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Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1427**

Marc Anthony Birk,
petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

**Filed January 22, 2013
Affirmed
Stauber, Judge**

Ramsey County District Court
File No. 62-CR-10-615

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

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

John J. Choi, Ramsey County Attorney, Thomas R. Ragatz, Assistant County Attorney,
Criminal Appeals Unit, St. Paul, Minnesota (for respondent)

Considered and decided by Stauber, Presiding Judge; Halbrooks, Judge; and
Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals
by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

STAUBER, Judge

Appellant challenges the postconviction court's order denying his petition for postconviction relief, arguing that the sentencing court miscalculated his criminal-history score. Because the sentencing court did not abuse its discretion in calculating appellant's criminal-history score, the postconviction court did not err by denying appellant's petition for relief, and we affirm.

FACTS

The facts giving rise to the present appeal are undisputed. In 2002, appellant Marc Anthony Birk was convicted of violating 625 Ill. Comp. Stat. 5/4-103(a)(1) (2002). The statute is captioned "Offenses relating to motor vehicles and other vehicles—Felonies" and, in relevant part, provides that it is unlawful for "[a] person not entitled to the possession of a vehicle or essential part of a vehicle to receive, possess, conceal, sell dispose, or transfer it, knowing it to have been stolen or converted." 625 Ill. Comp. Stat. 5/4-103(a)(1). The Illinois court sentenced appellant to 24 months' probation and 40 hours of community service.

On January 29, 2010, appellant was charged by two separate complaints—one related to an incident on November 17, 2009, and one related to an incident on January 27, 2010—with two counts of possession of a firearm by an ineligible person in violation of Minn. Stat. § 624.713, subds. 1(2), 2(b) (2008) and two counts of second-degree possession of a controlled substance in violation of Minn. Stat. § 152.022, subd. 2(a)(1) (2008), one count of each arising from each incident. Pursuant to a plea agreement,

appellant pleaded guilty to the two controlled-substance charges, and the two firearm-possession charges were dismissed.

The plea agreement called for appellant to receive a middle-of-the-box, guidelines sentence on the conviction stemming from the first incident and a middle-of-the-box, guidelines sentence, less 24 months, on the conviction stemming from the second incident. At the time of the plea agreement, it was contemplated that appellant would have a criminal-history score of two for the first incident and three for the second incident.

A presentence-investigation report (PSI) was prepared, which included an unanticipated felony point in appellant's criminal-history score based on the 2002 Illinois conviction. Appellant moved for a recalculation of his criminal-history score, arguing that the Illinois conviction should be treated as a gross-misdemeanor conviction as opposed to a felony conviction. The state opposed the motion, arguing that the criminal-history score calculated in the PSI was correct. The district court found that the Illinois conviction was properly considered as a felony and the criminal-history score calculated in the PSI was accurate. The district court therefore, as per the plea agreement, imposed a 78-month sentence for the conviction stemming from the first incident and a concurrent 64-month sentence (representing a 24-month downward departure from the presumptive 88-month sentence) for the conviction stemming from the second incident. Appellant did not file a direct appeal.

In April 2012, appellant petitioned for postconviction relief, requesting that one point be removed from his criminal-history score and he be resentenced accordingly. The

state opposed the petition. The postconviction court denied appellant's petition without a hearing, and this appeal follows.

D E C I S I O N

In reviewing a postconviction court's decision to grant or deny relief, issues of law are reviewed de novo and issues of fact are reviewed for sufficiency of the evidence. *Leake v. State*, 737 N.W.2d 531, 535 (Minn. 2007); *see also Butala v. State*, 664 N.W.2d 333, 338 (Minn. 2003) (noting that appellate courts "extend a broad review of both questions of law and fact" when reviewing postconviction proceedings). The district court's determination of a defendant's criminal-history score will not be reversed absent an abuse of discretion. *State v. Stillday*, 646 N.W.2d 557, 561 (Minn. App. 2002), *review denied* (Minn. Aug. 20, 2002).

The state has the burden of establishing a defendant's criminal-history score. *Bolstad v. State*, 439 N.W.2d 50, 53 (Minn. App. 1989). In calculating a defendant's criminal-history score, a particular weight is given "for every felony conviction for which a felony sentence was stayed or imposed before the current sentencing or for which a stay of imposition of sentence was given before the current sentencing." Minn. Sent. Guidelines II.B.1 (2009). "The designation of out-of-state convictions as felonies, gross misdemeanors, or misdemeanors shall be governed by the offense definitions and sentences provided in Minnesota law." Minn. Sent. Guidelines II.B.5 (2009). "The determination of the equivalent Minnesota felony for an out-of-state felony is an exercise of the sentencing court's discretion and is based on the definition of the out-of-state offense and the sentence received by the offender." *Id.*

Appellant was charged and convicted under an Illinois statute that specifically references motor vehicles. *See* 625 Ill. Comp. Stat. 5/4-103(a)(1) (captioned “Offenses relating to motor vehicles and other vehicles—Felonies”). The statute criminalizes a person not entitled to possession of a vehicle or essential part thereto receiving, possessing, concealing, selling, disposing, or transferring the vehicle knowing it to have been stolen or converted. *Id.* The sentencing court concluded that the equivalent Minnesota offense for appellant’s 2002 Illinois conviction was Minn. Stat. § 609.52, subd. 2(a)(17) (2002), and later reaffirmed this conclusion in denying appellant’s petition for postconviction relief. The Minnesota statute provides that a person who “takes or drives a motor vehicle without the consent of the owner or an authorized agent of the owner, knowing or having reason to know that the owner or an authorized agent of the owner did not give consent” is guilty of theft. Minn. Stat. § 609.52, subd. 2(a)(17). Because both statutes specifically involve motor vehicles and the unlawful control over them, the district court did not abuse its discretion by concluding that the definition of the statute under which appellant was convicted in Illinois is most analogous to the definition of Minn. Stat. § 609.52, subd. 2(a)(17).

The sentencing court must also base its determination on “the sentence received by the offender.” Minn. Sent. Guidelines II.B.5 (2009). “When a prior felony conviction resulted in a misdemeanor or gross misdemeanor sentence, that conviction shall be counted as a misdemeanor or gross misdemeanor conviction for purposes of computing the criminal history score.” Minn. Sent. Guidelines II.B.1(e) (2009).

Here, appellant received a 24-month probationary sentence in Illinois, but he received no stated period of jail time. Illinois courts may impose a period of probation for felony offenses. 730 Ill. Comp. Stat. 5/5-4.5-35 (2002). If an offender violates a condition of probation prior to the end of the probation period, the court “may continue him on the existing sentence, with or without modifying or enlarging the conditions, or may impose any other sentence that was available under [the relevant statutes] at the time of initial sentencing.” 730 Ill. Comp. Stat. 5/5-6-4 (2002). Functionally, this sentence is the equivalent of a stay of imposition in Minnesota. *See* Minn. Stat. § 609.135, subd. 1(a) (2012) (providing that sentencing court may stay imposition of a sentence except in cases when the offense is subject to a mandatory sentence). Because a stay of imposition on a felony offense adds a criminal-history point, the sentencing court did not abuse its discretion by including a point for appellant’s Illinois conviction, and the postconviction court did not err by denying appellant’s petition for relief.

The parties dedicate a significant portion of their briefs to arguing whether a sentencing court may consider the nature of an out-of-state offense in determining the equivalent Minnesota offense for criminal-history-score purposes. Appellant argues that the supreme court’s opinion in *Hill v. State*, 483 N.W.2d 57 (Minn. 1992), and the opinions of this court relying on *Hill* are no longer authoritative given that the sentencing guidelines were amended in 2006, removing the reference to the nature of the offense. But appellant conceded at oral argument that the postconviction court’s order does not consider the nature of the offense. We agree. And because the postconviction court did

not consider the nature of the offense, we decline to address the parties' arguments concerning the continued precedential authority of *Hill* and its progeny.

Affirmed.