STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1024

State of Minnesota,
Respondent,

vs.

Arthur Rafie Mullins,
Appellant.

Filed April 25, 2022
Reversed and remanded
Slieter, Judge

Stearns County District Court
File No. 73-CR-14-10924

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

Janelle P. Kendall, Stearns County Attorney, Michael J. Lieberg, Assistant County Attorney, St. Cloud, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Andrew J. Nelson, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Segal, Chief Judge; Slieter, Judge; and Rodenberg, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

SLIETER, Judge

Appellant challenges his 360-month executed prison sentence for first-degree criminal sexual conduct, arguing that the sentence was calculated with an incorrect criminal-history score. Because appellant's criminal-history score was calculated incorrectly, we reverse and remand.

FACTS

Appellant Arthur Rafie Mullins was charged with one count of first-degree and two counts of second-degree criminal sexual conduct. Based on a plea agreement, Mullins pleaded guilty to first-degree criminal sexual conduct, in violation of Minn. Stat. § 609.342, subd. 1(a) (2008), and the remaining charges were dismissed.

During the plea hearing, Mullins's counsel and respondent State of Minnesota outlined the terms of the plea agreement:

> MULLINS'S TRIAL COUNSEL: We've got an agreement. [Mullins] is going to plead guilty to first-degree crim sex. The other charges dismissed. 360 months stayed. 60 days in jail. Psychosexual evaluation, and he has to register.
>
> Is that correct?
>
> THE STATE: It is. . . . [We] also discussed that [Mullins] needs to be ordered to cooperate with the presentence investigation, all previously-ordered conditions of release, and appear for the sentencing hearing.
>
> If he fails to do any of this, the plea would stick and the State could argue up to the full 360 months.

Before accepting Mullins's guilty plea and entering a conviction, the district court asked Mullins:

> THE COURT: [D]o you understand that you need to cooperate with the presentence investigation process, comply with all of the previously-set release conditions and return for sentencing?
>
> MULLINS: Yes.
>
> THE COURT: Do you further understand that if you fail to do any of those things, you could not withdraw your guilty plea, but the State would not be bound by the plea agreement and could ask that your sentence be executed?
>
> MULLINS: Yes.

Mullins absconded and failed to appear at the scheduled sentencing hearing. He was apprehended over one year later.

Mullins then moved to withdraw his guilty plea. During the sentencing hearing, the district court denied Mullins's motion and sentenced him to 360 months in prison based on a severity-level A offense and a criminal-history score of 8 points, which included one custody-status point. Mullins directly appealed from his judgment of conviction. Our court affirmed his conviction but remanded for resentencing to allow the state to offer evidence of Mullins's criminal-history score, specifically, his custody status at the time of the offense. *State v. Mullins*, No. A19-1620, 2020 WL 5107289, at *4 (Minn. App. Aug. 31, 2020), *rev. denied* (Minn. Nov. 25, 2020).

During the resentencing hearing, the parties agreed that the original criminal-history score of 8 points was an error. Instead, Mullins's criminal-history score, before considering a custody-status point, was 5. The parties disagreed, however, as to whether

one custody-status point should be added to reach a total criminal history score of 6. A criminal-history score of 5 results in a presumptive guidelines sentence range of 261 to 360 months and a presumptive sentence of 306 months.[1] Minn. Sent. Guidelines IV. (2008). A criminal-history score of 6 results in a 306 to 360 months sentence range, with a presumptive sentence of 360 months. *Id.*

Mullins argued that the one custody-status point should not apply because he only admitted to committing the offense during a date range, identified in the complaint, of January 1, 2009, through March 1, 2013. Because no specific date of offense was identified, Mullins argued, the state could provide no evidence showing that he was on supervision at the time of the offense. The state responded that the custody-status point applied because Mullins was on supervision at times during part of the offense-date range from November 2008 until March 2010, and at certain times during 2012.

The district court agreed with the state and assigned one custody-status point, explaining:

> As a matter of law, I think the date range does allow the custody point to be applied in this particular case. As I read the guidelines here, and I'm looking at the 2008 guidelines, it states that one point is assigned if the offender commits the current offense within the period of the initial probationary sentence for that. There's a date range to the offense, and that

[1] The presumptive sentence consists of a recommended fixed duration surrounded by a range of lengths "15 percent lower and 20 percent higher than the fixed duration," all of which are presumed acceptable. Minn. Sent. Guidelines II.I. (2008); *see also* Minn. Stat. § 244.09, subd. 5(2) (2008) ("The guidelines shall provide for an increase of 20 percent and a decrease of 15 percent in the presumptive, fixed sentence."). However, because the maximum prison sentence for a first-degree criminal-sexual-conduct conviction is 360 months, the maximum sentence for a criminal-history score of five or six are both capped at 360 months. *See* Minn. Stat. § 609.342, subd. 2(a) (2008).

> I don't think exact specificity is required and that certainly by clear and convincing evidence based on his own admissions that the custody point should apply, but -- so I think that the score should be [6].

The district court also found that the one custody-status point would not change Mullins's sentence because:

> the entire analysis really comes down to the plea agreement. The plea agreement, if you actually look at the plea petition, if you actually look at the actual transcript, it just says 360 months, which is a sentence that was authorized whether you looked at a score of 6 or a 5 for that.
>
> . . . .
>
> Today is a very narrow issue about criminal history score, and either if it's a [6] or a [5] the same result occurs, the original sentence stands.

The district court resentenced Mullins to an executed 360-month imprisonment. Mullins appeals.

DECISION

The parties agree that the district court erred by including one custody-status point in his criminal-history score. Even when parties agree that the district court erred, appellate courts independently review the legal issue. *See State v. Hannuksela*, 452 N.W.2d 668, 673-74 n.7 (Minn. 1990). We review a district court's determination of a defendant's criminal history and sentence for an abuse of discretion. *State v. Maley*, 714 N.W.2d 708, 711 (Minn. App. 2006); *State v. Soto*, 855 N.W.2d 303, 307-08 (Minn. 2014).

The state must prove a custody-status point applies and must do so by a fair preponderance of the evidence. *Maley*, 714 N.W.2d at 711. "Fair preponderance of the

evidence means that [a fact] must be established by a greater weight of the evidence." *Id.* at 712 (quoting *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980)). "It must be of a greater or more convincing effect and lead you to believe that it is more likely that the claim is true than not true." *Id.* at 712 (quotation omitted). When reasonable doubt exists as to when a defendant's criminal act occurred, the issue should be resolved in the defendant's favor. *State v. Goldenstein*, 505 N.W.2d 332, 347-48 (Minn. App. 1993), *rev. denied* (Minn. Oct. 19, 1993).

The Minnesota Sentencing Guidelines provide that an offender is assigned one custody-status point if the offender "was on probation, parole, supervised release, conditional release, or confined in a jail." Minn. Sent. Guidelines II.B.2.a (2008). "The basic rule assigns offenders one point if they were under some form of criminal justice custody when the offense was committed." Minn. Sent. Guidelines cmt. II.B.201 (2008).

Mullins, when providing a factual basis for his guilty plea, admitted that he committed the offense sometime during the date range described in the complaint of January 1, 2009, through March 1, 2013. Critically, Mullins did not admit to committing the offense on a specific date.

Because the state failed to prove by a fair preponderance of the evidence that Mullins "was on probation, parole, supervised release, conditional release, or confined in a jail" on the date when the offense occurred, the district court abused its discretion by assigning one custody-status point to Mullins when calculating his criminal-history score. *Maley*, 714 N.W.2d at 711.

A district court "must use accurate criminal history scores in order to set mandatory presumptive sentences that comply with the Minnesota Sentencing Guidelines." *State v. Maurstad*, 733 N.W.2d 141, 142 (Minn. 2007). Thus, "any sentence based on an incorrect criminal history score is an illegal sentence." *State v. Provost*, 901 N.W.2d 199, 201 (Minn. App. 2017) (quotation omitted).

The state argues that we need not remand this case. We disagree. Our court in *Provost* explained,

> the sentencing guidelines serve as the anchor for a district court's discretion at sentencing, when a guidelines range moves up or down, offenders' sentences tend to move with it. Given the great discretion vested in the district court in sentencing matters, we recognize that not every defendant who receives a sentence at the top or bottom end of the presumptive range when sentenced with an incorrect criminal history score need necessarily receive a similarly situated sentence within the presumptive range when resentenced with a correct criminal history score. However, when a defendant is sentenced based on an incorrect criminal history score, a district court must resentence the defendant.

Id. at 202 (quotation and citation omitted); *see also State v. Stewart*, 923 N.W.2d 668, 680 (Minn. App. 2019) (reversing and remanding for resentencing with instructions to use correct criminal-history score), *rev. denied* (Minn. Apr. 16, 2019).

The state also argues that *Provost* is distinguishable because it "was based on an entirely different procedural posture." We are not persuaded. *Provost* clearly directs that, when a district court imposes a sentence based on an incorrect criminal-history score, the "district court must resentence the defendant." *Provost*, 901 N.W.2d at 202. In order to comply with the sentencing guidelines, a district court "must use accurate criminal history

scores." *Maurstad*, 733 N.W.2d at 142. Therefore, we are required to remand the matter for resentencing.[2] *Provost*, 901 N.W.2d at 202.

Accordingly, we reverse Mullins's sentence and remand for resentencing. The district court may exercise its discretion to impose a sentence within the range for 5 criminal-history points.

Reversed and remanded.

[2] Mullins argues that we should instruct the district court to "consider whether [his] new criminal history score of [5] renders his guilty plea unintelligent." Because Mullins did not properly raise the argument on appeal, nor did he properly brief the issue, we do not consider it. *State v. Beaulieu*, 859 N.W.2d 275, 278 n.3 (Minn. 2015) (holding that failure to make a timely assertion of a right is a forfeiture of that right); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (holding that issues not briefed on appeal are waived).