STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0663

Robert Earl Leatherberry, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 25, 2022
Affirmed
Smith, Tracy M., Judge

St. Louis County District Court
File No. 69DU-CR-15-1250

Robert Earl Leatherberry, Rush City, (pro se appellant)

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

Kimberly J. Maki, St. Louis County Attorney, Jessica J. Fralich, Assistant County Attorney, Duluth, Minnesota (for respondent)

Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

SMITH, TRACY M., Judge

Appellant Robert Earl Leatherberry appeals the district court's order denying his motion to correct his sentence, arguing that the district court erred by rejecting his argument that his criminal-history score was miscalculated to include a felony point for a Wisconsin

conviction when he received a gross-misdemeanor sentence for that offense after his probation was revoked. We conclude that, because Leatherberry received a stay of imposition for a felony-level offense, the district court properly assigned a felony point for the out-of-state conviction, despite the later probation revocation and gross-misdemeanor sentence. We therefore affirm.

FACTS

This case has a winding procedural history.

In 2016, Leatherberry was convicted of criminal sexual conduct in the first degree under Minn. Stat. § 609.342, subd. 1(e)(i) (2014). Before sentencing, Leatherberry challenged the sentencing worksheet's calculation of his criminal-history score, arguing that he should not be assigned one felony point for a 2006 conviction in Wisconsin for driving or operating a vehicle without consent, in violation of Wis. Stat. § 943.23(3) (2005-06).

The Wisconsin conviction was a "Felony I" offense under Wisconsin law and as such could have resulted in a sentence of imprisonment of more than one year. *See* Wis. Stat. § 939.50(3)(i) (2005-06) (noting that imprisonment for a Felony-I offense is "not to exceed 3 years and 6 months"). After pleading guilty to the offense, Leatherberry was convicted, but the Wisconsin court "withheld" his sentence, according to Wisconsin records, and imposed 120 days of stayed jail time and three years of probation. Leatherberry's probation was later revoked, and the Wisconsin court sentenced him to nine months in local jail.

At sentencing for this case, the district court rejected Leatherberry's argument that no felony point should be assigned to the Wisconsin conviction. It determined that Leatherberry had received the equivalent of Minnesota's stay of imposition of sentence for the Wisconsin conviction and that a felony point should be assigned. The district court sentenced Leatherberry to the presumptive sentence of 306 months' imprisonment. *See* Minn. Sent. Guidelines 4.B, 5.B (2014).

Leatherberry appealed his conviction but did not raise the criminal-history-score issue. This court affirmed. *See State v. Leatherberry*, No. A16-0731, 2017 WL 1549969 (Minn. App. May 1, 2017), *rev. denied* (Minn. July 18, 2017).

Leatherberry then petitioned for postconviction relief, arguing, among other things, that he was improperly assigned a felony point for the Wisconsin conviction and requesting an evidentiary hearing. The district court denied his petition without an evidentiary hearing, concluding that the criminal-history-score issue was procedurally barred under *State v. Knaffla* because it had been fully litigated at sentencing and Leatherberry had failed to raise it in his direct appeal. *See State v. Knaffla*, 243 N.W.2d 737, 738 (Minn. 1976). Leatherberry appealed the postconviction order, and this court reversed in part, concluding that the criminal-history-score challenge was not procedurally barred, and remanded for a determination of whether an evidentiary hearing was required on that issue. *Leatherberry v. State*, No. A19-1649, 2020 WL 3957249, at *4-5 (Minn. App. July 13, 2020).

On remand, the district court held an evidentiary hearing on the criminal-history-score issue. Leatherberry did not submit additional evidence. The district court denied

Leatherberry's postconviction petition for sentencing relief, finding that Leatherberry did not meet his burden of proof and that the Wisconsin conviction was properly assigned a felony point because Leatherberry received a stay of imposition of sentence for a felony.

Leatherberry did not appeal that postconviction order but instead moved to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9. Once again, he argued that he should not have received a felony point for the Wisconsin conviction. The district court denied Leatherberry's motion in two orders, finding that he failed to meet his burden of proof because he presented no additional evidence and noting that the "motion is denied for the reasons set forth in the [district court's order denying postconviction relief], which is the law of the case."[1]

Leatherberry appeals.

DECISION

Under Minn. R. Crim. P. 27.03, subd. 9, the court may "at any time correct a sentence not authorized by law." We review a district court's denial of a motion to correct a sentence under Minn. R. Crim. P. 27.03, subd. 9, for an abuse of discretion. *See Townsend v. State*, 834 N.W.2d 736, 738 (Minn. 2013). A district court abuses its discretion when it makes a decision based on an erroneous view of the law or when its decision is against logic and facts in the record. *Riley v. State*, 819 N.W.2d 162, 167 (Minn. 2012). We review

[1] One of Leatherberry's arguments in this appeal is that the district court erroneously determined that his criminal-history-score challenge is *Knaffla*-barred. But the district court did not rule based on *Knaffla*. Rather, it rejected Leatherberry's motion to correct his sentence on the merits as well as on the law of the case as established in its previous rejection of the identical argument in Leatherberry's postconviction petition.

legal conclusions de novo and factual findings under the clearly erroneous standard. *See Townsend*, 834 N.W.2d at 738.

Though the state bears the burden at sentencing to show that a prior conviction qualifies for inclusion in the defendant's criminal-history score, in the context of a motion to a correct sentence, the defendant bears the burden of proving that the sentence was based on an incorrect criminal-history score. *Williams v. State*, 910 N.W.2d 736, 740-43 (Minn. 2018); *see also* Minn. Stat. § 590.04, subd. 3 (2020) (placing the burden of proof on the petitioner in postconviction proceedings).

The Minnesota Sentencing Guidelines direct how to count out-of-state convictions for criminal-history-score purposes. The guidelines provide: "An offense may be counted as a felony only if it would **both** be defined as a felony in Minnesota, and the offender received a sentence that in Minnesota would be a felony-level sentence, which includes the equivalent of a stay of imposition." Minn. Sent. Guidelines 2.B.5.b (2014). There is no dispute that the Wisconsin offense would be defined as a felony in Minnesota; it equates to felony motor vehicle use without consent under Minn. Stat. § 609.52, subd. 2(17) (2004). The only question is whether Leatherberry received a sentence that would be a felony-level sentence in Minnesota.

Under the guidelines, felony convictions are assigned a particular weight (one point in this case) in a defendant's criminal-history score "provided that a felony sentence was stayed or imposed before the current sentencing or a stay of imposition of sentence was given before the current sentencing." Minn. Sent. Guidelines 2.B.1 (2014). A stay of

imposition "occurs when the court accepts and records a finding or plea of guilty, but does not impose (or pronounce) a prison sentence." Minn. Sent. Guidelines 1.B.19.a (2014). If the defendant "successfully completes the stay, the case is discharged, and the conviction is deemed a misdemeanor . . . but is still included in criminal history under section 2.B." *Id.*

The sentence for Leatherberry's conviction could have exceeded one year's imprisonment. Leatherberry received a "sentence withheld" for the Wisconsin conviction. Under Wisconsin law, "if a person is convicted of a crime," a court may "withhold sentence . . . and . . . place the person on probation" and may impose conditions on that probation. Wis. Stat. § 973.09(1)(a) (2005-06). The Wisconsin court found that Leatherberry was "guilty as convicted" and then withheld his sentence. In this context, Leatherberry received the equivalent of a stay of imposition.

But Leatherberry argues that, even if he received a stay of imposition for the Wisconsin conviction, he should not have received a felony point for that conviction because, after he violated his probation, he was sentenced to only nine months. In Minnesota, a felony sentence is more than one year of imprisonment. Minn. Stat. § 609.02, subd. 2 (2020). A gross-misdemeanor sentence is between 91 days and one year. *Id.*, subds. 3, 4 (2020). A sentence of nine months is therefore a gross-misdemeanor sentence and not a felony sentence in Minnesota.

Leatherberry relies on section 2.B.1.h of the guidelines to argue that his ultimate nine-month sentence—and not his stay of imposition—controls. That section states,

"[W]hen a prior felony conviction resulted in a non-felony sentence (misdemeanor or gross misdemeanor), the conviction must be counted in the criminal history score as a misdemeanor or gross misdemeanor conviction as indicated in section 2.B.3." Minn. Sent. Guidelines 2.B.1.h. Leatherberry argues that section 2.B.1.h qualifies the general rule, contained in section 2.B.1, that a felony conviction is counted as a felony for criminal-history-score purposes when a stay of imposition was given. *See* Minn. Sent. Guidelines 2.B.1. Under Leatherberry's interpretation, although he was given a stay of imposition, his out-of-state conviction should not be assigned a felony point because he was ultimately given a gross-misdemeanor sentence.

The argument is unpersuasive. Section 2.B.1 of the guidelines lists three circumstances in which a felony conviction is counted as a felony for criminal-history-score purposes: (1) when a felony sentence was stayed, (2) when a felony sentence was imposed, and (3) when a stay of imposition was given. *Id.* Here, the third circumstance applies: a stay of imposition was given. Section 2.B.1 does not say that a felony weight is *not* assigned if, following a stay of imposition, a person is sentenced to a non-felony sentence. Under the plain language of section 2.B.1, a felony point must be assigned based on the stay of imposition.

Additionally, although section 2.B.1.h directs that convictions for which non-felony sentences are given must be counted as indicated in another provision of the guidelines, it does not address a stay of imposition followed by a probation revocation and a non-felony

sentence. Thus, section 2.B.1.h does not qualify section 2.B.1's general rule that a felony conviction is counted when a stay of imposition of sentence is given.

Our decision in *State v. Stewart* does not compel a different result. 923 N.W.2d 668 (Minn. App. 2019), *rev. denied* (Minn. Apr. 16, 2019). In that case, a defendant had a prior felony conviction for which he had initially received a stay of imposition and was placed on probation. Later, the district court "amended" the sentence and imposed and executed a gross-misdemeanor sentence. *Id.* at 678. We concluded that, because the defendant received an amended gross-misdemeanor sentence, the prior felony conviction should count as a gross misdemeanor, not a felony, for criminal-history-score purposes. *Id.* at 680. Because *Stewart* dealt with an *amended* sentence, we did not analyze the effect of a stay of imposition. *Id.* at 678-80. As discussed above, when a defendant is given a stay of imposition for a felony, the underlying conviction counts as a felony for criminal-history-score purposes. Minn. Sent. Guidelines 2.B.1. Because Leatherberry received a stay of imposition for the Wisconsin offense, that conviction counts as a felony.[2]

[2] This conclusion accords with our reasoning in another unpublished opinion addressing an out-of-state conviction after *Stewart*. In *State v. Finley*, as part of analyzing the effect of a suspended indeterminate sentence of 8 to 19 months, we said that a stay of imposition of a sentence for which more than one year of imprisonment was authorized results in counting the underlying felony for criminal-history-score purposes. *State v. Finley*, No. A18-1597, 2020 WL 132168, at *6 (Minn. App. Jan. 13, 2020), *rev. denied* (Minn. Mar. 25, 2020). Consistent with our reasoning in that case, Leatherberry's Wisconsin conviction should be counted because more than one year's imprisonment was authorized when he was given a stay of imposition of sentence.

In sum, under section 2.B.1 of the guidelines, a felony point was properly included in Leatherberry's criminal-history score for his Wisconsin conviction because the offense would have been a felony under Minnesota law, and he received a stay of imposition of a sentence that could have exceeded one year. Therefore, the district court did not abuse its discretion in denying Leatherberry's motion to correct his sentence. [3]

Affirmed.

[3] Respondent State of Minnesota also argues that Leatherberry failed to meet his burden of proof because he failed to show that the Wisconsin conviction was a stay of adjudication rather than a stay of imposition. A stay of adjudication occurs when "a judgment of guilty has not been entered before the current sentencing." Minn. Sent. Guidelines. 2.B.1.g; *see also State v. Verschelde*, 595 N.W.2d 192, 195-96 (Minn. 1999) (noting that a stay of adjudication is not a judgment of guilty). Stays of adjudication are given no weight in a defendant's criminal-history score. Minn. Sent. Guidelines 2.B.1.g. But Leatherberry concedes in his brief that he received a stay of imposition. He argues that the felony point was incorrectly assigned because he ultimately received a non-felony sentence following the stay of imposition, not because he received a stay of adjudication.