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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0438**

State of Minnesota,
Respondent,

vs.

Ryan Drew Kraulik,
Appellant.

**Filed April 21, 2009
Reversed and remanded
Randall, Judge*
Dissenting, Peterson, Judge**

Marshall County District Court
File No. K1-05-000361

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

Michael D. Williams, Marshall County Attorney, P.O. Box 159, Warren, MN 56762 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Cathryn Y. Middlebrook, Assistant State Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Considered and decided by Toussaint, Chief Judge; Peterson, Judge; and Randall, Judge.

UNPUBLISHED OPINION

RANDALL, Judge

Appellant Ryan Drew Kraulik challenges the district court's decision to revoke his probation and execute a 36-month sentence that he received in 2005 for first-degree driving while impaired. At his hearing, appellant requested that the district court grant him credit for 12 months he erroneously served on a prior, unrelated 2003 conviction. Because the district court abused its discretion by failing to consider appellant's erroneous incarceration as a mitigating factor to support a downward departure, we reverse and remand for resentencing.

FACTS

In 2003, appellant was arrested in Marshall County and charged with first-degree driving while impaired (DWI), a felony. He pleaded guilty and was sentenced to 36 months, stayed. He violated the terms of his probation, resulting in execution of his sentence, which he served in full before being released. In October 2005, at a postconviction hearing to correct his sentence, the district court vacated the felony conviction as erroneous and corrected the conviction to a gross misdemeanor, for which appellant should have received a 24-month sentence. As a result of the error, appellant served an additional 12 months in prison. The criminal defense attorney, the prosecutor, the district court judge, and the probation officer involved did not dispute that appellant

was wrongly sentenced and that he served an additional 12 months he did not have to, before the error came to light.

In December 2005, appellant was arrested on another offense and charged with first-degree DWI. In early 2006, he pleaded guilty and his 36-month sentence was stayed.

In 2007, appellant violated his probation. At the revocation hearing, appellant requested that the district court take “equity and fairness” into account and grant him credit for the 12 months that he had erroneously served on his 2003 conviction. The district court asked the probation officer to comment on the request, to which the officer stated “what mistakes were made were made,” and “what’s done is done.” The district court thereafter executed the 36-month sentence.

DECISION

The parties have characterized appellant’s request as one for jail credit. Jail credit is based on equitable principles, but it requires some connection in time to the current offense. *See State v. Folley*, 438 N.W.2d 372, 374-75 (Minn. 1989) (holding that equity required granting credit from time that investigation on current offense was complete). A defendant is entitled to credit for jail time served on another offense from the time when there is probable cause to charge him with the offense. *State v. Fritzke*, 521 N.W.2d 859, 862 (Minn. App. 1994).

This is not a typical jail-credit situation. Because appellant’s erroneous incarceration was fully served before he committed the 2005 offense on which credit is sought, there is no support for an award of “jail credit.” The erroneous sentence was

fully served and there is nothing to credit. Nonetheless, jail credit is based on “equity and fairness,” and the fact remains that appellant was erroneously incarcerated for 12 months, an injustice by any stretch of the imagination. While a remedy may not always exist for erroneous or wrongful incarceration, the district court was presented with a compelling case for remedial action, more appropriately in the form of a downward departure.

Generally, it is improper to use a qualitative analysis of a defendant’s criminal history to support a departure. *State v. Higginbotham*, 348 N.W.2d 327, 329 (Minn. 1984). But because appellant’s prior offenses were used to enhance his offense to a felony, those offenses could not be used in computing his criminal history score. *See State v. Zeimet*, 696 N.W.2d 791, 796 (Minn. 2005).

When appellant committed the current offense in December 2005, he had a prior North Dakota offense from 2003, the prior 2003 Marshall County offense that was improperly charged as a felony and on which appellant erroneously served an additional 12 months in jail, and two Pennington County offenses from May 13 and May 23, 2000, which were sentenced on the same day.

The Minnesota Sentencing Guidelines are generally designed to pursue proportionality and “[e]quity in sentencing.” Minn. Sent. Guidelines I. In this case, appellant committed the 2003 Marshall County offense, but has been overpunished for it. In the federal courts, a defendant is entitled to credit for time erroneously spent at liberty, typically when he is mistakenly released due to clerical error. *See, e.g., United States v. Martinez*, 837 F.2d 861, 865 (9th Cir. 1988); *White v. Pearlman*, 42 F.2d 788, 789 (10th Cir. 1930). In the same vein, Minnesota courts should not disregard time a defendant has

erroneously spent in jail when there is a means to remedy it, such as a downward durational departure.

Although appellant's two Pennington County offenses were not committed as part of the same behavioral incident, they were relatively close in time and were sentenced at the same court appearance. When offenses are committed within ten days of each other, the guidelines may recognize this as a crime spree, and may reduce the number of criminal history points that can be accumulated that way. *See* Minn. Sent. Guidelines cmt. II.B.108. And there is even a mitigating factor for lower severity level offenses when an offender has acquired prior felony sentences in a single court appearance. *Id.*, II.D.2.a.(4)(b). The two May 2003 offenses could be characterized as more of a crime spree than a reflection of appellant's normal history.

Finally, a February 2007 probation progress report found that appellant completed treatment and was successful for at least a year of supervision. He also served a year on probation for the 2003 offense. Thus, the record does not establish that appellant is a persistent DWI offender.

A first-degree DWI defendant is one who has had three or more prior drunk-driving incidents within the ten years prior to the current offense. Minn. Stat. § 169A.24, subd. 1(1) (2004). Appellant's history is less severe than that of a typical felony DWI defendant. Two of his prior offenses were committed within a very short period and a third was erroneously punished as a felony. Taking into account the erroneous incarceration and recognizing the guidelines' principles of equity and proportionality in sentencing, the district court should have considered this as a mitigating factor. We

therefore reverse appellant's 36-month sentence. We remand to the district court to correct the record on this sentence and reduce the sentence to 24 months.

Reversed and remanded.

PETERSON, Judge (dissenting)

I respectfully dissent because I do not think that the district court abused its discretion when it did not consider the 12 months that appellant incorrectly served for a previous offense as a mitigating factor that warrants a 12-month downward departure in appellant's sentence for his current offense. Although it is extremely unfortunate that the error in appellant's previous sentence was not corrected before he served the sentence, there is no authority that recognizes this error as a basis for granting a downward departure in his current sentence or that recognizes a downward departure in appellant's current sentence as a remedy for the error in his previous sentence.

Recognizing the sentencing error as a basis for granting a downward departure is inconsistent with the departure principles set forth in the sentencing guidelines. Under the guidelines, one mitigating factor recognized as a basis for a departure is that "substantial grounds exist which tend to excuse or mitigate the offender's culpability, although not amounting to a defense." Minn. Sent. Guidelines II.D.2.a.(5). This factor allows a court to reduce a sentence when an offender is less culpable than in a typical case. But the erroneous sentence for appellant's previous offense does not affect his culpability for his current offense. In the absence of any authority that recognizes a previous sentencing error as a basis for granting a departure, the district court did not abuse its discretion when it did not use the current sentencing procedure as a mechanism for crafting a remedy for the past sentencing error.