STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1711

State of Minnesota,
Respondent,

vs.

David Josef Lovejoy,
Appellant.

Filed July 22, 2013
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

Polk County District Court
File No. 60-CR-11-2086

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Greg Widseth, Polk County Attorney, Andrew W. Johnson, Assistant County Attorney, Crookston, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Cathryn Middlebrook, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Ross, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

BJORKMAN, Judge

Appellant challenges his sentences for five convictions of possession of pornographic work involving a minor, arguing that the district court incorrectly

calculated his criminal-history score because his offenses arose out of a single course of conduct against multiple victims. In a pro se supplemental brief, appellant also contends that the district court (1) abused its discretion by ordering him to complete a sex-offender assessment as a condition of his executed sentence and (2) erred by denying his motion to suppress. We affirm the denial of the motion to suppress, reverse the imposition of the sex-offender-assessment condition, and remand to determine whether appellant's offenses were part of a single course of conduct against multiple victims.

FACTS

On August 3, 2011, appellant David Lovejoy gave police written and oral consent to search his laptop computer. On August 18, Lovejoy called the police, asking when his computer would be returned. Officer Darin Selzer responded that he hoped to return the computer by August 22.

Officers imaged the computer's hard drive and performed a visual search of its files. In the computer's RRV Advisors account, officers found 11 pictures depicting children engaged in sexual conduct. The pictures were downloaded on April 18, 2011, at 11:14 a.m., 11:37 a.m., 11:40 a.m., 11:41 a.m., 11:42 a.m., 11:48 a.m., and 11:51 a.m. Lovejoy created the RRV Advisors account and was the only person who used the account.

Respondent State of Minnesota charged Lovejoy with 11 counts of possession of pornographic work involving a minor. Lovejoy moved to suppress the pictures, contending that he revoked his consent to search the computer on August 18. The district

court denied the motion, concluding that Lovejoy did not make an unequivocal statement withdrawing his consent.

Lovejoy entered an *Alford* plea[1] to five offenses in exchange for dismissal of the other charges. At the guilty-plea hearing, Lovejoy acknowledged that the record contains evidence that the pictures were downloaded at different times on April 18. Pursuant to the plea agreement, the district court increased Lovejoy's criminal-history score by each charge on which he was sentenced that day[2] and imposed executed concurrent sentences of 15 months, 20 months, 25 months, 30 months, and 39 months in prison. The district court also ordered Lovejoy to complete a sex-offender assessment. This appeal follows.

D E C I S I O N

I. The district court must determine whether Lovejoy's offenses were part of a single course of conduct against multiple victims.

Under certain circumstances, a district court sentencing a defendant for multiple offenses on the same day may increase the defendant's criminal-history score to reflect each conviction on which he or she is sentenced. *See State v. Williams*, 771 N.W.2d 514, 521 (Minn. 2009). But if the offenses arose from a single course of conduct against multiple victims, the district court may only increase the defendant's criminal-history score by the two offenses at the highest severity levels. *State v. Parr*, 414 N.W.2d 776, 780 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988); Minn. Sent. Guidelines

[1] An *Alford* plea allows a defendant to plead guilty while maintaining his or her innocence because the record contains sufficient evidence to support a conviction. *See State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977).

[2] Lovejoy's criminal-history scores were zero for count 9, one for count 6, two for count 4, three for count 11, and four for count 8.

II.B.1.d. (2010); *see also* Minn. Sent. Guidelines cmt. II.B.108 (2010) (stating that Minn. Sent. Guidelines II.B.1.d applies "when such sentences are imposed on the same day").

The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). The question of whether multiple offenses were committed as part of a single course of conduct involves factual determinations that we review for clear error. *See State v. O'Meara*, 755 N.W.2d 29, 37 (Minn. App. 2008). But when the facts are not disputed, whether multiple offenses arose from a single course of conduct presents a question of law, which we review de novo. *See State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

As an initial matter, we address the state's argument that Lovejoy waived his challenge to the district court's calculation of his criminal-history score by entering into the plea agreement and by not objecting to his sentence in the district court. Generally, issues raised for the first time on appeal are not reviewable. *Garza v. State*, 632 N.W.2d 633, 637 (Minn. 2001). But a defendant cannot waive the right to appeal an illegal sentence. *State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007). A sentence based on an incorrect criminal-history score is illegal. *Id.* at 147. And a district court may not impose an illegal sentence merely because the parties accepted the sentence as part of a plea agreement. *See State v. Misquadace*, 644 N.W.2d 65, 72 (Minn. 2002) (stating that a plea agreement alone does not support a departure from the sentencing guidelines); *see also Maurstad*, 733 N.W.2d at 148 (stating that "a defendant cannot forfeit review of his criminal history score calculation"). Because Lovejoy asserts that his sentences were

based on an incorrect criminal-history score and because he cannot consent to an illegal sentence in a plea agreement, we reject the state's waiver argument.

Lovejoy argues the district court abused its discretion in calculating his criminal-history score because his offenses arose out of a single course of conduct against multiple victims. The sentencing guidelines do not define "single course of conduct," but we observed in *Parr* that the comments to the guidelines indicate that the offenses must occur during an incident "limited in time and place." 414 N.W.2d at 780 (emphasis omitted). And we turned for guidance to caselaw addressing whether offenses were committed as part of a single behavioral incident under Minn. Stat. § 609.035 (2010). *See id.* at 780-81 (quoting *State v. Banks*, 331 N.W.2d 491, 493 (Minn. 1983)). As in *Parr*, we apply the section 609.035 analysis here.

To determine whether offenses are part of a single behavioral incident, we consider the time, the place, and whether the offenses were motivated by a single criminal objective. *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997); *Banks*, 331 N.W.2d at 493. This is not a mechanical test but rather an analysis of all the facts and circumstances. *Soto*, 562 N.W.2d at 304. The state must prove by a preponderance of the evidence that the offenses did not occur as part of a single behavioral incident. *State v. Williams*, 608 N.W.2d 837, 841-42 (Minn. 2000).

The district court did not conduct a section 609.035 analysis or determine whether Lovejoy's offenses arose from a single course of conduct against multiple victims. And the record as to time, place, and criminal objective is limited. Although Lovejoy acknowledges that the pictures were downloaded at different times on April 18, the

complaint shows that all pictures were downloaded within a period of 37 minutes. The record also does not indicate where Lovejoy was located when the pictures were downloaded, whether he had a single criminal objective, or whether the images depict multiple victims. The district court's failure to address these factors and the lack of a developed record prevent us from determining whether the district court acted within its discretion when calculating Lovejoy's criminal-history score. Accordingly, we remand to the district court to determine whether Lovejoy's offenses arose from a single course of conduct against multiple victims. *See State v. Kvam*, 336 N.W.2d 525, 528 (Minn. 1983) (stating appellate courts may remand for findings when necessary to review the district court's order).

II. The district court abused its discretion by ordering Lovejoy to complete a sex-offender assessment as a condition of his executed sentences.

The district court has substantial discretion to impose a sentence authorized by law. *State v. Munger*, 597 N.W.2d 570, 573 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). The legislature has the exclusive authority to define the punishments and range of sentences for offenses. *State v. Pugh*, 753 N.W.2d 308, 310 (Minn. App. 2008). When a district court imposes an executed prison term, the Minnesota Department of Corrections determines the conditions of imprisonment. Minn. Stat. § 609.105, subd. 2 (2010); *State v. Cook*, 617 N.W.2d 417, 420-21 (Minn. App. 2000), *review denied* (Minn. Nov. 21, 2000). The district court may not impose a condition on an executed sentence unless expressly authorized by statute. *See Pugh*, 753 N.W.2d at 311 (concluding the district court could not impose a no-contact order as part of defendant's executed

sentence); *State v. Burdick*, 355 N.W.2d 176, 178 (Minn. App. 1984) (determining that the district court did not have authority to require the defendant to participate in a chemical-dependency program while incarcerated).

Lovejoy argues that the district court abused its discretion by ordering him to complete a sex-offender assessment as part of his executed sentence.[3] We agree. The district court does not cite any statute permitting it to order a sex-offender assessment as a condition of an executed sentence for a conviction of possession of child pornography. And we have found no authority allowing the district court to do so.

The only statutes that permit a district court to order a sex-offender assessment do not apply under the circumstances of this case. First, under Minn. Stat. § 617.247, subd. 7 (2010), the district court must order a mental examination if a defendant is convicted of a second or subsequent violation of possession of child pornography within 15 years of the prior conviction. This statute applies when "prior to the commission of the violation or offense, the actor has been adjudicated guilty of a specific similar violation or offense." Minn. Stat. § 609.02, subd. 11 (2010). Although Lovejoy was convicted of five counts of possession of child pornography, his multiple convictions do not constitute a second or subsequent offense because Lovejoy had not been adjudicated guilty of possession of child pornography prior to committing the offenses.

[3] The state contends that Lovejoy waived this challenge by not raising it to the district court and by accepting the plea agreement. We are not persuaded. Because Lovejoy is challenging the legality of his sentence, he cannot waive this argument. *See Pugh*, 753 N.W.2d at 311. And Lovejoy cannot consent to an illegal sentence in a plea agreement. *See Misquadace*, 644 N.W.2d at 72.

Second, the district court must order a sex-offender assessment before sentencing when a defendant is convicted of a felony-level sex offense. Minn. Stat. § 609.3457, subd. 1 (2010). But the definition of sex offense does not include possession of child pornography, *see id.*, subd. 4 (2010), and Lovejoy's assessment was ordered as part of his executed sentence, not prior to sentencing.

Because there is no statute that authorizes the district court to order Lovejoy to complete a sex-offender assessment as part of his executed sentence, we conclude that the district court abused its discretion by imposing this requirement.[4]

III. Lovejoy waived his challenge to the search of his computer.

Lovejoy argues that the district court erred by denying his motion to suppress because he revoked his consent to search his computer on August 18. We disagree. By pleading guilty, Lovejoy waived his right to challenge the search under the Fourth Amendment. *See Hirt v. State*, 309 Minn. 574, 575, 244 N.W.2d 162, 162-63 (1976); *State v. Sandmoen*, 390 N.W.2d 419, 423 (Minn. App. 1986).

Affirmed in part, reversed in part, and remanded.

[4] We note that the department of corrections' programming includes sex-offender treatment. Minn. Stat. § 241.67, subd. 1(1) (2010).