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STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1443

State of Minnesota,
Respondent,

vs.

Bruce R. Holman,
Appellant.

Filed October 21, 2008
Affirmed in part, reversed in part, and remanded
Kalitowski, Judge

Otter Tail County District Court
File No. 56-K0-06-1326

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Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and Larkin, Judge.

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

KALITOWSKI, Judge

On appeal from his first-degree test-refusal conviction, appellant Bruce R. Holman argues that the district court: (1) abused its discretion by admitting appellant's prior convictions for impeachment purposes; (2) committed plain error affecting appellant's substantial rights when it failed to instruct the jury on every element of the test-refusal charge; (3) abused its discretion in calculating appellant's criminal history score; and (4) abused its discretion by refusing to grant appellant's request for a downward dispositional departure. In addition, appellant in his pro se supplemental brief contends that the district court: (1) abused its discretion by refusing to reopen the omnibus hearing to allow appellant to challenge the state's use of appellant's prior North Dakota DUI conviction to enhance his test-refusal offense; and (2) clearly erred in determining that the officer had an adequate basis for stopping appellant's vehicle and requiring that he take a breath test. We affirm appellant's conviction but because the district court erred in calculating appellant's criminal history score we reverse appellant's sentence and remand for resentencing.

D E C I S I O N

I.

Appellant argues that the district court abused its discretion by determining that appellant's prior failure-to-remit-tax convictions were admissible as impeachment evidence. We disagree.

We afford considerable discretion to the district court's rulings on evidentiary issues, reviewing its determinations regarding whether to admit prior-crimes evidence to impeach a defendant or a witness for a clear abuse of discretion. *State v. Swanson*, 707 N.W.2d 645, 654 (Minn. 2006) (citing *State v. Ihnot*, 575 N.W.2d 581, 584 (Minn. 1998)); *State v. Gassler*, 505 N.W.2d 62, 67 (Minn. 1993). Evidence that a defendant has been convicted of a crime involving dishonesty or false statement is admissible for impeachment purposes. Minn. R. Evid. 609(a)(2); *see State v. Sims*, 526 N.W.2d 201, 201 (Minn. 1994) (stating that any crime involving dishonesty or false statement is automatically admissible for impeachment purposes).

Evidence that a defendant has been convicted of a felony not involving dishonesty or false statement may also be admitted for impeachment purposes, so long as it is less than ten years old and the district court "determines that the probative value of admitting this evidence outweighs its prejudicial effect." Minn. R. Evid. 609(a)(1), (b). To determine whether the probative value of admitting a prior criminal conviction outweighs its prejudicial effect, the following factors must be considered:

> (1) the impeachment value of the prior crime, (2) the date of the conviction and the defendant's subsequent history, (3) the 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) the importance of defendant's testimony, and (5) the centrality of the credibility issue.

State v. Jones, 271 N.W.2d 534, 538 (Minn. 1978).

Here, the district court determined that appellant's prior failure-to-remit-tax convictions were admissible as both crimes of dishonesty under Minn. R. Evid. 609(a)(2)

and general felonies under Minn. R. Evid. 609(a)(1). Because Minnesota courts have not specifically addressed whether willful failure to remit tax qualifies as a crime of dishonesty, we need to assess whether this offense "involve[s] untruthful conduct" or some element of deceit. *State v. Gassler*, 505 N.W.2d 62, 66 (Minn. 1993) (quotations omitted); *see also State v. Ross*, 491 N.W.2d 658, 659 (Minn. 1992) (discussing application of the section 609(a)(2) exception).

As noted by the district court, the "willful" language of Minn. Stat. § 289A.63 (2004), "implies an intentional act rather than an omission," and the actual conduct underlying appellant's convictions involved appellant intentionally misrepresenting the purchase price of a vehicle in order to obtain a reduced sales tax payment when transferring its title – acts "more akin to theft by swindle than, for example, shoplifting." Because caselaw supports this analysis, we conclude that it was within the district court's discretion to determine that appellant's prior failure-to-remit-tax convictions were admissible as crimes of dishonesty. *Compare State v. Greer*, 635 N.W.2d 82, 90 (Minn. 2001) (concluding that a prior conviction for providing false information to the police constituted a crime of dishonesty), *and State v. Norris*, 428 N.W.2d 61, 71 (Minn. 1988) (concluding that theft by swindle is a crime of dishonesty under Minn. R. Evid. 609(a)(2)), *with Ross*, 491 N.W.2d at 659-60 (concluding that burglary is not a crime of dishonesty), *and Sims*, 526 N.W.2d at 202 (concluding that aggravated robbery is not a crime of dishonesty).

Moreover, even if appellant's willful-failure-to-remit-tax convictions did not constitute crimes of dishonesty, they are nonetheless admissible under the general felony

provision of Minn. R. Evid. 609(a)(1). The convictions are less than ten years old, and application of the *Jones* factors illustrates that the probative value of admitting the convictions outweighs their prejudicial effect.

Impeachment Value of the Prior Convictions

Appellant argues that his prior convictions have minimal impeachment value because willful failure to remit tax is "not inherently a deceitful act that suggests the defendant has a propensity to lie." But even if this is true, in *Gassler*, the Minnesota Supreme Court recognized that "the fact that a prior conviction did not directly involve truth or falsity does not mean it has no impeachment value." 505 N.W.2d at 67; *see also State v. Whiteside*, 400 N.W.2d 140, 144 (Minn. App. 1987) (noting that *any* prior crime has impeachment value in the sense that it allows the jury to see a defendant as a "whole person," and better gauge the truthfulness of a defendant's testimony), *review denied* (Minn. Mar. 18, 1987). Accordingly, this factor weighs in the favor of admitting appellant's prior convictions.

Date and Similarity of Past Convictions

Because appellant's failure-to-remit-tax convictions occurred in 2004, and thus fell well within Minn. R. Evid. 609(b)'s ten-year time limit, appellant concedes that the timeliness factor weighs in favor of admitting the prior convictions. Likewise, appellant acknowledges that the lack of similarity between his prior convictions and the charged offense minimizes concerns as to whether the jury might give unfair weight to evidence of appellant's past crimes, and thus weighs in favor of their admission.

Importance of Defendant's Testimony

Appellant argues that this factor weighs against admission of his prior convictions because his testimony was of central importance in his case. Because the record here shows that appellant decided to waive his right to testify based in part on the district court's ruling on the admissibility of appellant's past convictions, this factor weighs in favor of excluding appellant's past convictions. But this factor is not determinative of the convictions' admissibility. *See Gassler*, 505 N.W.2d at 67-68.

Centrality of the Credibility Issue

When a defendant's credibility is a key issue in a case, such centrality weighs in favor of admitting past crimes for impeachment purposes. *State v. Bettin*, 295 N.W.2d 542, 546 (Minn. 1980). Since appellant and the officer were the only two witnesses involved in the incident here, appellant's testimony would have been important in the jury's evaluation of the case. Thus, this *Jones* factor weighs in favor of admitting appellant's past convictions.

In sum, because appellant's prior willful-failure-to-remit-tax convictions are admissible as crimes of dishonesty and under the general felony provision of Minn. R. Evid. 609, we conclude that the district court's evidentiary ruling admitting them for impeachment purposes was within its discretion.

II.

Appellant argues that the district court's failure to instruct the jury on each element of the test-refusal offense constituted plain error affecting appellant's substantial rights. We disagree.

The district court has significant discretion in crafting jury instructions. *State v. Broulik*, 606 N.W.2d 64, 68 (Minn. 2000). A jury instruction is erroneous if it materially misstates the law. *State v. Moore*, 699 N.W.2d 733, 736 (Minn. 2005). "[J]ury instructions must be viewed in their entirety to determine whether they fairly and adequately explained the law of the case." *State v. Flores*, 418 N.W.2d 150, 155 (Minn. 1988).

Even though appellant here objected generally to the district court's proposed instruction, he failed to specifically challenge the omission of the procedural prerequisites incorporated from the implied-consent statute. In general, failure to object to jury instructions before they are submitted to the jury constitutes a waiver of the issue on appeal. *State v. Richardson*, 633 N.W.2d 879, 885 (Minn. App. 2001). Nonetheless, we have discretion to consider "[p]lain errors or defects affecting substantial rights . . . although they were not brought to the attention of the trial court." Minn. R. Crim. P. 31.02; *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). "The plain error standard requires that the defendant show: (1) error; (2) that was plain; and (3) that affected substantial rights." *State v. Strommen*, 648 N.W.2d 681, 686 (Minn. 2002) (citing *Griller*, 583 N.W.2d at 740). But even "[i]f those three prongs are met, [this court] may correct the error only if it seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotation omitted). An error is plain if the law on point is clear and controlling. *See Griller*, 583 N.W.2d at 740-41. A plain error "affects substantial rights" if it is "prejudicial and affect[s] the outcome of the case." *Id*. at 741.

Plain Error

In order to be convicted of criminal test refusal, a jury must find that certain procedural prerequisites set forth in the implied-consent statute are met beyond a reasonable doubt. *See* Minn. Stat. § 169A.20, subd. 2 (2004); Minn. Stat. § 169A.51, subd. 1(b) (2004). The implied-consent statute states that

> b) The test may be required of a person when an officer has probable cause to believe the person was driving, operating, or in physical control of a motor vehicle in violation of section 169A.20 (driving while impaired), and one of the following conditions exist:
>
> (1) the person has been lawfully placed under arrest for violation of section 169A.20 or an ordinance in conformity with it;
>
> . . .
>
> (3) the person has refused to take the screening test provided for by section 169A.41 (preliminary screening test);
>
> . . .
>
> (4) the screening test was administered and indicated an alcohol concentration of 0.08 or more.

Minn. Stat. § 169A.51, subd. 1(b) (2004). The person must also be informed of specific information that is set out in the statute. Minn. Stat. § 169A.51, subd. 2 (2004).

In *State v. Ouellette*, we determined that the district court's failure to instruct a jury that it must find that one of the four conditions set forth in the implied-consent statute was present in order to convict a defendant under the test-refusal statute constituted "an error of fundamental law." 740 N.W.2d 355, 360 (Minn. App. 2007) (concluding that the jury must be instructed to find that the implied-consent advisory was read and that one of the four additional conditions listed in Minn. Stat. § 169A.51, subd. 1(b), was present), *review denied* (Minn. Dec. 19, 2007). Similarly, the jury here was not

instructed regarding the requirement that one of the four conditions set forth in Minn. Stat. § 169A.51, subd. 1(b), must be established. Accordingly, we conclude that the district court's instructions to the jury constituted plain error.

Affecting Substantial Rights

For plain error to affect substantial rights, it must be prejudicial; that is, there must be a reasonable likelihood that the error significantly affected the verdict. *Griller*, 583 N.W.2d at 741. An appellant has the burden of proving the prejudice prong of the plain-error test. *Id*. An error is harmless if, based on the relevant factors, the error did not have a significant impact on the verdict beyond a reasonable doubt. *State v. Shoop*, 441 N.W.2d 475, 480-81 (Minn. 1989). Thus, appellant needs to show beyond a reasonable doubt that he was unfairly prejudiced and did not receive a fair trial because of the district court's failure to instruct the jury regarding the need to prove one of the four conditions set forth in Minn. Stat. § 169A.51, subd. 1(b).

Appellant argues that because "it is impossible to predict how the jury might have responded had it been instructed completely," the district court's omission of key elements of the offense in its instructions was prejudicial error. We disagree.

The elements omitted from the jury instructions were supported by unchallenged evidence at trial. And although appellant contends that more detailed instructions might have caused the jury to question whether the officer actually read appellant the implied-consent advisory form and required that he take a preliminary breath test, the unchallenged testimony of the officer at trial established both of these conditions. Because the evidence established that the procedural prerequisites set forth in the

implied-consent statute were met, there is no reasonable likelihood that the district court's omission affected the verdict. *See Ouellette*, 740 N.W.2d at 360 (concluding that where there was no evidence of dispute as to whether the officer read the defendant the implied-consent advisory and placed the defendant under lawful arrest for DWI, the district court's failure to instruct the jury on the procedural prerequisites of the implied-consent statute constituted harmless error). We thus conclude that appellant is not entitled to a new trial.

III.

Appellant argues that the district court erred in calculating his criminal history score and determining his sentence. Because the sentence imposed on appellant was based on an erroneous criminal history score we agree and remand to the district court for resentencing.

A presumptive felony sentence is calculated using the severity of the offense and the offender's prior criminal record. *See* Minn. Sent. Guidelines II. Most offenses have an assigned severity level ranging from I to XI. Minn. Sent. Guidelines II.A. Although appellant does not dispute that his test-refusal offense has a severity level of VII, he challenges the district court's calculation of his criminal history score. We will not reverse a district court's determination of a defendant's criminal history score absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002).

In the interest of promoting its goals of fairness, uniformity, and proportionality, the Minnesota Sentencing Guidelines "provide uniform standards for the inclusion and weighting of criminal history information," including offender's convictions from other

jurisdictions. Minn. Sent. Guidelines cmt. II.B.02, cmt.II.B.501-504; *State v. Reece*, 625 N.W.2d 822, 824-25 (Minn. 2001). Under these standards, a sentencing court considers the nature, definition, and sentence imposed for a defense in an attempt to determine "how the offender would have been sentenced had the offense occurred in Minnesota at the time of the current offense, not when the offense actually occurred out of state." *Reece*, 625 N.W.2d at 825.

On appeal, the state concedes that appellant's criminal history score incorrectly included an additional half point for appellant's prior conviction under South Dakota's habitual criminal statute. A review of the habitual offender law indicates that appellant was charged under this statute for sentencing-enhancement purposes as a result of his criminal history, not because of any independent offense or course of conduct. *See* S.D. Codified Laws § 22-7-7 (2005); *State v. Grooms*, 339 N.W.2d 318, 320 (S.D. 1983) (noting that the purpose of the habitual offender statute is to allow for sentencing enhancement if the state can prove that a defendant has prior felony convictions). Because appellant's habitual offender conviction was a sentencing enhancement, and not an independent criminal act that has a corollary in Minnesota law, the district court erred as a matter of law in adding an additional half point to appellant's criminal history score for this conviction. *See* Minn. Sent. Guidelines cmt. II.B.02, cmt.II.B.502-503; *Reece*, 625 N.W.2d at 825.

Although the state admits that appellant's criminal history score was miscalculated, it argues that appellant's argument in favor of resentencing is moot because (1) appellant did not raise this issue in the district court and (2) the sentence

appellant received fell within the presumptive range. But in *State v. Maurstad*, the supreme court held that since a sentence based on an incorrect criminal history score constitutes an "illegal sentence," a "defendant may not waive review of his criminal history score calculation." 733 N.W.2d 141, 147 (Minn. 2007). In explaining its decision, the *Maurstad* court relied on the purpose of the sentencing guidelines, noting that sentencing pursuant to the guidelines is designed to help "maintain uniformity, proportionality, rationality, and predictability in sentencing." *Id*. at 146-47. Moreover, the court held that since a defendant cannot waive review of his criminal history score calculation, the plain error doctrine is inapplicable. *Id*. at 148. Accordingly, appellant's failure to challenge the miscalculation of his criminal history score does not preclude him from raising it on appeal.

A review of appellant's sentencing worksheet shows that if he had not erroneously received a half point for his South Dakota habitual criminal conviction, he would have had a total of five and one half criminal history points instead of six, which would be rounded down to five for purposes of calculating his sentence. The Minnesota Sentencing Guidelines indicate that the presumptive sentence for a defendant with a criminal history score of five who is convicted of a severity level VII offense is between 57-79 months, whereas the presumptive sentence for a defendant who is convicted of a severity level VII offense with a criminal history score of six is between 62-86 months. *See* Minn. Sent. Guidelines IV, Sentencing Guidelines Grid. Because the 72-month sentence imposed on defendant was based on an erroneous criminal history score and its corollary presumptive-sentencing range, we remand to the district court for resentencing.

IV.

Additionally, appellant argues that the district court abused its discretion by denying appellant's motion for a downward dispositional departure based on his amenability to probation. We disagree.

Only in a "rare" case will we reverse a district court's imposition of a presumptive sentence. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). The Minnesota Sentencing Guidelines instruct courts to impose a presumptive sentence unless there are "substantial and compelling circumstances" warranting departure. Minn. Sent. Guidelines II.D. Moreover, even when "substantial and compelling circumstances are present," the district court has broad discretion to decide whether to depart from the presumptive sentence. *Kindem*, 313 N.W.2d at 7.

Appellant argues that the district court abused its discretion by failing to consider his documented success in alcohol treatment as a basis for a downward departure. We disagree. The record indicates that the district court gave careful consideration to all those factors weighing both for and against a sentencing departure. The district court acknowledged appellant's success thus far in treatment, but determined that appellant's history of DUI-related convictions created a high risk of relapse and a serious public safety concern that outweighed appellant's interest in receiving treatment within a probationary setting. Because the record shows that the district court fully considered all legitimate factors for and against departure, we conclude that the district court's denial of appellant's motion for a downward dispositional departure was within its discretion.

V.

Appellant argues that the district court erred in using his prior North Dakota DUI conviction to enhance his test-refusal offense, and that the district court abused its discretion by refusing to reopen the omnibus hearing to allow him to challenge this charge enhancement. Although appellant's attorney withdrew this argument on appeal, appellant reasserted this issue in his pro se supplemental response brief. But because *State v. Schmidt* and *State v. Fussy* are controlling, appellant's argument fails. 712 N.W.2d 530, 533 (Minn. 2006); 467 N.W.2d 601, 603 (Minn. 1991).

On appeal, we "may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2004). Whether a statute or a provision of the sentencing guidelines has been properly construed is a question of law subject to de novo review. *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005). We will not reverse a district court's decision on whether to reopen an omnibus hearing absent an abuse of discretion. *See State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002).

Pursuant to Minnesota law, violation of an alcohol-related driving offense, including test refusal, can be enhanced to a first-degree felony if the violation is committed "within ten years of the first of three or more qualified prior impaired driving incidents." Minn. Stat. § 169A.24, subd. 1(1) (2004). "Prior impaired driving convictions" and "prior impaired driving-related losses of license," as well as equivalent

out-of-state convictions, constitute incidents that qualify for enhancement. *See* Minn. Stat. § 169A.03, subd. 20(5), 21(4), 22 (2004).

Here, shortly before his jury trial began, appellant agreed to stipulate to the driving-after-cancellation charge and to his three prior alcohol-related driving offenses. Although two of appellant's prior alcohol-related convictions were Minnesota convictions, one was a North Dakota conviction. Appellant's attorney challenged the state's use of appellant's North Dakota conviction, arguing that there was no evidence to show that appellant had legal representation with respect to his North Dakota DUI conviction, and that an uncounseled conviction could not be used to enhance a Minnesota alcohol-related driving offense. But the district court refused to consider appellant's argument, finding that appellant waived this issue by failing to raise it at the omnibus hearing.

Appellant now raises this same argument again in his pro se supplemental response brief. It is unclear whether appellant is arguing that his North Dakota DUI conviction cannot be used for charge-enhancement purposes because it was based on an uncounseled test decision, or an uncounseled guilty plea. But regardless, the district court's refusal to reopen the omnibus hearing was within its discretion.

In *State v. Schmidt*, the Minnesota Supreme Court held that out-of-state convictions based on uncounseled test decisions can be used to enhance a Minnesota impaired-driving offense. 712 N.W.2d 530, 539 (2006). Alternatively, if appellant's argument is based on the assertion that his North Dakota conviction involved an uncounseled guilty plea, and not just an uncounseled test refusal, the record shows that

appellant failed to meet the requisite notice and evidentiary requirements. In order to challenge the district court's use of his prior conviction for sentencing-enhancement purposes, appellant was required to (1) promptly notify the state that his North Dakota DUI conviction was obtained in violation of his constitutional rights and (2) produce evidence to support that contention. *State v. Mellett*, 642 N.W.2d 779, 789 (Minn. App. 2002). Here, although appellant had several months notice that the state intended to use his North Dakota conviction for charge-enhancement purposes, he neglected to raise this argument until the day of trial. Furthermore, appellant failed to put forth any evidence in support of his contention that his North Dakota conviction was obtained in violation of his right to counsel. Although appellant testified that he could not remember whether he was represented with regards to the North Dakota offense, he failed to submit an affidavit or any other evidence to support his constitutional claim. And because appellant failed to meet the notice and evidence requirements set forth in *Mellett*, the state had no burden to prove that appellant was counseled with regards to his prior North Dakota DUI conviction.

Because the state's use of appellant's North Dakota DUI conviction for charge-enhancement purposes was in accordance with Minnesota law and supported by the record, we conclude that the district court's refusal to reopen the omnibus hearing was within its discretion.

VI.

In his pro se supplemental brief, appellant also argues that the district court erred in finding that the officer had an adequate basis for stopping his vehicle and requiring that he take a breath test. We disagree.

A police officer may stop a vehicle so long as he has a particularized and objective basis for suspecting the vehicle's occupant of criminal activity. *United States v. Cortez,* 449 U.S. 411, 417-18, 101 S. Ct. 690, 695 (1981). And a police officer's observation of a traffic violation, however insignificant, justifies stopping a vehicle for limited investigative purposes. *State v. George,* 557 N.W.2d 575, 578 (Minn. 1997). The "particularized basis for the intrusion must be both articulable and reasonable." *State v. Askerooth,* 681 N.W.2d 353, 364 (Minn. 2004) (citing *Terry v. Ohio,* 392 U.S. 1, 21, 88 S. Ct. 1868, 1880 (1968)). But the factual basis required to support a stop is minimal and may be supplied by information that the officer acquires from another person, including an informant. *Jobe v. Comm'r of Pub. Safety,* 609 N.W.2d 919, 921 (Minn. App. 2000). Whether the basis for a stop is reasonable is a legal determination that we review de novo. *Id.*

Moreover, a police officer may expand a permitted stop to investigate suspected illegal activity if there is reasonable, articulable suspicion of other such activity. *State v. Wiegand,* 645 N.W.2d 125, 135 (Minn. 2002). And we have recognized that "roadside sobriety tests are not required to support an officer's reasonable belief that a driver is intoxicated." *Holtz v. Comm'r of Pub. Safety*, 340 N.W.2d 363, 365 (Minn. App. 1983).

Here, the officer stopped appellant's vehicle after he received an anonymous phone call reporting that appellant was driving while intoxicated, and subsequently observed appellant driving his vehicle over the speed limit. The officer testified that he "detected a strong odor of an alcoholic beverage emanating from" appellant's breath and observed that appellant was unsteady on his feet. When the officer asked appellant whether there was a possibility that he was under the influence of alcohol, appellant stated that he had a few drinks, but was not intoxicated. And when appellant told the officer where he had been earlier in the evening, he stated that he had been at happy hour at the Sandpiper, a local restaurant that was no longer in business.

The record indicates that the officer was precluded from requesting that appellant perform field sobriety tests because (1) appellant's swollen eye rendered him unable to perform the horizontal gaze nystagmus test; (2) appellant's prosthetic leg inhibited him from performing the one-leg-stand and walk-and-turn tests; and (3) appellant refused to take a preliminary breath test. We conclude that the district court did not err in determining that the facts and circumstances surrounding appellant's arrest indicate that the officer had a reasonable, articulable basis for stopping appellant's vehicle and requesting that he take a breath test.

Affirmed in part, reversed in part, and remanded.