the district court was biased against him; and (7) the state engaged in sentencing manipulation. *State v. McDonald*, No. A15 0268, 2016 WL 596222, at *1 (Minn. App. Feb. 16, 2016), *review denied* (Minn. Apr. 19, 2016). We determined that McDonald was not entitled to relief on any of these grounds and affirmed McDonald's convictions and sentence. *Id.* at *1-9.

On July 17, 2017, McDonald petitioned the district court for postconviction relief, arguing that he should be resentenced under the 2016 Minnesota Drug Sentencing Reform Act (DSRA), 2016 Minn. Laws ch. 160, §§ 1-22, at 1-17, for his first-degree controlled-substance crime because his sale of approximately 12 grams of methamphetamine would only constitute a second-degree offense under Minn. Stat. § 152.022, subd. 1(1) (2016).

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[1] The sentence was a double upward departure based on the finding that McDonald committed these crimes as part of a pattern of criminal conduct.

McDonald also argued that his sentence violated his due-process and equal-protection rights, the district court committed evidentiary errors, the state engaged in sentencing manipulation, and he received ineffective assistance of counsel. The state conceded that McDonald should be resentenced under the DSRA but argued that his remaining claims were *Knaffla*-barred. *See State v. Knaffla*, 309 Minn. 246, 252, 243 N.W.2d 737, 741 (1976) (providing that claims that were raised on direct appeal, or were known or should have been known but were not raised on direct appeal, are procedurally barred).

On August 17, 2017, the postconviction court granted, in part, McDonald's petition, determining that McDonald was entitled to resentencing for his first-degree controlled-substance crime but denied all other requested relief on the ground that the claims are *Knaffla*-barred. The state asked the postconviction court to grant its request for a double upward durational departure and to sentence McDonald to 250 months of incarceration. McDonald requested a presumptive sentence of 125 months. On November 14, 2017, the postconviction court amended McDonald's 316-month sentence to a 250-month sentence. McDonald appeals from both the August 17 and November 14 postconviction orders. Because his appeal from the August 17 order is untimely, we accepted jurisdiction only over the appeal of the November 14 order.

D E C I S I O N

The sole issue before us is whether the postconviction court's refusal to characterize his first-degree controlled-substance sale conviction as a second-degree controlled-substance sale conviction based on the DSRA's updated weight thresholds violates McDonald's constitutional right to equal protection because it treats offenders differently

based on the dates of their crimes and because the pre-DSRA sentencing guidelines disparately impacted African Americans.

The U.S. Constitution's Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The Equal Protection Clause of the Minnesota Constitution provides that "[n]o member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or the judgment of his peers." Minn. Const. art. I, § 2. To show that a statute violates an appellant's equal-protection rights, the appellant bears the heavy burden of proving beyond a reasonable doubt that the statute treats similarly situated persons differently. *State v. Johnson*, 813 N.W.2d 1, 10 (Minn. 2012). Under the similarly situated test, a state violates equal protection if it "prescribes different punishments or different degrees of punishment for the same conduct committed under the same circumstances by persons similarly situated." *Id.* at 12. The Equal Protection Clause "does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant aspects alike." *Id.* (quotation omitted). "We review the constitutionality of a statute de novo." *Deegan v. State*, 711 N.W.2d 89, 92 (Minn. 2006).

The DSRA became law on May 22, 2016, and changed Minnesota's drug-sentencing guidelines by reducing sentences for low-level, nonviolent drug offenders. 2016 Minn. Laws ch. 160, §§ 1-22, at 1-17. In *State v. Kirby*, the supreme court applied the "amelioration doctrine," which provides that an amended criminal statute applies to crimes committed before its effective date if: (1) the legislature has made no statement

clearly establishing that it intends to abrogate the amelioration doctrine; (2) "the amendment mitigate[s] punishment"; and (3) final judgment has not been entered as of the effective date. 899 N.W.2d 485, 490 (Minn. 2017). The supreme court held that the amelioration doctrine applies to section 18 of the DSRA, which amended the sentencing grid for drug offenses and became effective on May 23, 2016. *Id.*; *see also* 2016 Minn. Laws ch. 160, § 18, at 15-16; Minn. Sent. Guidelines 4.C (2016).

In *State v. Otto*, the supreme court clarified that the DSRA amendments to the weight requirements for drug offenses do not apply to crimes that were committed before August 1, 2016. 899 N.W.2d 501, 503-04 (Minn. 2017). The supreme court reasoned that because the DSRA states that the weight requirements for first-, second-, and third-degree drug sale became "effective August 1, 2016, and appl[y] to crimes committed on or after that date," the legislature's intent was "crystal clear: to abrogate the amelioration doctrine." *Id.* (citing 2016 Minn. Laws ch. 160, §§ 4-5, at 2-6). Therefore, under *Otto*, a district court cannot amend the degree of an offender's drug conviction based on the DSRA's updated weight requirements. *Id.*

In resentencing McDonald under the DSRA, the postconviction court determined that the presumptive sentence was 125 months of incarceration. But the postconviction court doubled the presumptive sentence based on the jury's determination that McDonald is a career offender. *See* Minn. Stat. § 609.1095, subd. 4 (2012) (providing that a district court "may impose an aggravated durational departure from the presumptive sentence up to the statutory maximum sentence if the factfinder determines that the offender has five or more prior felony convictions and that the present offense is a felony that was committed

as part of a pattern of criminal conduct"). The postconviction court correctly applied the DSRA's updated sentencing grid to McDonald's first-degree controlled-substance sale conviction, *see Kirby*, 899 N.W.2d at 487, without applying the DSRA's updated weight thresholds to amend the degree of McDonald's conviction, *see Otto*, 899 N.W.2d at 503.

McDonald argues that the postconviction court's refusal to apply the DSRA's weight thresholds to persons convicted before August 1, 2016, violates equal-protection guarantees because he received a more serious sentence than those who committed the same conduct after August 1, 2016. We must first consider whether McDonald is being treated differently than others similarly situated who committed the same conduct under the same circumstances. *Johnson*, 813 N.W.2d at 11. An offender who violates the 2012 version of the controlled-substance statute is not "in all relevant respects alike" to an offender who violates a 2016 version of the controlled-substance statute. A 2012 offender committed his crime at a different time than a 2016 offender and violated a different version of the statute. *Cf.* Minn. Stat. § 152.022, subd. 1(2) (2016); Minn. Stat. § 152.021, subd. 1(1) (2012).

McDonald next contends "that the racial disparity in drug case sentencing violates his right to equal protection." To show that a statute violates the Equal Protection Clause based on race, an appellant must show "that the statute classifies individuals on the basis of some suspect trait." *State v. Frazier*, 649 N.W.2d 828, 832 (Minn. 2002). If the statute itself does not classify on the basis of race, an appellant must demonstrate that the statute creates a racial classification in practice. *Id.*

McDonald does not argue that the legislature's refusal to apply the DSRA weight thresholds to acts committed before August 1, 2016, classifies individuals on the basis of a suspect trait. Instead, he argues that the statute creates a racial classification in practice. McDonald cites literature that states there is racial disparity between African American and white offenders for arrest and imprisonment rates related to drug crimes. Although McDonald discusses overall disparity rates for drug crimes, he has not demonstrated how the legislature's decision not to apply the DRSA's weight thresholds retroactively causes those disparities, and therefore he has not demonstrated that the DSRA creates a racial classification in practice.

The postconviction court did not abuse its discretion in amending McDonald's sentence.

Affirmed.