STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0888

Lannon Lavar Burdunice, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed May 2, 2022
Affirmed
Ross, Judge

Hennepin County District Court
File No. 27-CR-16-19342

Lannon Lavar Burdunice, Bayport, Minnesota (pro se appellant)

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

Michael O. Freeman, Hennepin County Attorney, Jonathan P. Schmidt, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Ross, Presiding Judge; Worke, Judge; and Larkin, Judge.

NONPRECEDENTIAL OPINION

ROSS, Judge

Lannon Burdunice shot and killed a man over illegal drugs. The district court convicted Burdunice of murder and unlawfully possessing a firearm, and it sentenced him to 40 years in prison. Burdunice unsuccessfully appealed his conviction and unsuccessfully

petitioned the district court for postconviction relief. He challenges the district court's postconviction decision on multiple theories, none convincing. We therefore affirm.

FACTS

Lannon Burdunice shot and killed a man in July 2016 after arguing over a small amount of marijuana. A jury found him guilty of second-degree murder and possessing a firearm as an ineligible person. Minn. Stat. §§ 609.19, subd. 1(1), 624.713, subd. 1(2) (2014). The district court sentenced Burdunice under the mandatory minimum term of five years in prison for the firearm offense. Minn. Stat. § 609.11, subd. 5(b) (2014). Using the *Hernandez* method to calculate Burdunice's criminal-history score, it imposed a 40-year prison term for the murder offense, the statutory maximum.

Burdunice appealed, and we rejected his various challenges to his conviction and sentence. *State v. Burdunice*, No. A18-1269, 2019 WL 3000714, at *1 (Minn. App. July 8, 2019), *rev. denied* (Minn. Sept. 17, 2019). He then filed a "motion for correction modification/reduction of sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9," arguing that his sentences were unlawful. The district court converted his motion to a petition for postconviction relief under Minnesota Statutes sections 590.01–.11 (2020), and it denied the petition.

Burdunice appeals that decision.

DECISION

Burdunice challenges the district court's decision denying his petition for postconviction relief. We first address the district court's decision to treat Burdunice's rule 27 "sentencing" motion as a petition for postconviction relief. A rule 27 motion attacks "a

sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9. But when resolving a motion captioned as a sentence challenge also implicates an underlying conviction, the district court should treat it as a petition for postconviction relief. *State v. Coles*, 862 N.W.2d 477, 480 (Minn. 2015). The appropriate standard of review is "an open question," but we review the district court's decision here de novo. *Bolstad v. State*, 966 N.W.2d 239, 242–43 (Minn. 2021). Burdunice argued that the charge of illegal-firearm possession is an "included offense" and that his conviction for that offense should not have been sentenced, citing Minnesota Statutes section 609.04 (2014). Under that statute, a defendant "may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1. By asking the district court to reverse his sentence under that statute, Burdunice implicated his conviction. The district court therefore properly treated his rule 27 motion as a postconviction petition. The state did not raise and the district court did not address whether Burdunice's postconviction claims are barred by *State v. Knaffla*, 243 N.W.2d 737, 741 (Minn. 1976). We therefore also will not consider *Knaffla* and instead address the appeal on the merits.

We reject Burdunice's argument that his conviction and sentence violate the "included offense" restriction in section 609.04. Whether an offense is an included offense is a question of law we review de novo. *State v. Degroot*, 946 N.W.2d 354, 364 (Minn. 2020). Burdunice argues that, by proving that he committed the murder using a gun, the state also proved that he illegally possessed the gun, making the gun offense an included offense. The argument overlooks the fact that, to determine whether one offense is included in another, we compare the elements of the offenses, not the circumstances of the crimes.

State v. Coleman, 373 N.W.2d 777, 780–81 (Minn. 1985). None of the elements of the two offenses overlap. The murder charge required the state to prove that Burdunice "cause[d] the death of a human being with intent to effect the death of that person or another, but without premeditation," Minn. Stat. § 609.19, subd. 1(1), while the firearm offense required the state to prove that he was ineligible to possess a firearm and did so knowingly, Minn. Stat. § 624.713, subd. 1 (2014). Under these elements, proof that a defendant committed second-degree murder does not necessarily prove that he committed the firearm offense.

We are also unpersuaded by Burdunice's reliance on Minnesota Statutes section 609.035 (2014). That statute generally prohibits punishing a defendant for multiple offenses when they arose from a single behavioral incident. Minn. Stat. § 609.035. But a firearms exception to the single-behavioral-incident rule applies to "a prosecution for or conviction of a violation of section . . . 624.713, subdivision 1, clause (2)," and does not prevent multiple sentences arising from the incident. *Id.*, subd. 3. Burdunice's multiple sentences for murder and the firearm conviction do not violate the statute.

Burdunice next argues unconvincingly that the district court's application of *State v. Hernandez*, 311 N.W.2d 478 (Minn. 1981), violates statutory and constitutional law. The *Hernandez* court rejected a similar challenge and allowed the district court to sentence a defendant for two or more offenses in one hearing by applying each preceding conviction to calculate the defendant's criminal-history score for each succeeding offense. *Hernandez*, 311 N.W.2d at 480–81; *see also* Minn. Sent. Guidelines 2.B.1.e (2015). This approach applies to illegal-firearm convictions. *State v. Williams*, 771 N.W.2d 514, 522–24 (Minn.

2009) (concluding sentencing guidelines do not prohibit application of *Hernandez* to multiple convictions and sentences under felon-in-possession exception to section 609.035). And Burdunice's *Hernandez* sentences are consistent with his right to a jury trial under the Sixth Amendment. Although a defendant is entitled to a jury determination of any facts that may enhance his sentence, *Blakely v. Washington*, 542 U.S. 296, 301 (2004), this right does not apply to prior convictions, *Apprendi v. New Jersey*, 530 U.S. 466, 488–89 (2000). Burdunice's guilt resulted from a jury decision. We reject his statutory and constitutional arguments under *Hernandez*.

Burdunice has not shown that his 40-year sentence for second-degree murder resulted from an incorrect criminal-history score. He bears the burden of establishing that the district court imposed an unlawful sentence. *Williams v. State*, 910 N.W.2d 736, 742 (Minn. 2018). We review the district court's criminal-history calculation for an abuse of discretion. *State v. Edwards*, 900 N.W.2d 722, 727 (Minn. App. 2017), *aff'd*, 909 N.W.2d 594 (Minn. 2018). The parties believed during sentencing that Burdunice's criminal-history score included five and one-half felony points and that the district court must round downward to five. *See* Minn. Sent. Guidelines, cmt. 2.B.102 (Supp. 2015). The prosecutor relied on a score of five when urging the district court to impose a sentence at the top of the presumptive range of 346 to 480 months. The presentence investigation report instead presumed a score of six and indicated that the presumptive range was therefore 363 to 480 months. This result seems to be correct by our calculation. The parties appear to be rounding down twice instead of calculating the felony points and rounding down only if

there is a partial point. But we need not discuss the disagreement further for the following reasons.

The district court adopted the state's argument that Burdunice ought to be sentenced at the top of the presumptive range. In doing so, it did not specify whether it was following the prosecutor's understanding (of a criminal-history score of five) or the probation office's understanding (of a score of six). But the top of the presumptive sentencing range in this case is the same under either criminal-history score. Because the 480-month prison sentence falls within that range under either score, Burdunice has not met his burden of establishing that the district court imposed an unlawful sentence even if his claim of error is correct. Remanding for the district court to identify the applied score would change nothing. In any event, we hold that the district court did not abuse its discretion.

Burdunice forwards other arguments warranting little discussion. We see no merit to his contention that the sentencing guidelines are unconstitutional under *United States v. Booker*, 543 U.S. 220, 233–34 (2005), which held that the federal sentencing guidelines are not mandatory unless the sentencing facts are found by a jury. Unlike the circumstances in *Booker*, the only facts that the district court relied on to enhance Burdunice's sentence were his prior convictions, which may serve as the basis for mandatory enhancements without violating the right to a jury. And because a district court need not explain its reasons for imposing a presumptive sentence, *State v. Johnson*, 831 N.W.2d 917, 925 (Minn. App. 2013), we similarly see no merit in Burdunice's contention that the district court abused its discretion by ignoring arguments he made at sentencing.

Affirmed.