

*This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A12-0593**

State of Minnesota,  
Appellant,

vs.

Clifton Thomas,  
Respondent.

**Filed August 13, 2012  
Reversed and remanded  
Stoneburner, Judge**

Hennepin County District Court  
File No. 27-CR-11-23124

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

Michael O. Freeman, Hennepin County Attorney, Elizabeth A. Roosevelt Johnston, Assistant Hennepin County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Sara J. Euteneuer, Assistant State Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and Connolly, Judge.

**UNPUBLISHED OPINION**

**STONEBURNER**, Judge

The state appeals the district court's failure to impose the mandatory-minimum sentence required by Minn. Stat. § 152.023, subd. 3(b) (2010), for respondent's

conviction of a third-degree controlled-substance crime subsequent to a prior controlled-substance conviction. We reverse and remand for resentencing consistent with the requirement of the mandatory sentencing statute.

## FACTS

In July 2006, respondent Clifton Thomas pleaded guilty to fifth-degree controlled-substance crime in violation of Minn. Stat. § 152.025, subd. 2(1) (2004), and was given a stay of adjudication under Minn. Stat. § 152.18, subd. 1 (2004). He was released from probation in 2010.

In January 2012, Thomas pleaded guilty to third-degree controlled-substance crime in violation of Minn. Stat. §§ 152.023, subds. 1(1), 3(b), 609.101, subd. 3, and 152.01, subd. 16a (2010), for selling Vicodin, a schedule III controlled substance, to an undercover police officer. Appellant State of Minnesota argued to the district court that Minn. Stat. § 152.023, subd. 3(b), mandated a 24-month executed sentence. Thomas does not dispute that his conviction of third-degree controlled-substance crime is a “subsequent controlled substance conviction” for which the statute requires a mandatory-minimum 24-month executed sentence,<sup>1</sup> but he argued to the district court that the district court has the authority to depart from the mandated sentence. Noting the likelihood of an appeal, the district court agreed with Thomas and sentenced him to a stayed sentence of 24 months. This appeal by the state followed.

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<sup>1</sup> Minn. Stat. § 152.01, subd. 16a (2010), provides in relevant part that “a ‘subsequent controlled substance conviction’ means that before commission of the offense for which the person is convicted under this chapter, the person received a disposition for a felony-level offense under section 152.18, subdivision 1.”

## DECISION

Whether Minn. Stat. § 152.023, subd. 3(b), requires a mandatory minimum term of incarceration is a question of statutory construction thoroughly analyzed in *State v. Turck*, 728 N.W.2d 544 (Minn. App. 2007) (holding that the sentence for third-degree controlled-substance crime that is a subsequent controlled-substance crime cannot be stayed, and the district court must sentence to an executed prison term of not less than two years), *review denied* (Minn. May 30, 2007).

Thomas argues that his case is distinguishable because, unlike Turck, who “committed a very typical third degree drug offense” and had a criminal history score of seven, Thomas had a criminal history score of one and his offense, selling his prescription medication for \$60 to an undercover police officer, “is clearly less serious than the typical drug offense.” But neither the legislature nor the caselaw has recognized such a distinction. Because *Turck* is controlling, we reverse and remand for sentencing pursuant to the mandate of Minn. Stat. § 152.023, subd. 3(b).

**Reversed and remanded.**