STATE OF MINNESOTA
IN COURT OF APPEALS
A08-634

State of Minnesota,
Respondent,

vs.

Craig Robert Johnson,
Appellant.

Filed April 14, 2009
Affirmed
Ross, Judge

Dakota County District Court
File No. K3-07-1518

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

James C. Backstrom, Dakota County Attorney, Amy A. Schaffer, Assistant County Attorney, Dakota Judicial Center, 1560 Highway 55, Hastings, MN 55033 (for respondent)

Richard L. Swanson, 207 Chestnut Street, Suite 235, P.O. Box 117, Chaska, MN 55318 (for appellant)

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

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

ROSS, Judge

We must decide whether an unresolved appeal of one felony impaired-driving conviction prevents the district court from relying on that conviction when sentencing the driver for another impaired-driving conviction. Craig Johnson appeals his sentence for his 2007 conviction of first-degree driving while impaired. Johnson contends that the district court erred when calculating his sentence because it considered his 2005 first-degree impaired-driving conviction, which was on appeal in this court when he committed his 2007 offense. The district court sentenced Johnson to 48 months in prison because it found that his 2007 conviction was a subsequent felony conviction under the sentencing guidelines. We affirm.

FACTS

The material facts are undisputed. On March 30, 2007, a person flagged down a police officer in an Eagan parking lot. The person directed the officer to a parked truck that was still running and occupied by an apparently intoxicated man. The officer approached the truck and asked its occupant to turn it off. The occupant, Craig Johnson, complied.

Johnson was substantially inebriated. The officer noticed that Johnson's speech was slurred, his eyes were glassy, and he smelled of alcoholic beverages. When Johnson got out of the truck, he was unsteady on his feet. He failed a preliminary breath test and the officer arrested him. Because Johnson was exceptionally intoxicated, the officer took him to the hospital. There, the officer read him the implied consent advisory, and

Johnson agreed to provide a urine sample for alcohol testing. The test showed that Johnson's alcohol concentration was .27, more than three times the per se level of impairment.

The state charged Johnson with two counts of first-degree driving while impaired and with driving after cancellation, in violation of Minnesota Statutes sections 169A.20, subdivisions 1(1) and 1(5), and .24, and 171.24, subdivision 5 (2006). Johnson pleaded guilty to first-degree DWI. He acknowledged that he had prior convictions for alcohol-related driving offenses in December 1998, January 1999, August 2001, and March 2005. The court accepted Johnson's plea, ordered a pre-sentence investigation, and directed him to return for sentencing.

At the sentencing hearing, Johnson's attorney tried to persuade the district court to disregard Johnson's 2005 felony DWI because Johnson was not on probation for that offense and because it was the subject of an appeal to this court at the time he committed the 2007 offense. Johnson's attorney acknowledged that the Scott County district court had found Johnson guilty of felony DWI for the 2005 offense in February 2006, but he argued that Johnson had not been "convicted" of that offense until the court of appeals later affirmed the district court's decision:

> And I would like to point out . . . we think that this case should probably not be an executed sentence because [Johnson] wasn't on probation at the time of the offense, and, arguably, even though there was a conviction, it was uncertain if that conviction would have been for a gross misdemeanor or a misdemeanor [until the court of appeals issued its decision].

The district court questioned the merit of Johnson's argument, stating, "But [the sentencing guideline] doesn't say probation, it says prior conviction."

Johnson's attorney replied, "But at the time [of Johnson's 2007 DWI], still we didn't know what the conviction was for. If I would have been successful on appeal we certainly wouldn't be arguing this case today because [the 2005 DWI] would have been [merely] a gross misdemeanor."

The district court concluded that Johnson's 2007 DWI was a subsequent felony DWI under the guidelines and sentenced him to 48 months in prison. Johnson appeals.

D E C I S I O N

Johnson contends that the district court erred in calculating his sentence because it "misconstrued the legal status" of his 2005 DWI offense. Specifically, he argues that the district court should not have considered his 2005 DWI in determining his sentence for his 2007 DWI because (1) his sentence for the 2005 DWI was stayed; (2) his appeal of that conviction was not decided until April 17, 2007 (after he committed the present offense); and (3) he was not placed on probation for the 2005 felony DWI until after this court affirmed his conviction. Johnson's arguments miss the mark. Whether his 2005 felony DWI sentence was stayed or whether he was on probation are irrelevant to his sentence; because he was "convicted" of a felony DWI before his 2007 felony DWI, the district court could consider the 2005 conviction when sentencing Johnson for the 2007 offense.

Deciding an appeal from an allegedly improper sentence, we "review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory

requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the district court." Minn. Stat. § 244.11, subd. 2(b) (2008). "Whether a statute or a provision of the sentencing guidelines has been properly construed is a question of law to be reviewed de novo." *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005).

It is undisputed that Johnson's 2007 offense is a felony. An impaired-driving offense constitutes a felony when the person "commits the [current] violation within ten years of the first of three or more qualified prior impaired driving incidents." Minn. Stat. § 169A.24, subd. 1 (2006). Johnson pleaded guilty to first-degree DWI for his March 2007 offense and admitted that he committed the violation within ten years of his December 1998, January 1999, and August 2001 qualified impaired-driving incidents. Johnson also admitted that he had a prior offense for first-degree DWI from an incident in 2005.

Johnson challenges the district court's conclusion that the 2007 DWI was a "subsequent felony DWI" that increased Johnson's criminal-history score to two points and made his presumptive prison sentence 48 months. The district court's approach follows the guidelines. When a felony DWI offender with two criminal history points has a prior felony DWI conviction, the sentencing guidelines direct a 48-month executed sentence. Minn. Sent. Guidelines II.E and IV. A person is "convicted" when a district court accepts and records a guilty plea, a guilty verdict from a jury, or a finding of guilty by the court. Minn. Stat. § 609.02, subd. 5 (2006). "For accepted pleas, verdicts, or findings of guilt to become convictions under Minnesota law, the conviction must be

recorded. The general practice . . . is to have the conviction recorded and appear in a judgment entered in the file." *State v. Hoelzel*, 639 N.W.2d 605, 609 (Minn. 2002) (citations omitted).

Johnson's challenged DWI offense occurred on March 18, 2005. Johnson was charged with both first-degree refusal to test and first-degree DWI. He had submitted his case to the district court in a *Lothenbach* proceeding held on February 24, 2006. That same day, the district court found him guilty of first-degree refusal to test, dismissed the other charges, and imposed a 36-month jail sentence that the court stayed on various conditions of probation. First-degree test refusal is a felony. Minn. Stat. § 169A.20, subd. 2 (2004). Johnson was therefore "convicted" of felony DWI on February 24, 2006, when the district court found that he was guilty and recorded its finding in the sentencing order.

Johnson's arguments regarding the timing of his prior appeal and his probation status are immaterial to whether he was previously convicted. Johnson offers no legal basis or plausible reasoning to support his contention that a defendant is not "convicted" until this court decides his appeal. Our opening line deciding that earlier appeal begins, "Appellant challenges his conviction of first-degree refusal to submit to a chemical test." *State v. Johnson*, A06-963, 2007 WL 1121455, at *1 (Minn. App. Apr. 17, 2007). Without citing to any legal authority, Johnson asserts that because a district court of a different county had concluded that Johnson was not on probation for the 2005 offense while it was on appeal (an assertion that the state doubts), "common logic compels a conclusion" that he was not at that time actually convicted of that offense. We do not see

this logic, so we are not compelled. Because Johnson was convicted of a felony DWI before March 30, 2007, the district court properly considered Johnson's prior conviction and did not err by imposing the presumptive 48-month executed prison sentence.

Affirmed.