STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1359

State of Minnesota,
Respondent,

vs.

Vincent Eugene Stobb,
Appellant.

Filed January 13, 2014
Affirmed
Hudson, Judge

Mille Lacs County District Court
File No. 48-CR-05-2622

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

Janice S. Jude, Mille Lacs County Attorney, Tara C. Ferguson Lopez, Assistant County Attorney, Milaca, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hudson, Judge; and Smith, Judge.

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

HUDSON, Judge

Appellant challenges the district court's order denying a motion to correct his 2006 sentence as unauthorized by law, arguing that the district court erred by failing to

reduce his criminal-history score to zero when imposing permissive consecutive sentencing under the Minnesota Sentencing Guidelines (2006). Because appellant was sentenced pursuant to Minn. Stat. § 169A.28 (2004), which requires mandatory minimum sentencing, the district court did not err by declining to impose sentence using a reduced criminal-history score, and we affirm.

FACTS

In January 2006, after police stopped appellant Vincent Eugene Stobb's vehicle in Mille Lacs County, appellant entered a *Norgaard* plea to first-degree driving-while-impaired (DWI), committed within ten years of the first of three prior qualified impaired-driving incidents, in violation of Minn. Stat. § 169A.20, subd. 1(1), .24 (2004). In March 2006, the district court sentenced appellant to 66 months, based on the severity level of his offense and his criminal-history score of five; the sentence was imposed consecutively to a 48-month sentence in Aitkin County for a probation violation on a felony DWI. Appellant moved to correct his sentence pursuant to Minn. R. Crim. P. 27.03, subd. 9, arguing that he should have received only a 36-month sentence because the Minnesota Sentencing Guidelines require that, on a permissive consecutive sentence, his criminal-history score should be reduced to zero. *See* Minn. Sent. Guidelines II.F. (2006), effective Aug. 1, 2005. The district court denied the motion, reasoning that appellant was sentenced under Minn. Stat. § 169A.28 (2004), which requires mandatory consecutive sentencing for repeat DWI offenses, and that in *State v. Holmes*, 719 N.W.2d 904, 909 (Minn. 2006), the Minnesota Supreme Court held that sentencing guideline II.F.

does not apply to a mandatory consecutive sentence imposed under Minn. Stat. § 169A.28. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by sentencing him using a criminal-history score of five, rather than a criminal-history score of zero, based on the application of Minnesota Sentencing Guideline II.F.2. "The [district] court may at any time correct a sentence not authorized by law." Minn. R Crim. P. 27.03, subd. 9. This court will not reverse the denial of a motion to correct a sentence under Minn. R. Crim. P. 27.03, subd. 9, unless the district court abused its discretion. *Anderson v. State*, 794 N.W.2d 137, 139 (Minn. App. 2011), *review denied* (Minn. Apr. 27, 2011). But we consider de novo legal issues of interpreting statutes and the sentencing guidelines. *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006).

The state initially challenges this court's jurisdiction to correct appellant's sentence, arguing that he did not appeal the sentence within the required time frame after his 2006 conviction and did not seek postconviction relief. But this court retains authority to review a sentence for inconsistency with statutory requirements and to direct entry of an appropriate sentence. *See* Minn. R. Crim. P. 28.05, subd. 2. We may therefore consider appellant's substantive argument on the accuracy of his criminal-history score. *Cf. Vazquez v. State*, 822 N.W.2d 313, 320 (Minn. App. 2012) (holding that the two-year time limitation for postconviction petitions does not apply to a motion to correct a sentence under Minn. R. Crim. P. 27.03, based on a challenge to the accuracy of a criminal-history score).

The sentencing guidelines in effect at the time of appellant's offense and sentencing provide that "[f]or each offense sentenced consecutive to another offense(s), other than those that are presumptive, a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration." Minn. Sent. Guidelines II.F. Appellant argues that, because his felony DWI conviction is listed as an offense eligible for permissive consecutive sentencing in Minn. Sent. Guidelines VI (2006), the district court erred by failing to reduce his criminal-history score to zero when it ordered permissive consecutive sentencing.

The district court, however, rejected appellant's argument based on the application of *Holmes*, 719 N.W.2d at 909, in which the Minnesota Supreme Court addresed the issue of the imposition of mandatory consecutive sentences for qualifying DWI convictions under Minn. Stat. § 169A.28 (2004). The supreme court noted that, although Minn. Stat. § 169A.28 requires a court to impose consecutive sentences for certain DWI convictions, the sentencing guidelines do not address consecutive sentencing under section 169A.28 as either presumptive or permissive consecutive sentencing. *Holmes*, 719 N.W.2d at 909. The court stated that "[p]ermissive consecutive sentencing is . . . limited to very specific situations that . . . do not apply in this case." *Id*. (citing Minn. Sent. Guidelines II.F). Therefore, the supreme court held that, "because by its terms section II.F does not apply to a mandatory consecutive sentence under Minn. Stat. § 169A.28," when a district court imposes mandatory consecutive sentencing under that

statute, the offender's criminal-history score is not amended downward under the guidelines. *Id*.

Appellant argues that *Holmes* is inapposite because, in that case, the defendant's felony DWI sentence was imposed consecutively to a gross-misdemeanor sentence, and the sentencing guidelines do not apply to gross-misdemeanor sentencing. He argues that because, in contrast, both of his sentences were for felonies, the sentencing guidelines should apply. But the result in *Holmes* was not based on the fact that the defendant's felony sentence was imposed consecutively to a gross-misdemeanor sentence. Rather, the supreme court concluded that, because Minn. Stat. § 169A.28 required the imposition of consecutive sentencing on qualified DWI convictions, and the sentencing guidelines did not refer to that statute, the guidelines did not provide for a reduction in a criminal-history score because permissive consecutive sentencing was not involved. *See id*.

Appellant also argues that consecutive sentencing under section 169A.28 must be considered the equivalent of a presumptive sentence under the guidelines, so that his criminal-history score should be reduced to one, resulting in a consecutive 42-month sentence. *See* Minn. Sent. Guidelines II.F (stating that if a consecutive sentence is presumptive, a criminal history of one is assigned). We reject this argument based on the supreme court's statement in *Holmes* that "[n]either the text nor the comments to section II.F. address consecutive sentencing under section 169A.28 as a case in which either a presumptive or a permissive consecutive sentence may be imposed." *Holmes*, 719 N.W.2d at 909.

Appellant also argues that he is entitled to the benefit of a 2006 amendment to Minn. Stat. § 169A.28, which took effect following *Holmes* and within 90 days of his sentencing. In that amendment, the Minnesota Legislature added subdivision 1(b), which provides that "[t]he requirement for consecutive sentencing . . . does not apply if the person is being sentenced to an executed prison term for a violation of section 169A.20 (driving while impaired) under circumstances described in section 169A.24 (first-degree driving while impaired)." Minn. Stat. § 169A.28, subd. 1(b) (2006); *see* 2006 Minn. Laws ch. 260, art. 2, § 4, at 734–35. The legislature provided that the effective date of the amendment was June 2, 2006, the day following its enactment. 2006 Minn. Laws ch. 260, art. 2, § 4, at 735. Statutes are not retroactive unless clearly so intended by the legislature. Minn. Stat. § 645.02 (2012). No statutory authority exists for retroactive application of the 2006 amendment.

Appellant argues that the amendment may be applied retroactively because it only clarified the legislature's intent. *See State v. Lilleskov*, 658 N.W.2d 904, 909 (Minn. App. 2003) (concluding that an amendment applied retroactively when it merely extended the scope of a statute, which already provided for its retroactive application). But here, the legislature explicitly stated that the amendment is effective on the day following its enactment, which shows that the legislature did not clearly and manifestly intend the statute to have retroactive effect. *See State v. McDonnell*, 686 N.W.2d 841, 846 (Minn. App. 2004) (holding that an amendment to the DWI statute excluding license suspensions for underage drinking and driving did not retroactively apply to DWI violations that occurred before the amendment), *review denied* (Minn. Nov. 16, 2004).

Appellant also argues that his conviction was not final when the amendment took effect. *Cf. State v. Coolidge*, 282 N.W.2d 511, 514 (Minn. 1979) (holding that "a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached"). But "the principle stated in *Coolidge* applies only in the absence of a contrary statement of intent by the legislature." *McDonnell*, 686 N.W.2d at 846; *see also State v. Basal*, 763 N.W.2d 328, 336 (Minn. App. 2009) (noting that subsequent cases have narrowed *Coolidge* and concluding that language setting forth the effective date of an amendment expressed legislative intent that the amendment does not have retroactive effect). Here, the legislature specifically provided the date that the amendment was to take effect; the amendment also refers to a person who "is being sentenced." 2006 Minn. laws, ch. 260, art. 2, § 4, at 735. Thus, the legislature expressed its intent that the 2006 amendment does not apply to a sentencing, such as appellant's, which occurs before its stated effective date. Accordingly, the district court did not err by declining to apply the amendment retroactively to appellant's sentence.

Affirmed.