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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0656**

State of Minnesota,
Respondent,

vs.

Jermaine Liljune Johnson,
Appellant.

**Filed February 3, 2014
Affirmed
Johnson, Judge**

Olmsted County District Court
File Nos. 55-CR-12-3953 & 55-CR-12-3855

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

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Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Hooten, Judge; and Smith,
Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

Jermaine Liljune Johnson pleaded guilty to possession of a firearm and first-degree aggravated robbery. The district court imposed concurrent prison sentences of 60 months and 75 months, respectively. On appeal, Johnson argues that the district court erred by incorrectly calculating his criminal-history score. We affirm.

FACTS

Johnson's appeal encompasses two convictions arising from two separate incidents. The first incident occurred during the evening of June 3, 2012. Law-enforcement officers responded to a report of gunshots near an apartment complex in the city of Rochester. On June 18, 2012, the state charged Johnson, in case number 55-CR-12-3953 (the '3953 case), with unlawful possession of a firearm, drive-by shooting, second-degree assault, and intentional discharge of a firearm.

The second incident occurred on June 11, 2012. Law-enforcement officers responded to a report of an armed robbery at a motel in the city of Rochester. On June 13, 2012, the state charged Johnson, in case number 55-CR-12-3855 (the '3855 case), with aggravated robbery, second-degree assault, and unlawful possession of a firearm.

In November 2012, the state and Johnson entered into a plea agreement pursuant to which Johnson pleaded guilty to unlawful possession of a firearm in the '3953 case and to aggravated robbery in the '3855 case. In exchange for Johnson's plea, the state

recommended concurrent minimum presumptive sentences (*i.e.*, “bottom-of-the-box” sentences) and dismissed the remaining charges in both cases.

In a pre-sentence investigation, a probation officer prepared sentencing worksheets that calculated Johnson’s criminal-history score for each offense according to the sentencing guidelines. In addition to the adult felony points assigned, both worksheets assigned one juvenile point to Johnson based on two felony offenses he committed before age 18, one of which was an Illinois conviction for intent to deliver heroin. Johnson received 24 months of “intensive probation” as a result of that conviction.

In January 2013, the district court conducted a sentencing hearing for both the ‘3855 case and ‘3953 case. The district court calculated Johnson’s criminal-history score in the manner recommended by the probation officer’s worksheets. Accordingly, the district court sentenced Johnson to the statutory mandatory minimum sentence of 60 months of imprisonment in the ‘3953 case, based on a criminal-history score of three, and to the minimum presumptive sentence of 75 months of imprisonment in the ‘3855 case, based on a criminal-history score of four. Johnson appeals.

D E C I S I O N

Johnson argues that the district court erred in calculating his criminal-history score. Specifically, he argues that the district court should not have included one juvenile point in his criminal-history score based in part on his prior Illinois conviction for intent to deliver heroin because the “intensive probation” that was ordered for that conviction makes it the equivalent of a gross-misdemeanor sentence in Minnesota law, not a felony sentence.

As a general rule, this court applies a *de novo* standard of review to a district court's interpretation of the sentencing guidelines. *State v. Zeimet*, 696 N.W.2d 791, 793 (Minn. 2005). But we apply 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); *see also* Minn. Sent. Guidelines 2.B.5., ¶ 1 (Supp. 2011).

The parties contested numerous issues in the district court, but their appellate briefs have narrowed the issues for this court to resolve. The parties now agree that the district court properly determined that Johnson's Illinois offense is equivalent to the Minnesota offense of felony fourth-degree controlled substance crime, in violation of Minn. Stat. § 152.024 (2012). The parties in their briefs also agree that the "intensive probation" Johnson received for the Illinois conviction is the equivalent of a stay of imposition under Minnesota law. *Cf.* Minn. R. Juv. Delinq. P. 15.05, subd. 1.¹ In light of these agreements, the central issue on appeal is whether, under Minnesota law, a district court may, when assigning criminal-history points, consider a prior conviction of felony fourth-degree controlled substance crime that was committed while the defendant was a

¹At oral argument, Johnson's counsel argued that the intensive probation arising from the prior Illinois conviction is *not* the equivalent of a stay of imposition under Minnesota law. This argument was not preserved in the district court, where Johnson did not object to the district court's characterization of the offense as a stay of imposition. In addition, counsel's oral argument is inconsistent with his appellate brief, in which he plainly states, "His sentence was the Minnesota equivalent of a stay of imposition." Because the argument was neither raised in the district court nor in appellant's brief, the argument is forfeited, and we decline to consider it. *See State v. Grecinger*, 569 N.W.2d 189, 193 n.8 (Minn. 1997); *Carey v. State*, 765 N.W.2d 396, 399 n.1 (Minn. App. 2009), *review denied* (Minn. Aug. 11, 2009).

juvenile and that resulted in a stay of imposition. If Johnson were to prevail in his argument that a district court may not do so, he would have only three criminal-history points instead of four in the ‘3855 case, and the minimum presumptive guidelines sentence for that conviction would be 67 months instead of 75 months. *See* Minn. Sent. Guidelines 2.B.4.

A district court must determine a defendant’s presumptive sentence according to the severity of the present offense and the defendant’s criminal-history score. Minn. Sent. Guidelines 2.A, B. The sentencing guidelines prescribe the number of points to be assigned to a prior Minnesota conviction when calculating a defendant’s criminal-history score based on the severity of the prior conviction. Minn. Sent. Guidelines 2.B.1. But if a defendant has a prior conviction from another state, a district court must determine the points to be assigned to the prior conviction by referring to the severity level of “the equivalent Minnesota felony offense.” Minn. Sent. Guidelines 2.B.5.

Furthermore, if a defendant has a prior conviction for a felony offense committed while a juvenile, the conviction “should be included in the juvenile history section if it meets the requirements outlined in 2.B.4.” Minn. Sent. Guidelines 2.B.5. Section 2.B.4 requires, among other things, that the juvenile offense was committed after the defendant’s 14th birthday and the current offense was committed before the defendant’s 25th birthday. Minn. Sent. Guidelines 2.B.4. It is undisputed that both juvenile convictions in this case satisfy these requirements.

For every two prior felony offenses that meet the requirement of section 2.B.4, the district court must assign one criminal-history point. Minn. Sent. Guidelines 2.B.4. It

also is undisputed that Johnson has one prior felony-level juvenile adjudication from Minnesota.

Thus, the only question in this appeal is whether Johnson's prior Illinois conviction should be treated as a felony for purposes of determining his criminal-history score. To characterize the severity of Johnson's prior out-of-state juvenile offense, a district court must look to "the offense definitions and sentences provided in Minnesota law." Minn. Sent. Guidelines 2.B.5. If a prior felony conviction resulted in the imposition of a gross-misdemeanor sentence, the conviction should be treated as a gross misdemeanor for purposes of calculating a criminal-history score. Minn. Sent. Guidelines 2.B.1.e. But if a prior felony conviction resulted in a stayed sentence, the conviction should be treated as a felony for purposes of calculating a criminal-history score. Minn. Sent. Guidelines 2.B.1; *State v. Campbell*, 814 N.W.2d 1, 7 (Minn. 2012). As stated above, the parties' briefs are consistent in stating that Johnson's "intensive probation" is the equivalent of a stay of imposition.

Johnson contends that the stay of imposition and intensive probation arising from his prior Illinois conviction should be treated as a gross-misdemeanor sentence, not a felony sentence, because of a statute providing that a prior felony conviction should be "deemed to be for a misdemeanor or a gross misdemeanor if the sentence imposed is within the limits provided by law for a misdemeanor or gross misdemeanor as defined in section 609.02." Minn. Stat. § 609.13, subd. 1(1) (2012). Section 609.02 defines a gross misdemeanor as any crime that is not a felony and not a misdemeanor, Minn. Stat. § 609.02, subd. 4, and it defines a felony as a crime for which "a sentence of

imprisonment for more than one year may be imposed,” *id.*, subd. 2. If an offender is convicted of a gross misdemeanor, the district court may stay the imposition of a sentence for a maximum of two years. Minn. Stat. § 609.135, subd. 2(c) (2012). Based on these provisions of Minnesota law, Johnson contends that his prior Illinois conviction resulted in a gross-misdemeanor sentence because the two-year duration of his intensive probation is within the maximum duration allowed by Minnesota law and because he spent less than one year in jail.

Johnson’s argument is foreclosed by *Campbell*, in which the supreme court rejected a nearly identical argument. The appellant in *Campbell* argued that the district court should not have awarded him a felony point for a prior robbery conviction because his sentence was within the gross-misdemeanor limits. 814 N.W.2d at 6. The prior conviction had resulted in a two-year stay of imposition, during which time the appellant was on probation. *Id.* The supreme court reasoned that even though the prior felony conviction resulted in a stay of imposition, it is treated as a felony for purposes of calculating criminal-history points. *Id.* at 7 (citing Minn. Sent. Guidelines cmt. 2.B.101). The supreme court explained that “felony stays of imposition result in felony criminal history points no matter what period of probation the defendant receives.” *Id.* (citing Minn. Sent. Guidelines 2.B.1). The supreme court further explained that a prior felony conviction may be treated as a gross misdemeanor for purposes of calculating criminal-history points under part 2.B.1 of the sentencing guidelines *only* if a sentence *actually was imposed* on the prior conviction and, “[b]y definition, when a court stays imposition of a sentence it imposes no sentence.” *Id.*

In light of *Campbell*, Johnson's prior Illinois conviction, which resulted in a stay of imposition, may be treated as a felony for purposes of calculating criminal-history points. Thus, the district court did not err by including a point in Johnson's criminal-history score based in part on the offense he committed in Illinois while he was a juvenile.

Affirmed.