STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0361

Marlow Shelton McDonald, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed November 29, 2021
Affirmed
Reyes, Judge

Blue Earth County District Court
File No. 07-CR-14-1678

Zachary A. Longsdorf, Longsdorf Law Firm, P.L.C., Inver Grove Heights, Minnesota (for appellant)

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

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County Attorney, Mankato, Minnesota (for respondent)

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

NONPRECEDENTIAL OPINION

REYES, Judge

Appellant challenges the postconviction court's denial of his motion to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, arguing that he should be resentenced

using a criminal-history score of four instead of the previously used score of six. We affirm.

FACTS

Following a jury trial in September 2014, appellant Marlow Shelton McDonald was convicted of a first-, second-, and third-degree controlled-substance crime, fleeing a police officer, unlawful possession of a firearm, and being a prohibited person in possession of a firearm. During the sentencing phase of the trial, the jury also found that appellant had five or more prior felony convictions and that his current offenses were committed as part of a pattern of criminal conduct.

Before appellant's sentencing hearing, Blue Earth County calculated appellant's criminal-history score at six based in part on the following felonies: one point for a 2004 falsely impersonating another conviction; one-half of a point for a 2004 aggravated-forgery conviction; and one point for a 2002 Illinois burglary conviction. With a criminal-history score of six, the first-degree controlled-substance conviction carried a presumptive sentence of 158 months' imprisonment. The district court granted a double upward durational departure based on appellant's career-offender status and sentenced appellant to 316 months' imprisonment. Appellant filed a direct appeal asserting numerous claims but did not challenge any of the felonies included in his criminal-history score. *State v. McDonald*, No. A15-0268 (Minn. App. Feb. 16, 2016), *rev. denied* (Minn. Apr. 19, 2016). This court rejected appellant's claims and affirmed his conviction and sentence. *Id.*

In June 2017, appellant petitioned for postconviction relief and asked to be resentenced under the newly enacted 2016 Minnesota Drug Sentencing Reform Act

(DSRA). The state agreed, and the postconviction court amended his 316-month sentence to a 250-month sentence, relying on an updated sentencing worksheet that assigned the same six criminal-history points as appellant had in his original 2014 sentencing worksheet. Appellant also asserted various other claims but again did not challenge his criminal-history-score calculation. Appellant's other claims were deemed *Knaffla*-barred[1] and denied.

Appellant challenged the postconviction court's application of the DSRA to his new sentence on appeal but did not challenge the inclusion of any felonies in his criminal-history score. *McDonald v. State*, No. A18-0064 (Minn. App. July 30, 2018). This court rejected appellant's arguments and affirmed the postconviction court's amended sentence. *Id.*

In December 2020, appellant brought a motion under Minn. R. Crim. P. 27.03, subd. 9, to correct his sentence. Appellant moved to be resentenced using a criminal-history score of three instead of six, arguing that: (1) he should not have been assigned separate points for his 2004 aggravated-forgery, false-impersonation, and fifth-degree controlled-substance convictions because they arose out of a single behavioral incident and (2) his 2002 Illinois burglary conviction should not have been included because it would not have been considered a felony in Minnesota. The postconviction court denied appellant's motion. This appeal follows.

[1] *See State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976) ("[W]here direct appeal has once been taken, all matters raised therein, and all claims known but not raised, will not be considered upon a subsequent petition for postconviction relief.").

DECISION

We review the postconviction court's denial of a rule 27.03, subd. 9 motion to correct a sentence for an abuse of discretion. *Townsend v. State*, 834 N.W.2d 736, 738 (Minn. 2013). Specifically, we review the postconviction court's legal conclusions de novo and its factual findings for clear error. *Id.* When a defendant files a motion for resentencing under rule 27.03, subd. 9, after the time for direct appeal has passed, the defendant bears the burden of proving that his sentence is based on an incorrect criminal-history score. *Williams v. State*, 910 N.W.2d 736, 742-43 (Minn. 2018). Placing the burden of proof on defendants in postconviction, post-appeal rule 27.03, subd. 9 motions "incents defendants to make timely objections at sentencing, which helps to ensure that the district court has all of the relevant information before the [district] court is called upon to impose a sentence." *Id.* at 743.

I. The postconviction court did not abuse its discretion by determining that appellant failed to meet his burden of proving that his convictions of aggravated forgery and falsely impersonating another arose out of a single behavioral incident.

Appellant first argues that the postconviction court abused its discretion when it determined that appellant failed to show that his 2004 conviction of falsely impersonating another should not have been included in his criminal-history score because his convictions

of aggravated forgery and falsely impersonating another arose out of a single behavioral incident.[2] We do not agree.

Generally, "if a person's conduct constitutes more than one offense under the laws of [Minnesota], the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1 (2014). This prohibition against multiple punishment applies only if the multiple offenses arose out of "a single behavioral incident." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). If multiple offenses arose out of a single behavioral incident, only the offense at the highest severity level should be considered in calculating the criminal-history score. Minn. Sent. Guidelines cmt. 2.B.107 (2014).

When determining whether crimes are committed as part of a single behavioral incident, courts consider whether there was (1) a single criminal objective and (2) a unity of time and place. *Bookwalter*, 541 N.W.2d at 294. The application of the "single behavioral incident" test depends heavily on the facts and circumstances of each case. *State v. Bauer*, 792 N.W.2d 825, 828 (Minn. 2011).

Here, appellant pleaded guilty to aggravated forgery and falsely impersonating another. To show that both offenses arose out of a single behavioral incident, appellant provided a plea-hearing transcript that included details about the two offenses. According

[2] In his original rule 27.03, subd. 9 motion, appellant argued that his 2004 fifth-degree controlled-substance conviction also arose out of the same behavioral incident as his forgery and false-impersonation convictions. But the postconviction court pointed out that the fifth-degree controlled-substance offense occurred on April 4, 2004, while the forgery and false-impersonation offenses occurred on January 10, 2003. Appellant accordingly dropped his claim regarding the fifth-degree controlled substance conviction on appeal.

to the transcript, appellant had been arrested on or around January 10, 2003. While going through the booking process at the Blue Earth County jail, appellant signed a fingerprint card with the name "Onassis Lloyd." Appellant admitted that he had given the name of his friend to avoid being arrested under his real name. As part of his guilty plea on the false-impersonation charge, appellant also admitted to signing an Advice of Rights sheet on the same day, January 10, 2003, with the same false name, Onassis Lloyd, at the Blue Earth County courthouse. Later during that same plea hearing, the district court noted that appellant's attorney had made a motion claiming that the two charges, aggravated forgery and falsely impersonating another, were a single course of conduct. Although the district court stated that it had only deferred the motion and that the motion was still active, the motion appears to have been withdrawn at some point. The district court did not address it when sentencing appellant for the forgery and false-impersonation offenses.

The postconviction court acknowledged that there was evidence in the record that the forgery and the false-impersonation offenses occurred on the same day, January 10, 2003, and that there was evidence that appellant provided the same name during both offenses. However, they occurred at different places: one offense occurred at the jail and the other occurred at the courthouse. In addition, the postconviction court found no evidence in the record regarding the sequence of events or how far apart in time the two offenses occurred. Without that evidence, the postconviction court found that appellant had failed to meet his burden of proving that the offenses arose out of a single behavioral incident because they lacked a unity of time and place.

Even assuming appellant provided enough evidence to show that he committed the forgery and false-impersonation offenses with a single criminal objective, the postconviction court did not abuse its discretion when it determined that appellant had not shown that the two offenses were unified in time and place. Appellant acknowledges that the two offenses occurred at different locations but argues that the two offenses are nevertheless unified in place because the state transported appellant between locations as part of a single booking process. Appellant relies on *Bixby v. State*, 344 N.W.2d 390, 393 (Minn. 1984), in which the Minnesota Supreme Court held that a defendant's two acts of sexual intercourse that occurred at different places in one evening arose out of a single behavioral incident because there had been "just one basic incident of wrongdoing that took place at two different locations in one evening."

We do not agree that either *Bixby* or the case it relied upon, *State v. Herberg*, 324 N.W.2d 346 (Minn. 1982), controls the outcome here based on the unique facts and circumstances of this case. *Bixby* and *Herberg* are sexual-assault cases involving the same criminal act committed against the same victim in separate locations. Because the acts and victims were identical, the supreme court did not find the change in location significant. In this case, appellant provided the same name but in two different situations and to two different parties: he first provided the false name to law-enforcement officers at the police station while being fingerprinted, and he later provided that same false name on a statement of rights submitted to the district court during his first appearance at the courthouse. Moreover, in *Bixby* and *Herberg*, the supreme court took into account the fact that the defendants' underlying motivation remained the same even as they moved their victims to

new locations. *See Bixby*, 344 N.W.2d at 393. Here, the record appellant relies on shows that he gave the false name to police to avoid arrest but does not show why appellant later gave the false name to the district court. Appellant's case is therefore further distinguishable from *Bixby* and *Herberg* because, on this record, we cannot say whether appellant's underlying motivation was the same at the two separate locations.

Appellant also failed to show that the offenses were unified in time. The "unity of time" factor is a fact-specific analysis that requires more than just a general determination that the offenses were committed on the same date. *See State v. Stevenson*, 286 N.W.2d 719, 720 (Minn. 1979) (concluding that two incidents of sexual contact with the victim five hours apart were not part of single behavioral incident); *State v. Schevchuk*, 163 N.W.2d 772, 776 (Minn. 1968) (holding that several crimes were not part of single behavioral incident when offenses occurred at clearly separate times over a period of two and one-half hours); *Bookwalter*, 541 N.W.2d at 297 (determining that sexual assault and attempted murder that took place in single evening nevertheless occurred at distinct times). Without a more specific showing of the time that passed between appellant's forgery and false-impersonation offenses, we cannot say that appellant's offenses were unified in time. The postconviction court therefore did not abuse its discretion when it found that appellant failed to meet his burden of showing that the two offenses arose out of a single behavioral incident.

II. The postconviction court did not abuse its discretion by determining that appellant failed to meet his burden of proving that his Illinois burglary conviction should not have been included in his criminal-history score.

Appellant also argues that his 2002 Illinois burglary conviction should not have been included in his criminal-history score, or, alternatively, that it should have been assigned one-half of a criminal-history point rather than one point. We are not persuaded.

A defendant's criminal-history score is determined by assigning a particular weight to every conviction for which a felony sentence was stayed or imposed. Minn. Sent. Guidelines cmt. 2.B.101 (2014); *see also State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). A prior out-of-state conviction may be counted as a felony if the offense would be defined as a felony in Minnesota and the defendant received a felony-level sentence. Minn. Sent. Guidelines 2.B.5.b (2014). To determine whether a defendant's out-of-state conviction should be included in a defendant's criminal-history score, the sentencing court should compare the definition of the out-of-state offense with the definitions of comparable Minnesota offenses but may also consider the nature of the out-of-state offense and the sentence the offender received. *Hill v. State*, 483 N.W.2d 57, 61 (Minn. 1992).

Appellant pleaded guilty to and was convicted of burglary in violation of 720 Ill. Comp. Stat. 5/19-1 (West 2002) which states that "[a] person commits a burglary when without authority he or she knowingly enters or without authority remains within a building, housetrailer, watercraft, aircraft, motor vehicle, railroad car, or any part thereof, with intent to commit therein a felony or theft." The equivalent Minnesota burglary statute, Minn. Stat. § 609.582, subd. 3 (2014), only prohibits a person from entering "a building without consent and with intent to steal or commit any felony or gross misdemeanor while

in the building . . . ." Appellant argues that his Illinois conviction would not have been considered a felony in Minnesota because Minnesota's equivalent burglary statute does not prohibit entering or remaining within a housetrailer, watercraft, aircraft, motor vehicle, or railroad car, and because the record is silent regarding the factual basis for appellant's burglary conviction.

The postconviction court correctly noted that appellant showing that the Illinois burglary statute is broader than Minnesota's equivalent statute does not, by itself, establish that appellant's conviction would not have been considered a felony in Minnesota. Appellant instead had the burden to show that his Illinois burglary conviction was based on conduct that would not have fallen under Minnesota's burglary statute: specifically, appellant had to show that his conviction was based on appellant entering or without authority remaining within a housetrailer, watercraft, aircraft, motor vehicle, or railroad car. But appellant provided no facts underlying the Illinois burglary conviction.

Alternatively, appellant argues that if the Illinois burglary conviction is deemed equivalent to a theft conviction under Minn. Stat. § 609.52, appellant should be assigned only one-half of a criminal-history point for an under-$5,000 theft offense because there is nothing in the record indicating the value of the property involved. Appellant's alternative claim fails because, even if the postconviction court did deem the Illinois burglary conviction to be equivalent to a Minnesota theft conviction, there is no evidence in the record showing that appellant's Illinois burglary conviction involved a loss of property worth $5,000 or less, as would be required to reduce the points assigned for the burglary conviction from one point to one-half of a point. The postconviction court therefore did

not abuse its discretion when it determined that appellant failed to meet his burden of proving that his Illinois burglary conviction should not have been included in his criminal-history score.

Affirmed.