

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A21-0057**

State of Minnesota,  
Respondent,

vs.

Jose Martin Lugo, Jr.,  
Appellant.

**Filed November 8, 2021  
Reversed and remanded  
Worke, Judge**

Nobles County District Court  
File No. 53-CR-15-141

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

Joseph M. Sanow, Nobles County Attorney, Worthington, Minnesota; and

Travis J. Smith, Special Assistant County Attorney, Slayton, Minnesota (for respondent)

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

Considered and decided by Slieter, Presiding Judge; Worke, Judge; and Cochran,  
Judge.

**NONPRECEDENTIAL OPINION**

**WORKE**, Judge

Appellant challenges the sentence imposed for his controlled-substance-crime conviction, arguing that the sentence does not conform to the subsequent enactment of the

Drug Sentencing Reform Act (DSRA) and was inappropriately calculated with an out-of-state conviction factored into his criminal-history score. We reverse and remand for resentencing.

## FACTS

In February 2015, appellant Jose Martin Lugo Jr. was charged with second-degree possession of a controlled substance, driving after revocation, and possession of drug paraphernalia.

Lugo pleaded guilty to second-degree possession of a controlled substance. The state dismissed the remaining charges. The parties agreed to a 68-month prison sentence, which was the presumptive sentence calculated using two criminal-history points—one felony point and one custody-status point. The one felony point was the result of two prior convictions, each representing one-half point. The first was a failure-to-appear offense that occurred in South Dakota in November 2015. The second was a fleeing-a-peace-officer offense that occurred in Minnesota.

The district court later corrected Lugo's criminal-history score due to a miscalculation of Lugo's custody status. The new presumptive sentencing range was between 50 and 69 months. The parties agreed to the previously-agreed-upon sentence of 68 months in prison, which remained within the new presumptive range.

In October 2020, the district court sentenced Lugo to 68 months in prison.<sup>1</sup> This appeal followed.

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<sup>1</sup> The significant time span between filing of the charges in 2015 and sentencing in 2020 is due to the case moving through an earlier appeal.

## DECISION

Lugo argues that he should be resentenced in accordance with the DSRA because his case had not reached a final judgment at the time that the DSRA was enacted. Lugo also challenges the one-half point in his criminal-history score for the South Dakota conviction, arguing that the state failed to prove that this offense would have been considered a felony in Minnesota. The interpretation of the sentencing guidelines is a legal question that is reviewed de novo. *State v. Strobel*, 921 N.W.2d 563, 575 (Minn. App. 2018), *aff'd*, 909 N.W.2d 594 (Minn. 2018). “We review determinations of a defendant’s criminal history score for abuse of discretion.” *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd*, 909 N.W.2d 594 (Minn. 2018).

### ***DSRA***

Following the enactment of the DSRA, the presumptive sentencing range for Lugo’s conviction would be reduced from a presumptive sentence of 58 months in prison to a 58-month stay of execution. Lugo’s current sentence of 68 months in prison represents an upward departure from the sentencing guidelines. A sentence within the sentencing guidelines range is presumed appropriate. Minn. Sent. Guidelines II.D (2014). The district court must impose the presumptive sentence unless “substantial and compelling circumstances” based on aggravating factors warrant an upward departure. *State v. Jackson*, 749 N.W.2d 353, 360 (Minn. 2008). Circumstances are considered substantial and compelling when “the defendant’s conduct in the offense of conviction was significantly more or less serious than that typically involved in the commission of the crime in question.” *State v. Misquadace*, 644 N.W.2d 65, 69 (Minn. 2002).

Resentencing under the DSRA-amended sentencing guidelines is appropriate when: “(1) the Legislature made no statement that clearly establishes the Legislature’s intent to abrogate the amelioration doctrine; (2) the amendment mitigated punishment; and (3) final judgment had not been entered as of the date the amendment took effect.” *State v. Kirby*, 899 N.W.2d 485, 490 (Minn. 2017). In *Kirby*, the supreme court concluded that the legislature made no statement clearly establishing its intent to abrogate the amelioration doctrine and the DSRA mitigates punishment. *Id.* at 496. Thus, Lugo should be resentenced if the three requirements of the amelioration doctrine are satisfied. And based on *Kirby*, the first and second requirements are satisfied. This leaves us to determine whether final judgment was entered as of the date the amendment took effect.

A judgment is not considered final for the “purposes of the third requirement of the amelioration doctrine if the defendant has timely filed a notice of appeal and the direct appeal is still pending.” *Luna-Pliego v. State*, 904 N.W.2d 916, 919 (Minn. App. 2017). This appeal is Lugo’s direct appeal from his conviction. Therefore, Lugo’s conviction has not reached a final judgment, and the third requirement has been met.

Because Lugo has satisfied each of the *Kirby* requirements, the DSRA should be applied to his sentence and we remand for resentencing.

***South Dakota conviction***

The sentencing guidelines “provide uniform standards for the inclusion and weighting of criminal history information that are intended to increase the fairness and equity in the consideration of criminal history.” *State v. Reece*, 625 N.W.2d 822, 824 (Minn. 2001) (quotation omitted). An out-of-state felony conviction is “included in a

defendant's criminal-history score." *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006). When a defendant's sentence is based on an incorrect criminal-history score, the case must be remanded for resentencing. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017).

Based on its severity level, a defendant is assigned between one-half and two points for each conviction for which a felony sentence was stayed or imposed before the current sentencing. Minn. Sent. Guidelines 2.B.1 (2014). "The [district] 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. (2014). Points are assigned to an out-of-state conviction in accord with "the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense." Minn. Sent. Guidelines 2.B.5.b. (2014). An out-of-state conviction may be deemed a felony only if it would be defined as a felony in Minnesota and the sentence imposed was a felony-level sentence. *Id.*

The state has the burden of proving by a preponderance of the evidence the facts necessary to justify inclusion of a defendant's out-of-state convictions. *Maley*, 714 N.W.2d at 711. The state must show that "the prior conviction was valid, the defendant was the person involved, and the crime would constitute" a felony, gross misdemeanor, or misdemeanor in Minnesota. *Id.*

Here, there is no record evidence regarding Lugo's South Dakota conviction. The nature of the offense committed is a necessary factor in determining whether a failure-to-appear conviction in South Dakota constitutes a felony in Minnesota, and this determination could alter Lugo's sentence. However, because Lugo failed to object to the

inclusion of this offense in his criminal-history score, and the state was never provided an opportunity to submit evidence regarding it, the proper remedy is to remand for an opportunity for the state “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), *rev. denied* (Minn. July 15, 2008).

**Reversed and remanded.**