STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1364

State of Minnesota,
Respondent,

vs.

Luong Binh Ky,
Appellant.

Filed October 14, 2008
Affirmed
Schellhas, Judge

Olmsted County District Court
File No. 55-K1-05-943

Lori Swanson, Attorney General, John S. Garry, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street SE, Rochester, MN 55904-3712 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Suzanne M. Senecal-Hill, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges his convictions of third-degree assault and fifth-degree assault. Appellant argues that the district court (1) abused its discretion when it allowed him to be impeached with two prior felony convictions and (2) erred in sentencing him by including a custody-status point in the calculation of his criminal-history score. We affirm.

FACTS

A jury found appellant Luong Binh Ky guilty of third-degree assault and fifth-degree assault. The charges stemmed from a fight between appellant and T.T. at a nightclub in Rochester, Minnesota. The victim testified that appellant punched him in the stomach, threatened him, hit him hard on the head, and that afterwards, he saw appellant drop a beer bottle. The victim was cut on his eyebrow and suffered vision loss. Appellant claims that he acted in self-defense and did not hit the victim with a beer bottle.

The district court ruled that if appellant testified, he could be impeached with two prior felony convictions: a May 1998 conviction of ineligible person in possession of a firearm and a March 2004 conviction of fifth-degree controlled-substance crime. Appellant acknowledged the felony convictions during his testimony. Before cross-examination, the district court cautioned the jury that the prior convictions were admitted "only for your consideration in determining whether Mr. Ky is telling the truth in this

case. And you are not to consider that conviction as evidence of either his character or conduct except as you may believe that it reflects on his believability."

In its final instruction, the district court told the jury that "[i]n deciding the believability and weight to be given to the testimony of a witness," it could consider "[e]vidence that the witness has been convicted of a crime." The court then explained:

> You may consider whether the kind of crime committed indicates the likelihood the witness is telling or not telling the truth. In the case of Mr. Ky you must be especially careful to consider any previous conviction or convictions only as it may affect the weight of Mr. Ky's testimony. You must not consider any previous conviction as evidence of guilt of the offense for which Mr. Ky is on trial.

The district also instructed the jury that:

> Evidence of Mr. Ky's prior convictions has been admitted into evidence. The evidence concerning prior convictions of Mr. Ky was admitted only for your consideration in deciding whether Mr. Ky is telling the truth in this case. You must not consider these convictions of evidence of Mr. Ky's character or conduct except as you may think it reflects on believability. Mr. Ky is not being tried for, and may not be convicted, of any offenses other than the charged offense. You are not to convict Mr. Ky on the basis of any prior convictions. To do so might result in unjust double punishments.

At sentencing, the district court explained that the sentencing-guidelines worksheet calculated the presumptive sentence for the third-degree assault conviction as 27 months, executed, with a range of 26 to 28 months. The calculation included a custody-status point in appellant's criminal-history score. Defense counsel stated that "the status point my client is concerned may be incorrect. Apparently there was a change in the law in 2004 that allowed for the status point. This was an offense committed in

2003." The district court noted that the firearm-possession conviction resulted in a sentence of 15 years of probation from which appellant was discharged early on June 21, 2000, and that the offense was deemed a misdemeanor. The court then stated that the custody-status point would be imposed because the new offense was committed within the period of the original term of 15 years' probation. Defense counsel then questioned only whether the offense fit within the relevant portion of the guidelines because the sentence involved a stay of imposition that then became a misdemeanor upon appellant's discharge from probation. The court sentenced appellant to 27 months' imprisonment, the presumptive sentence calculated with the disputed custody-status point.

This appeal follows.

D E C I S I O N

I.

Appellant argues that the district court erred by admitting his prior felony convictions for impeachment purposes. Admission of prior convictions for impeachment purposes is reviewed for a clear abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006). Appellant argues that the district court erred by admitting his prior convictions to impeach him. He argues that the convictions were not relevant to his credibility because they were not crimes of dishonesty and that their admission created a "grave risk" that the jury would find him guilty "because he was a bad person with two felonies on his record."

A witness's credibility may be attacked by evidence that the witness was convicted of a crime other than a crime of dishonesty within the last ten years if the crime

was punishable by death or imprisonment for more than one year and its probative value outweighs its prejudicial effect. Minn. R. Evid. 609(a), (b). To determine if the probative value of a prior conviction outweighs its prejudicial effect under rule 609(a), courts consider five factors set forth in *State v. Jones*, 271 N.W.2d 534, 537-38 (Minn. 1978):[1] (1) impeachment value; (2) the date of conviction and the defendant's subsequent history; (3) similarity of the past crime with the charged crime (the greater the similarity the greater the reason for not permitting use of the prior crime to impeach); (4) importance of the defendant's testimony; and (5) centrality of the credibility issue. *Id.* In applying the *Jones* factors, the supreme court's recent application of the factors in *Swanson* is instructive.

A. Impeachment Value

In *Swanson*, the impeachment value of the prior crime supported admissibility because it helped the jury see the "whole person." *Swanson*, 707 N.W.2d at 655. Appellant argues that the "whole person" rationale is problematic and that only crimes that bear on credibility should have impeachment value. Appellant did not raise this argument before the district court and accordingly we will not address it on appeal. *Id.* at 656 (refusing to address a similar challenge to the application of rule 609 when raised for the first time on appeal); *State v. Davis*, 735 N.W.2d 674, 681 (Minn. 2007) (same).

[1] "Although *Jones* was decided before [r]ule 609 became effective," the supreme court concluded that "these factors remain suitable" and reaffirmed "their application in determining whether the probative value outweighs the prejudice under the rule." *State v. Ihnot*, 575 N.W.2d 581, 586 (Minn. 1998).

Appellant also argues that jurors and judges have an "overwhelming tendency" to misuse prior-conviction evidence as propensity evidence and that a limiting instruction is ineffective to deal with this tendency. But the supreme court has ruled that a cautionary instruction "adequately protects [a] defendant against the possibility that the jury would convict him on the basis of his character rather than his guilt." *State v. Brouillette*, 286 N.W.2d 702, 708 (Minn. 1979). Here, the district court cautioned the jury after the convictions were admitted in testimony and twice in its final jury instructions. Thus, appellant was adequately protected.

B. Timeliness

In *Swanson*, the factor of the date of the conviction also supported admission of convictions that were less than ten years old that showed a "pattern of lawlessness." 707 N.W.2d at 655. Appellant does not argue that this factor weighed against admission and, indeed, it weighs in favor of admission because the convictions were less than ten years old and showed a "pattern of lawlessness."

C. Similarity

The more similar the past conviction to the charged offense, the more likely it is that the conviction is more prejudicial than probative. *Swanson*, 707 N.W.2d at 655. Under *Swanson*, assault convictions were considered similar to the charge of murder, and therefore this factor weighed against admission. 707 N.W.2d at 655. Here, appellant argues that his prior convictions have an underlying connotation of dangerousness and violence that makes them similar to the charge of third-degree assault. Appellant's

argument is unpersuasive. Because the crimes are not similar, this factor weighs in favor of admission.

D. Importance of Testimony

In *Swanson*, where the defendant's testimony was essential to his defense, and credibility was a central issue, this factor weighed in favor of admission. 707 N.W.2d at 655. Here, appellant similarly argues that his testimony was essential because he needed to explain to the jury what happened in light of the other testimony and that this factor therefore weighs against admission. But under *Swanson*, this factor weighs in favor of admission.

E. Credibility as Central Issue

In *Swanson*, where the jury's task was to determine whether to believe the defendant over other witnesses, credibility was a central issue and this factor weighed in favor of admission. 707 N.W.2d at 655-56. Here, appellant concedes that credibility was important to the case, and therefore this factor weighs in favor of admission.

Because all five *Jones* factors weigh in favor of admission, the district court did not abuse its discretion by admitting appellant's prior convictions.

II.

Appellant argues that the district court erred in sentencing him because of the assignment of a custody-status point in calculating his criminal-history score. Under section II.B.2.c of the sentencing guidelines, a criminal-history point is assigned if the offender "committed the current offense within the period of the initial length of stay pronounced by the sentencing judge for a prior felony," but "[t]his policy does not apply

if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence." Minn. Sent. Guidelines II.B.2.c. Appellant argues that section II.B.2.c. violates equal protection by treating similarly situated groups differently without a rational basis.

The supreme court recently interpreted section II.B.2.c. of the sentencing guidelines to apply only to those discharged from determinate terms before the entire probationary period initially imposed has passed. *State v. Maurstad*, 733 N.W.2d 141, 149, 150 (Minn. 2007). Appellant received a custody-status point under section II.B.2.c because he was discharged from a 15-year determinate term of probation after approximately three years and was convicted of an offense within the 15-year determinate period of probation initially imposed.

Appellant did not raise an equal-protection argument before the district court. Ordinarily an issue, including a constitutional claim, not raised before the district court is forfeited on appeal. *State v. Busse*, 644 N.W.2d 79, 89 (Minn. 2002). And an issue not raised below would ordinarily be reviewed only for plain error under Minn. R. Crim. P. 31.02. But in *Maurstad*, the supreme court concluded that calculation of a criminal-history score cannot be forfeited and Minn. R. Crim. P. 31.02 does not qualify the authority of courts "to correct an illegal sentence at any time" under Minn. R. Crim. P. 27.03, subd. 9. *Maurstad*, 733 N.W.2d at 148 (quotation omitted). The *Maurstad* court advised that "we cannot now anticipate a case in which, after concluding that a defendant received an illegal sentence, we would decline to correct it because the error that led the district court to impose the sentence was not plain." *Id.* Under *Maurstad*, appellant's

constitutional challenge is properly part of this appeal because it is a challenge to the calculation of his criminal-history score.

Appellate courts review the constitutionality of a statute de novo. *State v. Behl*, 564 N.W.2d 560, 566 (Minn. 1997). "The equal protection clauses of both the United States and Minnesota constitutions mandate that all similarly situated individuals shall be treated alike." *State v. Richmond*, 730 N.W.2d 62, 71 (Minn. App. 2007) (quotation omitted), *review denied* (Minn. June 19, 2007). To succeed in his equal-protection claim, appellant must demonstrate beyond a reasonable doubt that the sentencing guidelines violate a constitutional right. *See Gluba ex rel. Gluba v. Bitzon & Ohren*, 735 N.W.2d 713, 719 (Minn. 2007) (stating that statutes are presumed constitutional and the party challenging their constitutionality must establish beyond a reasonable doubt that the statute challenged violates a constitutional right). "If a constitutional challenge involves neither a suspect classification nor a fundamental right, [appellate courts] review the challenge using a rational basis standard under both the state and federal constitutions." *Id.* Appellant does not claim that section II.B.2.c involves a suspect class or fundamental right. Appellant argues that the section fails because it treats similarly situated groups differently without a rational basis.

An equal-protection challenge to the sentencing guidelines is analyzed under the same equal-protection analysis that applies to other laws. *See State v. Jaworksy*, 505 N.W.2d 638, 644 (Minn. App. 1993) (addressing equal-protection challenge to the sentencing guidelines and treating guidelines like legislation), *review denied* (Minn. Sept. 30, 1993). "An essential element of an equal protection claim is that the persons

claiming disparate treatment must be similarly situated to those to whom they compare themselves. Similarly situated groups must be alike in all relevant respects." *St. Cloud Police Relief Ass'n v. City of St. Cloud*, 555 N.W.2d 318, 320 (Minn. App. 1996) (citation and quotation omitted), *review denied* (Minn. Jan. 7, 1997). Equal protection "does not require the state to treat things that are different in fact or opinion as though they were the same in law." *Behl*, 564 N.W.2d at 568.

Appellant argues that the group to which he belongs–offenders discharged early from a determinate term of probation who commit a new crime during the initial term–is similarly situated to two groups who do not receive a custody-status point under the guidelines. The first group is offenders who are discharged from an indeterminate term of probation who commit a new crime within the maximum possible initial probationary term. The second group is offenders whose sentences are executed after probation revocation and who commit a new crime within the initial probationary term. Appellant argues that the groups are similarly situated in that all three groups are subject to no criminal supervision at the time of the new offense.

Appellant argues that the only difference between determinate and indeterminate terms is that the sentencing court says "for" a period of years in the former and "up to" a period of years in the latter. This difference in language can appear slight but in *Maurstad*, the supreme court concluded that this difference in language is significant. 733 N.W.2d at 150. The *Maurstad* court stated that a sentence "of 10 years" is arguably more onerous than a sentence of "up to 10 years" and concluded that the "specific word choices" at sentencing "do matter, especially when a person's liberty is at stake." *Id.* at

150-51. The court acknowledged that offenders with identical criminal-history scores could be treated differently based solely on the type of probationary term imposed, but concluded that "in a proceeding as fundamental to a person's liberty as sentencing, the sentencing court's word choices do matter." *Id.* at 151. Consistent with the supreme court's reasons in *Maurstad*, we conclude that because the groups receive sentences that differ in a meaningful way, they are not similarly situated.

Appellant's argument that his group is similarly situated to those whose sentences are executed also fails. Offenders who are discharged early do not serve their entire sentences and receive the benefit of a stay and the lesser restriction of liberty found in probation. Those who violate probation and have their sentences executed serve their sentences in full through incarceration. Because of these material differences, the groups are not similarly situated. Because appellant has failed to demonstrate beyond a reasonable doubt that the sentencing guidelines treat similarly situated groups differently without a rational basis, his equal-protection challenge fails.

Affirmed.