STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0335

State of Minnesota,
Respondent,

vs.

Dennis Donald Cavanaugh,
Appellant.

Filed January 6, 2014
Affirmed
Johnson, Judge

Ramsey County District Court
File No. 62-CR-09-10505

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

John Choi, Ramsey County Attorney, Laura Rosenthal, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Kathryn J. Lockwood, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Smith, Judge; and Minge, Judge.*

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

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

JOHNSON, Judge

Dennis Donald Cavanaugh pleaded guilty to criminal vehicular operation. On appeal, he challenges the length of his sentence. The district court assigned one and one-half criminal-history points to each of two prior convictions in Illinois and sentenced Cavanaugh based on a total of three criminal-history points. Cavanaugh argues that the district court should have assigned only one criminal-history point to each of the two prior Illinois convictions, which would have resulted in a more favorable presumptive sentence under the sentencing guidelines. We conclude that the district court did not err by assigning one and one-half points to each of Cavanugh's two prior Illinois convictions and, therefore, affirm.

FACTS

On November 28, 2008, Cavanaugh rear-ended a vehicle and caused a chain collision of three vehicles that were waiting at a stoplight in the city of North St. Paul, near the intersection of State Highway 36 and State Highway 120. Police officers who arrived at the scene did not see any skid marks indicating that Cavanaugh had slowed his vehicle before the crash. Cavanaugh's alcohol concentration was .16. Cavanaugh's passenger suffered multiple severe and permanent injuries. The passengers of the three other vehicles reported no injuries.

In June 2009, the state charged Cavanaugh with criminal vehicular operation, in violation of Minn. Stat. § 609.21, subd. 1(4) (2008). In June 2012, Cavanaugh pleaded guilty. The Ramsey County Community Corrections Department prepared a sentencing

worksheet that suggested a criminal-history score of three, based on two prior felonies from Illinois, which were assigned one and one-half points each. The first prior conviction was for unlawful delivery of a controlled substance of less than one gram of cocaine, in 2001; the second was for unlawful possession of a controlled substance with intent to deliver, involving not more than one gram of cocaine, in 2005. *See* 720 Ill. Comp. Stat. 570/401(d)(i) (2008). The probation officer determined the prior convictions to be the equivalent of convictions of the Minnesota offense of third-degree controlled substance crime, in violation of Minn. Stat. § 152.023, subd. 1 (2008).

Before sentencing, Cavanaugh challenged the proposed criminal-history score of three. Cavanaugh argued to the district court that if he had engaged in the same conduct in Minnesota, he would have been charged with fifth-degree possession and fourth-degree possession, respectively. The state argued that the sentencing worksheet is correct, and the district court agreed. Accordingly, the applicable guidelines sentence was an executed sentence of 29 to 39 months of imprisonment. *See* Minn. Sent. Guidelines II.B.1, IV, V (2008). The district court imposed a sentence of 33 months of imprisonment. Cavanaugh appeals.

D E C I S I O N

Cavanaugh argues that the district court erred in calculating his criminal-history score. Specifically, Cavanaugh argues that the district court erred by determining that his two prior Illinois convictions are the equivalent of convictions of the Minnesota offense of third-degree controlled substance crime. Cavanaugh contends that the prior Illinois convictions also fit within the definition of the Minnesota offense of fourth-degree

controlled substance crime. If that were true, only one criminal-history point would be assigned to each prior conviction, Cavanaugh would have a total of two criminal-history points instead of three, and his presumptive guidelines sentence would be a stayed sentence of 28 months. *See* Minn. Sent. Guidelines II.B.1, IV, V.

A defendant's presumptive sentence is determined by the severity of the present offense and the defendant's criminal-history score. Minn. Sent. Guidelines II. The sentencing guidelines prescribe the points to be assigned to prior Minnesota convictions when calculating a defendant's criminal-history score based on the severity of the prior convictions. Minn. Sent. Guidelines II.B.1. If a defendant has prior convictions from another state, a district court determines the points to be assigned to those prior convictions by referring to the severity level of "the equivalent Minnesota felony offense." Minn. Sent. Guidelines II.B.5.

When ascertaining "the equivalent Minnesota felony offense," a district court should give primary consideration to the nature of the prior conviction and the sentence imposed. *State v. Reece*, 625 N.W.2d 822, 825 (Minn. 2001); Minn. Sent. Guidelines II.B.5. If the prior out-of-state conviction is a drug-related offense, a district court should consider "the amount and type of the controlled substance." Minn. Sent. Guidelines cmt. II.B.503. For a prior felony conviction from either Minnesota or another state, if "multiple severity levels are possible . . . but the information on the criteria that determine the severity level ranking is unavailable, the lowest possible severity level should be used." Minn. Sent. Guidelines cmt. II.B.104. This court applies an abuse-of-discretion standard of review to a district court's determination of a defendant's criminal-

history score. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

Both of Cavanaugh's prior Illinois convictions were for violations of a statute that makes it "unlawful for any person knowingly to manufacture or deliver, or possess with intent to manufacture or deliver, a controlled substance." *See* 720 Ill. Comp. Stat. 570/401. In Illinois, "delivery" is defined as "the actual, constructive or attempted transfer of possession of a controlled substance, with or without consideration, whether or not there is an agency relationship." 720 Ill. Comp. Stat. 570/102(h) (2008). The Illinois definition of delivery is equivalent to the Minnesota definition of "sell," which means to "give away, barter, deliver, exchange, distribute or dispose of to another, or to manufacture; or . . . to possess with intent to" perform one of those acts. Minn. Stat. § 152.01, subd. 15a(1), (3) (2008). Accordingly, the district court determined that Cavanaugh's two prior Illinois convictions are equivalent to convictions of third-degree controlled substance crime in Minnesota, which makes it unlawful to sell "one or more mixtures containing a narcotic drug." *See* Minn. Stat. § 152.023, subd. 1(1). Because third-degree controlled substance crime carries a severity level of VI, a prior Minnesota conviction of that offense yields one and one-half criminal-history points. Minn. Sent. Guidelines II.B.1.a., V.

Cavanaugh does not dispute that his prior Illinois convictions are equivalent to third-degree controlled substance crime in Minnesota. Rather, he argues that his prior Illinois convictions *also* are equivalent to *fourth*-degree controlled substance crime in Minnesota, which carries a severity level of IV and yields only one criminal-history

point. Minn. Sent. Guidelines II.B.1.a., V. His argument focuses on the "type of the controlled substance" at issue in the prior convictions, which is cocaine. *See* Minn. Sent. Guidelines cmt. II.B.503. A person is guilty of third-degree controlled substance crime in Minnesota if he "unlawfully sells one or more mixtures containing a *narcotic drug*." Minn. Stat. § 152.023, subd. 1(1) (emphasis added). A person is guilty of fourth-degree controlled substance crime in Minnesota if he "sells one or more mixtures containing a *controlled substance* classified in Schedule I, II, or III." Minn. Stat. § 152.024, subd. 1(1) (2008) (emphasis added). Cavanaugh asserts that, in Minnesota, cocaine is classified as both a narcotic drug and a schedule II controlled substance. *Compare* Minn. Stat. § 152.01, subd. 10(2), *with* Minn. Stat. § 152.02, subd. 3(1)(d) (2008). He further asserts that, given a choice between severity levels of IV and VI, the district court was required to select "the lowest possible severity level." *See* Minn. Sent. Guidelines cmt. II.B.104.

In response, the state disputes Cavanaugh's assertion that cocaine is classified as both a narcotic drug and a schedule II controlled substance. The state cites *State v. Richmond*, 730 N.W.2d 62 (Minn. App. 2007), *review denied* (Minn. June 19, 2007), in which this court held that a sale of less than three grams of cocaine is governed exclusively by the statute setting forth the offense of third-degree controlled substance crime. *Id.* at 67-70. In *Richmond*, we explained as follows:

> [U]nder Minnesota's classification system, all narcotic drugs are controlled substances, but not all controlled substances are narcotic drugs. While cocaine could therefore be considered a schedule II *controlled substance*, under the plain language

> of these statutory definitions, cocaine is more precisely a schedule II *narcotic drug*.
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> . . . .
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> [W]e hold that the legislature intended the sale of a mixture containing a total weight of less than three grams of cocaine, that is, a mixture "containing a narcotic drug," to be *punished as a third-degree, and not as a fourth-degree, controlled substance crime*.

Id. at 67, 69 (emphasis omitted and added) (citing *State v. Benniefield*, 678 N.W.2d 42, 44 (Minn. 2004); *State v. Vernon*, 283 N.W.2d 516, 518-19 (Minn. 1979)). Although the *Richmond* case arose in a different context (a constitutional challenge to the applicable statutes on equal-protection grounds), *id.* at 66, the holding in *Richmond* is equally applicable in the present context.

In light of *Richmond*, the district court did not err by determining that Cavanaugh's prior Illinois convictions are the equivalent of convictions of the Minnesota offense of third-degree controlled substance crime. Accordingly, the district court did not err by assigning one and one-half criminal-history points to each of Cavanaugh's prior Illinois convictions, determining that he has a total of three criminal-history points, and imposing an executed sentence of 33 months of imprisonment.

Affirmed.