

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0045**

State of Minnesota,
Respondent,

vs.

Arlen Dean Silberg,
Appellant.

**Filed October 9, 2017
Affirmed
Bratvold, Judge**

Dakota County District Court
File No. 19HA-CR-16-1435

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

James C. Backstrom, Dakota County Attorney, Chip Granger, Assistant County Attorney,
Hastings, Minnesota (for respondent)

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

Considered and decided by Hooten, Presiding Judge; Bjorkman, Judge; and
Bratvold, Judge.

UNPUBLISHED OPINION

BRATVOLD, Judge

Appellant challenges his conviction of second-degree drug possession, arguing that the provisions of the 2016 Drug Sentencing Reform Act (DSRA), 2016 Minn. Laws. Ch. 160 §§ 4-5, require that his conviction be reduced to a third-degree offense. We affirm.

FACTS

On October 9, 2015, police arrested appellant Arlen Silberg for attempting to steal from a store. During a search, police found a pipe and a bag containing .215 and 13.7 grams of methamphetamine, respectively. In April 2016, the state charged Silberg with second-degree possession of methamphetamine, fifth-degree possession of methamphetamine, and attempted misdemeanor theft. In September 2016, a jury convicted Silberg of all three counts.

The case proceeded to sentencing in October 2016. Silberg had a criminal history score of nine and a custody-status point, which resulted in a presumptive sentencing range of 95 to 132 months under the sentencing grid in effect at the time of his offenses. Minn. Sent. Guidelines 4.A. 2.B.2(c) (2014).

During sentencing, Silberg argued that he should have his conviction reduced to third-degree drug possession under the DSRA, which, if applicable to him, would result in a presumptive sentencing range of 52 to 71 months. 2016 Minn. Laws, ch. 160, §§ 4-5, 18(b), at 5-6, 16. *Compare* Minn. Stat. § 152.022, subd. 2(a)(1) (2014) (providing that a person who possesses between 6 and 25 grams of methamphetamine is guilty of second-degree possession), *and* Minn. Sent. Guidelines 4.A (2014) (sentencing grid in effect at the

time of Silberg’s offenses), *with* Minn. Stat. § 152.023, subd. 2(a)(1) (2016) (providing that a person who possesses between 10 and 25 grams of methamphetamine is guilty of third-degree possession), *and* Minn. Sent. Guidelines 4.C (2016) (DSRA-amended sentencing grid). The district court denied Silberg’s request, adjudicated him guilty of second-degree drug possession, and sentenced him to an executed sentence of 111 months for that count. Silberg appeals.

D E C I S I O N

Silberg argues that he is entitled to a reduction of his conviction from second-degree to third-degree drug possession based on the mitigating provisions of the DSRA, which went into effect while his case was pending. Silberg also requests resentencing under the DSRA, but only if his conviction is reduced to third degree. The state responds that the DSRA does not apply to Silberg’s conviction and sentence because he committed his offense before the DSRA amendments went into effect.

After the parties completed briefing in this court, the supreme court decided two cases addressing the issue presented in this appeal. In *State v. Kirby*, the supreme court announced the “amelioration doctrine,” which provides that an amended criminal statute applies to crimes committed before its effective date if: (1) there is no clear statement by the legislature that it intends to abrogate the amelioration doctrine; (2) “the amendment mitigates punishment”; and (3) final judgment has not been entered as of the effective date. 899 N.W.2d 485, 490 (Minn. 2017). *Kirby* held that the amelioration doctrine applies to section 18 of the DSRA, which directed amendment of the sentencing grid for drug

offenses and became effective on May 23, 2016. *Id.*; *see also* 2016 Minn. Laws, ch. 160, § 18, at 16; Minn. Sent. Guidelines 4.C (2016).

In *State v. Otto*, released on the same day as *Kirby*, the supreme court rejected an argument identical to Silberg's and held that the amelioration doctrine does not apply to the DSRA provisions that amended the weight requirements for drug offenses. 899 N.W.2d 501, 503 (Minn. 2017). Sections 4 and 5 of the DSRA increased the weight requirement for second- and third-degree drug possession and stated that they became "effective August 1, 2016, and appl[y] to crimes committed on or after that date." 2016 Minn. Laws, ch. 160, §§ 4-5, at 5-7. The supreme court concluded that the legislature's intent was "crystal clear: to abrogate the amelioration doctrine." 899 N.W.2d at 503. *Otto* therefore held that the DSRA amendments to the weight requirements for drug offenses do not apply to crimes that were committed before August 1, 2016. *Id.* at 504. Because Silberg committed his offense in October 2015, we conclude that he is not entitled to have his conviction reduced from second degree to third degree under the amelioration doctrine.

Silberg argues that he is entitled to be resentenced, but only if his conviction is reduced to third-degree drug possession. Silberg has not asked for relief under section 18 of the DSRA, and we affirm his second-degree conviction. *McKenzie v. State*, 583 N.W.2d 744, 746 n.1 (Minn. 1998) ("[I]ssues not argued in briefs are deemed waived on appeal." (alteration in original) (citation omitted)). We also note that remand for resentencing would be unnecessary in Silberg's case because the presumptive sentencing range under the 2014 and 2016 DSRA-amended guidelines for second-degree drug possession is the same.

Compare Minn. Sent. Guidelines 4.A (2014), *with* Minn. Sent. Guidelines 4.C (2016).

Therefore, Silberg is not entitled to resentencing.

Consistent with *Kirby* and *Otto*, we conclude that Silberg is not entitled to a reduction of his conviction from second-degree drug possession to third-degree drug possession under the DSRA, and that Silberg is not entitled to resentencing under the DSRA-amended sentencing grid.

Affirmed.