STATE OF MINNESOTA
IN COURT OF APPEALS
A09-429

Major Vincent Linear, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed January 5, 2010
Affirmed
Minge, Judge

Ramsey County District Court
File No. 62-K8-07-002005

Marie L. Wolf, Interim Chief Public Defender, Cathryn Middlebrook, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Susan Gaertner, Ramsey County Attorney, Mark Nathan Lystig, Assistant County Attorney, 50 West Kellogg Boulevard, Suite 315, St. Paul, MN 55102 (for respondent)

Considered and decided by Minge, Presiding Judge; Schellhas, Judge; and Larkin, Judge.

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

MINGE, Judge

Appellant challenges the district court's denial of his petition for postconviction relief, arguing that the district court improperly calculated his criminal-history score and that his plea is not valid because it was not knowingly, voluntarily, and intelligently entered. We affirm.

D E C I S I O N

I.

Appellant challenges the district court's calculation of his criminal-history score on three grounds: (1) the state failed to prove certain out-of-state convictions; (2) two out-of-state convictions were within one month from decay when he reoffended; and (3) his custody status was one month from expiration date when he reoffended.

The district court's determination of an individual's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 564 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002). A motion for a corrected sentence may be treated as a petition for postconviction relief. *Powers v. State*, 731 N.W.2d 499, 501 n.2 (Minn. 2007). On a petition for postconviction relief, this court reviews legal issues de novo and reviews issues of fact for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007). Appellate courts "afford great deference to a district court's finding of fact and will not reverse the findings unless they are clearly erroneous. The decisions of a postconviction court will not be disturbed unless the court abused its discretion." *Dukes v. State*, 621 N.W.2d 246, 251 (Minn. 2001) (citations omitted).

Finally, on a postconviction petition, the petitioner has the burden of establishing by a preponderance of the evidence that he is entitled to relief. Minn. Stat. § 590.04, subd. 3 (2006); *State v. Warren*, 592 N.W.2d 440, 449 (Minn. 1999).

Appellant first asserts that his out-of-state convictions were erroneously included in his criminal-history score because the state failed to prove them. A defendant's criminal-history score is calculated by assigning points "for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing." Minn. Sent. Guidelines II.B.1 (2006). Out-of-state convictions are included in calculating a defendant's criminal-history score. Minn. Sent. Guidelines cmt. II.B.502. The sentencing court has the discretion to determine the weight assigned to each "out-of-state conviction after considering the nature and definition of the offense and the sentence imposed for the offense." *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001).

Appellant failed to challenge the use of his out-of-state convictions at sentencing. In his postconviction petition, appellant fails to provide any particulars as to how or why the out-of-state convictions were inadequately established. Our review of the record does not disclose a facial or obvious failure of proof. Appellant cannot successfully challenge these out-of-state convictions with nothing more than an unsupported assertion.

Appellant next argues that the district court erred in calculating his criminal-history score by including two out-of-state convictions that were within one month from becoming irrelevant when he committed the offense. "A prior felony sentence or stay of imposition would not be counted in criminal history score computation if fifteen years

had elapsed from the date of discharge or expiration of that sentence or stay of imposition to the date of the current offense." Minn. Sent. Guidelines cmt. II.B.111. "The Minnesota Sentencing Guidelines are clear that prior felony offenses do not decay for 15 years and are considered in computing criminal history scores. Offenses that are [several] years away from decay cannot be blithely dismissed if sentencing guidelines are to have meaning." *State v. Ferguson*, 441 N.W.2d 508, 509 (Minn. App. 1989) (citation omitted), *review denied* (Minn. July 12, 1989). Here, the district court has no obligation to discount the criminal-history score because the inclusion of prior offenses is close to expiration. Because appellant's out-of-state convictions had not yet expired, his criminal-history score properly included two points for his out-of-state convictions.

Third, appellant argues that the district court erred in calculating his score by including one custody-status point because his custody status was to expire within one month after the date of the current offense. A custody-status point is given if the defendant, at the time of the committed offense, was on supervised release, probation, bail release, or some other type of criminal-justice supervision. Minn. Sent. Guidelines II.B.2. When a custody-status point is assigned, an additional three months is "added to the duration of the appropriate cell time which then becomes the presumptive duration." *Id.* Offenders are assigned "one point if they were under some form of criminal justice custody *when the offense was committed*. . . . [T]he potential for a custody status point should remain for the initial length of stay pronounced by the sentencing judge." Minn. Sent. Guidelines cmt. II.B.201 (emphasis added).

Appellant argues that, although he was on custody status when he committed the offense, he was no longer on custody status at sentencing. Again, Minnesota Sentencing Guidelines are clear. Regardless of the time of the hearing or sentencing, one custody-status point is assigned if an offender is on supervised release at the time the offense was committed. Minn. Sent. Guidelines cmt. II.B.201. Accordingly, the custody-status point was not erroneously included in appellant's criminal-history score.

In sum, we conclude that the district court did not abuse its discretion in calculating appellant's criminal-history score.

II.

Finally, appellant claims his plea was not knowingly, voluntarily, and intelligently entered because he was not advised at the plea hearing that he would be subject to an additional three months based on his custody status. Because this issue was not raised before the district court as a part of appellant's postconviction petition, we decline to consider it for the first time on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that we will generally not consider issues not argued and considered in the district court).

Affirmed.

Dated: