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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0568

State of Minnesota,
Respondent,

vs.

Louis Ambrose,
Appellant.

Filed September 11, 2017
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-CR-11-6509

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

John J. Choi, Ramsey County Attorney, Laura Rosenthal, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Benjamin J. Butler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Johnson, Judge; and Larkin, Judge.

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

JOHNSON, Judge

In 2011, Louis Ambrose pleaded guilty to attempted second-degree intentional murder. The district court imposed a sentence that includes a restitution obligation of

$1,111.41. In 2015 and 2016, Ambrose filed multiple motions to correct his sentence, all of which the district court denied. In this appeal, Ambrose challenges his restitution obligation and the calculation of his criminal-history score. We affirm.

FACTS

On August 16, 2011, Ambrose and his girlfriend, E.J., had an argument at her home. Later that day, Ambrose threw a Molotov cocktail through a first-floor bedroom window, which started a fire inside the home. Ambrose intentionally prevented E.J. from leaving the home by blocking her access to the front door. A neighbor heard E.J.'s screams and intervened, which enabled E.J. to escape the burning home. Ambrose fled, but police officers later found him nearby and arrested him.

The next day, the state charged Ambrose with one count of attempted second-degree intentional murder, in violation of Minn. Stat. §§ 609.17, subd. 1, .19, subd. 1(1) (2010), and one count of first-degree arson, in violation of Minn. Stat. § 609.561, subd. 1 (2010).

In November 2011, Ambrose pleaded guilty to the charge of attempted second-degree intentional murder. His attorney assisted him in providing a factual basis for the plea, as follows:

> DEFENSE COUNSEL: So is it true that [you and E.J.] had gotten into an argument and you had left the home?
>
> AMBROSE: Yeah.
>
> DEFENSE COUNSEL: At some point on that morning did you throw some items through the window of her bedroom that set the house on fire?
>
> AMBROSE: I thought we was going to attempted murder.

DEFENSE COUNSEL: I'm getting to that. But we have to get there first. You're not going to be convicted of arson, sir.

. . . .

Mr. Ambrose, at some point in that morning did you throw some items through the window of [E.J.]'s bedroom that set the house, that bedroom on fire?

AMBROSE: Yeah.

. . . .

DEFENSE COUNSEL: In that process did you close the door to the house that was on fire?

AMBROSE: Yep.

DEFENSE COUNSEL: And did you attempt to keep [E.J.] in the house with you while the house was on fire?

AMBROSE: Yep.

DEFENSE COUNSEL: Was it your intent at that point, Mr. Ambrose, to basically die with [E.J.] in that fire?

AMBROSE: Basically, yeah.

DEFENSE COUNSEL: And [E.J.] was not able to get out of the house because you were blocking the door; is that correct, sir?

AMBROSE: True.

. . . .

DEFENSE COUNSEL: So you would agree that your behavior on that day, on the 16th, and your actions on that day by keeping [E.J.] in the house you were attempting to kill her; is that right?

AMBROSE: Yeah.

In exchange for his plea of guilty to the charge of second-degree intentional murder, the state agreed to dismiss the charge of first-degree arson. The parties agreed to jointly recommend a sentence at the low end of the applicable sentencing guidelines range. The plea agreement did not contain any provision concerning restitution. In December 2011, the district court sentenced Ambrose to 173 months of imprisonment, which is the low end of the applicable sentencing guidelines range. The district court ordered restitution in an amount to be determined.

Three days after the sentencing hearing, the owner of the multi-unit building in which E.J. lived requested restitution. The building owner's sworn affidavit states that he sustained a financial loss of $1,111.41, which consists of an insurance deductible of $1,000 and uninsured repair expenses of $111.41. E.J. did not request restitution. In April 2012, the district court ordered Ambrose to pay $1,111.41 in restitution to the building owner. Ambrose did not pursue a direct appeal from his conviction or his sentence.

Between June 2015 and August 2015, Ambrose filed multiple *pro se* motions to correct his sentence. *See* Minn. R. Crim. P. 27.03, subd. 9. In November 2015, the district court denied the motions. Ambrose appealed, *pro se*. This court reversed and remanded because the record was unclear as to whether Ambrose had been informed of his right to counsel. *Ambrose v. State*, No. A15-1972 (Minn. App. July 20, 2016) (order opinion).

In October 2016, Ambrose, with the assistance of counsel, filed a motion to correct his sentence. In that motion, he argued that the district court erred by awarding restitution on the ground that the building owner's financial losses were not caused by the attempted

murder, the charge of which he was convicted, but rather by the alleged arson, the charge that was dismissed. Ambrose also argued that the district court erred at the time of sentencing by including a custody-status point in his criminal-history score. Ambrose also filed additional *pro se* motions to correct his sentence between January 2016 and January 2017. In February 2017, the district court issued an order in which it denied Ambrose's counseled motion and his *pro se* motions. Ambrose appeals.

D E C I S I O N

I. Restitution

Ambrose first argues, through counsel, that the district court erred by denying his motion to correct his sentence with respect to his challenge to the restitution award. He contends that the restitution award is not authorized by law on the ground that the building owner's financial losses were not directly caused by the conduct for which he was convicted. He further contends that the building owner's losses were caused by the fire, which was the factual basis of the arson charge, which was dismissed when he pleaded guilty to attempted murder. He provides additional argument on this issue in his *pro se* supplemental brief. In response, the state argues that the district court did not err because the restitution award is based on conduct to which Ambrose admitted during the plea hearing, which established his guilt of attempted murder.

A district court "may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. If a criminal offender files a motion and demonstrates that a sentence is not authorized by law, a district court must correct the sentence. *Reynolds v. State*, 888 N.W.2d 125, 129-30 (Minn. 2016). A criminal offender may utilize the

procedure in rule 27.03, subdivision 9, to challenge a restitution award. *Evans v. State*, 880 N.W.2d 357, 359-60 (Minn. 2016).

In Minnesota, restitution awards are governed primarily by statute. *See* Minn. Stat. §§ 611A.04-.06 (2010); *see also State v. Gaiovnik*, 794 N.W.2d 643, 646-52 (Minn. 2011). The "primary purpose" of restitution is "to restore crime victims to the same financial position they were in before the crime." *State v. Palubicki*, 727 N.W.2d 662, 666 (Minn. 2007). Accordingly, "A victim of a crime has the right to receive restitution as part of the disposition of a criminal charge . . . against the offender if the offender is convicted." Minn. Stat. § 611A.04, subd. 1(a). The word "victim," as used in the restitution statute, is defined to mean "a natural person who incurs loss or harm as a result of a crime." Minn. Stat. § 611A.01(b) (2010).

In determining whether to order restitution to a victim and in what amount, a district court must consider, among other things, the "amount of economic loss sustained by the victim as a result of the offense," as supported by facts in the record. Minn. Stat. § 611A.045, subd. 1(a). A victim's "compensable loss must be 'directly caused by the conduct for which the defendant was convicted.'" *State v. Nelson*, 796 N.W.2d 343, 347 (Minn. App. 2011) (quoting *State v. Latimer*, 604 N.W.2d 103, 105 (Minn. App. 1999)); *see also State v. Ramsay*, 789 N.W.2d 513, 517-18 (Minn. App. 2010) (reversing restitution award that "far exceed[ed] the loss attributable to the offense" of conviction). The victim's loss also must "have some factual relationship to the crime committed." *Nelson*, 796 N.W.2d at 347; *see also State v. Fader*, 358 N.W.2d 42, 48 (Minn. 1984) (concluding that factual record did not support restitution award). If a victim sustained such a loss, a district

court has "significant discretion" to determine the amount of restitution. *State v. Tenerelli*, 598 N.W.2d 668, 671-72 (Minn. 1999). This court applies an abuse-of-discretion standard of review to a district court's decision concerning an award of restitution. *Id.* at 672.

The district court resolved Ambrose's challenge to the restitution award as follows:

> During the plea hearing, Ambrose testified under oath that he threw items into the residence that set it on fire and closed the door to kill E.N.J. in the fire. The fire caused damage to M.S.'s residence. The total loss incurred due to the fire damage to the residence was $65,271.63, while the out-of-pocket economic loss to M.S. was $1,111.41. This out-of-pocket loss was directly caused by Ambrose's conduct as demonstrated by the record facts. It is a direct result of Ambrose's conduct that M.S. incurred economic loss. And, while Ambrose is presently incarcerated and his income and resources are more limited, the restitution award is not insurmountably excessive. Therefore, the restitution award for M.S.'s economic loss was properly ordered in the amount of $1,111.41.

Ambrose contends that the district court erred because "the loss—the damages to the house—was not caused by conduct for which [he] was convicted." Rather, he contends: "The conduct for which [he] was convicted was preventing [E.J.] from leaving an already-burning building. That conduct did not directly cause the damage to the building." He contends further that the building owner is not a victim of his crime because E.J. is the only person who could be the victim of the offense of attempted murder.

The district court properly characterized the conduct for which Ambrose was convicted. Ambrose was convicted of attempted murder not merely because he attempted to prevent E.J. from leaving a burning building; he was convicted of attempted murder because he first intentionally set the building on fire and then attempted to prevent E.J. from leaving it. Starting the fire was part of his murder scheme. He admitted during the

plea hearing that he started the fire after an argument with E.J., and it is apparent from the record of the plea hearing that he started the fire as a means of causing E.J.'s death. The record shows that the conduct underlying Ambrose's conviction of attempted murder "directly caused" the building owner's loss. *See Nelson*, 796 N.W.2d at 347.

Thus, the district court did not err by denying Ambrose's motion to correct his sentence with respect to the restitution award.

II. Custody-Status Point

Ambrose also argues that the district court erred by denying his motion to correct his sentence with respect to his challenge to a custody-status point in his criminal-history score. A criminal offender may invoke rule 27.03, subdivision 9, to challenge a custody-status point in his criminal-history score. *State v. Maurstad*, 733 N.W.2d 141, 148-50 (Minn. 2007). We apply an abuse-of-discretion standard of review to a district court's determination of a defendant's criminal-history score. *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992); *State v. Drljic*, 876 N.W.2d 350, 353 (Minn. App. 2016).

After Ambrose's guilty plea, a probation officer conducted a pre-sentence investigation. The probation officer calculated Ambrose's criminal-history score to be five. That score includes one custody-status point based on the fact that Ambrose committed attempted murder within the original term of probation for a 2006 fifth-degree controlled-substance offense, in which the district court sentenced Ambrose to 19 months of imprisonment but stayed execution of the sentence and placed him on probation for 10 years, until 2016. In 2008, however, the district court found that Ambrose violated the terms of his probation and ordered him to serve 180 days in jail, after which time his

sentence was discharged. As a result, Ambrose was discharged from probation approximately eight years before the original probation term would have expired. The custody-status point is based on a sentencing guideline that states, "One point is assigned if the offender . . . committed the current offense within the period of [an] initial probationary sentence." Minn. Sentencing Guidelines 2.B.2.b (2011). The same guideline also states that a custody-status point is not assigned "if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence." *Id.* Ambrose's 2006 sentence was not executed; rather, it was discharged after he served 180 days in jail for a probation violation.

In his counseled motion to correct sentence, Ambrose argued to the district court that his sentence is not authorized by law because, at the probation-violation hearing in the controlled-substances case in 2008, he was not informed that he could elect to execute his sentence rather than to serve time in jail.[1] He argued further that, if he had been so informed, he might have chosen to execute his 19-month prison sentence rather than serve a 6-month jail term, which would have allowed him to avoid a custody-status point at sentencing in this case. Ambrose based his argument on caselaw that recognizes an offender's right at the time of sentencing to demand an executed prison sentence instead of being placed on probation. *See State v. Rasinski*, 472 N.W.2d 645, 650-51 (Minn. 1991);

[1]We note that Ambrose did not provide the district court with any transcripts or other records of his 2006 sentencing hearing. For purposes of this opinion, we assume without deciding that the district court did not advise him of any such right.

State v. Randolph, 316 N.W.2d 508, 510 (Minn. 1982). The district court resolved Ambrose's argument as follows:

> A criminal defendant has a right to demand execution of the presumptive sentence when the probationary sentence is more onerous even if society's interest appears to be better served by the probationary sentence. *State v. Rasinski*, 472 N.W.2d 645, 651 (Minn. 1991). However, the right to demand execution at the sentencing hearing does not imply that later having violated probation, a criminal defendant is entitled to demand execution of sentence. *Bail v. State*, 391 N.W.2d 8, 10 (Minn. App. 1986), *review denied* (Minn. Sept. 22, 1986). The district court was not, therefore, required at the 2008 probation violation hearing to present Ambrose with the choice of serving the entirety of the 19-month sentence or serving 180 days and being discharged early from probation.

On appeal, Ambrose acknowledges this court's opinion in *Bail* but suggests that, in essence, two subsequent opinions have overruled *Bail*. He cites *Rasinski* and asserts that, by logical extension, a defendant such as himself "might think a probationary sentence is more onerous than an executed sentence in a situation like this, because the probationary sentence comes with a custody point and an executed sentence does not." But the appellant in *Rasinski* requested execution of his prison sentence before the time for a direct appeal, not years later after a probation violation, as in this case. *See* 472 N.W.2d at 648; *State v. Rasinski*, 464 N.W.2d 517, 520 (Minn. App. 1990), *rev'd in part*, 472 N.W.2d 645 (Minn. 1991). Ambrose also cites *State v. Jennings*, 448 N.W.2d 374 (Minn. App. 1989), in which we recognized that, because of a general preference for concurrent sentencing, "a defendant serving a prison sentence on a felony has the right to execution of a prior probationary sentence." *Id.* at 375. We concluded in *Jennings* that the offender could execute a probationary sentence even if his subsequent sentence was imposed in another state. *Id.*

The offender in *Jennings* requested execution of his prison sentence approximately one year after sentencing. *See id.* at 374. But he then was serving a sentence on another felony conviction, which implicated concerns about consecutive and concurrent sentencing, not about future custody-status points. *Id*. at 374-75. Contrary to Ambrose's argument, the opinions in *Rasinski* and *Jennings* do not contradict *Bail*, in which we rejected the offender's argument, first raised after a probation violation, for a "retroactive change in sentence" on the ground that he was not advised at sentencing that he had a right to demand execution of a probationary sentence. *See Bail*, 391 N.W.2d at 10; *see also Rasinski*, 472 N.W.2d at 648; *Jennings*, 448 N.W.2d at 375. The *Bail* opinion applies to this case and forecloses Ambrose's argument.

Thus, the district court did not err by denying Ambrose's motion to correct his sentence with respect to his challenge to the custody-status point in his criminal-history score.

III. *Pro Se* Arguments

Ambrose makes two additional arguments in a *pro se* supplemental brief.

First, Ambrose argues that the district court erred by denying his motion to correct his sentence on the ground that his conviction is based on evidence that relates to the dismissed charge of first-degree arson. He contends that he may not be convicted of and sentenced for attempted murder because he did not plead guilty to arson; that without an arson conviction, there is no evidence of a fire; and that if there is no evidence of a fire, there is no attempted murder. His argument is without merit for several reasons. A criminal offender may invoke rule 27.03, subdivision 9, to challenge a sentence but may

not invoke the rule to challenge a conviction. *State v. Coles*, 862 N.W.2d 477, 480-81 (Minn. 2015). Furthermore, there is no authority for the proposition that the district court could not find Ambrose guilty of attempted murder without also finding him guilty of arson. Ambrose's guilty plea is supported by an adequate factual basis. *See State v. Raleigh*, 778 N.W.2d 90, 94 (Minn. 2010).

Second, Ambrose argues that the district court erred by denying his motion to correct his sentence on the ground that his criminal-history score at sentencing incorrectly included one point for four prior misdemeanor convictions. *See* Minn. Sentencing Guidelines 2.B.3. He contends for the first time on appeal that he was convicted of only two of the misdemeanors and that the two other misdemeanors were dismissed. Ambrose did not submit evidence to the district court to support this argument. Accordingly, he cannot demonstrate that the district court erred by not recalculating his criminal-history score with fewer prior misdemeanor offenses.

In sum, the district court did not err by denying Ambrose's counseled motion to correct his sentence or his *pro se* motions to correct his sentence.

Affirmed.