STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1855

State of Minnesota,
Respondent,

vs.

Nicholas John Westlund,
Appellant.

Filed September 5, 2017
Affirmed
Schellhas, Judge

Lyon County District Court
File No. 42-CR-16-569

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

Richard R. Maes, Lyon County Attorney, Marshall, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

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

SCHELLHAS, Judge

Appellant argues that he is entitled to a reduction of his conviction, from second-degree controlled-substance crime to third-degree controlled-substance crime, because the

mitigating provisions of the 2016 Drug Sentencing Reform Act presumptively apply to cases that are pending at the time of enactment. We affirm.

FACTS

On June 1, 2016, police executed a search warrant at the apartment of appellant Nicholas Westlund in the City of Marshall and seized approximately 24.9 grams of methamphetamine and various items of drug paraphernalia, including two glass smoking pipes, a metal spoon or scoop, several empty small baggies similar to ones used to package drugs for sale, and a digital scale with residue believed to be methamphetamine. The state charged Westlund with first-degree controlled-substance crime, in violation of Minn. Stat. § 152.021, subd. 1(1) (2014) (sale of ten or more grams of methamphetamine on one or more occasions within a 90-day period); second-degree controlled-substance crime, in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2014) (possession of six grams or more of methamphetamine); and possession of drug paraphernalia, in violation of Minn. Stat. § 152.092 (2014).

On August 8, 2016, based on a plea agreement, Westlund pleaded guilty to the second-degree possession charge in exchange for the state's agreement to dismiss the other charges and to recommend a prison sentence of 117 months in prison—the high end of the guidelines range. The state also agreed not to pursue any charges stemming from another incident involving Westlund on May 24, 2016. During the plea colloquy, Westlund acknowledged that police seized 24.9 grams of methamphetamine from his apartment. The district court accepted the plea and ordered a sentencing worksheet, which confirmed that the presumptive guidelines range for this severity-level-eight offense for an offender with

Westlund's criminal-history score of five, was an executed sentence in the range of 84 to 117 months. *See* Minn. Sent. Guidelines 4.A. (2015) (Sentencing Guidelines Grid). On August 23, 2016, the district court convicted Westlund of second-degree possession of a controlled substance and sentenced him to 117 months in prison.

This appeal follows.

D E C I S I O N

Westlund argues that he is entitled to a reduction of his conviction from second-degree to third-degree controlled-substance crime, based on the mitigating provisions of the 2016 Drug Sentencing Reform Act (DSRA), which became effective on August 1, 2016, before his conviction became final. He seeks a remand to the district court for resentencing.

Westlund pleaded guilty to second-degree controlled-substance crime, which made it a crime to possess more than six grams of methamphetamine. *See* Minn. Stat. § 152.022, subd. 2(a)(1) (2014). Westlund claims that under the DSRA, as of August 1, 2017, his conduct constitutes third-degree possession[1] and carries a presumptive sentence in the range of 44 to 61 months for an offender with his criminal-history score. *See* Minn. Stat. § 152.023, subd. 2(a)(1) (2016) (providing person is guilty of third-degree possession if

[1] The DSRA also increased the amount necessary for first-degree sale from 10 to 17 grams or more. *See* Minn. Stat. §§ 152.021, subd. 1(1) (2014); 152.021, subd. 1(1) (2016). Because police seized approximately 24.9 grams of methamphetamine from Westlund's apartment, along with evidence of sale activity, his conduct might support a first-degree sale conviction under the 2016 Act. But under the terms of the plea agreement, the state agreed to dismiss the first-degree-sale charge against Westlund in exchange for his plea of guilty to the less-serious offense of second-degree possession.

person unlawfully possesses one or more mixtures of a total weight of ten grams or more containing a narcotic drug other than heroin); Minn. Sentencing Guidelines 4.C (2016).

The relevant portions of the DSRA became effective on August 1, 2016, for "crimes committed on or after that date." 2016 Minn. Laws ch. 160, §§ 3-7. By its plain language, the DSRA does not apply to Westlund's offense, which Westlund committed on June 1, 2016. Yet Westlund argues that he is entitled to a reduction because his conviction is not yet final.

Westlund relies on *State v. Coolidge*, in which the supreme court held that "a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached." 282 N.W.2d 511, 514 (Minn. 1979). "The rationale for such a rule is that the legislature has manifested its belief that the prior punishment is too severe and a lighter sentence is sufficient." *Id.* In *Edstrom v. State*, 326 N.W.2d 10, 10 (Minn. 1982), the supreme court declined to apply *Coolidge* and carved out an exception in cases where the "legislature has clearly indicated its intent that the [newly enacted] statutes have no effect on crimes committed before the effective date of the act."

Since briefing was completed in this case, the Minnesota Supreme Court has instructed that the common-law principle discussed and applied in *Coolidge* and *Edstrom* should be referred to as the "amelioration doctrine." *State v. Kirby*, ___ N.W.2d ___, ___, No. A15-0117, slip op. at 5−6 (Minn. July 26, 2017); *State v. Otto*, ___ N.W.2d ___, ___, No. A15-1454, slip op. at 2 (Minn. July 26, 2017). In *Otto*, the supreme court rejected a claim identical to Westlund's claim, holding that a defendant is not entitled to a reduced conviction under the DSRA, because the legislature's intent to "abrogate" the doctrine, by

its effective-date language, was clear. *Id.*, slip op. at 2−3. Consistent with *Otto*, we reject Westlund's claim that he is entitled to a reduction in his conviction under the amelioration doctrine.

Kirby and *Otto* also addressed an issue not presented by Westlund in this case: whether the amelioration doctrine requires that he be resentenced under the DSRA-amended sentencing grid. In *Kirby* and *Otto*, which involved first-degree possession convictions, the supreme court held that the amelioration doctrine required that the defendants be resentenced under the DSRA-amended sentencing grid. Westlund does not claim that he is entitled to be resentenced under the DSRA-amended sentencing grid, perhaps because application of the new grid to his offense and criminal-history score would result in the same sentence that was imposed on him under the 2015 sentencing guidelines grid. The DSRA-amended sentencing grid does not change the sentencing range for persons convicted of second-degree controlled-substance crime (possession) and a criminal-history score of five points. Under either the 2015 or the 2016 grid, the sentencing range for this offense and offender is 84 to 117 months. Under the terms of his plea agreement, Westlund agreed to a 117-month prison sentence, and that is what he received.

Consistent with *Otto* and *Kirby*, we conclude that Westlund is not entitled to a reduction of his conviction of second-degree controlled-substance crime to third-degree controlled-substance crime under the DSRA, and Westlund is not entitled to resentencing under the DSRA-amended sentencing grid.

Affirmed.