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Minn. Stat. § 480A.08, subd. 3 (2006).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1403**

State of Minnesota,
Appellant,

vs.

Heather Mae Morehouse,
Respondent.

**Filed February 5, 2008
Reversed and remanded
Hudson, Judge
Dissenting, Randall, Judge**

Kandiyohi County District Court
File No. 34-CR-06-2543

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul,
Minnesota 55101-2134; and

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(for respondent)

Considered and decided by Kalitowski, Presiding Judge; Randall, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

Appellant State of Minnesota challenges the district court's stay of adjudication following respondent Heather Mae Morehouse's guilty plea to a gross misdemeanor theft charge. Appellant argues that the district court erred in issuing a stay of adjudication because it did not find that appellant abused its prosecutorial charging function. Respondent argues that the pre-trial diversion program set forth in Minn. Stat. § 401.065 (2006) denied her equal protection under the law. Because the district court erred when it stayed adjudication without finding that appellant abused its prosecutorial charging function, we reverse and remand for sentencing. Because respondent's equal-protection argument was not raised before, or considered by, the district court, we do not address it.

FACTS

In December 2006, respondent was charged with one count of felony theft in violation of Minn. Stat. § 609.52, subds. 2(1), 3(3)(a) (2006), for stealing a total of \$1,000 from her employer between August 2006 and December 2006. Thereafter, respondent entered into a plea agreement and pleaded guilty to a reduced charge of one count of gross misdemeanor theft under Minn. Stat. § 609.52, subds. 2(1), 3(4) (2006).

Following her guilty plea, a probation officer recommended in a pre-sentencing investigation report (PSI) that respondent receive a stay of adjudication, a \$250 fine, and one year of probation with certain conditions.

At the sentencing hearing, respondent's attorney argued for a stay of adjudication based on respondent's lack of prior convictions, her compliance with pre-trial release

conditions, her payment of restitution, and her demonstrated remorse. Appellant objected to the PSI recommendation to stay adjudication because: (1) the charge had already been reduced from a felony to a gross misdemeanor; (2) the offense involved 15 separate thefts over several months; and (3) respondent stole from her employer, who had placed her in a position of trust. The state did not object to the other PSI recommendations.

After hearing appellant's objection, the district court stated:

I'm going to increase the penalty for [respondent], but I'm not going to convict her of the offense because -- well the fact that [respondent's attorney] points out. I don't want her saddled with this conviction and I . . . understand what [appellant] says. Had she had any other encounters with the law this would be a different result.

The district court then accepted respondent's guilty plea, stayed adjudication of the charge, and placed respondent on probation for up to two years with certain conditions.

This appeal follows.

DECISION

I

Appellant challenges the district court's order to stay adjudication of a gross-misdemeanor charge. Because appellant commenced this criminal action in 2006, we treat this challenge as an appeal from a pre-trial order.¹ *See State v. Thoma*, 569 N.W.2d

¹ Effective April 1, 2007, Minn. R. Crim. P. 28.04, subd. 7, provides a specific procedure for prosecutors to appeal from an order staying adjudication. Under this amended rule, a prosecutor appealing a stay of adjudication no longer must show that the stay of adjudication critically impacted the outcome of the trial and is not responsible for attorney fees a defendant incurs from the appeal. *Compare* Minn. R. Crim. P. 28.04, subd. 2, *with id.*, subd. 7. But because this criminal case commenced prior to April 1, 2007, the procedure for appeals from pre-trial orders in rule 28.04, subd. 2, applies.

205, 208 (Minn. App. 1997) (holding that stay of adjudication in non-felony case is a pre-trial order appealable by the state), *aff'd mem.*, 571 N.W.2d 773 (Minn. 1997). To appeal from a pre-trial order, the prosecuting attorney must clearly and unequivocally show that the district court erred and that the error, unless reversed, will critically impact the outcome of the prosecution. Minn. R. Crim. P. 28.04, subd. 2; *State v. Brown*, 709 N.W.2d 313, 316 (Minn. App. 2006) (holding that reduction in charge, along with stay of adjudication and favorable terms of plea met critical-impact standard). Because the district court ordered a stay of adjudication over the prosecutor's objection and thereby prevented the prosecution from obtaining a conviction, appellant has shown that the stay of adjudication critically impacted the outcome of the prosecution. Therefore, our analysis moves to whether the district court erred in staying adjudication.

Appellant argues that the district court erred in issuing a stay of adjudication because the district court did not find that the prosecutor abused his discretion in the prosecutorial charging function. We agree. Before a district court can order a stay of adjudication over the prosecutor's objection, the district court must find that the prosecutor clearly abused his discretion in the exercise of the prosecutorial charging function. *State v. Lee*, 706 N.W.2d 491, 496 (Minn. 2005).

Here, the district court did not find that the prosecutor clearly abused his discretion in the exercise of the prosecutorial charging function. Instead, the district court appeared to stay adjudication because it was concerned about the collateral consequences that would result from respondent having a criminal record. After *Lee*, these concerns do not support a stay of adjudication. Therefore, because the district court did not find that the

prosecutor abused the prosecutorial charging function, the district court erred when it ordered a stay of adjudication over the prosecutor's objection. Accordingly, we reverse the order staying adjudication and remand to the district court for sentencing.

II

Respondent contends that she was denied equal protection under the law because the pre-trial diversion program set forth in Minn. Stat. § 401.065 (2006) "treats similarly situated people differently dependent upon where the[] alleged crime is committed." Because respondent's argument was not raised before, or considered by, the district court, we decline to address it. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996).

Reversed and remanded.

RANDALL, Judge (dissenting)

I respectfully dissent. I would affirm the district court. The district court's stay of adjudication on a gross misdemeanor charge is akin to a downward departure. With the discretion granted to trial judges on sentencing issues, I can find no reason to interfere with what the district court did.