STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1967

State of Minnesota,
Respondent,

vs.

Edell Jackson,
Appellant.

Filed November 25, 2013
Affirmed in part, reversed in part, and remanded
Bjorkman, Judge

St. Louis County District Court
File No. 69DU-CR-10-4149

Lori Swanson, Attorney General, Karen B. Andrews, Assistant Attorney General, St. Paul, Minnesota; and

Mark S. Rubin, St. Louis County Attorney, Duluth, Minnesota (for respondent)

Cathryn Middlebrook, Interim Chief Appellate Public Defender, Rachel F. Bond, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Stoneburner, Judge.

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

BJORKMAN, Judge

Appellant challenges his convictions of two controlled-substance offenses, arguing that (1) the district court erred by admitting his confession because he did not validly

waive his *Miranda* rights, (2) the district court erred by imposing an upward durational departure in sentencing based on the career-offender statute, and (3) the warrant of commitment does not accurately reflect appellant's convictions. We affirm appellant's convictions but remand for correction of the warrant of commitment. We reverse appellant's sentence and remand for a determination as to the sequence of appellant's prior convictions justifying career-offender sentencing.

FACTS

In November 2010, the Lake Superior Drug and Gang Task Force worked with confidential informant V.B. to conduct controlled purchases of cocaine from appellant Edell Jackson. Using prerecorded currency, V.B. purchased crack cocaine from Jackson on four occasions: 1 gram on November 1, 1.8 grams on November 3, 0.9 grams on November 10, and 0.3 grams on November 15. Police arrested Jackson on December 1, and a search of his person uncovered 1.6 grams of cocaine and four hydrocodone tablets. After the search, Jackson waived his *Miranda* rights and gave a statement to police admitting to selling cocaine.

Jackson was charged with second-degree sale of a controlled substance, four counts of third-degree sale of a controlled substance, two counts of fifth-degree possession of a controlled substance (hydrocodone and cocaine), and unlawful possession of a firearm. Jackson moved to suppress his statements to police. The district court granted the motion with respect to statements Jackson made prior to receiving a *Miranda* warning but denied the motion with respect to his post-*Miranda* statements.

Jackson waived his right to a jury trial, and the district court found him guilty of second-degree sale of a controlled substance and fifth-degree possession of a controlled substance (cocaine). The district court declined to adjudicate Jackson guilty on the four controlled-substance charges underlying the aggregate second-degree offense and acquitted him of one count of fifth-degree possession of a controlled substance (hydrocodone) and unlawful possession of a firearm.

The state sought an aggravated sentence based on the career-offender statute, Minn. Stat. § 609.1095, subd. 4 (2010). Jackson waived his right to a sentencing jury. The district court found that Jackson has five prior felony convictions and committed the second-degree sale of a controlled substance as part of a pattern of criminal conduct. The district court imposed a sentence of 144 months' imprisonment for that offense and a concurrent sentence of 21 months' imprisonment for fifth-degree possession of a controlled substance. This appeal follows.

D E C I S I O N

I. Jackson voluntarily waived his *Miranda* rights.

Before a statement taken from a defendant during custodial interrogation can be admitted at trial, the state must prove that the defendant knowingly, intelligently, and voluntarily waived his *Miranda* rights. *State v. Dominguez-Ramirez*, 563 N.W.2d 245, 252 (Minn. 1997). Whether a defendant validly waived *Miranda* rights depends on the totality of the circumstances, including the defendant's age, maturity, intelligence, education, experience, and ability to comprehend, as well as the lack or adequacy of warnings, the length and legality of the detention, the nature of the interrogation, and

whether the defendant was deprived of physical needs or denied access to friends. *State v. Farrah*, 735 N.W.2d 336, 341 (Minn. 2007); *State v. Camacho*, 561 N.W.2d 160, 168 (Minn. 1997). "Ordinarily, the state is deemed to have met its burden if it shows that the defendant was fully advised of his *Miranda* rights, indicated he understood his rights, and gave a statement." *Dominguez-Ramirez*, 563 N.W.2d at 252. We review a district court's factual findings regarding a claimed *Miranda* waiver for clear error, *Farrah*, 735 N.W.2d at 341, but we independently determine, based on the district court's findings, "whether the state has shown by a fair preponderance of the evidence that the waiver was knowing, intelligent, and voluntary," *State v. Wilson*, 535 N.W.2d 597, 603 (Minn. 1995).

Jackson argues that his waiver was not voluntary. We disagree. The record shows he was repeatedly and accurately advised of his *Miranda* rights. The two interviewing officers provided Jackson a written *Miranda* statement and read it to him twice. Both before and after giving the *Miranda* advisory, the officers told Jackson that it was his choice whether to have a lawyer and that they could not promise any particular outcome in exchange for his willingness to talk to them. Jackson stated that he understood the rights as they were explained to him; that "[n]o promises or threats" had been made to him; and that "[h]aving these rights in mind," he wished to talk to the officers at that point rather than waiting for a lawyer. These facts are sufficient to satisfy the state's burden of proving Jackson voluntarily waived his *Miranda* rights. *See Dominguez-Ramirez*, 563 N.W.2d at 252.

Jackson contends, however, that a closer examination reveals coercive circumstances surrounding his purported waiver. He first highlights that he was not

permitted to answer his cell phone when it rang and that the officers did not provide anything for him to drink or permit him to use the bathroom. But Jackson's detention prior to his *Miranda* warning and waiver was "not lengthy," and he never asked for a drink or to use a bathroom. The officers provided cigarettes to him, and while he reached for his phone the one time it rang prior to the *Miranda* advisory, he did not request permission to answer it. *See Camacho*, 561 N.W.2d at 170 (noting, in concluding statement was voluntary, that defendant was detained for less than one and one-half hours and was not prevented from using the phone or bathroom, eating, or drinking). Jackson next argues that his expressed concern about "his girl" and the officers' references to possible federal prosecution indicate coercion. We disagree. The officers said that they would be communicating with state and federal prosecutors but did not threaten federal prosecution; in fact, they expressly disclaimed any knowledge of how or where prosecution would proceed. And Jackson's subjective fears about federal prosecution or collateral consequences for himself or his family do not establish coercion.[1] *See State v. Morales-Mulato*, 744 N.W.2d 679, 686-87 (Minn. App. 2008), *review denied* (Minn. Apr. 29, 2008).

[1] Jackson also asserts that the officers limited his access to counsel during the initial part of the interrogation by questioning him without a *Miranda* warning. But the conversation prior to the *Miranda* warning was focused on the officers clarifying whether Jackson wanted to invoke his right to counsel or not after Jackson requested a lawyer then declared that "everything changed" when officers discovered additional drugs during the search of his person. Some discussion to clarify whether he was invoking counsel was proper. *See State v. Robinson*, 427 N.W.2d 217, 223 (Minn. 1988). But to the extent that the discussion went beyond clarification, the district court accounted for this fact by suppressing any statements Jackson made before receiving a *Miranda* warning.

Finally, Jackson asserts that the officers coerced him to waive his *Miranda* rights by telling him, "[I]f you want to talk to us, this is the—this is your opportunity to do so." We are not persuaded. Jackson relies on inapposite cases, all of which address strict limits on what police can say after a suspect has unequivocally invoked the right to counsel. *See State v. Ray*, 659 N.W.2d 736, 742-43 (Minn. 2003); *State v. Hannon*, 636 NW.2d 796, 806 (Minn. 2001); *State v. Munson*, 594 N.W.2d 128, 138 (Minn. 1999). When, as here, a suspect has not expressly refused to talk, "the police must . . . be allowed to encourage suspects to talk." *State v. Merrill*, 274 N.W.2d 99, 108 (Minn. 1978). That encouragement can include explaining the limits of the right to counsel and that invocation could result in the defendant's side of the story not being told. *See State v. Ortega*, 798 N.W.2d 59, 72-73 (Minn. 2011) (holding that officer properly clarified equivocal invocation of right to counsel by explaining that the conversation must stop if the right is invoked and stating that the result of invocation may be that the defendant's perspective may not be known, without stating that defendant "would *never* have the opportunity to make a statement") (distinguishing *Hannon*). Here, the officers accurately informed Jackson that he had an "opportunity" to talk to them but conversation would have to cease if he requested a lawyer. They did not state that he would never have another opportunity to give a statement. The record amply supports the district court's finding that the officers "clearly were attempting to get [Jackson] to cooperate" but did not coerce him to do so.

Moreover, even if the district court erred in concluding that Jackson's *Miranda* waiver was valid, "the admission of a defendant's statements to police at trial in violation

of *Miranda* does not require a new trial if the state can show beyond a reasonable doubt that the error was harmless." *Farrah*, 735 N.W.2d at 343. The state has done so here. Jackson's statement played a relatively minor role in his three-day trial and no apparent role in the district court's decision. The district court noted that the statement was admitted but did not make any findings based on Jackson's statement, instead focusing on the controlled buys, V.B.'s testimony identifying Jackson as the person who sold him the crack cocaine on all four occasions, and Jackson's testimony. The district court expressly considered various factors bearing on V.B.'s credibility and found V.B.'s testimony more credible than Jackson's "version of the events." On this record, we conclude any error in admitting Jackson's post-*Miranda* statements was harmless beyond a reasonable doubt.

II. The district court abused its discretion by imposing an aggravated sentence under the career-offender statute without determining the sequence of Jackson's prior offenses and convictions.

We review a sentencing enhancement based on the career-offender statute for an abuse of discretion. *State v. Munger*, 597 N.W.2d 570, 574 (Minn. App. 1999), *review denied* (Minn. Aug. 25, 1999). But construction of a criminal statute is a question of law subject to de novo review. *State v. Murphy*, 545 N.W.2d 909, 914 (Minn. 1996).

Under the career-offender statute, the district court may impose an aggravated durational departure up to the statutory maximum if it determines that (1) "the offender has five or more prior felony convictions" and (2) "the present offense is a felony that was committed as part of a pattern of criminal conduct." Minn. Stat. § 609.1095, subd. 4. To be counted toward the first requirement, a prior conviction must have "occurred before the offender committed the next felony resulting in a conviction and before the

offense for which the offender is being sentenced." *Id.*, subd. 1(c) (2010); *State v. Huston*, 616 N.W.2d 282, 283 (Minn. App. 2000). Consequently, the career-offender statute requires "five sequential felony offenses and convictions . . . (i.e., offense/conviction, offense/conviction, offense/conviction, etc.)." *Huston*, 616 N.W.2d at 283-84.

The state submitted the following evidence of Jackson's prior convictions:

Jackson's Prior Offenses	Offense Date	Conviction Date
1. Manufacture/delivery of cocaine	unknown [charged 5/2/00]	11/16/00
2. Possession of cocaine w/ intent to deliver	2/21/01	6/27/01
3. Possession of controlled substance	unknown [charged 2/17/05]	7/7/05
4. Possession of controlled substance	unknown [charged 11/26/06]	5/2/07
5. Possession of controlled substance	8/17/07	11/29/07
6. Sale of controlled substance	4/20/10	8/16/11

It is undisputed that all six convictions are felonies.

Jackson contends that the evidence does not establish five sequential offenses and convictions because (1) his first conviction was not final before he committed the subsequent offense and (2) the record does not indicate when he committed some of the offenses. We address each of these arguments in turn.

A. Finality of convictions

Jackson asserts that his first conviction does not count for purposes of career-offender sentencing because it was not final until after he committed his second offense.[2] We disagree based on the plain language of the career-offender statute. *See State v. Kelbel*, 648 N.W.2d 690, 701 (Minn. 2002) (identifying plain language of a statute as the touchstone of statutory interpretation).

The career-offender statute defines conviction as "any of the following accepted and recorded by the court: a plea of guilty, a verdict of guilty by a jury, or a finding of guilty by the court." Minn. Stat. § 609.1095, subd. 1(b) (2010). This definition does not include the concept of finality. Nor does the sequential requirement that each of the offender's five or more prior felony convictions have "occurred before the offender committed the next felony resulting in a conviction." *See* Minn. Stat. § 609.1095, subds. 1(c), 4; *Huston*, 616 N.W.2d at 283. But Jackson asserts that because a conviction overturned on appeal does not constitute a conviction, a conviction cannot be considered a conviction until the date when it becomes final. We are not persuaded.

First, the cases on which Jackson relies for the proposition that "conviction" means "final conviction" focus on the preclusive effect of a conviction and do not address the timing of a conviction. *See State v. Castillo-Alvarez*, 836 N.W.2d 527, 533-34 (Minn.

[2] The state asserts that Jackson waived this argument by failing to raise it to the district court and contends that this court therefore should review only for plain error. But a defendant cannot waive a challenge to an illegal sentence. *See State v. Maurstad*, 733 N.W.2d 141, 147 (Minn. 2007); *see also State v. Outlaw*, 748 N.W.2d 349, 355-56 (Minn. App. 2008) (rejecting argument that appellant waived challenge to career-offender sentencing by failing to object to district court's determination that out-of-state convictions were felonies), *review denied* (Minn. July 15, 2008).

2013) (holding that "conviction" in Minn. Stat. § 609.045 (2012) requires "a final conviction, one that has not been set aside on appeal, in order for the statute to bar another prosecution"). As such, they are inapposite. Second, Jackson's extrapolation from the premises stated in those cases is flawed. The fact that a conviction overturned on appeal cannot be counted toward the requisite five or more sequential felony convictions, *see id.* at 534 ("a conviction that has been reversed is a legal nullity"), does not mean that a conviction affirmed on appeal must be deemed to have "occurred" on the date of that affirmance, rather than on the date the district court accepted the guilty plea or guilty verdict. And as we noted in *Huston*, the sequencing requirement prevents the "prejudicial use of multiple convictions resulting from a short crime spree" and permits the offender five opportunities for postconviction reform. 616 N.W.2d at 284. These purposes do not preclude consideration of a conviction that was still pending on appeal when the defendant committed his next offense. In sum, we discern no basis for departing from the statutory definition of conviction, which does not require finality.

B. Timing of offenses

Jackson contends that the state failed to show that two of his convictions arose out of offenses that followed a conviction, as required under *Huston*. We agree. While Jackson's first, second, fifth, and sixth convictions comport with *Huston*'s sequencing requirement, the available evidence does not indicate, and the district court failed to address, whether the same is true of his third and fourth convictions.[3]

[3] The record does not contain any evidence of when the offenses underlying the first, third, and fourth convictions occurred, but this evidentiary deficit does not preclude

The state contends that sequential ordering can be inferred from (1) the nearly four-year time span between Jackson's second conviction and the date that he was charged with the offense underlying his third conviction, (2) the separate charging of the offense underlying Jackson's fourth conviction more than one year after Jackson was convicted of the third, and (3) the fact that Jackson's fourth conviction preceded his fifth offense. We agree these circumstances suggest that Jackson's third and fourth convictions relate to offenses that occurred after his second conviction. But none of them *requires* such a determination as to either offense. And the district court did not expressly address the sequencing of the offenses or the paucity of evidence as to when the offenses occurred. Because the district court failed to address the requisite criteria for sentencing under the career-offender statute, we reverse Jackson's sentence.

We next consider whether remand is appropriate. In *Outlaw*, we reversed a sentence imposed under the career-offender statute because the state failed to prove that at least 5 of appellant's 11 prior convictions were felonies but remanded to permit the state to "further develop the sentencing record so that the district court can appropriately make its determination" of whether he had "the requisite number of prior felony convictions to support an aggravated sentence." 748 N.W.2d at 355-56. Jackson contends *Outlaw* is distinguishable and that remanding would improperly permit the state to present additional evidence on the sequence of his offenses and convictions in violation of his right against double jeopardy. We disagree. The state already proved

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consideration of the first conviction, since the underlying offense plainly occurred prior to the conviction date.

that Jackson has six prior felony convictions; the dates of the underlying offenses are facts that would have had to be proved beyond a reasonable doubt to obtain those convictions and therefore fall within the ambit of those facts susceptible to limited judicial fact-finding under *Outlaw*. *See id.* at 355 (concluding that district court may rely on facts proved beyond a reasonable doubt in determining independently whether convictions satisfy requirement of "five or more prior felony convictions").

Moreover, we are reversing not because Jackson lacks the requisite sequential criminal history, as in *Huston*, but because the record does not show that his proved history of convictions satisfies all of the statutory criteria, as in *Outlaw*. Also like *Outlaw*, the deficiency in the record is at least partly attributable to Jackson's failure to raise this issue before the district court. *See id.* at 356 (noting that appellant did not object to district court's determination that his out-of-state convictions were felonies). Accordingly, we remand for the district court to develop a sentencing record and resentence Jackson.

III. The warrant of commitment must be corrected.

Both parties assert that the warrant of commitment is incorrect. We agree. The district court's findings plainly indicate that it found Jackson guilty of fifth-degree possession of a controlled substance with respect to the cocaine found on his person on December 1 (count 7 of the amended complaint) but acquitted him of fifth-degree possession of a controlled substance with respect to the hydrocodone found on his person during the same search (count 6 of the amended complaint). But the warrant of commitment erroneously reflects a conviction for count 6 rather than count 7. On this

record, we conclude the warrant of commitment must be corrected to reflect that Jackson was convicted of count 7 and acquitted of count 6.

Affirmed in part, reversed in part, and remanded.