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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1238**

State of Minnesota,
Respondent,

vs.

Kirk Lloyd Nelson,
Appellant.

**Filed July 22, 2008
Reversed and remanded
Willis, Judge**

Chisago County District Court
File No. CR-06-783

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

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Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Willis, Presiding Judge; Halbrooks, Judge; and Johnson, Judge.

UNPUBLISHED OPINION

WILLIS, Judge

Appellant challenges his sentence for first-degree driving while impaired, arguing that the district court erred in its determination of the duration of the sentence. We reverse and remand.

FACTS

On March 27, 2006, a deputy with the Chisago County Sheriff's Department stopped a car driven by appellant Kirk Lloyd Nelson for speeding and for not having a rear license plate. After Nelson failed several field sobriety tests, the deputy administered a preliminary breath test that showed an alcohol concentration of .128, and the deputy placed Nelson under arrest. At the county jail, officers learned that Nelson had been convicted of three alcohol-related driving offenses since 1997, that his driver's license had been cancelled as inimical to public safety, and that he was on supervised release from an executed prison sentence for one of the prior convictions. As a result of the March 2006 incident, Nelson was charged with, among other crimes, first-degree driving while impaired, in violation of Minn. Stat. §§ 169A.20, subd. 1(5), .24, subds. 1, 2 (2004).

On December 4, 2006, Nelson pleaded guilty to first-degree driving while impaired in exchange for the state's agreement to dismiss the remaining charges and seek only the presumptive sentence under the guidelines. The district court accepted Nelson's guilty plea, set the matter for sentencing, and ordered a presentence investigation. At sentencing on March 26, 2007, Nelson argued for a downward dispositional departure,

which the district court denied. He also requested that the district court impose a sentence concurrent with any other sentence that resulted from the fact that he had committed the current offense while on supervised release from an executed prison sentence. The district court denied Nelson's request, sentenced him to 75 months' imprisonment, and ordered that the sentence be served consecutively "to any other sentence."¹ This appeal follows.

D E C I S I O N

Nelson argues that he is entitled to the application of a 2006 amendment to Minn. Stat. § 169A.28 in determining his sentence and that the application of that amendment requires that he be resentenced under the Minnesota Sentencing Guidelines. This court reviews de novo questions of statutory construction and the interpretation of the sentencing guidelines. *State v. Holmes*, 719 N.W.2d 904, 907 (Minn. 2006).

At the time of Nelson's offense in March 2006, section 169A.28 required that district courts impose consecutive sentences for:

- (1) violations of section 169A.20 (driving while impaired) arising out of separate courses of conduct;
- (2) a violation of section 169A.20 when the person, at the time of sentencing, is on probation for, or serving, an executed sentence for a violation of 169A.20 . . . and the prior sentence involved a separate course of conduct; or
- (3) a violation of section 169A.20 and another offense arising out of a single course of conduct that is listed in subdivision 2, paragraph (e), when the person has five or more qualified prior impaired driving incidents within the past ten years.

¹ Although the district court did not identify any "other sentence," it is clear that the district court and the parties anticipated that Nelson would receive another sentence because he committed the current offense while on supervised release from an executed prison sentence.

Minn. Stat. § 169A.28, subd. 1 (2004). Later in 2006, the legislature amended section 169A.28 by adding 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).

We agree with Nelson that he is entitled to the application of the 2006 amendment to Minn. Stat. § 169A.28 in determining his sentence. The legislature provided that the effective date of the amendment was the day following its enactment, so that the effective date was June 2, 2006. *See* 2006 Minn. Laws ch. 260, art. 2, § 4, at 734-35. The amendment does not specify that it applies only to offenses committed after its effective date. Rather, by its terms, the amendment applies “at the time of sentencing” to a defendant who “is being sentenced.” Accordingly, a defendant is entitled to the application of the amendment if he is sentenced on or after the effective date. Here, Nelson was sentenced in March 2007, well after the June 2, 2006 effective date, and, therefore, he is entitled to the application of the amendment to section 169A.28.

Because the 2006 amendment was in effect at the time of Nelson’s sentencing, the district court was not required by statute to impose a consecutive sentence. But as Nelson acknowledges, the district court still was permitted, under the sentencing guidelines, to impose a consecutive sentence because Nelson committed the current offense while on supervised release from an executed prison sentence for a prior alcohol-related driving

conviction. Thus, Nelson does not contend that he is entitled to a concurrent sentence. Rather, he claims that a remand is required for a recalculation of the duration of a consecutive sentence. Specifically, he argues that if his sentence is to be imposed consecutively, then, in light of the amendment to section 169A.24, the imposition of such a sentence is governed by the sentencing guidelines, which require using a criminal-history score of one in calculating the duration of the sentence. The state has filed a letter with this court in lieu of a brief, agreeing that Nelson is “entitled to be sentenced as set forth in his brief” and requesting that “the matter be remanded for [re]sentencing.” We agree that a remand for resentencing is required.

Under the sentencing guidelines, “[c]onsecutive sentences are presumptive when the conviction is for a crime committed by an offender . . . on supervised release . . . from an executed prison sentence.” Minn. Sent. Guidelines II.F. The guidelines provide that when a consecutive sentence is presumptive, “a criminal history score of one, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration.” *Id.* Here, Nelson committed the current offense while on supervised release from an executed prison sentence. His sentence, therefore, is presumptively consecutive and the duration must be calculated based on a criminal-history score of one.²

² The mandatory-minimum sentence for a first-degree driving-while-impaired conviction is 36 months. Minn. Stat. § 169A.276, subd. 1(a) (2004). Because that mandatory minimum is a shorter term than the presumptive sentence using a criminal-history score of one (42 months), the guidelines require using a criminal-history score of one to determine the duration of a consecutive sentence. *See* Minn. Sent. Guidelines II.F.

It appears that the district court calculated the duration of Nelson's sentence based on his full criminal-history score of nine. The presumptive duration of a sentence for an offender with a criminal-history score of nine who is convicted of first-degree driving while impaired is 72 months. *Id.* at IV. Nelson's sentence included a three-month custody-status enhancement, and, thus, the district court imposed a 75-month sentence. Had the district court used a criminal-history score of one, as required by the guidelines, the presumptive duration of Nelson's sentence would have been 42 months, plus the three-month custody-status enhancement. *See id.* The guidelines next require that the district court calculate, based on Nelson's full criminal-history score, the duration of a concurrent sentence, which, as already noted, is 75 months. *Id.* at II.F. If such a 75-month concurrent sentence would result in more time to serve than a 45-month consecutive sentence, then the guidelines provide that Nelson's sentence is presumptively concurrent. *See id.* But either of these sentences—that is, the 75-month concurrent sentence or the 45-month consecutive sentence—would be shorter than the 75-month consecutive sentence that the district court imposed. Therefore, a remand is necessary to recalculate the duration of Nelson's sentence, regardless of whether that sentence ultimately is concurrent with or consecutive to another sentence.

We note that the Minnesota Supreme Court's decision in *State v. Holmes* does not preclude resentencing here. In *Holmes*, the supreme court held that consecutive sentences under section 169A.28 are neither presumptive nor permissive under the sentencing guidelines, but rather are mandatory by statute, and, thus, they are not governed by the rules in the guidelines regarding the duration of presumptive and

permissive consecutive sentences. 719 N.W.2d at 909. But consecutive sentences for first-degree driving-while-impaired convictions were no longer mandatory by statute at the time of Nelson’s sentencing because the 2006 amendment to section 169A.28 had become effective. And the supreme court in *Holmes* stated that its decision “express[ed] no opinion about the [2006 amendment to section 169A.28] and the effect [it] will have on sentencing in future [similar] cases.” *See id.* at 909 n.9. The facts here clearly establish one of the limited circumstances in which consecutive sentences are classified as presumptive under the guidelines because Nelson was on supervised release from an “executed prison sentence” when he committed the current offense. *See Minn. Sent. Guidelines II.F.*

We reverse Nelson’s sentence and remand for resentencing consistent with this opinion.

Reversed and remanded.