STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0265
A19-0270

State of Minnesota,
Appellant (A19-0270),
Respondent (A19-0265),

vs.

Eric Christopher Thorsen,
Appellant (A19-0265),
Respondent (A19-0270).

Filed February 10, 2020
Reversed and remanded
Larkin, Judge

Ramsey County District Court
File No. 62-CR-18-2469

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

John Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney, St. Paul, Minnesota (for appellant/respondent State of Minnesota)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for respondent/appellant Eric Thorsen)

Considered and decided by Slieter, Presiding Judge; Larkin, Judge; and Reyes, Judge.

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

LARKIN, Judge

This consolidated appeal follows appellant's conviction and sentence for felony identity theft. The issues concern the impact of appellant's Illinois conviction for identity theft and related incarceration on his Minnesota sentence. In appeal A19-0270, the state challenges the district court's award of jail credit. In appeal A19-0265, appellant challenges the district court's calculation of his criminal-history score. Because the district court erroneously awarded appellant 279 days of custody credit for time served on his Illinois conviction, and because the record does not satisfy us that the district court correctly assigned appellant a felony point for appellant's Illinois conviction, we reverse and remand for resentencing.

FACTS

In April 2018, the State of Minnesota charged appellant Eric Christopher Thorsen with two counts of felony identity theft under Minn. Stat. § 609.527, subds. 2-3(5) (2016). The state alleged that Thorsen possessed "cloned" transaction cards and that he used those cards to make purchases with funds from accounts without the account holders' knowledge. The state alleged that between August 9 and 30, 2016, Thorsen possessed, in Minnesota, the identities of at least 34 people. The state further alleged that between September 22, 2016 and February 14, 2017, Thorsen possessed, in Minnesota, the identities of at least 16 additional people.

Thorsen pleaded guilty to both counts pursuant to a plea agreement in which the state agreed to dismiss identity-theft charges in Winona and Hennepin Counties and to

recommend a prison sentence between 63 and 82 months. In exchange, Thorsen agreed to pay restitution to all of the victims. The district court accepted Thorsen's plea, adjudicated him guilty of the two felony identity-theft counts, and ordered a presentence investigation (PSI).

The PSI recommended 263 days of custody credit. Thorsen requested additional credit, arguing that he was arrested in Illinois on March 28, 2017, for "possession of the IDs and credit cards previously used in connection" with one of the identity-theft counts in this case, that the State of Illinois charged him with identity theft, that he pleaded guilty to that offense, and that he was in custody in Illinois from March 2017 to January 2018. Thorsen further argued that because "[t]he Illinois case and all time spent in custody there, is part and parcel of [this] case," he should receive credit for his incarceration in Illinois.

The PSI investigator filed an addendum to the PSI, which stated that Thorsen was not entitled to custody credit for his Illinois incarceration because he was incarcerated based on the Illinois offense. But the PSI addendum noted that Thorsen was entitled to some additional jail credit, beginning on the day that he was released from custody in Illinois.

At sentencing, Thorsen requested 279 additional days of Illinois custody credit, arguing that the conduct underlying this case and the Illinois conviction were "part of a single behavioral incident." Thorsen also argued that he should receive one-half of a felony point in the calculation of his criminal-history score for his 2017 Illinois identity-theft conviction because there was only one victim in that case.

The district court granted Thorsen's request for 279 additional days of custody credit, reasoning that "the 279 days were served on a matter that was not unrelated to [this] matter" and that the Illinois conduct and the underlying conduct in this case were part of a "single behavioral incident." The district court imposed one felony point for Thorsen's 2017 Illinois conviction when calculating his criminal-history score, entered judgments of conviction for both felony identity-theft counts, and sentenced Thorsen to serve concurrent 78-month prison terms.

The state and Thorsen appealed. The state challenges the district court's award of Illinois custody credit. Thorsen challenges the district court's assignment of a felony point for his 2017 Illinois conviction. This court consolidated the appeals.[1]

D E C I S I O N

I.

We begin with the state's appeal. The state contends that "[u]nder well-established Minnesota precedent, the district court erred in awarding 279 days of custody credit for time [Thorsen] spent incarcerated in Illinois on an Illinois conviction."

A criminal defendant is entitled to credit for time spent in custody "in connection with the offense or behavioral incident being sentenced." Minn. R. Crim. P. 27.03, subd. 4(B). The defendant has the burden of establishing that he is entitled to such credit. *State*

[1] Because the parties did not request oral argument, the arguments are limited to their briefs. *See* Minn. R. Civ. App. P. 133.03 (providing that "[i]f a party desires oral argument, a request must be included in the statement of the case"); *see also* Minn. R. Civ. App. P. 134.01(a) (stating that oral argument will be allowed unless "no request for oral argument has been made by either party in the statement of the case required by Rule 133.03").

v. Clarkin, 817 N.W.2d 678, 687 (Minn. 2012). Custody credit "must be deducted from the sentence and term of imprisonment." Minn. R. Crim. P. 27.03, subd. 4(B). The decision to award custody credit is not discretionary with the district court. *State v. Roy*, 928 N.W.2d 341, 344 (Minn. 2019). "The district court's decision to award custody credit is a mixed question of fact and law; the court must determine the circumstances of the custody the defendant seeks credit for, and then apply the rules to those circumstances." *Id.* (quotation omitted). Appellate courts review the factual findings underlying custody-credit determinations for clear error, but review questions of law, such as the interpretation of the rules of criminal procedure, de novo. *Id.*

In *State v. Willis*, the supreme court held:

> A defendant charged with a crime in Minnesota and held in custody in another state at request of Minnesota authorities is not entitled to credit against a Minnesota sentence for time in custody in the other state *unless the Minnesota charge was the sole reason for the detention by the other state*.

376 N.W.2d 427, 427 (Minn. 1985) (emphasis added). The supreme court recently reaffirmed the *Willis* rule in *State v. Roy*, holding that "a defendant can only receive credit for time spent in the custody of another jurisdiction if the time was served solely in connection with the Minnesota offense." 928 N.W.2d at 345.

The state argues that because the "district court did not find that . . . Thorsen had met his burden of establishing that he was held in Illinois custody solely in connection with a Minnesota offense," there was no basis to award Thorsen 279 days of custody credit for that time. The state relies on *Willis* as support. 376 N.W.2d at 428-29.

Thorsen acknowledges the *Willis* rule, but argues that "when two jurisdictions both favor concurrent sentencing, a defendant's multi-jurisdictional sentences should be concurrent, and therefore a defendant should necessarily receive credit against his Minnesota sentence for time spent in custody of the foreign jurisdiction." Thorsen argues that "[u]nder this reasoning, [he] should be credited for the time he spent in custody in Illinois for his directly related and concurrent identity-theft sentence."

Thorsen's argument is untenable in light of *Roy*. In that case, the supreme court explained,

> When determining whether to award custody credit, we distinguish between intrajurisdictional custody (custody within Minnesota) and interjurisdictional custody (custody outside of Minnesota). In evaluating credit for intrajurisdictional custody, we seek to avoid four potential concerns: de facto conversion of a concurrent sentence into a consecutive sentence; indigent persons serving effectively longer sentences as a result of their inability to post bail; irrelevant factors affecting the length of incarceration; and manipulation of charging dates by the prosecutor so as to increase the length of incarceration.
>
> We apply a different test for determining interjurisdictional custody credit. *For a defendant to receive credit on a Minnesota sentence for time spent in another jurisdiction's custody, the defendant's Minnesota offense must be the sole reason for the custody*.

928 N.W.2d at 345 (emphasis added) (quotations omitted).

The defendant in *Roy* argued that the supreme court has "awarded credit against a Minnesota sentence for time that a defendant spent in custody in connection with another jurisdiction's charges if both jurisdictions 'prefer concurrent sentencing and neither says a sentence is to be run consecutive.'" *Id.* at 346. The defendant in *Roy* relied on *State v.*

Wakefield, 263 N.W.2d 76, 77 (Minn. 1978), as Thorsen does here. *Id.* The supreme court in *Roy* said that it "[did] not find *Wakefield* persuasive because *Wakefield* is not a custody credit case" and instead "involved the related, but separate issue, of concurrent versus consecutive sentencing." *Id.* Thorsen's reliance on *Wakefield* is therefore unavailing.

Thorsen's reliance on *State v. Jennings* is similarly unavailing. 448 N.W.2d 374, 375 (Minn. App. 1989). In *Jennings*, this court addressed whether "a defendant serving a felony sentence imposed by another state for an offense committed there [has] the right to execution of a sentence previously imposed by a Minnesota court." *Id.* at 374. *Jennings* did not discuss the issue here, that is, whether a defendant should receive credit against his Minnesota sentence for time spent in custody in a foreign jurisdiction. *See id.*

In a pro se supplemental brief, Thorsen argues that the district court did not err in awarding custody credit because his Illinois incarceration "was 'in connection' with the Minnesota offenses" and "part of a single behavioral incident." That argument is unavailing because it is inconsistent with the relevant test. *See Roy*, 928 N.W.2d at 345 (reaffirming the "solely in connection" standard).

In sum, *Roy* is dispositive. "Under the test for determining interjurisdictional custody credit, a defendant can only receive credit for time spent in the custody of another jurisdiction if the time was served *solely in connection* with the Minnesota offense." *Id.* (emphasis added). It is undisputed that Thorsen's Illinois incarceration was based on his Illinois identity-theft charges and conviction, and not solely on his Minnesota offenses. Because Thorsen was not incarcerated in Illinois solely in connection with his Minnesota offenses, the district court erred by awarding him 279 days of custody credit for that time.

II.

We turn to Thorsen's appeal. Thorsen contends that the district court "abused its discretion when it assigned one felony point for [his] Illinois identity-theft conviction because the state failed to prove it was the equivalent of a severity level three offense." Before we address Thorsen's contention, we consider the state's response that "Thorsen's criminal-history score is irrelevant because, as part of his plea agreement, he agreed to a sentencing range of 63 to 82 months, was sentenced within the range, and has not sought to withdraw his plea."

"The presumptive sentence for a felony conviction is found in the appropriate cell on the applicable [sentencing guidelines] Grid located at the intersection of the criminal history score (horizontal axis) and the severity level (vertical axis)." Minn. Sent. Guidelines 2.C.1 (2016). "The sentences provided in the Grids are presumed to be appropriate for the crimes to which they apply." Minn. Sent. Guidelines 2.D.1 (2016). "The court must pronounce a sentence of the applicable disposition and within the applicable range unless there exist identifiable, substantial, and compelling circumstances to support a departure." *Id.* "[N]egotiated plea agreements that include a sentencing departure are justified under the guidelines in cases where substantial and compelling circumstances exist," but "plea agreements cannot form the sole basis of a sentencing departure." *State v. Misquadace*, 644 N.W.2d 65, 71 (Minn. 2002).

Sentencing pursuant to the sentencing guidelines "is a procedure based on state public policy to maintain uniformity, proportionality, rationality, and predictability in sentencing." Minn. Stat. § 244.09, subd. 5 (2016). It is the "responsibility of probation

officers and district courts to ensure the accuracy of every defendant's criminal history score" to achieve the state's policy of uniform sentencing under the sentencing guidelines. *State v. Maurstad*, 733 N.W.2d 141, 151 (Minn. 2007). "[S]entences must be based on correct criminal history scores, as these scores are the mechanism district courts use to ensure that defendants with similar criminal histories receive approximately equal sanctions for the same offense." *Id.* at 147. A defendant can neither waive nor forfeit appellate review of his criminal-history score "because a sentence based on an incorrect criminal history score is an illegal sentence." *Id.*; *see also* Minn. R. Crim. P. 27.03, subd. 9 ("The court may at any time correct a sentence not authorized by law.").

"[A] defendant's right to appeal an illegal sentence cannot be waived." *State v. Maley*, 714 N.W.2d 708, 714 (Minn. App. 2006). "This absolute right to appeal an illegal sentence further indicates that the state's burden to properly substantiate prior convictions does not change based on the perception—erroneous or not—that a defendant will not challenge his criminal-history score." *Id.*

In sum, the district court was obligated to sentence Thorsen pursuant to the sentencing guidelines, using his correct criminal-history score. Thorsen's agreement to plead guilty in exchange for the state's recommendation of a sentence between 63 and 82 months did not relieve the district court of that obligation. Nor did it relieve the state of its burden to properly substantiate Thorsen's prior Illinois conviction. *See id.* Thus, the correct calculation of Thorsen's criminal-history score was a necessary part of the district court's sentencing decision, and Thorsen's challenge to his criminal-history score is properly before us in this appeal.

When computing an offender's criminal-history score,

> the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given for a felony level offense, no matter what period of probation is pronounced, before the current sentencing.

Minn. Sent. Guidelines cmt. 2.B.101 (2016).

Convictions from other jurisdictions must be considered in calculating an offender's criminal-history score. Minn. Sent. Guidelines 2.B.5.a (2016); *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001). A non-Minnesota conviction "may be counted as a felony [in a criminal-history score] only if it would **both** be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b (2016). "[T]he sentencing court should compare the definition of the foreign offense with the definitions of comparable Minnesota offenses but also may consider the nature of the foreign offense and the sentence received by the offender for the offense." *Hill v. State*, 483 N.W.2d 57, 58 (Minn. 1992). The sentencing court is not limited to looking at the definition of an out-of-state conviction and determining if Minnesota has an offense with the same basic definition because it would "be unfair to those defendants receiving criminal history points for prior Minnesota convictions if their counterparts with prior foreign or out-of-state convictions of similar offenses for the same basic conduct did not receive criminal history points for those offenses." *Id.* at 61.

The state bears the burden to "show that a prior conviction qualifies for inclusion within the criminal-history score" and that the criminal-history score is calculated

correctly. *Williams v. State*, 910 N.W.2d 736, 740 (Minn. 2018). Yet, the state did not present any evidence regarding Thorsen's Illinois conviction. Nor did the state address whether or how it should be included in Thorsen's criminal-history score. Thorsen, however, argued in district court that his Illinois conviction should be counted as a half point, and not a full point, because there was only one victim. Thorsen submitted exhibits in support of his position, including his Illinois warrant of commitment, which indicated that he was convicted of one count of identity theft against one victim.

The district court assigned Thorsen a full felony point for his 2017 Illinois conviction, but it did not describe its reason for doing so. Instead, the district court simply stated, "There was a question about whether . . . the latest 2017 Illinois conviction should be a point, or half a point, I conclude that's a point." This court reviews the determination of Thorsen's criminal-history score for an abuse of discretion. *See State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Thorsen was convicted of identity theft under 720 Ill. Comp. Stat. 5/16-30(a)(4) (2016), which provides that when a person commits identity theft when the person knowingly

> uses, obtains, records, possesses, sells, transfers, purchases, or manufactures any personal identification information or personal identification document of another knowing that such personal identification information or personal identification documents were stolen or produced without lawful authority[.]

Under the analogous Minnesota identity-theft statute, Minn. Stat. § 609.527, subd. 2 (2016), "[a] person who transfers, possesses, or uses an identity that is not the person's

own, with the intent to commit, aid, or abet any unlawful activity is guilty of identity theft and may be punished as provided in subdivision 3."

Subdivision 3 of Minnesota's identity-theft statute, in turn, provides varying penalties depending on whether certain enhancement requirements are satisfied. Minn. Stat. § 609.527, subd. 3 (2016). "[I]f the offense involves a single direct victim and the total, combined loss to the direct victim and any indirect victims is $250 or less," the person may be sentenced "to imprisonment for not more than 90 days." *Id.*, subd. 3(1); Minn. Stat. § 609.52, subd. 3(5) (2016). "[I]f the offense involves a single direct victim and the total, combined loss to the direct victim and any indirect victims is more than $250 but not more than $500," the person may be sentenced to "imprisonment for not more than one year." Minn. Stat. § 609.527, subd. 3(2); Minn. Stat. § 609.52, subd. 3(4) (2016).

"[I]f the offense involves two or three direct victims or the total, combined loss to the direct and indirect victims is more than $500 but not more than $2,500," the person may be sentenced to "imprisonment for not more than five years." Minn. Stat. § 609.527, subd. 3(3); Minn. Stat. § 609.52, subd. 3(3) (2016). "[I]f the offense involves more than three but not more than seven direct victims, or if the total combined loss to the direct and indirect victims is more than $2,500," the person may be sentenced to "imprisonment for not more than ten years." Minn. Stat. § 609.527, subd. 3(4); Minn. Stat. § 609.52, subd. 3(2) (2016). Lastly, "if the offense involves eight or more direct victims; or if the total, combined loss to the direct and indirect victims is more than $35,000; or if the offense is related to possession or distribution of pornographic work in violation of section 617.246

or 617.247," the person may be sentenced "to imprisonment for not more than 20 years." Minn. Stat. § 609.527, subd. 3(5); Minn. Stat. § 609.52, subd. 3(1) (2016).

Minn. Stat. § 609.02 (2016) defines criminal-offense levels based on the sentences that may be imposed. In Minnesota, a felony is defined as "a crime for which a sentence of imprisonment for more than one year may be imposed." Minn. Stat. § 609.02, subd. 2. Thus, an identity-theft offense is not defined as a felony in Minnesota unless a sentence of imprisonment for more than one year may be imposed. Such a sentence may be imposed only if there are two or more direct victims, if the combined loss to direct and indirect victims is more than $500, or if "the offense is related to possession or distribution of pornographic work in violation of section 617.246 or 617.247." *See* Minn. Stat. § 609.527, subd. 3(3)-(5); Minn. Stat. § 609.52, subd. 3(1)-(3).

Thorsen argues that because his "Illinois offense involved one victim, but he received a felony-level sentence of two years, it appears his Illinois offense is most comparable to [Minn. Stat. § 609.527, subd. 3(3)] and worth half a felony point against his criminal history score." But an out-of-state conviction may be counted as a felony in a criminal-history score only if the conviction would be defined as a felony in Minnesota *and* the offender received a sentence that would be a felony-level sentence in Minnesota. Minn. Sent. Guidelines 2.B.5.b (2016) (emphasis added). Both parts of the test must be satisfied. *Id.*

Although the record indicates that Thorsen's Illinois conviction involved only one victim, the record does not indicate whether the combined loss to that victim was more than $500. Again, a single-victim identity-theft offense is not a felony in Minnesota unless

the loss to the victim was more than $500. *See* Minn. Stat. § 609.527, subd. 3(3). Thus, the current record does not establish that Thorsen's Illinois conviction would be defined as a felony in Minnesota.

Indeed, the state does not argue that the district court correctly counted Thorsen's Illinois conviction in his criminal-history score. Instead, it argues, "There is no indication that the 63-to-82 month range was contingent on a determination of [Thorsen's] criminal-history score, or that [the district court's] decision on what sentence to impose within that range had to take into account [Thorsen's] criminal-history score." As explained above, that position is untenable. However, the state also suggests that "[t]his court could remand for a determination of [Thorsen's] criminal-history score and for [the district court] to then decide whether [it] still considers 78 months the appropriate sentence within the range."

On this record, we are not satisfied that the district court correctly determined Thorsen's criminal-history score. We therefore reverse Thorsen's sentence and remand for the district court to recalculate his criminal-history score, as well as his custody credit, consistent with this opinion and to sentence him in accordance.

Reversed and remanded.