STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2145

State of Minnesota,
Respondent,

vs.

Kevin Herman Larson,
Appellant.

Filed December 30, 2008
Affirmed in part, reversed in part,
and remanded
Hudson, Judge

Carlton County District Court
File No. CR-06-3146

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

Thomas Pertler, Carlton County Attorney, 202 Courthouse, P.O. Box 300, Carlton, Minnesota 55718 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

HUDSON, Judge

On appeal from his two convictions of failure to register as a predatory offender, appellant argues that: (1) the evidence was insufficient to convict him; (2) his convictions and sentences violate double jeopardy and Minn. Stat. § 609.035; (3) his criminal-history score was improperly calculated; (4) his 30-month sentence constitutes an unintended and unsupported departure; and (5) he was not properly granted jail credit. We affirm in part, reverse in part, and remand.

FACTS

In 1993, appellant was sentenced to 36 months in prison based on his 1992 plea of guilty to second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(a) (1990). In 2004 and 2006, appellant was convicted (in Cass County and Carlton County, respectively) of failure to register as a predatory offender in violation of Minn. Stat. § 243.166. Appellant appealed, and this court affirmed each conviction in unpublished decisions. *See State v. Larson*, A05-40, 2006 WL 618857 (Minn. App.) (*Larson I*), *review denied* (Minn. May 16, 2006); *State v. Larson*, A07-623, 2007 WL 2993608 (Minn. App.) (*Larson II*), *review denied* (Minn. Dec. 19, 2007).

On June 30, 2006, as appellant's release from incarceration was approaching, appellant's case manager was notified by the Bureau of Criminal Apprehension (BCA) that appellant was not compliant with predatory-offender-registration requirements. Appellant's case manager presented appellant with a predatory-offender-registration form and explained to him its purpose. Appellant did not read the form and refused to sign it.

The case manager advised appellant that it is a felony not to register, but appellant nonetheless refused.

On August 28, 2006, while still incarcerated, appellant was presented with a BCA change-of-information form. At that time, appellant had an approved address to which he could be released, and the purpose of the form was to bring appellant into compliance with the BCA Predatory Offender Registration Unit. The case manager explained the purpose of the BCA form and discussed it with appellant, but appellant again refused to provide any information and would not sign the document. In September 2006, when requested to sign his release papers and the BCA registration form, appellant again refused.

Appellant was charged with three counts of failure to register as a predatory offender in violation of Minn. Stat. § 243.166, subd. 5 (2006). The state dismissed one count; a jury found appellant guilty of the remaining two counts. After calculating appellant's criminal-history score, the district court sentenced appellant to 30 months and 40 months, respectively, to be served concurrently. The district court credited appellant's jail time from June 30, 2006, for his 30-month sentence and from September 16, 2006, for his concurrent 40-month sentence. This appeal follows.

D E C I S I O N

I

Appellant argues that the evidence was insufficient to convict him because the state failed to prove that his time to register had elapsed and because he was not required to register with his prison case manager. In considering a claim of insufficient evidence,

this court's review is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction, is sufficient to allow the jurors to reach the verdict that they did. *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). This court will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense. *Bernhardt v. State*, 684 N.W.2d 465, 476–77 (Minn. 2004).

To convict an offender of knowingly failing to register as a predatory sex offender, the state must prove that (1) the defendant was required to register as a predatory offender; (2) the defendant knowingly violated a registration requirement, including the requirement to register; (3) the time period within which he was required to register had not elapsed; and (4) the failure to register occurred within the time period alleged in the complaint. Minn. Stat. § 243.166, subds. 1b, 3, 5, and 6. A person required to register as a predatory sex offender who knowingly violates any of the statutory provisions and who has previously been convicted of or adjudicated delinquent for violating the registration statute shall be sentenced to not less than two years, but not more than five years. Minn. Stat. § 243.166, subd. 5.

Appellant is required to register

Here, appellant's 1992 conviction of second-degree criminal sexual conduct obligates him to register as a sex offender with his assigned corrections agent, or, if none is assigned, with the local law-enforcement agency where he resides. Minn. Stat. § 243.166, subds. 1b(a)(1)(iii) and 3(a).

Appellant contends that his refusal to register with his prison caseworker did not violate the registration statute because his caseworker is neither an assigned corrections agent nor law-enforcement authority. We see no merit in appellant's position. First, Minn. Stat. § 243.166, subd. 3a, concerns offender registration when a person lacks a primary address.[1] Second, for appellant to claim that the incorrect person sought his compliance with the law puts form over substance. Appellant was and still is required by law to register as a sex offender, and the fact remains that appellant did not, in fact, register as a predatory offender.

Knowing violation of the registration requirement

Appellant's case manager presented appellant with a sex-offender-registration form on June 30, 2006. Appellant refused to sign it even though the form and the consequences of non-compliance were explained to him. On August 28, 2006, appellant's case manager presented appellant with a BCA change-of-information form. Appellant's case manager explained the purpose of the form and discussed it with him; appellant refused to provide any information and again refused to sign the document. In September 2006, when requested to sign his release papers and the BCA registration form, appellant again refused. This evidence, combined with appellant's past refusals to register and resulting incarcerations, indicate that appellant clearly knew of his duty to register. Appellant knowingly violated the registration requirement.

[1] We infer that appellant believes this section would apply to him because upon his release from custody he would lack a primary address.

The time period has not elapsed

Appellant further argues that the ten-year period for necessary registration had elapsed. An offender must maintain his registration as a sex offender for ten years after initially registering. Minn. Stat. § 243.166, subd. 6(a). This registration can be extended to 15 years based on previous failure(s) to provide the required information. Minn. Stat. § 243.166, subd. 6(b). Here, the record shows a 1994 BCA registration form was completed by appellant's corrections agent and forwarded to the BCA. Appellant argues that this constituted registration and, therefore, he is no longer required to comply with the statute (i.e., the time period in which he was required to register ended in 2004). But the statute specifically requires that the offender *sign* the registration form, among other things. Specifically, the statute provides:

> The registration provided to the corrections agent or law enforcement authority, *must consist of a statement in writing signed by the person, giving information required by the bureau of criminal apprehension, a fingerprint card, and photograph of the person taken at the time of the person's release from incarceration. . . . The registration information also must include a written consent form signed by the person* . . . .

Minn. Stat. § 243.166, subd. 4 (emphasis added).

Appellant was not in compliance with any of the requirements, and his argument that he was already registered asks this court to overlook not only the requirement of a signature, but the requirement of a fingerprint, a photograph, and a consent form. Because appellant was not in compliance with any of these registration requirements, the 1994 BCA form filled out by a corrections agent does not qualify for purposes of

registration. Registration is designed to inform law enforcement authorities concerning the offender's whereabouts at any period within the offender's registration term. Because appellant has never registered, the ten-year time period has not yet started to run and thus cannot be said to have elapsed.

Failure to register occurred within the time period alleged in the complaint

Because appellant has never registered in the 16 years since his initial criminal-sexual-conduct conviction, and the two failures to register occurred between June 2006 and September 2006 (a time when appellant was still obligated to register), the time period was properly alleged in the complaint.

Given that all four of the statutory requirements under Minn. Stat. § 243.166, subds. 1b, 3, 5, and 6, were proved beyond a reasonable doubt, we conclude that the evidence was sufficient to convict appellant for failure to register as a predatory offender.

II

Appellant argues that his current convictions of failure to register violate federal and Minnesota constitutional prohibitions against double jeopardy. This court reviews constitutional double-jeopardy claims de novo. *State v. Leroy*, 604 N.W.2d 75, 77 (Minn. 1999). Both the United States and the Minnesota constitutions guarantee that a criminal defendant may not be tried more than once for the same crime. *See* U.S. Const. amend. V (providing that "[n]o person shall . . . be subject for the same offense to be twice put in jeopardy [of punishment] of life or limb"); Minn. Const. art. I, § 7 (providing that "no person shall be put twice in jeopardy of punishment for the same offense"). The federal provision is binding on the states through the Fourteenth Amendment. *Benton v.*

Maryland, 395 U.S. 784, 794, 89 S. Ct. 2056, 2062 (1969). This prohibition protects a criminal defendant from "three distinct abuses: a second prosecution for the same offense after acquittal; a second prosecution for the same offense after conviction; and multiple punishments for the same offense." *State v. Humes*, 581 N.W.2d 317, 320 (Minn. 1998).

To support his argument, appellant first relies on the "same-elements" test articulated in *Blockburger v. United States*, which is used to determine whether the accused committed two offenses or only one. 284 U.S. 299, 304, 52 S. Ct. 180, 182 (1932). Where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied is whether each statutory provision requires proof of a fact which the other does not. *State v. Alexander*, 290 N.W.2d 745, 748 (Minn. 1980) (quoting *Blockburger*, 284 U.S. at 304, 52 S. Ct. at 182). "A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Blockburger*, 294 U.S. at 304, 52 S. Ct. at 182 (quoting *Gavieres v. United States*, 220 U.S. 338, 342, 31 S. Ct. 421, 422 (1911)). But appellant's reliance on *Blockburger* is misplaced. Appellant was not convicted of violating different statutes, but rather, he was convicted of violating the same statute on different dates. The prohibition of double jeopardy is not against *all* multiple punishments; it only prohibits multiple punishments for the same offense.

Next, appellant argues that his current convictions implicate the constitutional prohibition against double jeopardy because his circumstances had not materially

changed between the dates of his offenses. Appellant relies on this court's decision in *Larson II*, where we held that successive prosecutions did not offend appellant's double-jeopardy rights because the prosecutions for failure to register as a predatory offender occurred after "separate and distinct incarceration periods." *Larson II*, 2007 WL 2993608, at *6. This court concluded that, under the registration statute, any "material change in circumstances triggers the offender's duty [to register] anew even within the same general ten-year registration period." *Id.*, at *5. Here, appellant maintains that his conduct on the two dates alleged in the complaint constitute the same offense for double-jeopardy purposes because his circumstances had not materially changed. While we agree that appellant's circumstances had not materially changed, we do not agree that he was therefore exempted from the requirement to register as a predatory offender.

This court has recently held that the predatory-offender-registration requirement is a continuing obligation. *See State v. Ehmke*, 752 N.W.2d 117, 122 (Minn. App. 2008), *see also Longoria v. State*, 749 N.W.2d 104, 106–07 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008). Appellant's repeated violations of the registration statute were properly prosecuted separately because separate prosecutions are not barred when the offense is continuous and the defendant commits the same violation multiple times. *See, e.g.*, *State v. Sweet*, 179 Minn. 32, 33–34, 228 N.W. 337, 337 (1929) (upholding multiple prosecutions for abandoning a child); *State v. Wood*, 168 Minn. 34, 37–38, 209 N.W. 529, 530 (1926) (holding that failure to provide child support is continuous offense); *State v. Erickson*, 367 N.W.2d 539, 540 (Minn. App. 1985) (holding that "repeated prosecutions [for nuisance] may proceed over claims of double jeopardy until the

nuisance is abated") (quotation omitted). Appellant has a *continuing* duty to register and comply with the terms of the predatory-offender statute. Because appellant's duty was ongoing, his repeated failures to register constitute separate and distinct offenses. Therefore, the double-jeopardy clauses of neither the federal nor the state constitutions were violated.

Appellant similarly argues that Minn. Stat. § 609.035 (2006) bars his conviction because his two current convictions arose from a single, continuing act of refusal to register as a predatory offender while in prison. The statute provides that "if a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them." Minn. Stat. § 609.035, subd. 1. This court previously stated in *Larson II* that the prohibition in Minn. Stat. § 609.035 against multiple punishment does not apply here because each failure to register at a distinct period constitutes a separate offense. 2007 WL 2993608, at *6. Accordingly, appellant's multiple convictions do not violate Minn. Stat. § 609.035.

III

Appellant argues that the district court abused its discretion when it miscalculated his criminal-history score at sentencing. Appellant specifically maintains that the district court erroneously gave him an extra criminal-history point for one of his two 2004 convictions. Appellant bases this argument on: (1) the fact that his 2004 sentences were "merged" for sentencing and (2) he received only one sentence. Appellant asserts that only one conviction should qualify under section II.B.1 of the sentencing guidelines for

inclusion in his criminal-history score. 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 district court's intent at the 2004 sentencing cannot be clearly ascertained. The sentencing judgment and conditions form lists two offenses: (1) "fail to register as sex offender" and (2) "fail to change address" in violation of Minn. Stat. § 243.166 subds. 3(a) and (b). Below those entries is the phrase, "merged for snt." Further, the form directs that appellant be committed to the commissioner of corrections for one year and one day. From our review of the record, we cannot determine whether the district court intended to impose concurrent sentences, or whether it intended to sentence appellant for only one conviction when it "merged" the sentences and sentenced appellant to one year and one day. "Generally, when an offender is convicted of multiple current offenses, or when there is a prior felony sentence which has not expired or been discharged, concurrent sentencing is presumptive." Minn. Sent. Guidelines II.F. But on the state of this record, we cannot presume appellant's sentences were intended to be concurrent.

It is also not clear whether the two 2004 convictions arose out of a single behavioral incident. To determine whether a defendant's conduct constitutes more than one offense under Minn. Stat. § 609.035, the court first has to decide whether the conduct constituted a single behavioral incident. *See State v. Johnson*, 273 Minn. 394, 404–05, 141 N.W.2d 517, 525 (Minn. 1966). In determining whether multiple offenses arise from

a single behavioral incident, the court must consider whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible state of mind, or were motivated by a single criminal objective. *State v. Johnson*, 653 N.W.2d 646, 651–52 (Minn. App. 2002); *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). Crimes are part of a single behavioral incident "[w]hen one crime is committed with the intent of facilitating another or is but a means toward committing another." *State v. Huynh*, 504 N.W.2d 477, 483 (Minn. App. 1993), *aff'd*, 519 N.W.2d 191 (Minn. 1994).

This court may review whether the record supports the trial court's determination that the two offenses were not based on conduct that was part of a single behavioral incident. *See Bixby v. State*, 344 N.W.2d 390, 393–94 (Minn. 1984) (noting that in *State v. McAdoo*, 330 N.W.2d 104, 109 (Minn. 1983), the "precise issue" was whether the sentencing court's determination that the underlying conduct was divisible was supported by the record). Here, the district court did not make an explicit determination that appellant's conduct was or was not part of a single behavioral incident.

Because the district court did not make an explicit determination that appellant's conduct in 2004 was or was not part of a single behavioral incident, it is consequently unclear whether appellant's criminal-history points were properly calculated. This issue is remanded to the district court to make that determination and for resentencing, if appropriate.

IV

Appellant argues that the district court abused its discretion when it used the 2006 "sex offender grid" sentencing guidelines for his offense, which occurred in June 2006. Thus, appellant contends that his sentence was an unintended and unsupported departure and cites to *Williams v. State* to support the proposition that, "[i]f no reasons for departure are stated on the record at the time of sentencing, no departure will be allowed." 361 N.W.2d 840, 844 (Minn. 1985). "We review a sentencing court's departure from the sentencing guidelines for abuse of discretion." *State v. Geller*, 665 N.W.2d 514, 516 (Minn. 2003).

The district court sentenced appellant to 30 months for the June 30, 2006 offense—what it believed to be the presumptive guidelines sentence. But this was the presumptive sentence under the 2006 sentencing guidelines, which did not go into effect until August 1, 2006. Thus, appellant should have been sentenced in accordance with the guidelines existing on June 30, 2006, to wit: the 2005 sentencing guidelines. Respondent concedes that appellant was sentenced in accordance with the wrong guidelines.

The presumptive sentence for an offender is determined by locating the appropriate cell on the sentencing guidelines grid. Minn. Sent. Guidelines II. Under the 2005 sentencing guidelines, the presumptive sentence range was 18–25 months for a level III conviction by a felon with 5 criminal-history points. Minn. Sent. Guidelines IV, V. Assuming that appellant's criminal-history score was correctly determined, his sentence should have been, at most, 25 months for the June 30, 2006 offense.

We conclude that appellant's sentence was reached by application of the wrong sentencing guidelines. Accordingly, this issue is remanded to the district court for a correct determination of appellant's criminal-history score and application of the proper sentencing guidelines to appellant's conviction for the June 2006 offense.

V

Appellant argues that the district court erred by not granting him jail credit against his concurrent sentences from the date the state had probable cause to charge him. The granting of jail credit is not discretionary with the district court. *State v. Parr*, 414 N.W.2d 776, 778 (Minn. App. 1987), *review denied* (Minn. Jan. 15, 1988). A defendant is entitled to jail credit for all time spent in custody following arrest, including time spent in custody on other charges, beginning when the prosecution has probable cause to charge the defendant with the current offense. *State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994); Minn. R. Crim. P. 27.03, subd. 4(B). The defendant has the burden of establishing that he is entitled to jail credit for a specific period of time. *State v. Willis*, 376 N.W.2d 427, 428 n.1 (Minn. 1985).

Here, the district court did not credit appellant on his second conviction from the time the state had probable cause. The district court reasoned that because appellant was "still in custody," it would not be a chargeable offense until appellant was at the point of release from custody. The district court further reasoned that the prosecutor could not ethically charge appellant until September and his release date. But a defendant is entitled to jail credit for all time spent in custody following arrest, *including time spent in custody on other charges*. *Fritzke*, 521 N.W.2d at 862 (emphasis added). Because

appellant was already in custody on another conviction, he was entitled to jail credit from the time the state acquired probable cause to charge him with the new offense. *See State v. Morales*, 532 N.W.2d 268, 270 (Minn. App. 1995). That appellant was "still in custody" is therefore irrelevant for determining the date from which jail credit should apply for the second conviction. Rather, under *Fritz*, the relevant inquiry is when the prosecution had probable cause to charge appellant with the current offense. And here, there was probable cause to charge appellant with failure to register, at a minimum, from August 28, 2006 (the date of the charged offense). Accordingly, we remand this issue to the district court for a determination of appellant's jail credit from that date.

VI

In a pro se supplemental brief, appellant raises numerous additional arguments, including that Minnesota has an unconstitutional form of government; that this court has no authority to decide this case because it is not here on direct appeal; and that the predatory-offender-registration statute is akin to the Holocaust. Appellant cites no legal authority in support of his allegations. Failure to provide legal authority in support of an argument effectively waives that argument. *State v. Meldrum*, 724 N.W.2d 15, 22 (Minn. App. 2006), *review denied* (Minn. Jan. 24, 2007). In any event, we conclude that appellant's arguments have no merit.

For all of the reasons stated herein, we conclude that appellant was required to register as a predatory offender and the time period in which he was required to register had not lapsed; appellant's multiple convictions do not violate double jeopardy or Minn. Stat. § 609.035; the accuracy of appellant's criminal-history-point calculation cannot be

determined on this record; the district court erred when it imposed the presumptive sentence from the wrong sentencing guidelines; and the district court erred when it failed to grant appellant jail credit from the date that the state had probable cause to charge appellant.

Affirmed in part, reversed in part, and remanded.