STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1713

State of Minnesota,
Respondent,

vs.

Hunter Jay Parker,
Appellant.

Filed August 22, 2011
Affirmed in part, reversed in part, and remanded
Halbrooks, Judge

Mille Lacs County District Court
File No. 48-CR-08-895

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, St. Paul, Minnesota; and

Jan Jude, Mille Lacs County Attorney, Milaca, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, G. Tony Atwal, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Schellhas, Presiding Judge; Peterson, Judge; and Halbrooks, Judge.

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

HALBROOKS, Judge

Appellant challenges his sentences for first-degree test refusal and driving after cancellation on the ground that multiple sentences are statutorily prohibited in this

circumstance. Alternatively, appellant argues that even if multiple sentences are permitted, the district court erred by imposing his sentences in the wrong order and by not reducing his criminal-history score to zero before imposing the second sentence. Because we conclude that multiple sentences are permitted, we affirm in part. But because the district court imposed appellant's sentences in the wrong order, we reverse in part and remand.

FACTS

On April 4, 2008, James Caza, a Grand Casino Mille Lacs security guard, saw appellant Hunter Jay Parker get out of a minivan that had just come to an abrupt stop in the middle of an intersection. Caza approached appellant, who was staggering, slurring his words, repeating himself, and smelled of alcohol; Caza believed that appellant was drunk. Caza watched appellant walk into the hotel lobby and toward the area where the rooms are located. Caza asked security to notify law enforcement.

When Caza saw appellant return to the lobby, he asked appellant to push the van out of the intersection. Law enforcement arrived at about the same time appellant returned to the lobby. Deputy Daniel Mott asked appellant to submit to field sobriety tests and a preliminary breath test, but appellant refused. Mott arrested appellant, who again refused to submit to testing at the Search and Rescue building.

Appellant was charged with first-degree test refusal pursuant to Minn. Stat. §§ 169A.20, subd. 2, .24 (2006); first-degree driving while impaired (DWI) pursuant to Minn. Stat. §§ 169A.20, subd. 1(1), .24 (2006); and driving after cancellation (DAC) pursuant to Minn. Stat. § 171.24, subd. 5 (2006). He was convicted by a jury on all three

counts. On appeal, we reversed the convictions based on the improper admission of a prior unspecified felony conviction and remanded for a new trial. *State v. Parker*, No. A08-1981, 2009 WL 3818231, at *2 (Minn. App. Nov. 17, 2009).

On retrial, appellant was again convicted of all three counts. The district court sentenced appellant to 54 months in prison for first-degree test refusal and imposed a consecutive sentence of 365 days for DAC. The district court did not impose a sentence for first-degree DWI. This appeal follows.

D E C I S I O N

We review the district court's sentencing decision for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). But "[s]tatutory construction and interpretation of the sentencing guidelines are subject to de novo review." *State v. Johnson*, 770 N.W.2d 564, 565 (Minn. App. 2009).

I.

Ordinarily, a district court may not impose more than one sentence for multiple offenses committed during 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 (2006). But there are statutorily created exceptions. *See, e.g.*, Minn. Stat. § 609.035, subd. 2 (2006) (expressly permitting consecutive sentences when a person is sentenced for refusal to test and for driving after cancellation, notwithstanding the fact that the offenses arose out of the same course of conduct). When the material facts underlying the offenses are not in

dispute, we review de novo whether the offenses are part of a single behavioral incident. *State v. Reimer*, 625 N.W.2d 175, 176 (Minn. App. 2001). Appellant argues that none of the exceptions to the general prohibition on multiple sentences applies and that, because his offenses arise out of a single behavioral incident, multiple sentences are prohibited. We disagree.

It is the state's burden to prove that the offenses did not arise out of a single behavioral incident. *Id.* at 177. The issue of whether the offenses stem from a single behavioral incident "depends on the facts and circumstances of the particular case." *Id.* (quotation omitted).

> The test for determining if violations of two or more traffic statutes result from a single behavioral incident is whether they occur at substantially the same time and place and arise out of a continuous and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment.

Id. at 176-77 (quotation omitted).

In *Reimer*, we concluded that "driving with an expired driver's license is a continuing offense that recurs every time appellant drives." *Id.* at 177 (affirming the district court's conclusion that prosecution for driving with an expired license and DWI did not violate prohibition on serial prosecutions). "Moreover, the offenses of DWI and driving with an expired license do not manifest an indivisible state of mind or coincident errors of judgment. Appellant's decision to drive with an expired license may be attributed to errors in judgment wholly independent of his decision to drink and drive." *Id.* (quotation and citation omitted). We noted in *Reimer* that "Minnesota courts have

reached similar results in a variety of factual situations involving one or more motor vehicle violations." *Id.*; *see also State v. Meland*, 616 N.W.2d 757, 760 (Minn. App. 2000) (holding that driving with expired tabs and DWI did not arise from a single behavioral incident); *State v. Butcher*, 563 N.W.2d 776, 784 (Minn. App. 1997) (holding that illegally transporting a firearm and DAC did not arise from a single behavioral incident), *review denied* (Minn. Aug. 5, 1997); *State v. Bishop*, 545 N.W.2d 689, 692 (Minn. App. 1996) (holding that DAC and aggravated DWI involved dissimilar errors in judgment and therefore involved two offenses). DAC is considered "continuous" in nature and therefore does not meet the test of requiring "an indivisible state of mind or coincident errors of judgment." *State v. Reiland*, 274 Minn. 121, 124, 142 N.W.2d 635, 638 (1966). We therefore conclude that appellant's convictions of DAC and test refusal do not arise from a single behavioral incident—regardless of whether they occurred at substantially the same time and place.

Appellant argues that his decision to refuse chemical testing was an attempt to avoid apprehension, and it therefore must be considered part of a single behavioral incident. It is true that Minnesota appellate courts have generally held that multiple sentences are prohibited when one conviction is due to an attempt to avoid apprehension for another offense. *See, e.g*, *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (holding that criminal vehicular operation and felony failure to notify police of personal-injury accident arose from single behavioral incident). But appellant was not sentenced for DWI; and criminal test refusal can only fairly be characterized as an attempt to avoid

apprehension for DWI, not an attempt to avoid apprehension for DAC. We therefore find appellant's arguments to be unavailing.

Because appellant's convictions did not arise from a single behavioral incident, the limitation on multiple sentences found in Minn. Stat. § 609.035, subd. 1, does not apply. We therefore affirm the imposition of multiple sentences.

II.

Appellant argues that even if multiple sentences are permitted by statute, the district court abused its discretion by (1) imposing the sentences in the incorrect order; (2) failing to reduce appellant's criminal-history score to zero before imposing the second sentence; and (3) failing to justify the imposition of consecutive sentences, which appellant argues was a departure under the sentencing guidelines.

A. The order of the sentences

Appellant argues that, under the sentencing guidelines, "[m]ultiple offenses are sentenced in the order in which they occurred." Minn. Sent. Guidelines II.B.1 (2007); *see also* Minn. Sent. Guidelines II.F (2007) ("When consecutive sentences are imposed, offenses are sentenced in the order in which they occurred."). There is no dispute that appellant's DAC offense occurred before his test-refusal offense.

The state argues that appellant cannot challenge this error on appeal because he requested that the sentences be imposed in the order in which they were imposed. There are two problems with this argument. First, appellant made the request at the original sentencing hearing, before we reversed his convictions and remanded for a new trial. He made no such request at the sentencing hearing following his retrial. The sentencing

transcript from 2010 reflects that the prosecutor requested that appellant receive the same sentences that he received after his first conviction, but appellant did not renew his request that the sentences be imposed in the reverse order.

Second, although "[t]he invited error doctrine prevents a party from asserting an error on appeal that he invited or could have prevented in the court below," this doctrine does not apply to plain error. *State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007). "To establish a plain error a defendant must demonstrate that (1) there was an error, (2) it was plain, and (3) it affected substantial rights." *Id.* The instruction in the sentencing guidelines to impose multiple sentences in the order in which the offenses occurred is clear, and the failure to follow it is plain error. *See State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005) (stating that plain errors are those that are "clear and obvious"). We therefore conclude that the district court erred by imposing the sentences in the reverse order even if we were to consider appellant's earlier request.

B. Appellant's criminal-history score

The state argues, in the alternative, that any error of the district court in imposing appellant's sentences in the incorrect order was harmless because changing the order of appellant's sentences would not change the overall length of his sentence. Appellant contends that the error is not harmless because the district court was required to lower his criminal-history score to zero before imposing the second sentence.

The district court sentenced appellant to 54 months for felony test refusal, which is the presumptive sentence using a criminal-history score of three. Minn. Sent. Guidelines IV (2007). Under the sentencing guidelines, "[f]or each offense sentenced consecutive to

another offense(s), other than those that are presumptive, a zero criminal history score, or the mandatory minimum for the offense, whichever is greater, shall be used in determining the presumptive duration." Minn. Sent. Guidelines II.F. If a criminal-history score of zero had been used to calculate the presumptive duration of appellant's felony test-refusal sentence, the presumptive duration would have been 36 months rather than 54 months. Minn. Sent. Guidelines IV.

The state argues that the sentencing guidelines do not apply to this case because the Minnesota Supreme Court held in *State v. Holmes*, 719 N.W.2d 904, 909-10 (Minn. 2006), that section II.F does not apply to a Minn. Stat. § 169A.28 sentence. It is true that *Holmes* stands for the proposition that section II.F of the sentencing guidelines in effect at that time (those effective August 8, 2003) did not apply to mandatory consecutive sentences imposed pursuant to section 169A.28. 719 N.W.2d at 909-10. But the statutory scheme of section 169A.28 and section II.F of the sentencing guidelines applicable to appellant's convictions specifically address felony DWI sentences imposed pursuant to section 169A.28.

We find *Johnson* to be the most instructive in this situation. In *Johnson*, a driver pleaded guilty to the same two offenses involved here—gross-misdemeanor DAC and first-degree test refusal. 770 N.W.2d at 565. In *Johnson*, the district court ordered that the felony test-refusal sentence run consecutively to the gross-misdemeanor DAC sentence and used a criminal-history score of eight to calculate the duration of the DWI sentence. *Id.* We reversed and remanded for resentencing using a criminal-history score of zero. *Id*. at 566. We rejected the state's argument that the guidelines' requirement for

use of a zero criminal-history score applies only to permissive-consecutive-sentence situations set out in guidelines section II.F. *Id*. We agree with the *Johnson* court that the requirement to use a zero criminal-history score when imposing consecutive sentences applies to consecutive sentences imposed pursuant to Minn. Stat. § 169A.28. If appellant's sentences had been imposed in the correct order, this case would be analogous to *Johnson*, and his criminal-history score should have been reduced from three to zero before imposing the felony test-refusal sentence.

We therefore conclude that the district court's error in its sentencing order affected the presumptive duration of appellant's sentence, and we cannot say that the error was harmless. Accordingly, we reverse the sentences as imposed and remand for resentencing consistent with this opinion. Because we are reversing and remanding for resentencing, we do not address appellant's assertion that consecutive sentencing in the challenged order constitutes a departure.

Affirmed in part, reversed in part, and remanded.