STATE OF MINNESOTA
IN COURT OF APPEALS
A11-1468

State of Minnesota,
Respondent,

vs.

Sammy A. Lucio,
Appellant.

Filed July 16, 2012
Affirmed
Stauber, Judge

Polk County District Court
File No. 60CR101094

Greg Widseth, Polk County Attorney, Scott A. Buhler, Assistant County Attorney, Crookston, Minnesota (for respondent)

Mary E. Seaworth, Grand Forks, North Dakota; and

Henry D. Howe (pro hac vice), Grand Forks, North Dakota (for appellant)

Considered and decided by Stauber, Presiding Judge; Cleary, Judge; and Rodenberg, Judge.

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

STAUBER, Judge

Following his *Alford* plea on two controlled-substance charges, appellant argues that (1) the record does not accurately reflect his convictions; (2) the district court erred by sentencing appellant on both counts; and (3) the district court abused its discretion by

imposing longer sentences than those recommended in the presentence investigation. We affirm.

FACTS

On May 17, 2010, appellant Sammy A. Lucio was charged by complaint with conspiracy in violation of Minn. Stat. § 152.096, subd. 1 (2008), first-degree sale of a controlled substance in violation of Minn. Stat. §152.021, subd. 1(1) (2008), first-degree possession of a controlled substance in violation of Minn. Stat. § 152.021, subd. 2(1) (2008), and failure to affix a tax stamp in violation of Minn. Stat. § 297D.09 (2008). On March 29, 2011, appellant entered an *Alford* plea to the conspiracy and sale charges.[1] In exchange for the plea, the state dismissed the remaining charges and agreed to cap its recommendation for sentencing at 240 months.

At the plea hearing, the state summarized the evidence that it planned to present if the matter were to proceed to trial. The state indicated that it would present evidence that V.C. had purchased one ounce of methamphetamine from appellant's cousin and paid him $2,500 "for a previous ounce of methamphetamine that [V.C.] had obtained from [appellant]." The state indicated that another witness "would testify to the fact that [appellant] called him when he was living in Texas and asked him to drive a car up from Texas to the City of East Grand Forks" while methamphetamine and cocaine were concealed in the engine compartment of the vehicle, and appellant paid the witness

[1] With an *Alford* plea, a defendant maintains his or her innocence while conceding that there is a substantial likelihood that the evidence would support a conviction by a jury of the crime charged. *State v. Goulette*, 258 N.W.2d 758, 760 (Minn. 1977) (adopting holding of *North Carolina v. Alford*, 400 U.S. 25, 91 S. Ct. 160 (1970)).

$3,000 for doing so. Appellant acknowledged that he understood the evidence and that if a jury were to hear and believe the evidence, there would be a substantial likelihood that appellant would be found guilty of the first two counts of the complaint.

At sentencing, the state argued for an upward-departure sentence of 240 months on each count. Appellant argued against departure, questioned whether the convictions arose out of separate incidents, and asked that appellant only be sentenced on the conspiracy charge. The state responded that the conspiracy charge "was completed the day that [appellant] recruited [J.S.] to bring the cocaine and methamphetamine up from Texas" while the actual drug sales occurred almost a month later. The district court imposed an executed 129-month sentence on the conspiracy charge and an executed 160-month sentence on the sale charge, with the sentences to run concurrently. This appeal follows.

D E C I S I O N

I.

Appellant's warrant of commitment lists two convictions for first-degree sale of a controlled substance in violation of Minn. Stat. § 152.021, subd. 1(1). Appellant argues that the offender-locator database maintained by the Minnesota Department of Corrections lists an additional aiding-and-abetting modifier for appellant's convictions. Appellant asks us to correct the "official record of this case" to accurately reflect the charges to which he pleaded guilty.

This issue was not raised to the district court, and therefore is not properly before this court on appeal. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) (stating that

an appellate court will generally not consider matters not argued to and considered by the district court). We disagree with appellant's assertion that Minn. R. Civ. App. P. 110.05 allows us to change the record on appeal, especially absent any argument that the warrant of commitment received by this court is different from the warrant of commitment signed by the district court. And the printout from the Department of Corrections's database is not part of the record on appeal. *See* Minn. R. Civ. App. P. 110.01 (defining record on appeal). We therefore do not address appellant's argument on the issue further.

II.

Minnesota law generally prohibits multiple sentences for two or more offenses committed as part of 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 (2008).[2] Whether multiple offenses arose out of a single behavioral incident depends on whether the conduct occurred at the same time and place and whether the defendant had a single criminal objective. *State v. Bookwalter*, 541 N.W.2d 290, 294 (Minn. 1995). Resolution of the issue is a fact determination that will not be reversed on appeal unless clearly erroneous; in other words, the determination will be upheld unless it is unsupported by the record. *State v. Heath*, 685 N.W.2d 48, 61 (Minn. App. 2004), *review denied* (Minn.

[2] The fact that appellant's sentences were ordered to run concurrently does not alleviate any concern under section 609.035. *See State v. O'Hagan*, 474 N.W.2d 613, 622 (Minn. App. 1991) (holding that concurrent sentencing is barred if statute prohibits multiple sentencing), *review denied* (Minn. Sept. 25, 1991).

Nov. 16, 2004); *State v. Butterfield*, 555 N.W.2d 526, 530 (Minn. App. 1996), *review denied* (Minn. Dec. 17, 1996).

In determining whether offenses arose out of a single behavioral incident for the purposes of Minn. Stat. § 609.035, the district court looks at the factors of time and place and whether the conduct was motivated by a single criminal objective. *Bookwalter*, 541 N.W.2d at 294. Courts are also to consider "whether the offenses (1) arose from a continuous and uninterrupted course of conduct; (2) occurred at substantially the same time and place; and (3) manifested an indivisible state of mind. *Heath*, 685 N.W.2d at 61.

Here, the record supports the district court's determination that the conspiracy and sale charges did not arise from a single behavioral incident. Appellant acknowledged that the state would present evidence at trial that he paid J.S. $3,000 to transport methamphetamine and cocaine from Texas to Minnesota. The conspiracy was therefore committed when appellant and J.S. agreed to transport the drugs from Texas to Minnesota. *See* Minn. Stat. § 152.096, subd. 1 (stating that any person who conspires to commit any act prohibited by chapter 152, with certain exceptions not relevant here, is guilty of a felony); *see also State v. Tracy*, 667 N.W.2d 141, 146 (Minn. App. 2003) (holding that proving conspiracy does not require proof of underlying crime). Thus, by the time the drugs arrived in Minnesota and were sold, the conspiracy had already occurred. The "behavioral incident" giving rise to the conspiracy charge therefore took place *before* the "behavioral incident" giving rise to the sale charge, and the offenses are therefore divisible. *See Heath*, 685 N.W.2d at 61 (conducting similar analysis).

Because the district court did not clearly err by finding that the conspiracy conviction and sale conviction did not arise out of a single behavioral incident, the sentences are not invalid under Minn. Stat. § 609.035. The district court therefore did not err by imposing sentences on both counts.

III.

The list of issues presented in appellant's brief includes appellant's assertion that the district court abused its discretion by imposing sentences in excess of those recommended in the presentence investigation. But appellant does not provide any argument or citation to authority in support of this assertion. And an assignment of error in a brief based on mere assertion—without argument or citation to authority—is waived unless prejudicial error is obvious on mere inspection. *State v. Wembley*, 712 N.W.2d 783, 795 (Minn. App. 2006), *aff'd on other grounds*, 728 N.W.2d 243 (Minn. 2007). Because no such error is obvious—especially in light of the fact that the district court imposed guidelines sentences—we conclude that appellant has waived the issue and do not address it further. *See State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981) (stating an appellate court will reverse a district court's imposition of a presumptive sentence only in rare cases); *Hamilton v. State*, 398 N.W.2d 680, 683 (Minn. App. 1987) (stating that a PSI-recommended sentence neither compels a downward departure nor prevents an upward departure under the sentencing guidelines), *review denied* (Minn. Mar. 13, 1987).

Affirmed.