STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1695

State of Minnesota,
Respondent,

vs.

Sandy Woodrow Yancy,
Appellant.

Filed September 8, 2020
Affirmed
Johnson, Judge

Hennepin County District Court
File No. 27-CR-19-3232

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Veronica M. Surges, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bryan, Presiding Judge; Johnson, Judge; and Reilly, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Judge

Sandy Woodrow Yancy challenges his 131-month prison sentence. He argues that the district court erred by assigning him five criminal-history points, including three points

for three prior convictions, which, he asserts, arose from the same behavioral incident. Yancy did not raise the issue at the time of sentencing and did not introduce any evidence to show that the three prior convictions arose from the same behavioral incident. Consequently, the district court did not err by assigning three criminal-history points to the three prior convictions. Therefore, we affirm.

FACTS

In February 2019, the state charged Yancy with second-degree sex trafficking, in violation of Minn. Stat. § 609.322, subd. 1a(4) (2018), and second-degree promotion of prostitution, in violation of Minn. Stat. § 609.322, subd. 1a(2) (2018). The amended complaint alleges that, between September 2017 and December 2018, Yancy lived with Victim A at a residence in Minneapolis, Victim A performed more than 500 acts of commercial sex at that location, and Victim A was required to give Yancy at least half of the money she received for commercial-sex work.

In July 2019, Yancy and the state entered into a plea agreement in which Yancy agreed to plead guilty to second-degree promotion of prostitution. In exchange, the state agreed to, among other things, dismiss the charge of second-degree sex trafficking and request a bottom-of-the-box sentence of 131 months.

Yancy's sentencing worksheet indicates that he has three prior convictions in Hennepin County of theft by swindle, for which he was assigned three criminal-history points. The worksheet notes a different offense date for each prior theft-by-swindle conviction. The worksheet also notes that Yancy's present offense is at severity level C. At the sentencing hearing, Yancy's attorney informed the district court that the parties

agreed that Yancy's criminal-history score is five, and the district court so found. Given a severity level of C and a criminal-history score of five, the presumptive sentence is an executed sentence of between 131 and 180 months of imprisonment. Minn. Sent. Guidelines 4.B. (2018). The district court imposed an executed prison sentence of 131 months. Yancy appeals.

D E C I S I O N

Yancy argues that the district court erred by assigning three criminal-history points to his three theft-by-swindle convictions. He contends that the state did not prove by a preponderance of the evidence that his three prior convictions for theft by swindle were not part of a single behavioral incident. He asserts that "the state presented no evidence regarding [his] 2005 convictions" and that the only information before the district court was his sentencing worksheet.

In a felony case, a defendant's presumptive sentence is determined by the severity of the present offense and the defendant's criminal-history score. Minn. Sent. Guidelines 2 (2018). A criminal-history score is the "sum of points" that are assigned for, among other things, prior felony convictions and prior juvenile adjudications. Minn. Sent. Guidelines 2.B. The number of criminal-history points assigned to a prior felony conviction depends on the severity level of the prior offense. Minn. Sent. Guidelines 2.B.1. As a general rule, "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. Guidelines cmt. 2.B.101. But if an offender has "multiple offenses occurring in a 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. Guidelines cmt. 2.B.107. The term "single course of conduct" is equivalent to the term "single behavioral incident." Minn. Sent. Guidelines cmt. 2.B.116.

Yancy cites *State v. McAdoo*, 330 N.W.2d 104 (Minn. 1983), for the proposition that, for purposes of calculating a criminal-history score, the state bears the burden of proving that a defendant's prior convictions do not arise from a single behavioral incident. In *McAdoo*, the defendant argued that he should receive only two, as opposed to four, felony points for seven prior convictions that he contended were part of the same course of conduct. *Id*. at 108. The supreme court acknowledged that the state has "the burden of proving the facts which establish the divisibility of a defendant's course of conduct." *Id.* at 109. The supreme court concluded that, in light of the evidentiary record in that case, "the state met its burden of establishing the divisibility of the course of conduct underlying the [prior] convictions" and that "[t]he trial court was justified in relying on the police reports . . . in determining the circumstances of those convictions." *Id*.

Shortly after issuing its *McAdoo* opinion, the supreme court considered a similar argument by an appellant who had not challenged his criminal-history score at the time of sentencing. In *Pilger v. State*, 337 N.W.2d 695 (Minn. 1983), the defendant challenged the calculation of his criminal-history score on appeal by arguing that he should not have been assigned four points for four prior convictions that, he asserted, arose from a single behavioral incident. *Id.* at 697. The supreme court stated:

> Defendant did not raise this issue at the sentencing hearing and therefore a record was never developed on the issue. Defendant's claim that the four convictions were based on

> conduct that was part of [a] single-behavioral incident is therefore an assertion that was not made in the trial court and that cannot be substantiated on this appeal. Even at this late date the defense has not presented us with any evidence that would substantiate defendant's claim that all four convictions were based on conduct that was part of a single-behavioral incident.

Id. The supreme court rejected the argument without further discussion. *Id.*

In the following year, the supreme court considered a similar argument by an appellant who had properly made the challenge that Pilger had failed to make. In *Bixby v. State*, 344 N.W.2d 390 (Minn. 1984), the appellant petitioned for post-conviction relief, arguing that the district court had erred in calculating his criminal-history score on the ground that his two prior convictions of third-degree criminal sexual conduct arose from a single behavioral incident. *Id*. at 392. The petitioner had introduced the transcript of the prior criminal trial, which convinced the supreme court "that there was just one basic incident of wrongdoing that took place at two different locations in one evening." *Id.* at 393. Accordingly, the supreme court concluded that both the sentencing court and the post-conviction court erred by not determining that the two prior convictions arose from a single behavioral incident. *Id.* at 394. The supreme court cited *McAdoo* and *Pilger*, which it characterized as "instructive as to the procedures that should be followed." *Id.* at 393. The supreme court explained, "*McAdoo* supports the view that if the defendant seeks to prove that two prior convictions for which he was sentenced were based on conduct that was part of a single behavioral incident, the court sentencing him for the current offense is the proper court for deciding the issue." *Id*. at 394. The supreme court explained further that *Pilger* illustrates that "the appropriate procedure is for a defendant to raise the issue at the time

the judge is sentencing him for the current offense and to present evidence establishing his claim that the multiple convictions were based on conduct that was part of a single behavioral incident." *Id*. at 393-94.

Thus, if a defendant wishes to challenge a criminal-history score on the ground that it is improperly based on multiple prior convictions that arose from a single behavioral incident, the defendant should request a decision on the issue from the district court. *Id*. The defendant must raise the issue at the sentencing hearing and develop a factual record on the issue. *Pilger*, 337 N.W.2d at 697. Specifically, the defendant must "present evidence establishing his claim that the multiple convictions were based on conduct that was part of a single behavioral incident." *Bixby*, 344 N.W.2d at 394. If a defendant does not raise the issue and does not introduce any evidence, the claim "cannot be substantiated on . . . appeal." *Pilger*, 337 N.W.2d at 697. But if a defendant raises the issue and introduces evidence to support his claim, then the state bears the burden of proving the facts necessary to support a conclusion that the multiple prior convictions did not arise from a single course of conduct. *McAdoo*, 330 N.W.2d at 109.[1]

[1]We acknowledge the state's alternative argument that, if this court were to conclude that there is insufficient evidence in the record to support the district court's finding that Yancy's criminal-history score is five, the appropriate remedy would be a remand to the district court with instructions to allow additional evidence. The state cites *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008), in support of this alternative argument. In *Outlaw*, the appellant challenged the district court's finding that he had five prior felony convictions, which permitted the district court to sentence him as a career offender and impose an aggravated upward durational departure from the presumptive guidelines sentence, pursuant to section 609.1095, subdivision 4, of the 2006 Minnesota Statutes. *Id*. at 354-55. This court stated that the state bore the burden of proof and concluded that the state's evidence did not show that at least five prior convictions were or would be felony offenses pursuant to Minnesota law. *Id*. at 355-56. Accordingly,

In this case, Yancy did not raise any issue in the district court concerning whether three criminal-history points should be assigned to his three prior convictions of theft by swindle. He never made any such argument and never introduced any evidence relating to the three prior theft-by-swindle convictions. In fact, Yancy's attorney took the initiative of informing the district court that the parties agreed that Yancy's criminal-history score was five, a score that necessarily depended on the three points assigned to the three prior theft-by-swindle convictions. Because Yancy did not raise the issue or introduce evidence at the appropriate time and in the appropriate forum, he cannot now claim that the state did not satisfy its burden of proof on the issue. *See Bixby*, 344 N.W.2d at 393-94; *Pilger*, 337 N.W.2d at 697; *McAdoo*, 330 N.W.2d at 109.

Thus, the district court did not err by assigning Yancy three criminal-history points for his three prior theft-by-swindle convictions.

Affirmed.

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we reversed and remanded "for a determination of whether appellant has the requisite number of prior felony convictions to support an aggravated sentence," and we specifically stated that the state "is permitted to further develop the sentencing record." *Id*. at 356. We note that this court has, in unpublished opinions, reversed and remanded pursuant to *Outlaw* in some cases involving challenges to criminal-history scores. *See, e.g.*, *State v. Evans*, No. A19-1513, 2020 WL 4743498, at *2 (Minn. App. Aug. 17, 2020); *State v. Remund*, No. A19-0741, 2020 WL 2517072, at *3-5 (Minn. App. May 18, 2020); *State v. Altringer*, No. A17-0741, 2019 WL 1006790, at *2-5 (Minn. App. Mar. 4, 2019), *review granted* (Minn. June 18, 2019) *and appeal dismissed* (Minn. Nov. 19, 2019). We believe, however, that the principles that govern this appeal are found in the supreme court's opinions in *McAdoo, Pilger*, and *Bixby*, in which the appellants made the same type of argument that Yancy is making. In essence, the supreme court's caselaw imposes a preliminary burden on the defendant to raise the issue and introduce relevant evidence before the burden of persuasion shifts to the state. We are aware of no reason why an offender may not also raise the issue after final judgment in a post-conviction petition or a motion to correct sentence. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).