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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1974**

State of Minnesota,
Respondent,

vs.

Aaron Frances Phillips-Marrow,
Appellant.

**Filed November 23, 2020
Reversed and remanded
Larkin, Judge**

St. Louis County District Court
File No. 69DU-CR-19-372

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

Mark S. Rubin, St. Louis County Attorney, Jonathan D. Holets, Assistant County Attorney,
Duluth, Minnesota (for respondent)

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

Considered and decided by Johnson, Presiding Judge; Larkin, Judge; and Bjorkman,
Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges his sentence for felony domestic assault, arguing that the district court erroneously included two prior convictions in his criminal-history score. We reverse and remand for resentencing.

DECISION

The district court sentenced appellant Aaron Phillips-Marrow to serve concurrent prison terms of 30 and 33 months for two counts of felony domestic assault. The district court used a criminal-history score that included one and one-half criminal-history points for his 2015 convictions of fourth-degree assault of a peace officer and attempting to disarm a peace officer. Phillips-Marrow did not object to the district court's calculation of his criminal-history score or the court's inclusion of criminal-history points for his 2015 convictions. Phillips-Marrow now challenges his sentence, contending that the district court erred by including criminal-history points for both of his 2015 convictions in his criminal-history score.

This court reviews a district court's criminal-history score determination for an abuse of discretion. *State v. Strobel*, 921 N.W.2d 563, 573 (Minn. App. 2018), *aff'd*, 932 N.W.2d 303 (Minn. 2019); *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002) (“[W]e will not reverse the district court's determination of a defendant's criminal history score absent an abuse of discretion.”), *review denied* (Minn. Aug. 20, 2002).

In a felony case, a defendant's presumptive sentence is determined by the severity of the present offense and the defendant's criminal-history score. Minn. Sent. Guidelines

2 (2018). A criminal-history score is the “sum of points” that are assigned for, among other things, prior felony convictions and prior juvenile adjudications. Minn. Sent. Guidelines 2.B. The number of criminal-history points assigned to a prior felony conviction depends on the severity level of the prior offense. Minn. Sent. Guidelines 2.B.1. As a general rule, “the offender is assigned a particular weight for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing.” Minn. Sent. Guidelines cmt. 2.B.101. But if an offender has “multiple offenses occurring in a single course of conduct in which state law prohibits the offender from being sentenced on more than one offense, only the offense at the highest severity level should be considered.” Minn. Sent. Guidelines cmt. 2.B.107. The term “single course of conduct” is equivalent to the term “single behavioral incident.” Minn. Sent. Guidelines cmt. 2.B.116.

“Whether multiple offenses form part of a single behavioral act is a question of fact.” *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001). The determination of whether two intentional offenses arise from a single behavioral incident depends on whether the conduct shares a unity of time and place and “was motivated by an effort to obtain a single criminal objective.” *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011) (quotation omitted). Moreover, the determination depends on “the particular facts and circumstances of each case.” *State v. Jackson*, 615 N.W.2d 391, 394 (Minn. App. 2000), *review denied* (Minn. Oct. 17, 2000).

Phillips-Marrow argues that because the state failed to present any evidence demonstrating that his two 2015 convictions arose from separate behavioral incidents, those convictions were erroneously included in his criminal-history score. Thus, Phillips-

Marrow contends that his case should be remanded for resentencing without inclusion of criminal-history points for both of his 2015 convictions.

Two Minnesota Supreme Court cases inform our review of the specific sentencing issue raised in this case. The first is *Pilger v. State*, 337 N.W.2d 695 (Minn. 1983). In *Pilger*, the defendant challenged the calculation of his criminal-history score on the grounds that he should not have been assigned four points for four prior convictions because those convictions arose from a single behavioral incident, an argument that the defendant never raised during his sentencing hearing. 337 N.W.2d at 697. The supreme court stated:

Defendant did not raise this issue at the sentencing hearing and therefore a record was never developed on the issue. Defendant's claim that the four convictions were based on conduct that was part of [a] single-behavioral incident is therefore an assertion that was not made in the [district] court and that cannot be substantiated on this appeal. Even at this late date the defense has not presented us with any evidence that would substantiate defendant's claim that all four convictions were based on conduct that was part of a single-behavioral incident.

Id. The supreme court rejected the defendant's argument without further discussion. *Id.*

The second case is *Bixby v. State*, 344 N.W.2d 390 (Minn. 1984). In *Bixby*, the defendant petitioned for postconviction relief, arguing that the district court had erred in calculating his criminal-history score. 344 N.W.2d at 392. Specifically, the defendant argued that the district court erred by including two prior convictions of third-degree criminal sexual conduct because those offenses occurred during a single behavioral incident. *Id.* The petitioner had introduced a transcript of the prior criminal trial, which

persuaded the supreme court “that there was just one basic incident of wrongdoing that took place at two different locations in one evening.” *Id.* at 393-94. Accordingly, the supreme court concluded that both the sentencing court and the postconviction court erred by not determining that the two prior convictions arose from a single behavioral incident. *Id.* at 394.

The supreme court in *Bixby* explained “that if [a] defendant seeks to prove that two prior convictions for which he was sentenced were based on conduct that was part of a single behavioral incident, the court sentencing him for the current offense is the proper court for deciding the issue.” *Id.* The supreme court further explained that “the appropriate procedure is for a defendant to raise the issue at the time the judge is sentencing him for the current offense and to present evidence establishing his claim that the multiple convictions were based on conduct that was part of a single behavioral incident.” *Id.* at 393-94.

In this case, Phillips-Marrow did not present evidence establishing his single-behavioral-incident claim in district court. On appeal, he relies on the underlying presentence investigation (PSI) to argue that he satisfied his burden of production. He notes that the PSI indicates that the 2015 offenses occurred on the same date and that the district court sentenced the resulting convictions on the same day, using the same expiration date for the sentences. Phillips-Marrow argues that “[f]rom the limited record in this case, it appears that [his] prior convictions for assaulting a peace officer and attempting to disarm a peace officer involved a single victim and a single course of conduct.” He further argues that because “the state failed to meet its burden to prove both

of these offenses qualified for inclusions in [his] criminal history score,” it was “illegal for the district court to include felony points for both 2015 offenses when calculating [his] criminal history score.”

Respondent State of Minnesota does not dispute that Phillips-Marrow’s 2015 convictions are “both from the same court file, with the same offense date, and the same disposition and expiration dates.” Moreover, the state agrees that in this case, “resentencing is necessary.” The state argues that the “circumstances require a remand to allow the district court to make a factual determination of the correct criminal-history score to be used in calculating . . . Phillips-Marrow’s sentences.”

We view the state’s agreement that resentencing is necessary and its request for a remand for a factual determination of the correct criminal-history score as a concession that Phillips-Marrow has met his burden to produce evidence establishing his single-behavioral-incident claim. We agree that Phillips-Marrow has done so. Accordingly, the burden shifted to the state to establish that the offenses underlying Phillips-Marrow’s 2015 convictions did not occur during the same behavioral incident. But because the issue was not raised in district court, the state did not attempt to do so, and the necessary factual record was never developed. *See State v. Olson*, 379 N.W.2d 524, 527 (Minn. 1986) (“[I]t is the [district] court’s role to resolve any factual dispute bearing on the defendant’s criminal-history score.”); *see also Marchbanks*, 632 N.W.2d at 731 (“Whether multiple offenses form part of a single behavioral act is a question of fact.”). Thus, the state did not satisfy its “burden of proving the facts which establish the divisibility of a defendant’s course of conduct,” which is necessary to support the district court’s assignment of

criminal-history points for both of Phillips-Marrow's 2015 convictions. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). We therefore reverse Phillips-Marrow's sentence and remand for a factual determination of the correct criminal-history score to be used in resentencing. The state shall be allowed to present evidence to meet its burden on remand.

Reversed and remanded.