STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0501

State of Minnesota,
Respondent,

vs.

Edward Joseph Slominski,
Appellant.

Filed January 13, 2014
Affirmed
Chutich, Judge

Kanabec County District Court
File No. 33-CR-12-143

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

Amy R. Brosnahan, Kanabec County Attorney, Barbara McFadden, Assistant County Attorney, Mora, Minnesota (for respondent)

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

Considered and decided by Chutich, Presiding Judge; Larkin, Judge; and Rodenberg, Judge.

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

CHUTICH, Judge

Following his conviction for criminal sexual conduct in the second degree, appellant Edward Joseph Slominski appeals his sentence, arguing that the district court

abused its discretion by failing to consider the alleged illegality of an underlying sentence used to calculate his criminal-history score. Because Slominski failed to raise this argument before the district court and because the record provided does not allow us to adequately address this issue, we affirm.

FACTS

The facts underlying Slominski's criminal-history score are as follows. In April 2010, an underage male, "A," reported that Slominski tried to molest him when A was at Slominski's home. Another underage male, "B," reported that he had also been at Slominski's home and had found pornographic pictures in a filing cabinet depicting a minor. On May 7, 2010, after these reports were received, the Kanabec County Sheriff's Office executed a search warrant and found the pornographic pictures. Kanabec County then charged Slominski with two counts of attempted second-degree criminal sexual conduct, two counts of terroristic threats, one count of soliciting a child to engage in sexual conduct, and 11 counts of possessing pornographic work involving minors.

In January 2011, Slominski pleaded guilty to four counts of possession of pornographic work involving minors and pleaded guilty, by an *Alford* plea, to one count of attempted second-degree criminal sexual conduct. In April 2011, Slominski was sentenced on each count, with his sentences to run concurrently. His longest sentence of 36 months stemmed from the fourth count of possession of child pornography.

On May 27, 2011, investigators again spoke with A, who disclosed that Slominski had touched his penis on multiple separate occasions when A was 10 years old. Slominski was then charged with three counts of second-degree criminal sexual conduct

and one count of terroristic threats, arising from conduct in three different counties. Slominski pleaded guilty to one count of second-degree criminal sexual conduct.

Before sentencing on the guilty plea, Slominski moved to vacate his 2011 sentence for reasons unrelated to this appeal. The district court denied his motion. At his sentencing hearing, the county presented a pre-sentence investigation report that calculated a criminal-history score of five, one point for each of the 2011 sentences. Slominski did not object to this score. The district court sentenced Slominski to 119 months in prison, based on a criminal-history score of five. This appeal of Slominski's 2012 sentence followed.

D E C I S I O N

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). As explained below, we conclude that no abuse of discretion occurred.

Slominski's initial brief argued that the four 2011 convictions of possession of child pornography arose out of the same behavioral incident and under the Minnesota Sentencing Guidelines, he should not have been assigned more than two felony points for prior multiple convictions. Minn. Sent. Guidelines II.B.1.d. (2008). In his reply brief, however, he concedes that this exception for multiple victims does not apply because the four photographs giving rise to the 2011 possession convictions were taken of the same child.

Slominski now contends that the district court abused its discretion in relying on his 2011 sentence when calculating his criminal-history score because the four photographs arose from a single behavioral incident under Minnesota Statutes section 609.035 (2008). Slominski therefore contends that the 2012 sentencing court should have attributed only one criminal history point to the four convictions, and not four points, and that his sentence is therefore illegal.

Even though Slominski did not raise this argument in his initial brief, the state addressed in its brief the issue of whether Slominski could collaterally attack his 2011 sentence. Because Slominski's new argument is within the scope of the state's brief, the issue raised for the first time in Slominski's reply brief can be considered by this court. *See* Minn. R. Civ. App. P. 128.02 ("The reply brief must be confined to new matter raised in the brief of the respondent.").

Slominski did not argue at the 2012 sentencing hearing that possession of the four photographs was a single behavioral incident. But a defendant does not need to raise a challenge to his criminal-history score below for it to be reviewed by this court. *State v. Maurstad*, 706 N.W.2d 545, 549 (Minn. App. 2005), *aff'd*, 733 N.W.2d 141 (Minn. 2007). "The court may at any time correct a sentence not authorized by law." Minn. R. Crim. P. 27.03, subd. 9.

Slominski asserts that he was improperly sentenced for four convictions of possession of child pornography because under section 609.035 possession of the four photographs constitutes a single behavioral incident:

> [I]f a person's conduct constitutes more than one offense under the laws of this state, the person may be punished for only one of the offenses and a conviction or acquittal of any one of them is a bar to prosecution for any other of them.

Minn. Stat. § 609.035, subd. 1. Under section 609.035, a defendant may be convicted on multiple counts arising out of a single behavioral incident, but a defendant cannot then be sentenced, even concurrently, for each of those convictions. *State v. Ferguson*, 808 N.W.2d 586, 589 (Minn. 2012).

In reviewing whether multiple offenses arise from a single behavioral incident under section 609.035, we consider "whether the conduct (1) shares a unity of time and place and (2) was motivated by an effort to obtain a single criminal objective." *State v. McCauley*, 820 N.W.2d 577, 591 (Minn. App. 2012) (quotation omitted), *review denied* (Oct. 24, 2012). "Whether multiple offenses arose out of a single behavior[al] incident depends on the facts and circumstances of the particular case." *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). "[W]here the facts are established, the determination [whether offenses arose from the same behavioral incident] is a question of law subject to de novo review." *State v. Marchbanks*, 632 N.W.2d 725, 731 (Minn. App. 2001).

Applying these principles here, we conclude that the record does not contain undisputed facts about the contents, location, and timing of the four photographs, circumstances that are necessary to determine whether Slominski's conduct was part of a

single behavioral incident. Because the circumstances underlying the four counts of possession of child pornography are not established, we cannot, as a matter of law, determine whether section 609.035 applies.

Further, the issue was not presented to the district court for the necessary fact-finding. Where the issue was not raised, the sentencing court did not abuse its discretion in relying on Slominski's 2011 sentences to calculate his criminal-history score for the 2012 sentencing. Although a sentencing issue does not have to be raised in the district court to be considered on appeal, under the circumstances presented here, section 609.035 requires fact-finding, something that we cannot do and something that the sentencing court was not asked to do.

In sum, because the record before us does not contain undisputed facts sufficient for us to determine whether the photographs arose from a single behavioral incident, and because Slominski did not raise this issue before the sentencing court for the necessary fact-finding, we do not determine the merits of Slominski's claim concerning the legality of his 2011 sentences. We merely determine that, under these circumstances, the district court did not abuse its discretion in calculating Slominski's criminal-history score.

Affirmed.