

*This opinion is nonprecedential except as provided by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
A21-0358**

State of Minnesota,
Respondent,

vs.

Frederick Duane Fisher,
Appellant.

**Filed March 7, 2022
Reversed and remanded
Bratvold, Judge**

Beltrami County District Court
File No. 04-CR-17-3766

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

David L. Hanson, Beltrami County Attorney, David P. Frank, Chief Assistant County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jennifer Workman Jesness, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Frisch, Presiding Judge; Reyes, Judge; and Bratvold, Judge.

NONPRECEDENTIAL OPINION

BRATVOLD, Judge

Appellant challenges his conviction and sentence for felony driving while impaired (DWI), arguing the district court erred during sentencing by assigning him two criminal-history points for his 2003 federal conviction when the federal offense does not

have an equivalent under Minnesota law. Appellant asks this court to reverse and remand for resentencing. Respondent agrees the district court erred, contends the district court failed to assign a criminal-history score, and asks this court to reverse and remand for resentencing, but also seeks to expand the record on remand. Because we conclude the district court abused its discretion by failing to determine Fisher's criminal-history score before imposing a sentence, we reverse and remand for resentencing and direct the district court to decide whether respondent may supplement the record.

FACTS

In November 2017, while investigating reports of an assault, Bemidji police officers arrested appellant Frederick Duane Fisher after he fled from his vehicle on foot. A breath test showed Fisher's alcohol concentration to be 0.10, and the state charged Fisher with one count of first-degree DWI under Minn. Stat. § 169A.24, subd. 1 (2016), and one count of gross-misdemeanor driving after cancellation as inimical to public safety under Minn. Stat. § 171.24, subd. 5 (2016).

Fisher pleaded not guilty to both counts, and the court set a pretrial hearing in September 2018. Fisher and the state reached an agreement. Fisher pleaded guilty to first-degree DWI, and the state agreed to dismiss the remaining charge. Under the plea agreement, Fisher would request a stayed sentence and a downward dispositional departure, and the state agreed not to object "provided [the stayed sentence] be at the top end" of the presumptive guidelines range. If the district court executed the sentence and rejected Fisher's request for a downward dispositional departure, the state would "not object to a bottom of the box executed sentence."

The district court ordered a presentence investigation (PSI) report, which included a sentencing worksheet. According to the worksheet, Fisher had a criminal-history score of four points, which included two felony points for a 2003 federal conviction.¹ The worksheet also stated the presumptive range for Fisher's sentence was 51 to 72 months. Before sentencing, Fisher moved for a downward dispositional departure and to correct his criminal-history score, contending his 2003 federal conviction should only be assigned "a weight of 1 felony unit" because the federal statute he was convicted under "encompasses more conduct" than the Minnesota offense that receives two points, so the offenses are not equivalent.

Fisher failed to appear for sentencing, and the district court issued a warrant. Over a year later, police arrested Fisher. Fisher moved to withdraw his guilty plea, and the district court denied his motion.

During the sentencing hearing in December 2020, the state opposed a downward dispositional departure and argued Fisher should receive a "top of the box" sentence given Fisher's "post plea behavior and his absconding for a year and a half." Fisher's attorney reminded the district court that Fisher challenged "the correctness of the [criminal-]history score" in 2018, arguing he should receive one point and not two points for the 2003 federal conviction. Fisher's attorney also asked for a "bottom of the box" sentence, which she later stated was 46 to 64 months with the corrected criminal-history score.

¹ Fisher was convicted for aiding and abetting assault within a maritime or territorial jurisdiction.

After hearing more discussion by the parties, the district court stated it was “not going to be making a legal judgment” about Fisher’s criminal-history score. The district court sentenced Fisher to 63 months in prison with credit for 286 days.

This appeal follows.

DECISION

Both parties agree the district court abused its discretion during sentencing by failing to determine whether appellant’s 2003 federal conviction has an equivalent under Minnesota law. The parties disagree about whether the district court determined that Fisher’s criminal-history score included two points for the 2003 federal conviction and about the remedy. We proceed in three steps. First, we discuss a district court’s obligation to determine a defendant’s criminal-history score before imposing a sentence under the Minnesota Sentencing Guidelines (the guidelines). Second, we consider Fisher’s motion to correct his criminal-history score and conclude the district court abused its discretion by not determining Fisher’s criminal-history score before imposing a sentence. Finally, we discuss the parties’ different views about remand instructions.

A. Criminal-history score under the guidelines

Generally, district courts have wide discretion to impose sentences, and the appellate courts review a district court’s calculation of a defendant’s criminal-history score for an abuse of discretion. *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014). Sentencing under the guidelines “is a procedure based on state public policy to maintain uniformity, proportionality, and predictability in sentencing.” Minn. Stat. § 244.09, subd. 5 (2020). To achieve this policy of uniformity in sentencing, the district court must ensure that the

defendant's criminal-history score is accurate. *State v. Maurstad*, 733 N.W.2d 141, 151 (Minn. 2007).

A defendant's presumptive sentence can be located on the guidelines grid "at the intersection of the criminal history score and the severity level" for the offense of conviction. Minn. Sent. Guidelines 2 (Supp. 2017).² The 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). "A defendant's criminal-history score is calculated, in part, by allotting points for each of a defendant's prior convictions for which a felony sentence was imposed." *State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009) (quotations omitted); see Minn. Sent. Guidelines 2.B.1. A defendant is assigned between one-half and two points for each prior felony conviction stayed or imposed before the current sentence. Minn. Sent. Guidelines 2.B.1.

A district court must consider prior convictions from other jurisdictions when determining a defendant's criminal-history score under the guidelines. *Reece*, 625 N.W.2d at 824; see Minn. Sent. Guidelines 2.B.5.a. & cmt. 2.B.502. The guidelines provide that the weight of a prior felony conviction from a jurisdiction other than Minnesota "must be based on the severity level of the equivalent Minnesota felony offense." Minn. Sent. Guidelines 2.B.5.c. When a federal felony offense receives a sentence that would be felony

² We refer to the 2017 guidelines because "[t]he presumptive sentence for any offender convicted of a felony committed on or after May 1, 1980, is determined by the Sentencing Guidelines in effect on *the date of the conviction offense*," and Fisher committed this offense in November 2017. Minn. Sent. Guidelines 2 (emphasis added).

level in Minnesota but there is no comparable Minnesota offense, the prior federal felony conviction “must receive a weight of one in computing the criminal history score.” Minn. Sent. Guidelines 2.B.5.d. In *Hill v. State*, the Minnesota Supreme Court elaborated on this part of the guidelines, stating, “while the main focus should be on the offense definition [of the prior non-Minnesota conviction], the sentencing court should also consider the nature of the offense and the sentence received by the offender.” 483 N.W.2d 57, 61 (Minn. 1992) (quotations omitted).

Thus, a district court must determine a defendant’s criminal-history score, including the weight accorded to prior convictions from other jurisdictions, before imposing a sentence.

B. Fisher’s motion to correct his criminal-history score

Fisher argues the “district court abused its discretion by assigning 2 criminal history points” to his 2003 federal conviction “because the federal offense was not equivalent to the Minnesota offense of first-degree assault.” Fisher claims the district court “adopted the PSI writer’s assessment of 2 points” for the 2003 federal conviction by leaving the sentencing worksheet “in place.” The state argues that the district court “failed to assign points” for Fisher’s 2003 federal conviction. We agree with the state’s view of the record.

During sentencing, Fisher’s attorney raised the correctness of Fisher’s criminal-history score, explained how non-Minnesota convictions should be assessed under the guidelines, and argued Fisher should not be assigned two points for his 2003

federal conviction. Fisher's attorney asked the district court "to modify the sentencing guidelines worksheet" to reflect one felony point for the 2003 federal conviction.

The district court responded, "This is the first time I've heard" of the sentencing-guidelines argument; "it hasn't been briefed." Fisher's attorney disagreed, noting, "[A] full, long brief [was] filed by the defense in 2018." The prosecuting attorney commented that the state sent "an email response" to Fisher's 2018 motion and argued Fisher should be assigned two points for the 2003 federal conviction.³ The prosecuting attorney also stated, "If the court wishes to get a more formal response, um, then I would suggest that sentencing be continued." The district court asked Fisher's attorney what the presumptive sentence would be if Fisher received one felony point for his 2003 federal conviction, putting his total criminal-history score at three. Fisher's attorney responded that the presumptive sentence would be 54 months, with a range of 46 to 64 months.

The district court stated that it was "not going to be making a legal judgment" about the criminal-history score "because the sentence that [it] expected to impose would fall within the range of either four points or three points." The district court also stated, "I'm going to . . . leave the department of correction's sentencing sheet as is. It might become an issue in the future should there be any other convictions." The district court continued, "But for my purposes of today, I don't have to make a decision" on criminal-history points "because I'm not going to go to the top end of the box of 72 months." The district court

³ We note that the state's "email response" is not in the record, although Fisher's motion to correct is in the record.

sentenced Fisher to a 63-month executed sentence and said nothing more about Fisher's criminal-history score.

Despite Fisher's motion and a district court's obligation to determine a defendant's criminal-history score, the district court refused to determine Fisher's criminal-history score before imposing a sentence; the district court also refused to determine how many felony points were assigned to Fisher's 2003 federal conviction. We are aware of no legal authority, nor does Fisher provide any, supporting his contention that the district court implicitly determined his criminal-history score by leaving the sentencing worksheet "as is." *See generally Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (declining to address allegations unsupported by legal analysis or citation). We conclude the district court did not determine Fisher's criminal-history score before imposing a sentence.

Because the guidelines direct a district court to determine a defendant's criminal-history score before imposing a felony sentence, we conclude the district court abused its discretion by failing to determine Fisher's criminal-history score and failing to resolve the dispute over the points assigned to Fisher's 2003 federal conviction. *See State v. DeLaCruz*, 884 N.W.2d 878, 888 (Minn. App. 2016) (holding a district court abuses its discretion by failing to exercise discretion).

The parties agree this case should be reversed and remanded for resentencing. "[A] sentence based on an incorrect criminal history score is an illegal sentence" and is correctable at any time. *Maurstad*, 733 N.W.2d at 147. "When a defendant's sentence is based on an incorrect criminal-history score, [their] case must be remanded for

resentencing.” *State v. Woods*, 945 N.W.2d 414, 416–17 (Minn. App. 2020). Even if a sentence would still be within the presumptive guidelines range when calculated with the correct criminal-history score, a district court “must resentence the defendant” when the defendant is sentenced based on an incorrect criminal-history score. *State v. Provost*, 901 N.W.2d 199, 202 (Minn. App. 2017). This is “because the sentencing guidelines serve as the anchor for a district court’s discretion at sentencing, ‘when a [g]uidelines range moves up or down, offenders’ sentences tend to move with it.’” *Id.* (quoting *Molina-Martinez v. United States*, 578 U.S. 189, 199 (2016)). Because the district court did not determine Fisher’s criminal-history score, his sentence is not based on a correct criminal-history score, and therefore we reverse and remand for resentencing.

C. Instructions for remand

The parties disagree about how we should instruct the district court on remand. Fisher contends that “this [c]ourt must remand for re-sentencing with instructions to assess only 1 point for the [2003 federal conviction] and to sentence Fisher at a total criminal history score of 3 points.” The state argues that Fisher’s “case must be remanded back to the District Court for further findings and resentencing” because “the record needs to be developed on remand so that the district court can make a decision on whether to assign one or two weighted points” for Fisher’s 2003 federal conviction.

First, we reject Fisher’s request that we determine his criminal-history score. The district court did not decide this contested issue, so it is not amenable to appellate review. *See Steward v. State*, 950 N.W.2d 750, 756 (Minn. 2020) (“A reviewing court must

generally consider only those issues that the record shows were presented and considered by the trial court.” (quoting *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988))).

Second, we consider the state’s argument that “further findings” are required before resentencing because there are “gaps in the record” needing development. The state contends “federal records and transcripts” could help the district court determine whether Fisher’s 2003 federal offense is equivalent to a Minnesota offense. This argument is persuasive.

As discussed above, a district court assigns points for a prior non-Minnesota conviction by determining “the equivalent Minnesota offense based on the elements of the prior non-Minnesota offense.” Minn. Sent. Guidelines 2.B.5.b. The state has the burden to establish the facts necessary to assign points for a prior non-Minnesota conviction. *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983). “[T]he district court may not use out-of-state convictions to calculate a defendant’s criminal-history score unless the state lays foundation for the court to do so.” *State v. Maley*, 714 N.W.2d 708, 711 (Minn. 2006).⁴ “The state must establish by a fair preponderance of the evidence that the prior conviction was valid, the defendant was the person involved, and the crime would constitute a felony in Minnesota.” *See id.* (citing *Griffin*, 336 N.W.2d at 525).

⁴ *Maley* explains that the appropriate standard to prove a prior conviction is established by Minnesota Rule of Evidence 1005, which states official documents may be proved through certified copies or testified to be correct by a witness who has compared the document with the original. 714 N.W.2d at 711-12 (quoting Minn. R. Evid. 1005). If a certified copy of a non-Minnesota conviction “cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.” *State v. Griffin*, 336 N.W.2d 519, 525 (Minn. 1983) (emphasis omitted) (quoting Minn. R. Evid. 1005).

In *State v. Outlaw*, we permitted the state to develop the record on remand when the defendant did *not* object to the use of a non-Minnesota conviction in his criminal-history score. 748 N.W.2d 349, 356 (Minn. App. 2008), *rev. denied* (Minn. July 15, 2008). Fisher’s circumstances are distinct because Fisher *did* object to the use of his 2003 federal conviction in his criminal-history score. That said, “[w]e are not aware of precedent holding that the state is precluded from developing the record on remand if the defendant objected to the state’s use of an out-of-state conviction at sentencing.” *State v. Windell*, No. A18-1319, 2019 WL 2079811, at *11 (Minn. App. May 13, 2009) (reversing and remanding for the district court to decide whether the record on a non-Minnesota conviction should be expanded upon remand when the defendant objected to use of the non-Minnesota conviction in his criminal-history score at sentencing).

Here, Fisher absconded after his plea and caused a long delay before the sentencing hearing. The record lacks any evidence about Fisher’s 2003 federal conviction, including a certified copy of the conviction. The only documents referring to Fisher’s 2003 federal conviction are the sentencing-guidelines worksheet and Fisher’s December 2018 legal memorandum.

During Fisher’s sentencing hearing, the prosecuting attorney suggested a continuance if the district court required more information before determining Fisher’s criminal-history score. The district court did not rule on the state’s request. Thus, before resentencing Fisher, the district court must first decide whether the state may develop the

record related to Fisher's 2003 federal conviction and then determine Fisher's criminal-history score based on the record.

Reversed and remanded.