STATE OF MINNESOTA
IN COURT OF APPEALS
A09-0737

State of Minnesota,
Respondent

vs.

Bruce Raymond Holman,
Appellant.

Filed September 22, 2009
Affirmed in part and remanded in part
Stauber, Judge

Otter Tail County District Court
File No. 56K0061326

Bruce R. Holman, 1101 Linden Lane, Faribault, MN 55021-6400 (pro se appellant)

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

David J. Hauser, Otter Tail County Attorney, Ryan C. Cheshire, Assistant County Attorney, Suite 320, 121 West Junius, Fergus Falls, MN 56537 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Minge, Judge; and Stauber, Judge.

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

STAUBER, Judge

Following this court's remand for resentencing of appellant's first-degree test refusal conviction, the district court resentenced appellant based on a recalculated criminal-history score. On appeal, appellant argues that the district court (1) erred in refusing to require the state to produce evidence that appellant was counseled when he pleaded guilty in North Dakota for a prior driving while impaired (DWI) charge that was used to enhance his Minnesota test-refusal conviction to first degree and (2) abused its discretion in calculating his criminal-history score. We affirm appellant's conviction, but remand for further consideration of appellant's criminal-history score.

D E C I S I O N

I.

Appellant Bruce Holman contends that his conviction of first-degree test refusal must be reversed because the state was required to prove that he was represented by counsel as part of his prior North Dakota DWI conviction before allowing the state to use the offense for enhancement. This argument was rejected in appellant's first appeal. *See State v. Holman*, No. A07-1443, 2008 WL 4628407, at *7-8 (Minn. App. Oct. 21, 2008), *review denied* (Minn. Dec. 23, 2008). Thus, appellant's argument is procedurally barred. *See State v. Andren*, 350 N.W.2d 404, 405 (Minn. App. 1984) (stating that it is a "well-settled rule that a defendant is not entitled to raise issues already decided on appeal").

II.

Appellant also challenges the district court's calculation of his criminal-history score on several grounds. The state claims that appellant waived the right to challenge his score by failing to raise the issue in his first appeal. But "a sentence based on an incorrect criminal history score is an illegal sentence," and an illegal sentence may be corrected at any time. *See State v. Maurstad*, 733 N.W.2d 141, 146 (Minn. 2007) (citing Minn. R. Crim. P. 27.03, subd. 9). Therefore, appellant is entitled to review of his criminal-history score. 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).

a. 1990 South Dakota conviction of child abuse

Appellant contends that the district court incorrectly assigned him one-half criminal history point for his prior South Dakota conviction of child abuse because the conviction resulted from an uncounseled guilty plea. We disagree. Generally, a sentencing court may not include a prior conviction in a defendant's criminal history unless the state proves the prior conviction was not obtained in violation of the defendant's right to counsel. *State v. Edmison*, 379 N.W.2d 85, 87 (Minn. 1985). But appellant's argument constitutes a collateral challenge to his out-of-state conviction, and this court collaterally reviews a foreign conviction only in "unique cases." *See id.* at 86 (finding that denial of the right to counsel qualifies as a unique case). Moreover, in order to successfully challenge the inclusion of an offense in calculating a criminal-history score, the defendant must do more than simply request that the state be put to its burden.

The defendant must (1) provide notice of the specific conviction he intends to challenge, and (2) come forward with some evidence to support his contention. *State v. Goff*, 418 N.W.2d 169, 172 (Minn. 1988).

Prior to this appeal, appellant never argued that the conviction was obtained in violation of his right to counsel. Appellant has also neglected to offer any evidence to support his challenge to the validity of the plea. Thus, the district court did not abuse its discretion by including one-half criminal history point for this offense.

b. 1990 and 1996 South Dakota convictions

Appellant also argues that his 1990 felony conviction of grand theft for stealing a motor vehicle should not have been treated as a felony for purposes of determining his criminal-history score because the offense would be considered a gross misdemeanor under Minnesota law. Out-of-state convictions must be considered in calculating a defendant's criminal-history score. Minn. Sent. Guidelines cmt. II.B.502. The district court exercises its discretion in determining the equivalent Minnesota felony for an out-of-state felony, based on the definition of the out-of-state offense and the sentence received by the offender. Minn. Sent. Guidelines II.B.5. The state has the burden to establish the facts necessary to justify consideration of an out-of-state conviction in calculating a defendant's criminal-history score. *State v. Outlaw*, 748 N.W.2d 349, 355 (Minn. App. 2008), *review denied* (Minn. July 15, 2008).

The district court determined that appellant's South Dakota felony conviction of grand theft was equivalent to a conviction of theft of a motor vehicle under Minn. Stat. § 609.52, subd. 3 (1990). The statute provides that a person convicted of theft of a motor

vehicle is eligible for a sentence of imprisonment of up to five years. Minn. Stat. § 609.52, subd. 3(3)(d)(vi). Accordingly, the offense constitutes a felony under Minnesota law. *See* Minn. Stat. § 609.02, subd. 2 (2008) (defining felony as a "crime for which a sentence of imprisonment for more than one year may be imposed"). Because both offenses involve the theft of a motor vehicle and both are felonies, the district court did not abuse its discretion in assigning one criminal history point for the grand theft conviction. *See* Minn. Sent. Guidelines V (indicating that theft of a motor vehicle is a severity level IV offense); II.B.(1)(b) (requiring that an offender be assigned one criminal history point for each severity level IV offense).

Next, appellant argues that the district court erred by assigning him separate criminal history points for (1) his 1990 convictions of grand theft and receiving a stolen vehicle in South Dakota and (2) both of his 1996 convictions of giving false information about vehicle registration. Appellant contends that criminal history points could only be assigned for one of the 1990 convictions and one of the 1996 convictions because they arose out of the same behavioral incident as the other convictions from those years.

"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). The same principle applies to prior foreign convictions because

"[t]he designation of out-of-state convictions . . . shall be governed by the offense definitions and sentences provided in Minnesota law." Minn. Sent. Guidelines II.B.5. 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 state has the burden of proving "the facts necessary to justify consideration of out-of-state convictions in determining a defendant's criminal history score." *State v. Outlaw*, 748 at 355 (quotation omitted). And "it is the [district] court's role to resolve any factual dispute bearing on the defendant's criminal history score." *State v. Oberg*, 627 N.W.2d 721, 723 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). 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).

The district court did not determine whether appellant's convictions arose out of the same behavioral incidents. The record does contain a criminal history report documenting appellant's convictions in South Dakota. But the report only identifies the offenses committed, the dates of conviction, and the sentences imposed. The report indicates that appellant was convicted of both 1990 offenses on the same date and both involved stolen vehicles. Similarly, both of appellant's 1996 convictions were obtained on the same date and involved the same offense. This information raises the possibility that the convictions arose out of the same behavioral incident. But because there is

insufficient information in the record to resolve these issues, and because the state has the burden of establishing a defendant's criminal-history score, we remand to the district court to determine whether appellant's convictions arose out of the same behavioral incidents, and, if necessary, to resentence appellant.

Affirmed in part and remanded in part.