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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0616**

State of Minnesota,
Respondent,

vs.

Cody Douglas Thurstin,
Appellant.

**Filed April 15, 2019
Affirmed
Cochran, Judge**

Crow Wing County District Court
File No. 18-CR-17-3281

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Donald F. Ryan, Crow Wing County Attorney, Brainerd, Minnesota; and

Scott A. Hersey, Special Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Erik I. Withall, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Cochran,
Judge.

UNPUBLISHED OPINION

COCHRAN, Judge

Appellant Cody Douglas Thurstin challenges the application of the Minnesota Sentencing Guidelines, arguing that the sentencing enhancements included in the guidelines result in unfair double punishment. We affirm.

FACTS

In 1999, Thurstin was convicted of first-degree criminal sexual conduct (CSC) and sentenced to a probationary stay of imposition for 30 years. In August 2017, the state charged Thurstin with use of a minor in a sexual performance. Thurstin pleaded guilty with no agreement as to sentencing. The parties agreed during the plea hearing that Thurstin had a criminal-history score of five. The district court sentenced Thurstin to a presumptive guidelines sentence based on his criminal-history score of five. This appeal follows.

DECISION

Thurstin argues that the application of the sentencing guidelines to his current conviction results in unfair double punishment for past conduct by factoring his past CSC conviction into his criminal history score more than once in determining his sentence. He urges this court to order resentencing pursuant to this court's authority under Minn. Stat. § 244.11, subd. 2(b) (2016) to determine whether a sentence is "inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." "The interpretation of a

statute and the sentencing guidelines are questions of law that we review de novo.” *State v. Williams*, 771 N.W.2d 514, 520 (Minn. 2009).

The legislature has the “power to define the conduct which constitutes a criminal offense and to fix the punishment for such conduct.” *State v. Olson*, 325 N.W.2d 13, 17-18 (Minn. 1982). In 1978, the legislature established a sentencing guidelines commission to promulgate sentencing guidelines for district courts and prescribed the methods by which the sentencing guidelines are promulgated. 1978 Minn. Laws ch. 723, art. 1, § 9 at 765-67 (codified as amended at Minn. Stat. § 244.09 (2016)). Although the sentencing guidelines are advisory, a district court is required to “follow the procedures of the guidelines when it pronounces sentence in a proceeding to which the guidelines apply by operation of statute.” Minn. Stat. § 244.09, subd. 5(2); *see also State v. Soto*, 855 N.W.2d 303, 308 (Minn. 2014) (“A sentencing court must pronounce a sentence within the applicable range unless there exist identifiable, substantial, and compelling circumstances that distinguish a case and overcome the presumption in favor of the guidelines sentence.” (quotation omitted)).¹

Among its duties, the sentencing guidelines commission determines how an offender’s prior record will be used in determining his criminal-history points, which are used for sentencing. *State v. Zeimet*, 696 N.W.2d 791, 796 (Minn. 2005). Criminal history points include points for a defendant’s previous felony convictions, custody status, prior misdemeanor and gross misdemeanor convictions, and prior juvenile adjudications. Minn. Sent. Guidelines 2.B (Supp. 2017). Any modification in how criminal-history points are

¹ Thurstin did not argue that identifiable, substantial, and compelling circumstances existed to justify a downward durational departure.

determined must be submitted by the commission to the legislature. Minn. Stat. § 244.09, subd. 11. The change then becomes effective August 1 of the year submitted unless the legislature provides otherwise. *Id.*

Under the sentencing guidelines, defendants receive criminal-history points based on their previous felony convictions as well as their custody status. Minn. Sent. Guidelines 2.B.1, .2. The sentencing guidelines include a sex-offender grid that establishes a defendant's presumptive sentence for a variety of sexual offenses based on the severity of the offense and the defendant's criminal history score. Minn. Sent. Guidelines 4.B (Supp. 2017). The more serious a defendant's crime, and the higher his criminal history score, the greater his presumptive sentence. *Id.*

The sentencing guidelines assign higher criminal history scores when a defendant's current conviction and his prior conviction both fall on the sex-offender grid. Minn. Sent. Guidelines 2.B.1.b, 2.B.2.b. Based on the guidelines, Thurstin received three felony points instead of two for his previous CSC conviction because both his current conviction and his previous conviction are on the sex-offender grid. Minn. Sent. Guidelines 2.B.1.b. Similarly, Thurstin received two custody-status points instead of one because both his current conviction and his previous conviction, which qualifies for custody-status points, are on the sex-offender grid. Minn. Sent. Guidelines 2.B.2.b. Thurstin argues that this increase in both his felony points and his custody-status points unfairly double counted the fact that both his current conviction and his prior conviction are on the sex-offender grid, and that only one enhancement should be allowed, which would reduce his criminal-history score to four.

Thurstin concedes that the district court properly applied the guidelines as they are written, but he argues that the method that the sentencing guidelines prescribe for calculating his criminal-history score is unjust. Thurstin argues that we should extend the holdings of several cases stating that once conduct has been factored into an individual's guideline sentence, that same conduct cannot then be used as grounds to depart from the guidelines. *See e.g., State v. Meyers*, 869 N.W.2d 893, 897 (Minn. 2015) (“[F]acts considered by the Legislature in determining the severity of the offense being sentenced cannot serve as a basis for departure.”); *State v. Thompson*, 720 N.W.2d 820, 830 (Minn. 2006) (holding that conduct underlying one conviction cannot be used to support an upward departure in another conviction); *State v. Erickson*, 313 N.W.2d 16, 18 (Minn. 1981) (holding that prior criminal offenses could not be a grounds for departure because they were already factored into criminal-history points under the guidelines). Thurstin asks this court to extend the reasoning of these cases to hold that conduct cannot be counted twice to calculate an individual's presumptive sentence. “[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court.” *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. Dec. 18, 1987).²

Thurstin does not cite to any caselaw supporting his position that the guidelines cannot factor conduct into an individual's criminal-history score more than once in calculating a presumptive sentence, and we decline to extend the existing law. Thurstin's

² We note that Thurstin does not challenge the constitutionality of the provisions of the sentencing guidelines at issue in this appeal.

argument that his sentence is unjust amounts to a policy argument. “The function of the court of appeals is limited to identifying errors and then correcting them.” *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). Because the district court correctly applied the guidelines, there is no error for this court to correct.

Thurstin also does not cite to any caselaw supporting his position that Minn. Stat. § 244.11, subd. 2(b), allows this court to overturn a presumptive guideline sentence without any substantial and compelling mitigating circumstances justifying a downward departure from the guidelines. But even if we have the authority to overturn Thurstin’s presumptive sentence in the absence of circumstances justifying a downward departure, we conclude that his sentence is not “inconsistent with statutory requirements, unreasonable, inappropriate, excessive, or unjustifiably disparate,” and that his sentence is “warranted by the findings of fact issued by the district court.” Minn. Stat. § 244.11, subd. 2(b). Accordingly, the district court did not err in sentencing Thurstin.

Affirmed.