STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0953

Brian Scott Poquette, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed April 7, 2014
Affirmed
Kirk, Judge

Hennepin County District Court
File No. 27-CR-10-2339

Charles F. Clippert, St. Paul, Minnesota (for appellant)

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

Michael O. Freeman, Hennepin County Attorney, Alan J. Harris, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Worke, Judge; and Kirk, Judge.

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

KIRK, Judge

On appeal from the district court's correction of his sentence, appellant argues that (1) this court should permit him to withdraw his guilty plea, and (2) the district court improperly increased his sentence. We affirm.

FACTS

In January 2010, respondent State of Minnesota charged appellant Brian Scott Poquette with two counts of second-degree murder for an incident that occurred in June 1992. At a pretrial hearing in February 2011, the parties reached a plea agreement where appellant would receive a "sum total disposition" of 336 months in prison and credit for time served in custody in other states from 1992 through February 2011. In accordance with the agreement, appellant pleaded guilty to the amended charges of second-degree unintentional murder and first-degree assault. Applying the sentencing guidelines in effect at the time of the offense, the district court sentenced appellant to 195 months for his second-degree unintentional murder conviction (count one) and 141 months for the first-degree assault conviction (count two), to be served consecutively. The district court gave appellant credit for 1,909 days served.

In January 2013, appellant moved to correct his sentence under Minn. R. Crim. P. 27.03, subd. 9, arguing that his 141-month sentence for count two was not authorized by law. Appellant argued that the sentencing guidelines require a permissive consecutive sentence to be calculated using a zero criminal history score but, here, the district court used a criminal history score of five. Appellant contended that the mistake resulted in a

141-month sentence rather than an 81-month sentence, and the district court did not provide any reasons to support the departure. Appellant requested that the district court resentence him to 81 months. The state conceded that the district court should have applied a criminal history score of zero to the consecutive sentence and did not object to the district court correcting appellant's sentence. But the state argued that appellant was incorrectly awarded credit for time served in other states. Instead, the state asserted that appellant was only entitled to credit for 312 days served in Hennepin County.

The district court granted appellant's motion to correct his sentence and reduced appellant's sentence for count two to 81 months. The district court also reduced appellant's credit for time served to 312 days. Finally, the district court imposed a downward dispositional departure from the guidelines sentence for count one and reduced appellant's sentence for that count by 21 months, finding that it was necessary to uphold the parties' original agreement that appellant would actually serve 159 months. This appeal follows.

D E C I S I O N

I. We do not consider appellant's request to withdraw his guilty plea.

Appellant argues that he must be allowed to withdraw his plea because it was involuntary. Generally an appellate court will not consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). Although appellant did not raise this issue before the district court, we may consider a defendant's challenge to the district court's acceptance of a guilty plea on direct appeal if the grounds for the challenge are contained within the record on appeal. *See State v.*

Newcombe, 412 N.W.2d 427, 430 (Minn. App. 1987), *review denied* (Minn. Nov. 13, 1987). However, we do not consider appellant's argument here because appellant had the opportunity to raise this issue before the district court in response to the state's motion to reduce the credit he received for time served, but he chose not to do so.

II. The district court did not abuse its discretion by correcting appellant's sentence.

A district court may correct a sentence that is not authorized by law at any time. Minn. R. Crim. P. 27.03, subd. 9. The district court may modify a sentence during imposition of the sentence if it does not increase the period of confinement. *Id.* A sentence is unauthorized if it is contrary to law or applicable statutes. *State v. Borrego*, 661 N.W.2d 663, 666 (Minn. App. 2003). This court reviews a district court's decision regarding a Minn. R. Crim. P. 27.03, subd. 9, motion for an abuse of discretion. *Miller v. State*, 714 N.W.2d 745, 747 (Minn. App. 2006).

Appellant argues that the district court improperly increased the total time that he must serve in custody to 174 months and requests that this court reverse and remand to the district court with instructions to impose the 159-month sentence for which he bargained. In response, the state argues that the district court did not increase appellant's sentence.

We agree with the state's interpretation of the order. The district court originally imposed a 195-month sentence for count one and a consecutive 141 month-sentence for count two, for a total of 336 months. Appellant also received credit for 1,909 days served, which the district court calculated to be approximately 65 months. In considering

appellant's motion to correct his sentence, the district court calculated the actual amount of time that appellant would serve, reducing his sentence by his credit for time served and taking into account good time and time served out of state. The district court determined that appellant would actually serve 159 months under the original agreement.

The district court next calculated appellant's corrected sentence to be 173 months. Although appellant's sentence for count two decreased, the overall sentence increased because of the reduced credit he received for time served. The district court considered whether the increased sentence violated appellant's constitutional rights to due process and against double jeopardy, and concluded that it did not. But the district court ultimately concluded: "While it may be permissible to correct [appellant's] sentence in such a fashion, the [c]ourt believes that it would be unjust for [appellant] to serve more actual time than the parties originally negotiated." The district court exercised its discretion to depart from the presumptive sentencing guidelines and resentenced appellant to 255 months instead of the guidelines sentence of 276 months. Taking into account appellant's credit for time served and good time, he will actually serve approximately 159 months in prison. Thus, appellant's new sentence is the same as his previous sentence.

Further, the district court did not abuse its discretion by correcting appellant's sentence under Minn. R. Crim. P. 27.03, subd. 9, because the original sentence was illegal. As both appellant and the state agree, the district court erred when it imposed the original sentence because it did not use a criminal history score of zero to calculate appellant's sentence for count two, as required by the sentencing guidelines. *See* Minn.

Sent. Guidelines II.F.2 (1990). Applying the zero criminal history score, the appropriate sentence for count two is 81 months. Minn. Sent. Guidelines IV (1990). The credit for time served in the original order was also incorrect because the district court gave appellant credit for time served in other states for unrelated matters. *See State v. Willis*, 376 N.W.2d 427, 427 (Minn. 1985) ("A defendant charged with a crime in Minnesota and held in custody in another state . . . is not entitled to credit against a Minnesota sentence for time in custody in the other state unless the Minnesota charge was the sole reason for the detention by the other state.").

Finally, the district court did not abuse its discretion by imposing a downward dispositional departure for count one because it was within the district court's discretion to depart and the departure did not increase appellant's period of confinement. *See* Minn. R. Crim. P. 27.03, subd. 9 ("The court may modify a sentence during a[n] . . . imposition of sentence if the court does not increase the period of confinement."); *State v. Vance*, 765 N.W.2d 390, 395 (Minn. 2009) (stating that this court reviews a resentencing court's decision to depart from the sentencing guidelines for an abuse of discretion).

Affirmed.