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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-2050**

State of Minnesota,
Respondent,

vs.

Eric Benjamin Colon,
Appellant.

**Filed December 15, 2009
Reversed and remanded
Hudson, Judge**

Hennepin County District Court
File No. 27-CR-08-12143

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

Michael O. Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, Minnesota 55487 (for respondent)

Marie L. Wolf, Interim Chief Public Defender, Andrea Barts, Assistant Public Defender, 540 Fairview Avenue, Suite 300, St. Paul, Minnesota 55104 (for appellant)

Considered and decided by Toussaint, Chief Judge; Shumaker, Judge; and
Hudson, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this sentencing appeal, appellant argues that the district court erred by sentencing him to an upward durational departure as a career offender under Minn. Stat. § 609.1095, subd. 4 (2006), because the record does not establish that he had five sequential prior felony convictions. Because appellant has only three prior sequential Minnesota felony convictions, and the record is unclear whether at least two of appellant's prior out-of-state felony convictions would be considered felonies under Minnesota law, we reverse and remand.

FACTS

Appellant Eric Benjamin Colon pleaded guilty to one count of third-degree burglary in violation of Minn. Stat. § 609.582, subd. 3 (2006), and one count of felony theft of a motor vehicle in violation of Minn. Stat. § 609.52, subd. 2(1) (2006). At the plea hearing, appellant waived his *Blakely* right to a trial on the issue of whether he had five prior felony convictions and whether this offense was committed as a part of a pattern of criminal conduct so that he qualified as a career offender under Minn. Stat. § 609.1095, subd. 4.

In response to questioning by the district court, appellant agreed that he had five prior felony convictions in Minnesota. He also stated that he had additional felony convictions in Pennsylvania. The prosecutor told the district court that appellant had “at least 36 prior felonies.” The district court asked whether these were convictions. The prosecutor continued, “Some were changed from, I believe, the State of Pennsylvania

into misdemeanors because the last prosecutor from our division who dealt with [appellant] looked at the values of the items. So some of them were felony convictions for Pennsylvania purposes; they weren't for Minnesota purposes. Be that as it may, he does have a large number of felony convictions.”

The district court sentenced appellant to 110 months, an upward durational departure from the presumptive sentence. The departure was based on its determinations that appellant met the definition of a career offender because he had five prior felony convictions and this sixth felony conviction was part of a pattern of criminal conduct involving stealing motor vehicles. This appeal follows.

DECISION

A defendant may be sentenced to an upward durational departure from the presumptive guidelines sentence as a career offender if a factfinder determines that the defendant has five or more prior felony convictions and the current felony offense was committed as part of a pattern of criminal conduct. Minn. Stat. § 609.1095, subd. 4 (2006). Whether a defendant has the required five felony convictions for aggravated sentencing as a career offender presents a legal issue, which this court reviews de novo. *See State v. Outlaw*, 748 N.W.2d 349, 355–56 (Minn. App. 2008), *review denied* (Minn. July 15, 2008). Appellant’s failure to raise this issue before the district court does not waive review by this court because “a sentence based on an incorrect criminal history score is an illegal sentence.” *Id.*

The career-offender statute requires that the five prior felony convictions must be “five sequential felony offenses and convictions” so as to allow “five full postconviction

opportunities for reform.” *State v. Huston*, 616 N.W.2d 282, 283–84 (Minn. App. 2000) (quotation omitted). For purposes of applying the career-offender statute, a sentencing court has authority to determine whether out-of-state convictions are classified as felonies under Minnesota law. *Outlaw*, 748 N.W.2d at 355. The state has the burden to prove, “by a preponderance of the evidence, the facts necessary to justify consideration of out-of-state convictions in determining a defendant’s criminal-history score.” *Id.* (quotation omitted).

Appellant argues that the state did not establish by a preponderance of the evidence that he had five prior sequential felony convictions under Minnesota law. We agree. Although appellant agreed that he qualified as a career offender, the record before the district court did not contain a presentence investigation or a sentencing guidelines worksheet to indicate the number of appellant’s prior Minnesota felony convictions. Absent such information, the district court could not properly determine whether they qualified as sequential convictions for the purpose of applying the career-offender statute.

Further, assuming that the record did not establish that appellant had five prior sequential felony convictions in Minnesota, the district court would have been required to determine whether appellant had additional out-of-state convictions which would qualify as felonies under Minnesota law.

In determining whether an out-of-state conviction qualifies as a felony in Minnesota for purposes of determining a criminal-history score, the court examines “the definition of the offense, the nature of the offense, and the sentence received.” *State v. Combs*, 504 N.W.2d 248, 250 (Minn. App. 1993), *review denied* (Minn. Sept. 21, 1993).

The Minnesota Sentencing Guidelines provide that “designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law.” Minn. Sent. Guidelines II.B.5.

At the plea hearing, the state’s attorney told the district court that appellant had a number of prior felony convictions in Pennsylvania, but that not all of those convictions would be considered felonies in Minnesota because of the values of the items taken. The state did not present evidence as to which of the Pennsylvania convictions would be considered felonies under Minnesota law. Because the record does not show which, if any, of appellant’s Pennsylvania convictions would be felonies in Minnesota, it is inadequate to support appellant’s sentencing as a career offender under Minn. Stat. § 609.1095, subd. 4. Therefore, the district court erred by using those convictions to determine that appellant qualified as a career offender.

Appellant argues that this case should be remanded to the district court with instruction to resentence him to the presumptive sentence for the current offenses. But *Outlaw* dictates that we remand for further development of the sentencing record, so that the district court may appropriately make its sentencing determination. *Outlaw*, 748 N.W.2d at 356. Should the district court determine that appellant does not have the requisite five prior felony convictions for sentencing as a career offender, because appellant’s guilty plea may have been materially influenced by a mutual mistake as to that fact, it may be appropriate to allow appellant the opportunity to withdraw his plea. *See, e.g., State v. DeZeler*, 427 N.W.2d 231, 235 (Minn. 1988) (holding that when plea

agreement was based on mistaken assumption regarding defendant's criminal-history score, and agreement would have been structured differently had correct score been applied, proper remedy was remand to allow defendant to withdraw guilty plea).

Reversed and remanded.