STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1545

State of Minnesota,
Respondent,

vs.

Joseph Donald Peacock,
Appellant.

Filed July 27, 2020
Reversed and remanded
Halbrooks, Judge[*]

Pine County District Court
File Nos. 58-CR-17-1047, 58-CR-18-155

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

Reese Frederickson, Pine County Attorney, Lauren R. Dwyer, Assistant County Attorney, Pine City, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public Defender, St. Paul, Minnesota (for appellant)

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

[*] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

HALBROOKS, Judge

In this appeal from final judgment of convictions of first- and second-degree controlled-substance crimes, appellant challenges his sentences, arguing that his criminal-history score should not include a point for his Wisconsin felony convictions of bail jumping because the state did not prove that those offenses are felonies under Minnesota law. We reverse and remand for resentencing.

FACTS

At a consolidated plea hearing, appellant Joseph Donald Peacock pleaded guilty to first-degree drug possession in violation of Minn. Stat. § 152.021, subd.2 (a)(1) (2016), and second-degree drug possession in violation of Minn. Stat. § 152.022, subd.2 (a)(2)(1) (2016).

A presentence investigation established that Peacock had a criminal-history score of three points: one point from a gross misdemeanor battery conviction, one point from a 2019 felony drug possession conviction, and two half-points from two 2009 bail-jumping convictions in Wisconsin. Peacock did not object to his criminal-history score stemming from these convictions at sentencing. Peacock was sentenced to a 95 month guidelines sentence on the first-degree possession conviction and a 98 month guidelines sentence on the second-degree possession conviction, to be served concurrently. This appeal follows.

D E C I S I O N

Appellate courts may direct that a defendant's sentence be corrected based on an incorrect criminal-history score even if a defendant failed to raise the issue at sentencing. *State v. Scovel*, 916 N.W.2d 550, 553 n.5 (Minn. 2018). We review the district court's determination of an appellant's criminal-history score for an abuse of discretion. *State v. Edwards*, 900 N.W.2d 722, 727(Minn. App. 2017), *aff'd mem.*, 909 N.W.2d 594 (Minn. 2018).

"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). In order to include an out-of-state conviction, the state must show that (1) the prior conviction is valid; (2) the defendant is the person involved; and (3) the crime would constitute a felony in Minnesota. *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983). "The court must make the final determination as to whether and how a prior non-Minnesota conviction should be counted in the criminal[-]history score." Minn. Sent. Guidelines 2.B.5.a (2018). An out-of-state offense may only be counted as a felony "if it would both be defined as a felony in Minnesota, and the offender received . . . a felony-level sentence." Minn. Sent. Guidelines 2.B.5.b (2018).

Peacock does not dispute that his prior convictions are valid. Nor does he dispute that he was the person involved. He argues only that the district court erred by assigning him a felony criminal-history point because his two bail-jumping offenses under Wis. Stat. § 946.49, subd. 1(b) (2008) would not have been felonies if committed in Minnesota and because the state did not prove that they would have constituted felonies in Minnesota.

The state contends that "the Wisconsin bail-jumping convictions are felonies that correspond with a Minnesota felony offense." Specifically, the state argues that Wis. Stat. § 946.49, subd. 1(b) (2018) is equivalent to Minn. Stat. § 609.49, subd. 1(a) (2018). We disagree.

Wisconsin's bail-jumping statute provides that whoever is released from custody in a felony offense and intentionally fails to comply with the terms of his or her bond is guilty of a Class H felony. Wis. Stat. § 946.49, subd. 1(b).

Minnesota's failure-to-appear statute provides: "[a] person charged with or convicted of a felony and released from custody, with or without bail or recognizance, who intentionally fails to appear when required after having been notified that a failure to appear for a court appearance is a criminal offense . . . is guilty of a crime for failure to appear." Minn. Stat. 609.49, subd. 1(a).

The state claims that these statutes "both relate to pretrial release requirements and criminalize failure to follow those requirements." It is true that both statutes address certain conditions, violations of which can result in a felony when a defendant is released on bail or bond. However, Wisconsin's statute is broad and criminalizes any instance where a defendant "intentionally fails to comply with the terms of his or her bond." Wis. Stat. § 946.49, subd. 1. Minnesota's statute is limited to consequences for intentionally failing, after notification, to appear at court.

Peacock received his two Wisconsin bail-jumping convictions for (1) drinking in violation of the terms of his bond and (2) committing another crime while out on bond. Neither of these convictions stems from a failure to appear in court.

There is nothing in the record to indicate that bail jumping would be a crime, nonetheless a felony, in Minnesota.[1] And we do not have an equivalent statute in Minnesota that criminalizes the failure to comply with the terms of a bond. The sentencing worksheet does not explain the criminal-history points for the bail-jumping offense and simply lists each as a half-point. At the sentencing hearing, the state did not address the criminal-history score.

The state has not met its burden of establishing that Peacock's two bail-jumping convictions under Wis. Stat. § 946.49, subd. 1(b) qualify as felonies in Minnesota for the purposes of inclusion in his criminal-history score. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn.1983). We therefore conclude that the district court abused its discretion by including a felony criminal-history point for the Wisconsin bail-jumping violations. We reverse and remand for resentencing based on a criminal-history score that does not include the felony point for appellant's Wisconsin convictions of bail jumping.

Reversed and remanded.

[1] Minnesota Appellate courts have not previously analyzed Wisconsin's bail-jumping statute. However, while not identical, the supreme court has recently discussed criminal sanctions for violations of probation. It held that violating a term of probation is not "a court mandate, the violation of which subjects the probationer to a new criminal contempt charge." *See State v. Jones*, 869 N.W.2d 24, 29 (Minn. 2015) (holding willful violation of a term of probation does not itself constitute a violation of a "mandate of a court" under Minn. Stat. § 588.20, subd. 2(4) (2014)).