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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0622

State of Minnesota,
Respondent,

vs.

Vernon Brown,
Appellant.

Filed June 9, 2009
Affirmed
Stauber, Judge

Winona County District Court
File No. 85CR062949

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, Ngoc Nguyen, Assistant Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by, Stauber, Presiding Judge; Kalitowski, Judge; and Bjorkman, Judge.

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

STAUBER, Judge

Appellant Vernon Brown argues that the district court erred in calculating his criminal history score because it assigned separate criminal history points for two

offenses that arose out of a single behavioral incident. Because the offenses did not arise out of a single behavioral incident, we affirm.

FACTS

On October 16, 2007, appellant Vernon Brown pleaded guilty to second-degree controlled substance crime in violation of Minn. Stat. § 153.022, subd. 2(1) (2006). Prior to sentencing, the department of corrections submitted a sentencing worksheet to the district court indicating that appellant had a criminal history score of six. The department's calculation included a total of three and one-half points for appellant's 1989 convictions in Illinois of possession of a controlled substance (two points) and unlawful use of a weapon (one and one-half points).[1] Appellant moved to correct the department's calculation, claiming that criminal history points could only be assigned for one of the 1989 convictions because they both arose out of the same behavioral incident. The district court rejected appellant's argument and adopted the department's calculation. Appellant received an 81-month sentence, a downward durational departure from the presumptive 108-month sentence. This appeal followed.

D E C I S I O N

Appellant argues that the district court erred by assigning him criminal history points for each of his 1989 convictions because they both arose out of a single behavioral

[1] Appellant was convicted of two counts of possession of a controlled substance, but one of the counts was not included in calculating appellant's criminal history score because it had decayed. The points assigned for the Illinois offenses were determined by comparing them to their Minnesota counterparts. *See* Minn. Sent. Guidelines II(B)(5) (providing that the weight given to out-of-state offenses is determined by comparison to equivalent Minnesota offenses).

incident. "In cases of multiple offenses occurring in a single behavioral incident in which state law prohibits the offender being sentenced on more than one offense, only the offense at the highest severity level should be considered" in calculating an offender's criminal history score. Minn. Sent. Guidelines cmt. II.B.105; *see also State v. Nordby*, 448 N.W.2d 878, 880 (Minn. App. 1989) (concluding that a district court properly assigned separate criminal history points for offenses that did not arise out of the same behavioral incident). In determining whether a series of offenses arose from a single behavioral incident, the relevant factors are (1) unity of time and place and (2) whether the segment of conduct involved was motivated by an effort to obtain a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). The calculation 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). But whether multiple offenses are part of a single behavioral incident is a factual determination that will not be reversed unless clearly erroneous. *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005).

Appellant argues that his testimony at the sentencing hearing supports the conclusion that the offenses arose out of a single behavioral incident. Appellant testified that he was arrested for both offenses in Cook County, Illinois, after police executed a search warrant at a home and found him in possession of controlled substances and a firearm. But although the offenses were discovered almost simultaneously, appellant does not claim, and the record does not suggest, that he possessed the firearm in furtherance of his possession of the controlled substances. Appellate courts have

repeatedly held that, where nothing in the record demonstrates that a defendant's unlawful possession of a firearm furthers the offense of controlled substance possession, the crimes are separate behavioral incidents, even though police may discover the offenses at the same time. *See Mercer v. State*, 290 N.W.2d 623, 626 (Minn. 1980) (determining that possession of methamphetamine and a firearm constituted separate acts because there was no evidence that either crime was committed in furtherance of the other or that the defendant was motivated by a single criminal objective); *State v. Marchbanks*, 632 N.W.2d 725, 732 (Minn. App. 2001) (holding that possession of cocaine and firearm were not part of a single behavioral incident because an individual "could unlawfully possess a firearm without possessing any [drugs], and conversely . . . could possess [drugs] without possessing a firearm"). Thus, the district court did not clearly err in determining that the offenses were divisible.

Affirmed.