STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1503

State of Minnesota,
Respondent,

vs.

Rachel Ann Robak,
Appellant.

Filed September 17, 2018
Affirmed
Reyes, Judge

Stearns County District Court
File No. 73-CR-16-3917

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

Janelle P. Kendall, Stearns County Attorney, Kyle R. Triggs, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Charles F. Clippert, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Ross, Judge; and Florey, Judge.

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

REYES, Judge

Appellant challenges her sentences for a fifth-degree controlled-substance crime and two related petty-misdemeanor offenses, arguing that the district court erred by (1) imposing a stay of imposition rather than a stay of adjudication on the controlled-

substance offense and (2) imposing fines on the petty-misdemeanor offenses when they were part of the same course of conduct as the controlled-substance offense. We affirm.

FACTS

On March 26, 2016, police arrested appellant Rachel Ann Robak after they responded to a disturbance call outside a St. Cloud bar. While conducting subsequent searches, officers found marijuana and a glass pipe on appellant's person, and five Lorazepam pills, a controlled substance, in her wallet. Respondent State of Minnesota charged appellant with fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 2(a)(1) (2014). The state later amended the complaint to add petty-misdemeanor charges of possession of drug paraphernalia, Minn. Stat. § 152.092 (2014), and possession of marijuana, Minn. Stat. § 152.027, subd. 4(a) (2014). A jury convicted appellant of all three charges.

At sentencing on June 29, 2017, appellant sought a stay of adjudication on the controlled-substance offense pursuant to Minn. Stat. § 152.18, subd. 1 (2014), a deferral statute. The district court denied the request, ordered a stay of imposition on the fifth-degree controlled-substance offense, and placed appellant on probation for five years. The district court also ordered her to pay $50 fines for each of the petty-misdemeanor offenses. This appeal follows.

D E C I S I O N

I. The district court did not abuse its discretion by denying appellant's request for a stay of adjudication pursuant to the Drug Sentencing Reform Act.

Appellant argues that the district court erred by applying its discretion to stay imposition of sentence on her controlled-substance offense, rather than staying its adjudication, relying on the applicability of the 2016 amended version of the Drug Sentencing Reform Act (DSRA) to the offense. We disagree.

Under Minnesota law, prosecutions of specific first-time controlled-substance offenses are deferrable. Minn. Stat. § 152.18. On the date of appellant's controlled-substance offense, and under the proper circumstances, Minn. Stat. § 152.18, subd. 1, provided that "the court may, without entering a judgment of guilty and with the consent of the person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require." The legislature amended this provision in 2016 to make deferral mandatory, stating that "the court must" defer prosecution for first-time drug offenders. Act of May 22, 2016, ch. 160, § 10, 2016 Minn. Laws at 585 (codified at Minn. Stat. § 152.18, subd. 1(b)).

The mandatory deferral provision of Minn. stat. § 152.18, subd. 1(b), came into effect on August 1, 2016, and by its terms "applies to crimes committed on or after that date." Act of May 22, 2016, ch. 160, § 10, 2016 Minn. Laws at 585. As appellant's crime was committed on March 26, 2016, the amended version of Minn. Stat. § 152.18 requiring deferral did not apply.

Appellant further argues that the 2016 amendment should nevertheless apply to her case under the amelioration doctrine. This "doctrine applies [statutory amendments] to cases that are not yet final when the change in law takes effect." *State v. Kirby*, 899 N.W.2d 485, 488 (Minn. 2017). In *Kirby*, the supreme court ruled that the doctrine could allow the DSRA to apply to crimes committed before the 2016 amendment, but before their final adjudication, if three conditions are satisfied: "(1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect." *Id.*; *accord State v. Otto*, 899 N.W.2d 501, 504 (Minn. 2017) (reiterating the test set forth in *Kirby* and declining to apply the amelioration doctrine to other sections of the DSRA when the defendant's offense occurred before the DSRA took effect).

Here, appellant committed the offenses in March 2016, and the amended version of Minn. Stat. § 152.18 did not become effective until August 1, 2016. But, as in *Otto*, appellant's argument fails on the first factor of the *Kirby* test because the legislature stated that the amendment applies to crimes committed on or after its effective date. This is a clear expression of legislative intent to nullify the amelioration doctrine. The supreme court also examined this provision in *Otto* and concluded that "[t]he Legislature's intent . . . was crystal clear: to abrogate the amelioration doctrine." 899 N.W.2d 501. We likewise conclude that appellant is not entitled to relief under the 2016 amended Minn. Stat. § 152.18 and that the district court did not err in declining to stay adjudication.

II. The district court did not err in imposing fines for two petty misdemeanors.

Appellant next argues that the district court erred by imposing fines for the petty-misdemeanor offenses because they were committed during the same course of conduct as her fifth-degree controlled-substance offense. We are not persuaded.

Generally, a court may not sentence a defendant to "multiple sentences, even concurrent sentences, for two or more offenses that were committed as part of a single behavioral incident." *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012); *see* Minn. Stat. § 609.035 (2014). When the facts are not in dispute, as here, this court reviews de novo whether criminal acts are part of a single behavioral incident. *Ferguson*, 808 N.W.2d at 590.

Under Minnesota caselaw, Minn. Stat. § 609.035, subd. 1, does not apply to petty misdemeanors because petty misdemeanors do not constitute "offenses." *State v. Krech*, 312 Minn. 461, 464 n.2, 252 N.W.2d 269, 272 n.2 (1977); *see also* Minn. Stat. § 152.027, subd. 4(a) (petty misdemeanor to possess a small amount of marijuana); Minn. Stat. 152.092 (petty misdemeanor to possess drug paraphernalia). The statutory prohibition against multiple sentences expressed in Minn. Stat. § 609.035 does not apply to appellant's petty-misdemeanor offenses.

Affirmed.