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STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0079

State of Minnesota,
Respondent,

vs.

Roy Darnell Barron,
Appellant.

Filed November 30, 2020
Reversed and remanded
Connolly, Judge

Hennepin County District Court
File No. 27-CR-19-5551

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

Michael O. Freeman, Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

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

Considered and decided by Connolly, Presiding Judge; Reyes, Judge; and Gaïtas, Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges his sentence, arguing that his 2002 felony conviction for fifth-degree possession of a controlled substance was not executed and should not have been used in the calculation of his criminal-history score (CHS). Because this determination requires fact-finding, we reverse and remand to the district court to determine whether appellant's 2002 felony sentence was executed.

FACTS

In March 2019, appellant Roy Darnell Barron was charged with one count of first-degree criminal sexual conduct and one count of second-degree criminal sexual conduct. The complaint alleged that "on or about and between January 1, 2018 and February 1, 2019" appellant sexually abused his six-year-old granddaughter.

In August 2019, appellant entered a *Norgaard* plea to second-degree criminal sexual conduct,[1] waived his *Blakely* rights, admitted to aggravating factors, and agreed to a 210-month sentence, an upward departure from the sentencing guidelines. Appellant admitted that, at some point between January 1, 2018, and February 1, 2019, he was drinking heavily and doing crack cocaine regularly while living with his wife and granddaughter. Appellant's granddaughter reported that, at one point during this time period, he made her touch his genitals and hold his penis in her hand. Even though appellant had no memory

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[1] A *Norgaard* plea is a guilty plea entered by a defendant who is unable to recall the facts of the offense due to intoxication or loss of memory. *See State v. Ecker*, 524 N.W.2d 712, 717 (Minn. 1994).

of the incident due to his substance abuse, he stated that he had no reason to doubt the allegation against him.

The state and appellant agreed to the presence of three aggravating factors: (1) appellant was in a position of authority over his granddaughter; (2) appellant had a prior conviction involving an injury, namely a second-degree assault offense in 2010 where he cut someone with a knife; and (3) the current second-degree criminal sexual conduct is appellant's fifth violent offense. The district court accepted appellant's plea.

The Presentence Investigation (PSI) indicated that appellant's offense was severity level D, his CHS was five, and his presumptive prison sentence was 119 months. The sentencing worksheet indicated that appellant had a CHS of five from his prior felony convictions, which included a 2002 conviction of fifth-degree possession of a controlled substance. Appellant did not challenge the calculation of his CHS. The district court concluded that the three aggravating factors justified an upward durational departure and sentenced him to 210 months in prison. This appeal follows.

D E C I S I O N

A sentence based on an incorrect CHS is an illegal sentence that may be corrected at any time. *State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007). When a defendant fails to object to the district court's calculation of the CHS and the state's evidence is insufficient to carry its burden of proof as to the CHS, the proper remedy is to remand the matter to give the state an opportunity "to further develop the sentencing record so that the district court can appropriately make its determination." *State v. Outlaw*, 748 N.W.2d 349, 356 (Minn. App. 2008), *review denied* (Minn. July 15, 2008); *see also State v. Strobel*, 921

N.W.2d 563, 577 (Minn. App. 2018), *aff'd* 932 N.W.2d 303 (Minn. 2019). "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).

Appellant argues that the district court did not apply the 2019 amendment to the Minnesota Sentencing Guidelines, providing that a prior felony sentence does not count towards the CHS if, before the date of the current offense,

> (1) the prior felony sentence or stay of imposition expired or was discharged;
> (2) a period of fifteen years elapsed after the date of the initial sentence following the prior conviction; and
> (3) if the prior felony sentence was executed, a period of fifteen years elapsed after the date of expiration of the sentence.

Minn. Sent. Guidelines 2.B.1.c (2019). Here, the parties agree that the 2019 amendment applies to all cases not yet final on August 1, 2019, including appellant's case. Thus, the only issue is whether, for the purpose of calculating appellant's CHS under the 2019 amendment, his 2002 felony conviction for fifth-degree possession of a controlled substance was executed.

Appellant's CHS of five includes half a point for his 2002 felony conviction. Removing that conviction from the calculation would lower his CHS to four. *See* Minn. Sent. Guidelines 2.B.1.i ("if the sum of the weights results in a partial point, the point value must be rounded down to the nearest whole number."). Reducing his CHS to four would

lower his presumptive prison sentence from 119 months to only 91 months, a difference of 28 months.[2]

The sentence for appellant's 2002 felony was stayed, and he was placed on probation. Appellant's 2002 conviction fulfills the first two prongs: the felony sentence for his 2002 conviction has expired, and at least 15 years have passed between the date of the initial sentence, August 21, 2002, and the current offense, at the earliest, January 1, 2018.

Appellant argues that his 2002 sentence was never executed and that he was discharged from probation in 2005. In support of this argument, he relies on two documents. The first is the Register of Actions for 27-CR-02-056979, appellant's 2002 felony conviction, reflecting that, on March 29, 2005, "CT: 01 REVOCATION HEARING WAIVED/CT: 01 REVOCATION NOT ORDERED/NO BAIL REQUIRED/DEFT DISCHARGED FROM PROBATION/CREDIT JAIL TIME." The second document is the PSI stating, "08/21/02: Stay of Execution 17 months, 3 years probation, 8 days[,] credit 8, treatment, no use. 03/29/05: Probation Violation – No revocation."

The state argues that, due to the probation violation, appellant's stay of execution was revoked, his 2002 felony sentence was executed, and he was released from probation on February 6, 2006. The state also relies on two documents. The first is an amended court decision from March 29, 2005, indicating that probation was revoked; under the "Commit to Commissioner of Corrections – Adult" heading, the Register of Actions says, "17

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[2] A CHS of four carries a sentencing range of 78-109 months, whereas a CHS of five carries a sentencing range of 102-142 months. Minn. Sent. Guidelines 4.B.

MONTHS STAYED TIME REVOKED." The second document is the sentencing worksheet, indicating that appellant's 2002 felony conviction expired on February 6, 2006.

The record on whether appellant's felony sentence was executed is contradictory. This court is not a fact-finding court. *See State v. Breaux*, 620 N.W.2d 326, 334 (Minn. App. 2001). Therefore, this determination must be made by the district court. *See State v. Woods*, 945 N.W.2d 414, 420-21 (Minn. App. 2020) (reversed and remanded because decay-factor analysis required fact-finding or admission regarding current offense date).

Reversed and remanded.