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

**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1955**

Joseph Spencer Keller, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed July 27, 2010
Affirmed
Shumaker, Judge**

Chisago County District Court
File No. 13-CR-08-825

Joseph Spencer Keller, Sauk Rapids, Minnesota (pro se appellant)

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Janet Reiter, Chisago County Attorney, Jessica L. Stott, Assistant County Attorney,
Center City, Minnesota (for respondent)

Considered and decided by Shumaker, Presiding Judge; Bjorkman, Judge; and
Willis, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SHUMAKER, Judge

In this pro se postconviction appeal, appellant asserts that his 26-month sentence should be reduced to 21 months. Because the district court did not abuse its discretion in calculating appellant's criminal-history score or imposing a 26-month sentence, we affirm.

FACTS

Appellant Joseph Spencer Keller was sentenced to prison on January 4, 2007, for violating an order for protection, a felony offense. His release date was to be May 7, 2008. On April 29, 2008, while incarcerated, Keller committed the felony of terroristic threats. On May 12, 2008, at Keller's request, the district court ordered a "Rule 20" examination of Keller as provided in Minn. R. Crim. P. 20.01.

The district court sentenced Keller on July 18, 2008, to a prison term of 26 months after Keller pleaded guilty to the crime of terroristic threats. For the sentencing, the department of corrections completed a sentencing worksheet. Keller's conviction offense was a severity-level four; his custody-status point was one; and his felony points were five. Thus, Keller's total criminal-history score was six. The worksheet included one 2000 felony conviction for terroristic threats; one 1992 felony conviction for fifth-degree controlled substance; and two 1998 gross misdemeanors.

Keller filed a postconviction motion for recalculation of his felony points, specifically requesting that the postconviction court consider his 2000 felony-terroristic-threats conviction a gross misdemeanor rather than a felony, because his sentence was

modified to a gross-misdemeanor sentence. He also moved the postconviction court, pro se, to remove his custody-status point. The state conceded the motion for recalculating the felony points based on the 2000 conviction, and the postconviction court granted the requested relief, lowered the criminal-history score to 5, and modified the sentence to 23 months, accordingly. However, the postconviction court denied relief as to Keller's pro se motion to remove the custody-status point. Keller appeals from the denial of his pro se motion.

D E C I S I O N

Keller argues that the postconviction court did not properly calculate his criminal-history score, and as a result imposed an improper sentence. The district court's determination 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).

Custody Status Point

In reviewing a postconviction court's denial of relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007).

The Minnesota Sentencing Guidelines provide that one point shall be assigned if the offender was "on probation, parole, supervised release, conditional release, or confined in a jail, workhouse, or prison pending sentencing, following a guilty plea, [or] guilty verdict." Minn. Sent. Guidelines II.B.2.a. (2007). There are two exceptions, however. An offender is not assigned a custody-status point if the person was either

(1) committed for treatment or examination under Minn. R. Crim. P. 20, or (2) on parole status at the time the felony was committed for which he is being sentenced. Minn. Sent. Guidelines II.B.2. (2007).

Keller was incarcerated when he committed the present offense. He argues that the district court should not have assigned a custody-status point to him because his eligibility for that point should have ceased as of the date of his expected release, which was May 7, 2008, and he was not sentenced until July 18, 2008. Although the guideline rules do not state any specific expiration period for a custody-status point, the comments state that “[t]he 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.” Minn. Sent. Guidelines cmt. II.B.201 (2007). Thus, the relevant time period is when Keller committed the new offense, April 29, 2008, not when he was sentenced for the offense. Keller was incarcerated at the time he committed the new offense, and, therefore, a custody-status point was appropriately assigned.

Next, Keller argues that he should not receive a custody-status point because he was committed for treatment or examination under Minn. R. Crim. P. 20 when he committed the crime. Although Keller had requested a medical examination, he was not committed for treatment or examination as of the offense date. Therefore, this exception does not apply.

Finally, Keller argues that he should not receive a custody-status point because he was serving an executed sentence on a parole violation. He cites the comments, which provide that 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 (2007). Again, Keller committed the offense while he was incarcerated, not while he was on parole or after being discharged from the sentence; and this exception also does not apply.

2000 Felony Conviction

Keller argues that his 2000 conviction of felony terroristic threats should be deemed a gross misdemeanor because his sentence was modified to an executed 365-day sentence. This issue was raised by Keller’s public defender at the postconviction court, and the state conceded the issue. The postconviction court modified Keller’s criminal-history score accordingly.

Two 1998 Gross-Misdemeanor Convictions

Keller argues that his two 1998 gross-misdemeanor convictions should equate to one point because they were part of the same course of conduct. He raises this issue for the first time on appeal. “A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.” *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (quotations omitted). Moreover, although those two convictions are noted on the sentencing worksheet, Keller was not assigned a criminal-history point based on either one as he did not have four or more misdemeanor or gross-misdemeanor convictions. *See* Minn. Sent. Guidelines II.B.3 (2007) (stating that an offender is assigned one unit for each misdemeanor and gross-misdemeanor conviction, with four units equaling one point); *see*

also Minn. Sent. Guidelines cmt. II.B.301 (2007) (“An offender must have a total of four units to receive one point on the criminal history score.”).

Fifteen-Year Decay

Keller finally argues that decay precludes one-half point for his 1992 felony. Because Keller raises this issue for the first time on appeal, it is beyond our scope of review and we decline to address it. *See Thiele*, 425 N.W.2d at 582.

Affirmed.