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STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1863

State of Minnesota,
Respondent,

vs.

Jeffrey Darin Bean,
Appellant.

Filed September 23, 2019
Affirmed
Bratvold, Judge

Polk County District Court
File No. 60-CR-18-196

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

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Sharon E. Jacks, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Halbrooks, Judge; and Florey, Judge.

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

BRATVOLD, Judge

In this direct appeal from final judgments of conviction and sentences for three controlled-substance crimes, appellant argues that two of his sentences must be reversed

and remanded for resentencing because the district court erroneously calculated his criminal-history score. Because we conclude that the district court did not abuse its discretion, we affirm.

FACTS

On May 31, 2018, appellant Jeffrey Darin Bean pleaded guilty to two counts of third-degree controlled-substance sale (counts three and four) and one count of fifth-degree possession (count five) in exchange for the state dismissing two other charges and a guidelines sentence. The parties did not discuss Bean's criminal-history score at the plea hearing, with the exception that defense counsel stated that he intended to address the score at the sentencing hearing.[1] The district court accepted Bean's pleas, ordered a presentence investigation (PSI), and scheduled a sentencing hearing.

Probation prepared a PSI report, which calculated Bean's criminal-history score as five. This score was based on six prior convictions; three were Minnesota convictions from November 2006: (1) second-degree assault, dangerous weapon (one and one-half points); (2) second-degree assault, dangerous weapon (one and one-half points); (3) felony fleeing a peace officer in a motor vehicle (one-half point). And two were out-of-state convictions from January 2007: (4) felony fleeing in a motor vehicle (one-half point); (5) felony criminal mischief, equivalent to first-degree criminal damage to property, risk of bodily

[1] The preplea investigation had reported Bean's criminal-history score as five. Bean disputed this score when the preplea investigation was filed, and wrote a letter to the district court disputing his criminal-history score before he pleaded guilty.

harm (one point). Appellant also had a fifth-degree controlled-substance crime, possession (one-half point), from March 2013.[2]

Before the sentencing hearing, Bean disputed the PSI's calculation of his criminal-history score, relying on two memoranda stating that his criminal-history score was three. Bean argued that his criminal-history score for convictions one, two, three, four, and five was "based on multiple convictions, in Minnesota and North Dakota, from one single date, August 24, 2006." The state filed a memorandum that agreed with the PSI.

At the sentencing hearing, Bean testified that, on August 24, 2006, in the early morning hours, he was in Grand Forks, North Dakota, and had three drinks at two different restaurants. Bean left the second restaurant in his van to go to his home in East Grand Forks, Minnesota. Bean was speeding and a police officer attempted to pull him over, but Bean fled. In Grand Forks, law enforcement attempted to stop Bean by pulling in front of his van; Bean hit a total of five squad cars in North Dakota and continued driving. He drove across the bridge from Grand Forks to East Grand Forks while police continued in pursuit. After he entered Minnesota, Bean hit two more squad cars before he stopped and was arrested. The entire chase lasted around four minutes.

In November 2006, Bean was convicted in Minnesota of two counts of second-degree assault, fleeing a peace officer in a motor vehicle, and refusal to test. In January 2007, Bean was convicted in North Dakota of "fleeing in a motor vehicle, five

[2] The total is actually five-and-one-half points, but the guidelines state that if "the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number." *See* Minn. Sent. Guidelines 2.B.1.i. (2017).

counts of reckless endangerment, and one count of criminal mischief (known in Minnesota as criminal damage to property)."

Bean argued that, under the Minnesota Sentencing Guidelines, he was "supposed to accrue the points for the two most serious offenses" from August 24, 2006. Bean asserted that he should receive one and one-half points "for each of the [s]econd [d]egree [a]ssault charges" (i.e., convictions one and two), because these offenses were the most serious, and that, with no points for convictions three, four, and five, his criminal-history score should be three and one-half, "which would round down to 3." Bean asserted that convictions three, four, and five arose "out of the same single course of conduct," because they were motivated by "a desire to obtain a single criminal objective . . . to flee from law enforcement."

The state argued that the PSI underreported Bean's criminal-history score, but accepted the calculation for sentencing in this case. The state asserted that, under Minn. Stat. § 609.035 (2016), a fleeing offense "that spans multiple counties, involves damage or assaults against different officers, [is] deemed to be separate behavioral incidents." Thus, the state contended that Bean's criminal-history score was five.

The district court ruled at the hearing that the state had proven the August 24, 2006, offenses did not arise from a single course of conduct. The court reasoned that Bean "could have stopped after" each particular assault but chose to continue to flee; there were seven separate victims from different collisions; the chase took place in two states and over a two- to three-mile distance; and it "view[ed] [Bean's] conduct no different than if he had stopped to fire a gun at five different officers in the City of Grand Forks." Thus, the district

court concluded that Bean's criminal-history score was five. The district court sentenced Bean to the presumptive 51-month sentence on count three (third-degree sale), a concurrent 57-month presumptive sentence on count four (third-degree sale), and a concurrent 21 months on count five (fifth-degree possession). Bean appeals.

D E C I S I O N

On appeal, Bean argues that the district court erred in computing his criminal-history score. More specifically, Bean argues that the district court erred by including points from "five convictions committed during the same course of conduct . . . instead of including points for only the two most serious of those convictions."[3] The state contends that the district court did not abuse its discretion because Bean's prior "convictions did not arise from the same behavioral incident," and requests that this court affirm Bean's sentence.

We will not reverse a district court's criminal-history-score calculation absent an abuse of discretion. *See State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). Whether multiple offenses arose from a single course of conduct involves factual determinations that this court reviews for clear error. *State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). But when the facts are not disputed, whether multiple offenses arose from a single course of conduct presents a question of law, which is reviewed de novo. *See State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App.

[3] In his brief to this court, Bean argues that his sentences for the two third-degree controlled-substance crimes should have been 39 months and 45 months, and states that his 21-month sentence for the fifth-degree controlled-substance crime is correct.

2001). "The State bears the burden of proof at sentencing to show that a prior conviction qualifies for inclusion within the criminal-history score." *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018).

The Minnesota Sentencing Guidelines govern the determination of a presumptive sentence. *See Rushton v. State*, 889 N.W.2d 561, 564-65 (Minn. 2017). Under the Minnesota Sentencing Guidelines, presumptive sentences are determined by a grid with two axes, one for the severity of the current offense and a second axis for the defendant's criminal-history score. *See* Minn. Sent. Guidelines 2.C.1 (2017). Generally, calculating a defendant's criminal-history score involves determining the severity level of each prior felony and adding up the points. Minn. Sent. Guidelines at 2.B.1.a (2017). There is an exception to this rule where "multiple sentences" were imposed for crimes committed during a single course of conduct. *Id*. at 2.B.1.d (2017). The exception states: "When multiple offenses arising from a single course of conduct involving multiple victims were sentenced, include in criminal history only the weights from the two offenses at the highest severity levels." *Id.* at 2.B.1.d(2), *see also State v. McAdoo*, 330 N.W.2d 104, 107 (Minn. 1983). Thus, to decide this appeal, we must consider whether the district court abused its discretion in determining that Bean's convictions from his conduct on August 24, 2006, did not arise from a single course of conduct.

Based on our review, the state's brief misconstrues the issue on appeal. The state argues that Minn. Stat. § 609.035, subd. 1, which prohibits multiple *sentences* for conduct arising from a single-behavioral incident, does not apply to this case because it does not apply to offenses committed in another state. But Bean does not argue that he could

not be *sentenced* for the North Dakota offenses. Instead, Bean argues that, because these convictions arose from a single course of conduct, the Minnesota Sentencing Guidelines, not section 609.035, provide that the convictions cannot be included in his criminal-history-score calculation. As Bean correctly states, the guidelines provide that convictions from other states must be considered in calculating a defendant's criminal-history score. Minn. Sent. Guidelines cmt. 2.B.502 (2017) ("The Commission concluded that convictions from other jurisdictions must, in fairness, be considered in the computation of an offender's criminal history score."). At issue in this appeal is whether five of Bean's prior convictions may be included in his criminal-history score, not whether he was properly sentenced for those offenses. Thus, we consider whether Bean's prior convictions arose from a single course of conduct on August 24, 2006, under the Minnesota Sentencing Guidelines.

"Whether multiple offenses arose out of a single behavior incident depends on the facts and circumstances of the particular case." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995).[4] In considering whether multiple offenses constitute a single course of conduct, courts look at factors such as "time, place, and whether the offenses were motivated by a desire to obtain a single criminal objective." *State v. Gould*, 562 N.W.2d 518, 521 (Minn. 1997). This "is not a mechanical test" but rather an analysis of all the relevant facts and circumstances. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997).

[4] Nonetheless, we rely on caselaw analyzing Minn. Stat. § 609.035's same-behavioral-incident rule in our consideration of this issue. According to the Minnesota Sentencing Guidelines, "[l]egal authorities use the terms 'single course of conduct' and 'single behavioral incident' interchangeably." Minn. Sent. Guidelines cmt. 2.B.116 (2017).

The state must prove by a preponderance of the evidence that the offenses did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

First, five of Bean's felony offenses took place on August 24, 2006, in the "early morning hours." Based on Bean's testimony, the entire incident lasted "[p]robably four minutes." Second, three offenses occurred in Minnesota (convictions one, two, and three) and two offenses occurred in North Dakota (convictions four and five). The August 24 offenses began in Grand Forks, North Dakota and ended in East Grand Forks, Minnesota. Bean's conduct occurred over a two- to three-mile distance. In concluding that the offenses took place in different places, the district court relied on the fact that Bean crossed a state line during the chase. *See generally State v. Beard*, 380 N.W.2d 537, 543 (Minn. App. 1986) (concluding two convictions arose from separate behavioral incidents, in part, because one "arrest occurred in Alabama and the other occurred in Georgia"), *review denied* (Minn. Mar. 3, 1986).[5] And, as this court has held before, merely because the "crimes were committed within a short time span and within the same area does not mean

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[5] Bean argues that "the district court was relying on an Eighth Circuit opinion cited by the state," *Levering v. United States*, 890 F.3d 738 (8th Cir. 2018), when it found relevant that his offenses occurred in two separate states. In *Levering*, the Eighth Circuit concluded that a defendant committed two violent felonies "on occasions different from one another," to qualify as an armed career criminal under federal law, when he committed assaults in "two different counties at different times against different victims." 890 F.3d at 741. We agree with Bean that *Levering* is not relevant or persuasive here because it interprets a federal sentencing statute, not the Minnesota Sentencing Guidelines. *See id.*; *Jendro v. Honeywell, Inc.*, 392 N.W.2d 688, 691 n.1 (Minn. App. 1986) (stating that while statutory interpretation of federal law by federal courts "is entitled to due respect," this court is bound only by the statutory interpretations of the Minnesota Supreme Court and United States Supreme Court), *review denied* (Minn. Nov. 19, 1986).

the single behavioral incident prohibition is violated." *State v. Thomas*, 352 N.W.2d 526, 529 (Minn. App. 1984), *review denied* (Minn. Oct. 11, 1984).

Third, and most importantly, we consider whether Bean's offenses were motivated by a desire to obtain "a single criminal objective." *Bookwalter*, 541 N.W.2d at 294. Bean argues that we should conclude that all five offenses were committed with the same objective, namely, to avoid apprehension. But the district court found that Bean was not motivated by a single criminal objective because he "could have stopped after" hitting each squad car, and instead made the decision to continue driving. The record supports the district court's findings. In particular, during cross-examination at the sentencing hearing, Bean acknowledged that, at least five times during the pursuit, he "could have stopped" but chose not to. Bean also acknowledged that the circumstances changed after each collision. At the beginning of the chase, only one squad car pursued Bean, but by the time he "got over into East Grand Forks" he was followed by several officers in many squad cars from two different states. This testimony supports the district court's conclusion that Bean was not motivated by a single criminal objective.

Still, Bean cites caselaw that has held that, where a defendant commits a crime and then flees the scene to avoid apprehension, the flee offense arises from a single course of conduct, which includes the original offense. *See State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) ("In a series of decisions—the avoidance-of-apprehension cases—we have held that multiple sentences may not be used for two offenses if the defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense."); *see also State v. Boley*, 299 N.W.2d 924, 925-26 (Minn. 1980). But we

conclude that Bean's case is distinguishable from the "avoidance-of-apprehension cases" because, in those cases, the original offense and the fleeing offense were committed "contemporaneously," and the fleeing offense was committed in "order to avoid apprehension for the first offense." *Gibson*, 478 N.W.2d at 497. Here, Bean's offenses occurred within a short time frame on August 24, 2006, but were committed sequentially, not "contemporaneously." In addition, in *Gibson*, the defendant committed the fleeing offense in order to keep his identity hidden from law enforcement. *See id.* Here, however, law enforcement was already in pursuit of Bean and saw him commit the original speeding offense.

The circumstances in Bean's August 24, 2006 offenses are more similar to those in cases holding that an appellant's "conduct is divisible" because the appellant could have committed each offense without committing the others. *See Marchbanks*, 632 N.W.2d at 732 (concluding that the appellant's conduct was divisible because he "could unlawfully possess a firearm without possessing any crack cocaine, and conversely, he could possess crack cocaine without possessing a firearm"); *see also State v. Butcher*, 563 N.W.2d 776, 784 (Minn. App. 1997) (holding offense of possessing uncased firearm was separate from illegal taking of deer and driving after cancellation because, although committed in same time frame, the offenses did not share "an indivisible state of mind"), *review denied* (Minn. Aug. 5, 1997); *Thomas*, 352 N.W.2d at 529 (holding assault, although occurring within the same time frame as a cocaine sale, did not "further the completion of the sale" and "separate criminal objectives were intended").

While this is a close question and the record may have supported a different conclusion, we are not convinced that the district court abused its discretion in concluding that Bean's offenses from August 24, 2006, did not occur in a single course of conduct. Therefore, we affirm the district court's calculation of Bean's criminal-history score.

Affirmed.