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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0469**

State of Minnesota,
Respondent,

vs.

Nathaniel Christopher Glass,
Appellant.

**Filed August 14, 2017
Affirmed
Schellhas, Judge**

Ramsey County District Court
File Nos. 62-K1-05-000933, 62-K7-05-000953

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for respondent)

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

Considered and decided by Cleary, Chief Judge; Schellhas, Judge; and Randall,
Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant challenges an order denying his motion to correct two sentences imposed in December 2005, asserting that his sentences are based on an erroneously calculated criminal-history score that includes an Illinois conviction. We affirm.

FACTS

In October 2005, appellant Nathaniel Christopher Glass pleaded guilty in separate cases to first-degree criminal sexual conduct and to second-degree intentional murder. At Glass's plea hearing, defense counsel stated that "Glass will simply enter a plea of guilty as charged" to first-degree criminal sexual conduct and "will receive a 144-month sentence . . . pursuant to Minnesota Statutes." *See* Minn. Stat. § 609.342, subs. 1(c), 2(b) (2004) (stating that "the court shall presume that an executed sentence of 144 months must be imposed on an offender convicted of violating this section," and making it a crime to engage in sexual penetration with another while causing the person to have a reasonable fear of imminent great bodily harm).

At the plea hearing, defense counsel also stated that "Glass will be entering a plea of guilty" to second-degree intentional murder and that the "sentence on the murder file will be concurrent with the criminal sexual conduct matter." Counsel further stated: "Mr. Glass will then be agreeing to a 36-month upward departure from the guidelines and waiving his right to have a jury hear or determine whether or not he should receive that upward departure." Counsel continued:

I should note that there is no guarantee as to what my client's criminal history and score is, however, based on my own calculations, the State has also come up with the same calculation and it is anticipated that after sentencing on the criminal sexual conduct and sentencing on the homicide, there will be a 36-month upward departure, it should be a 402-month sentence.

During the plea colloquy, Glass answered questions about the terms of the plea agreement and acknowledged that he would receive the statutorily mandated sentence of 144 months' imprisonment on the criminal-sexual-conduct case, and a concurrent sentence, which included a 36-month upward durational departure from the sentencing guidelines, based on his criminal-history score as understood by his counsel and the state, in the second-degree-intentional-murder case.

Defense counsel explained that "Mr. Glass understands that if there has been a miscalculation in the sentence and if I have under calculated his points, his sentence on the homicide is guidelines plus 36 [months]." The court accepted Glass's guilty pleas.

The district court received sentencing worksheets and a presentence investigation report (PSI). The sentencing worksheet prepared in the second-degree-intentional-murder case calculated Glass's criminal-history score at 4, comprised of 1 custody status point, 2 points for the criminal-sexual-conduct conviction on which Glass would be sentenced first, and 1.5 points for a November 1999 Illinois controlled-substance conviction. Glass's PSI identifies the 1999 Illinois controlled-substance conviction as a felony and describes it as "Manufacture/Delivery Controlled Substance. Chicago, Cook County, IL. Pled guilty and sentenced 11/3/99, 24 months['] probation and \$50 lab fee."

At sentencing in December 2005, Glass challenged the weight assigned to the Illinois controlled-substance conviction because of its effect on the length of his sentence for second-degree intentional murder. Glass argued that because he did not serve any prison time for the Illinois controlled-substance conviction, the conviction should be treated as a gross misdemeanor, not a felony. Treating the conviction as a gross misdemeanor would decrease Glass's criminal-history score to 3, reducing his sentence for second-degree murder from 422 to 402 months. The state objected, the district court agreed with the state, and the court imposed concurrent prison sentences of 144 months for criminal sexual conduct and 422 months for second-degree intentional murder. Glass did not file a direct appeal.

Eleven years later, in July 2016, Glass moved to correct his 422-month second-degree-intentional-murder sentence under Minn. R. Crim. P. 27.03, subd. 9, arguing that the sentencing court miscalculated his criminal-history score by including the 1999 Illinois controlled-substance conviction as a felony, and that the court should have calculated his score at 3 not 4. The district court denied Glass's motion. This appeal follows.

D E C I S I O N

The district court concluded that the sentencing court properly included Glass's 1999 Illinois controlled-substance conviction in Glass's criminal-history score as a felony conviction because the Illinois offense could be charged as a felony in Minnesota and because the 24-month probationary sentence that the Illinois court imposed "is consistent with either a felony sentence or a gross misdemeanor sentence in Minnesota." Glass maintains that the court erred.

On appeal from the denial of a motion to correct a sentence under Minn. R. Crim. P. 27.03, subd. 9, this court will affirm if the district court properly exercised its discretion and if the sentence is authorized by law. *Anderson v. State*, 794 N.W.2d 137, 139 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011). A sentence based on an incorrect criminal-history score is an unauthorized sentence that may be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007).

Under the terms of his plea agreement, Glass agreed to a 36-month upward departure from the presumptive guidelines sentence for second-degree intentional murder. Because Glass committed the offense in March 2005, the 2004 statutes and guidelines apply. *See* Minn. Sent. Guidelines III.F. (2004). In 2004, the presumptive sentence for this severity-level-XI offense, for an offender with a criminal-history score of 4, was 386 months; with a criminal-history score of 3, the presumptive sentence would have been 366 months. Minn. Sentencing Guidelines IV. (2004) (sentencing guidelines grid).

Glass states in his brief that he “does not contest that the 1999 [Illinois] offense would be defined by Minnesota as a felony based on the elements” but argues that the state has never met its burden to prove that the sentence he received in Illinois “would [have been] a felony sentence in Minnesota.” And he argues that because he did not serve any time in prison for his 1999 Illinois controlled-substance conviction, and because the 24-month probationary sentence that he received in Illinois is consistent with either a felony or a gross misdemeanor, the evidence is insufficient to prove that his 1999 Illinois controlled-substance conviction was a felony. *See* Minn. Stat. § 609.135, subd. 2(c) (2004). The sentencing court rejected those arguments in 2005.

Appellate courts review the district court's calculation of an offender's criminal-history score for an abuse of discretion. *See Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992) (“[O]bviously if the sentencing court abuses its discretion in deciding whether or not to designate an out-of-state conviction as a felony for purposes of computing the defendant's criminal history score, then the court's determination may be reversed.”).

“The state . . . has the burden at a sentencing hearing of establishing the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score.” *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). The state must “produce evidence to establish by a fair preponderance of the evidence the validity of the prior convictions, the fact that the defendant was the person involved, and that the crimes constituted felonies in Minnesota.” *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). “[I]t is the trial court's role to resolve any factual dispute bearing on the defendant's criminal history score.” *State v. Olson*, 379 N.W.2d 524, 527 (Minn. 1986). “[I]n many, perhaps most, cases the [sentencing court's] determination can be made by the sentencing court without turning the sentencing hearing into a mini-trial relating to the conduct underlying the out-of-state conviction.” *Hill*, 483 N.W.2d at 61.

“The designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law.” Minn. Sent. Guidelines II.B.5. (2004). The sentencing court should examine both the offense definition and the sentence imposed. *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001). Glass insists that the state failed to meet its burden to establish that the sentence that the Illinois court imposed would be a felony sentence in Minnesota. Glass

is correct that the only record evidence regarding his Illinois sentence is that the Illinois court placed him on probation for 24 months. But he is incorrect that this evidence fails to prove that he received a felony sentence.

In *State v. Campbell*, 814 N.W.2d 1 (Minn. 2012), the supreme court addressed the determination of a criminal-history score under circumstances similar to Glass's. The district court assigned Campbell one felony criminal-history point for a 1995 robbery conviction for which Campbell had received a felony stay of imposition and a sentence within the gross misdemeanor range—two years of probation and community service. *Campbell*, 814 N.W.2d at 6. The supreme court acknowledged that, under Minn. Stat. § 609.13, subd 1(1) (2010), “[a] felony conviction is deemed a gross misdemeanor if the sentence imposed for the felony is within gross misdemeanor limits” and that the sentencing guidelines state that “felonies resulting in gross misdemeanor sentences count as gross misdemeanors in the calculation of criminal history scores.” *Id.* at 6–7. The supreme court further emphasized that the guidelines state that “criminal history is calculated by giving felony points to *every felony conviction* where a sentence was stayed or imposed or where a stay of imposition was given before the current sentence” and that “felony criminal history points are given for felony stays of imposition, regardless of the period of probation the court pronounced.” *Id.* at 7 (emphasis added). Because Campbell received a stay of imposition for a felony conviction, the supreme court concluded that the calculation of his criminal-history points was governed by the section of the guidelines, “which directs that felony stays of imposition result in felony criminal history points no matter what period of probation the defendant receives.” *Id.*

In this case, the record is not entirely clear about whether the Illinois court stayed imposition or execution of Glass's sentence before placing him on probation for 24 months. But under the sentencing guidelines, Glass's criminal-history score should be calculated by assigning felony points to his felony conviction, regardless of the period of probation pronounced by the Illinois court. *Id.* The fact that the probationary period is consistent with either a felony or a gross misdemeanor or that Glass did not spend time in prison as a result of the Illinois court's sentence is irrelevant. We therefore conclude that the sentencing court properly exercised its discretion in assigning Glass a felony point for his 1999 Illinois controlled-substance conviction for purposes of calculating his criminal-history score. The district court did not err by denying Glass's motion to correct his sentence, and we affirm.

Affirmed.