STATE OF MINNESOTA
IN COURT OF APPEALS
A11-816

State of Minnesota,
Respondent,

vs.

Gerald Wade Nickaboine,
Appellant.

Filed April 16, 2012
Affirmed as modified
Connolly, Judge

Mille Lacs County District Court
File No. 48-CR-10-247

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

Janice S. Jude, Mille Lacs County Attorney, Mark J. Herzing, Assistant County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Connolly, Presiding Judge; Stauber, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

CONNOLLY, Judge

Appellant challenges his 60-month prison sentence, arguing that the district court erred in calculating his criminal-history score as if appellant's 1992 felony criminal-vehicular-operation conviction was the basis for enhancement of his current driving-while-impaired (DWI) offense to a felony, rather than the three gross-misdemeanor offenses that he admitted as the factual basis for enhancement. Appellant also argues that the district court abused its discretion when it denied his motion for a dispositional departure. Because we conclude that the district court erred in calculating appellant's criminal-history score and sentencing appellant to 60 months in prison, we reduce the sentence to 48 months, the presumptive sentence available under the guidelines as properly applied, and affirm as modified.

FACTS

On February 2, 2010, a Minnesota state trooper observed appellant Gerald Wade Nickaboine driving a vehicle and not wearing his seatbelt. Upon pulling appellant over, the trooper noticed that he had watery, bloodshot eyes, slurred speech, and smelled of alcohol. A child, under one year of age, was seated in the middle rear passenger seat with only a lap belt. Appellant agreed to perform field sobriety tests. After failing the tests, he submitted to a preliminary breath test which indicated an alcohol concentration of 0.145. Appellant was then placed under arrest and transported to the Mille Lacs County Jail, where he submitted to another breath test, which indicated an alcohol concentration of 0.13.

On February 3, 2010, appellant was charged with seven counts of criminal conduct, including first-degree DWI in violation of Minn. Stat. § 169A.20, subd. 1(1) (2008) and § 169A.24 (2008). The basis for enhancement stated in the complaint was appellant's three prior gross-misdemeanors.

In August 2010, appellant pleaded guilty to first-degree DWI. At the plea hearing, the sentencing worksheet indicated that appellant's criminal-history score was one, resulting in a presumptive prison sentence of 42 months.[1] The sentencing worksheet did not include in appellant's criminal-history score the three gross-misdemeanors that were used to enhance the current offense to a felony. In his plea, appellant admitted that on February 2, 2010, he was driving a car in Mille Lacs County, that before driving he had been drinking alcohol, and that his test result was a .13 alcohol concentration. For enhancement purposes, he also admitted that he had three prior alcohol-related convictions: "one from 2000, from 2002, and one from 2007" at the time he was driving and pulled over.[2]

At the November 2010 sentencing hearing, the state indicated that it disagreed with the sentencing worksheet used at the plea hearing and requested a continuance to correct the worksheet so that appellant's 1992 criminal-vehicular-operation (CVO) conviction would be treated as if it were the basis for enhancement, rather than the three

[1] Under Minn. Sent. Guidelines (2009), the presumptive sentence for a severity-level-seven offense for an offender with a criminal-history score of one is 42 months in prison. This sentencing worksheet incorrectly calculated appellant's criminal-history score, as discussed below.

[2] Specifically, these convictions were a gross-misdemeanor DWI that occurred in 2000 and was sentenced in 2001, a 2002 gross-misdemeanor DWI that was sentenced in 2003, and a 2007 gross-misdemeanor DWI that was sentenced in 2008.

gross-misdemeanor convictions admitted to at the plea hearing. At the continued sentencing hearing in January 2010, the sentencing worksheet indicated a criminal-history score of four, resulting in a presumptive prison sentence of 60 months. The criminal-history score was calculated by treating the 1992 conviction as if it had been the basis for enhancement, instead of the three gross-misdemeanor convictions. As a result, appellant's three gross-misdemeanor convictions were included in his criminal-history score. In sum, the four points included one custody-status point (because appellant was on probation at the time of the offense), one point for the 1992 CVO felony, and two misdemeanor/gross-misdemeanor points. Appellant requested a dispositional departure, based on his completion of a residential treatment program and his acceptance to, and willingness to complete, the Teen Challenge program. The district court denied appellant's motion for a downward departure, and sentenced him to serve 60 months in prison. This appeal follows.

D E C I S I O N

I. Sentencing

Appellant does not attempt to withdraw his guilty plea or argue that his original plea should be withdrawn. Instead, appellant argues that this court should correct his sentence to 48 months to comply with the factual basis of his guilty plea, his understanding of how his sentence would be determined, and the relevant sentencing guidelines. "[T]he supreme court has recognized that a defendant is not required to withdraw his guilty plea in order to challenge an invalid sentence." *State v. Spraggins*, 742 N.W.2d 1, 6 (Minn. App. 2007) (citing *State v. Lewis*, 656 N.W.2d 535, 538 (Minn.

2003)). This court may review a sentence to "determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact." Minn. Stat. § 244.11, subd. 2(b) (2010). "Whether a statute or a provision of the sentencing guidelines has been properly construed is a question of law to be reviewed de novo." *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005).

Appellant pleaded guilty to first-degree DWI, in violation of Minn. Stat. § 169A.20, subd. 1(1) and 169A.24. The first-degree impaired driving statute makes a driving-while-impaired offense a felony when the person:

> (1) commits the violation within ten years of the first of three or more qualified prior impaired driving incidents;
> (2) has previously been convicted of a felony under this section; or
> (3) has previously been convicted of a felony under section 609.21, subdivision 1, clause (2), (3), (4), (5), or (6).

Minn. Stat. § 169A.24, subd. 1. As the factual basis for his guilty plea, and consistent with the factual allegations in the charging document, appellant admitted that, on February 2, 2010, he drove a motor vehicle under the influence of alcohol within ten years of the first of three or more qualified prior impaired-driving incidents, specifically, the gross-misdemeanor offenses that occurred in 2000, 2002, and 2007.

After appellant pleaded guilty, but before sentencing, the state decided that it wanted to use appellant's 1992 CVO conviction to enhance his DWI conviction, pursuant to Minn. Stat. § 169A.24, subd. 1(3). In 1992, appellant pleaded guilty to violating Minn. Stat. § 609.21, subd. 2a(3) (1990), criminal vehicular operation resulting in substantial bodily harm while having an alcohol concentration of 0.10 or more. The state could

certainly have used appellant's 1992 CVO conviction to enhance his offense under Minn. Stat. § 169A.24, subd. 1(3).[3] However, the state did not charge the offenses that way. Thus, appellant did not plead guilty under Minn. Stat. § 169A.24, subd. 1(3); he pleaded guilty under Minn. Stat. § 169A.24, subd. 1(1).

The state argues that it was allowed to use the gross misdemeanors in calculating appellant's criminal-history score because, "once an offense is established, determining an offender's criminal history score is not subject to an offender's plea." This ignores the fact that the offense was only established because appellant pleaded guilty to the three misdemeanors as the enhancement element. Moreover, the complaint specifically referenced the three misdemeanors as the prior qualified impaired-driving incidents that were used to support his first-degree DWI charge. Prosecutors have broad discretion in the exercise of the charging function, and courts will generally not interfere with the prosecutor's exercise of that discretion. *State v. Foss*, 556 N.W.2d 540, 540 (Minn. 1996). However, because of the wide latitude given to prosecutors in charging, they are expected to prosecute the original charge unless they amend the complaint. *See, e.g.*, *State v. Fitman*, ___ N.W.2d ___, ___, 2012 WL 171386, at *3 (Minn. App. Jan. 23,

[3] Appellant points out that Minn. Stat. § 169A.24, subdivision 1(3) does not mention Minn. Stat. section 609.21, subdivision 2a, which was the basis for his 1992 CVO conviction. He therefore argues that his 1992 CVO conviction cannot be used for enhancement purposes under the statute. However, this court recently addressed the very same issue and held that "a DWI defendant previously convicted of criminal vehicular operation for substantially harming another person while driving drunk is subject to conviction of first-degree DWI regardless of whether his prior conviction occurred when criminal vehicular operation was codified under section 609.21, subdivision 2a or when it was codified under subdivision 1(3)." *State v. Retzlaff*, 807 N.W.2d 437, 441 (Minn. App. 2011), *review granted* (Minn. Feb. 14, 2012).

2012) (noting that, where the prosecutor charged and tried appellant for the crime of concealing her child, the court could not correct the prosecutor's error and review the case as if appellant had been charged with retaining her child). If the state wanted to use the CVO as the enhancement element for this felony, then it should have amended the complaint. It did not.

Because it was too late for the district court to use appellant's 1992 CVO conviction to enhance his offense to a felony once the district court accepted appellant's guilty plea, we must recalculate appellant's correct criminal-history score to determine the correct presumptive sentence. *See Spraggins*, 742 N.W.2d at 7 (holding that the district court does not have authority to vacate a defendant's plea sua sponte). Under the Minnesota Sentencing Guidelines, a criminal-history index is composed of the following: "(1) prior felony record; (2) custody status at the time of the offense; (3) prior misdemeanor and gross misdemeanor record; and (4) prior juvenile record for young adult felons." Minn. Sent. Guidelines II.B (2011). Both parties agree that appellant has one custody-status point and one felony point for his 1992 CVO conviction. The parties disagree with respect to the additional two misdemeanor/gross-misdemeanor points that were included in appellant's criminal-history score at sentencing.

In computing a criminal-history score under the guidelines, four misdemeanor/gross misdemeanor "units" equal one criminal-history point; generally only one misdemeanor/gross-misdemeanor point is permitted in the computation of a criminal-history score. Minn. Sent. Guidelines II.B.3 (2011). However, when the current conviction is for first-degree DWI, the defendant's prior DWI violations are assigned two

units each and there is no limit on the total number of misdemeanor/gross-misdemeanor points included in the criminal-history score. *Id.* But, because the three prior gross-misdemeanors were the sole predicate offenses used to enhance appellant's offense, the district court was not allowed to use the gross misdemeanors when calculating his criminal-history score. *See* Minn. Sent. Guidelines II.B.6 (2011) (providing that prior misdemeanors/gross misdemeanors used to enhance the current offense to a felony cannot also be used when calculating misdemeanor units in the criminal-history score).

In calculating appellant's misdemeanor/gross-misdemeanor points, the district court included the following offenses: (1) 2008 Assault fifth-degree, 1 unit; (2) 2008 Gross Misdemeanor DWI, 2 units; (3) 2003 Gross Misdemeanor DWI, 2 units; (4) 2002 Criminal Vehicular Bodily Harm, 2 units; (5) 2001 Gross Misdemeanor DUI, 2 units; and (6) 2000 Criminal Damage to Property fourth-degree, 1 unit. Because the 2001, 2003, and 2008 gross-misdemeanor DWIs were used to enhance appellant's offense to a felony, they should not have been included when calculating appellant's misdemeanor/gross-misdemeanor points. *See* Minn. Sent. Guidelines II.B.6. Therefore, only the 2008 assault, 2002 criminal-vehicular-bodily-harm, and 2000 criminal-damage-to-property misdemeanors remain, for a total of four units, or one point, giving appellant a criminal-history score of three. However, the parties disagree regarding whether the 2000 fourth-degree criminal-damage-to-property offense has decayed. If it has decayed, appellant is left with only three units, and does not receive the third criminal-history point.

Appellant was sentenced for his fourth-degree criminal-damage-to-property offense on May 11, 2000 and placed on probation for one year. The current offense

occurred on February 2, 2010. The state argues that prior misdemeanor sentences "shall not be used in computing the criminal-history score if a period of ten years has elapsed since the date of discharge from or expiration of the sentence, to the date of the current offense." Minn. Sent. Guidelines II.B.3 (2011). But appellant points out that the state relies on the 2011 Minnesota Sentencing Guidelines.

Because appellant's offense occurred in February 2010, we must apply the Minnesota Sentencing Guidelines that were in effect at the time of the offense—the 2009 guidelines. *See* Minn. Sent. Guidelines (2009) (stating that the effective date for the Guidelines is August 1, 2009); Minn. Sent. Guidelines III.F (2009) (stating that the guidelines and modifications to the guidelines are to be "applied to offenders whose date of offense is on or after the specified modification effective date"). Under the 2009 Minnesota Sentencing Guidelines, "a prior misdemeanor or gross misdemeanor . . . conviction shall not be used in computing the criminal history score if a period of ten years has elapsed since the offender was adjudicated guilty for that offense, to the sentencing date for the current offense." Minn. Sent. Guidelines, II.B.3.c (2009). Because appellant was adjudicated guilty on May 11, 2000 and the sentencing date for the current offense was January 4, 2011, more than ten years has elapsed and the 2000 sentence has decayed. Without the 2000 criminal-damage-to-property misdemeanor, appellant had only three misdemeanor/gross-misdemeanor units: one unit for the 2008 assault and two units for the 2002 criminal-vehicular-bodily-harm convictions, which is less than the four units needed to equal one criminal-history point. *See* Minn. Sent. Guidelines II.B.3 (stating that four units equal one criminal-history point).

In conclusion, the district court erred in sentencing appellant to 60 months in prison because the court sentenced appellant as if his 1992 CVO conviction was the basis for enhancement of his current offense to first-degree DWI, rather than the three gross-misdemeanor offenses that appellant admitted as the factual basis for his plea. The three gross misdemeanors were therefore improperly included in appellant's criminal-history score. Moreover, the district court also erred in including appellant's 2000 criminal-damage-to-property offense because that misdemeanor had decayed, leaving appellant with only three misdemeanor/gross-misdemeanor units, which did not result in a criminal-history point. Appellant's correct criminal-history score was two, including one custody-status point and one felony point for his 1992 CVO conviction. The presumptive sentence for a severity-level-seven offense for an offender with a criminal-history score of two is 48 months in prison. Minn. Sent. Guidelines IV (2009). Therefore, we affirm appellant's sentence as modified to reflect the correct presumptive sentence of 48 months.

II. Dispositional Departure

The sentence ranges provided for in the Minnesota Sentencing Guidelines Grids are presumed to be appropriate for the crimes to which they apply and a judge "shall pronounce a sentence within the applicable range unless there exist identifiable, substantial and compelling circumstances." Minn. Sent. Guidelines I(4) (2011). "Substantial and compelling circumstances are those circumstances that make the facts of a particular case different from a typical case." *State v. Wenthold*, 427 N.W.2d 10, 11 (Minn. App. 1988), *review denied* (Minn. Sept. 16, 1988) (quotation omitted). A district

court's decision denying a request for a sentencing departure is discretionary and will not be reversed absent a clear abuse of discretion. *State v. Abrahamson*, 758 N.W.2d 332, 337 (Minn. App. 2008), *review denied* (Minn. Mar. 31, 2009). It is a rare case that warrants a reversal of the refusal to depart. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Even if there are reasons for departing downward, this court will not disturb the district court's sentence if the district court had reasons for refusing to depart. *State v. Bertsch*, 707 N.W.2d 660, 668 (Minn. 2006).

Appellant argues that the district court abused its discretion when it denied his motion for a dispositional departure because he had completed a residential treatment program and demonstrated his willingness to complete the Teen Challenge program. In making a decision regarding a dispositional departure, the district court is to "focus more on the defendant as an individual and on whether the presumptive sentence would be best for him and for society." *State v. Heywood*, 338 N.W.2d 243, 244 (Minn. 1983). In determining whether departure is warranted, the court may consider any relevant factors, including the defendant's age, prior record, remorse, cooperation, attitude in court, family support, and particular amenability to individual treatment in a probationary setting. *Abrahamson*, 758 N.W.2d at 337.

Appellant argues that the 13-month Teen Challenge program is suitable to his needs, that he has the support of his family, and that, when combined with a year of jail time, the long-term treatment program would satisfy the public-safety concerns arising from his offense. However, appellant's prior record does not support a finding that a departure was warranted. Appellant's record demonstrates that he is not particularly

amenable to treatment, that he is likely to re-offend, and that he has prior treatment failures. Appellant has a long criminal history, dating back to his 1992 CVO conviction. Since that felony conviction, appellant has received another CVO conviction, three DWI convictions, four driving-after-revocation convictions, two driving-after-cancellation inimical-to-public-safety convictions, and three driving-with-no-driver's-license convictions, despite having been incarcerated in local jails and completing treatment programs through that time. Here, appellant once again drove after consuming alcohol, with a minor child in the vehicle who was not in a child-safety restraint, while on probation for another offense. There are no substantial and compelling circumstances present that would support a dispositional departure, and the district court did not abuse its discretion in denying appellant's request for a departure.

Affirmed as modified.