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Minn. Stat. § 480A.08, subd. 3 (2008).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A08-0297  
A08-1553**

State of Minnesota,  
Respondent,

vs.

Kendrick Fidale Washington,  
Appellant,

and

Kendrick Fidale Washington, petitioner,  
Appellant,

vs.

State of Minnesota,  
Respondent.

**Filed July 28, 2009  
Affirmed  
Peterson, Judge**

Ramsey County District Court  
File No. K6-07-2410

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

Susan Gaertner, Ramsey County Attorney, Mitchell L. Rothman, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

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

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

## **UNPUBLISHED OPINION**

**PETERSON**, Judge

Appellant seeks modification of his sentence, arguing that the probation imposed for a prior offense was revoked and a jail sentence executed and, therefore, a custody-status point should not have been included in his criminal-history score. We affirm.

### **FACTS**

#### *Current offense*

Appellant Kendrick Fidale Washington pleaded guilty to committing felony violation of an order for protection; the offense occurred on July 3, 2007. The presentence investigation report (PSI) showed that appellant had a criminal-history score of four, which included three points for prior offenses and one custody-status point. The district court sentenced appellant to an executed term of 24 months in prison, which is the presumptive sentence for a severity-level-four offense committed by an offender with a criminal-history score of four. Minn. Sent. Guidelines IV-V.

Appellant filed a direct appeal challenging the sentence, which this court stayed pending completion of postconviction proceedings. Appellant then filed a petition for postconviction relief, seeking modification of his sentence on the ground that the custody-status point was improperly included in his criminal-history score. The district

court denied appellant postconviction relief, and appellant filed an appeal from the order denying postconviction relief. This court consolidated the two appeals.

*Prior offense*

The custody-status point at issue resulted from a prior felony conviction for fifth-degree possession of a controlled substance. In that case, on October 13, 2004, the district court committed appellant to the custody of the commissioner of corrections for a term of one year and one day but stayed execution of the sentence and placed appellant on probation for five years. Within five months, appellant violated a probation condition, and the district court issued an order directing that appellant be arrested and held in custody pending a hearing.

At the hearing, appellant admitted violating a probation condition, and the district court ordered that appellant serve a 90-day sentence at the Ramsey County Correctional Facility and be discharged from probation upon successful completion of that sentence. Appellant completed the sentence, and by order filed May 6, 2005, the district court ordered him discharged from probation effective April 30, 2005.

**DECISION**

Our review of a postconviction decision is limited to determining whether there is sufficient evidence to sustain the postconviction court's findings, and the decision will not be disturbed absent an abuse of discretion. *Zenanko v. State*, 688 N.W.2d 861, 864 (Minn. 2004). The determination of a defendant's criminal-history score is an issue within the district court's discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App.

2002). But we review the postconviction court's application of law de novo. *Williams v. State*, 692 N.W.2d 893, 896 (Minn. 2005).

Under the sentencing guidelines, one criminal-history point is assigned if an offender

committed the current offense within the period of the *initial length of stay* pronounced by the sentencing judge for a prior felony, gross misdemeanor or an extended jurisdiction juvenile conviction. This policy does not apply if the probationary sentence for the prior offense is revoked, and the offender serves an executed sentence[. . .]

Minn. Sent. Guidelines II.B.2.c. (emphasis added).

“[T]he phrase ‘initial length of stay’ refers to the initial length of a defendant’s probationary term pronounced by the sentencing judge.” *State v. Maurstad*, 733 N.W.2d 141, 150 (Minn. 2007).

The basic rule assigns offenders one point if they were under some form of criminal justice custody when the offense was committed for which they are now being sentenced. The Commission believes that the potential for a custody status point should remain for the entire period of the initial length of stay pronounced by the sentencing judge. An offender who is discharged early but subsequently is convicted of a new felony within the period of the initial length of stay should still receive the consequence of a custody status point. If probation is revoked and the offender serves an executed sentence for the prior offense, eligibility for the custody status point ends with discharge from the sentence.

Minn. Sent. Guidelines cmt. II.B.201.

Under Minn. Sent. Guidelines II.B.2.c, a custody-status point is assigned if the current offense was committed “within the period of the initial length of stay pronounced by the sentencing judge for a prior felony.” For the controlled-substance offense,

appellant was committed to the custody of the commissioner of corrections on October 13, 2004, so the initial five-year stay would have expired on October 12, 2009. The current offense was committed within that period, on July 3, 2007.

The custody-status point will be assigned unless (1) probation is revoked and (2) the offender serves an executed sentence. Minn. Sent. Guidelines II.B.2.c, cmt II.B.201. The guidelines define an “executed sentence” as “the total period of time for which an inmate is committed to the custody of the Commissioner of Corrections.” Minn. Sent. Guidelines app. (definition of terms).

Although language in the order for appellant’s arrest could be construed as revoking probation, that order was not a final order, and the later orders committing appellant to the Ramsey County Correctional Facility and discharging him from probation both refer to a discharge from probation, indicating that the 90-day jail sentence was a continuation of probation. Even if appellant’s probation was revoked, the commitment to the Ramsey County Correctional Facility was not a commitment to the commissioner of corrections and, therefore, appellant did not serve an executed sentence. *See* Minn. Stat. § 609.105 (2008) (distinguishing between commitment to commissioner of corrections and sentence of imprisonment to county jail); *State v. Kier*, 678 N.W.2d 672, 676 (Minn. App. 2004) (construing Minn. Stat. § 609.105 (2002)), *review denied* (Minn. Jun. 15, 2004). Accordingly, the policy of assigning a custody-status point for an offense committed within the initial length of stay pronounced for a prior felony conviction applies, and the district court did not abuse its discretion in assigning appellant a custody-status point and denying postconviction relief.

**Affirmed.**