STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1713

State of Minnesota,
Respondent,

vs.

Hunter Jay Parker,
Appellant.

Filed February 4, 2013
Affirmed
Halbrooks, Judge

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

Lori Swanson, Attorney General, Kimberly R. Parker, James B. Early, Assistant Attorneys General, St. Paul, Minnesota; and

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

David W. Merchant, Chief Appellate Public Defender, Julie Loftus Nelson, 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

On remand from the supreme court, we reconsider whether appellant Hunter Jay Parker's criminal-history score should have been reduced to zero before the imposition of

his felony test-refusal sentence. Because we conclude that the supreme court's decision in *State v. Campbell*, 814 N.W.2d 1 (Minn. 2012), applies to Parker's sentences and because, according to *Campbell*, the district court used the appropriate criminal-history score when imposing Parker's felony test-refusal sentence, we affirm.

FACTS

In 2008, Parker was convicted of first-degree test refusal pursuant to Minn. Stat. §§ 169A.20, subd. 2, .24 (2006); first-degree driving while impaired 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 sentenced to consecutive sentences of 54 months in prison for first-degree test refusal and 365 days for gross-misdemeanor DAC. He appealed his convictions, and this court remanded for a new trial. *State v. Parker*, No. A08-1981, 2009 WL 3818231, at *2 (Minn. App. Nov. 17, 2009). He was again convicted and received the same sentences.

In 2010, Parker appealed his sentences, arguing that multiple sentences in his situation were statutorily prohibited. *State v. Parker*, No. A10-1713, 2011 WL 3654394 (Minn. App. Aug. 22, 2011). Alternatively, Parker contended that, even if multiple sentences were permitted in his situation, 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. *Id.* at *3. Parker also argued that consecutive sentences were not permissive, and therefore the district court erred by not articulating reasons for a departure. *Id.* We held that multiple sentences were permitted, but that the district court committed plain error by sentencing Parker to first-degree test refusal before sentencing

him for DAC. *Id*. And we held that the error was not harmless because, had Parker's sentences been imposed in the correct order, his criminal-history score would have been reduced to zero before imposing the sentence for test refusal, thereby reducing the overall length of his sentence. *Id.* at *4.

Parker petitioned for review; the supreme court granted review but stayed proceedings pending its decision in *Campbell*. *Campbell* was released in May 2012. The supreme court lifted the stay on Parker's petition, "reversed [this court] in part with respect to the criminal history score to be used when sentencing [Parker] to first-degree test refusal," and remanded for reconsideration in light of *Campbell*.

D E C I S I O N

In *Campbell*, the supreme court interpreted Minnesota Sentencing Guidelines 2.F.2, which states, "For 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." 814 N.W.2d at 4. The supreme court held that "another offense(s)" means another "felony offense" and that when a felony offense is imposed consecutive to a gross-misdemeanor offense, the district court is not required to reduce a defendant's criminal-history score to zero. *Id.* at 6. In reaching this conclusion, the supreme court first determined that the phrase "another offense" in section 2.F.2 is ambiguous. *Id.* at 5. The supreme court therefore went on to examine the purpose of the guidelines. *Id.* The supreme court noted that, "[r]ecognizing that consecutive sentences are particularly severe punishment, the Commission intended that an offender's criminal history is

counted once, and only once, in consecutive sentencing." *Id.* at 5-6. The supreme court went on to explain that

> [a]n offender's criminal history is not factored into misdemeanor and gross misdemeanor sentencing. Campbell's three criminal history points had no effect on his sentence for the gross misdemeanor offense. Therefore, by using three criminal history points, the district court followed the policy underlying Minn. Sent. Guidelines 2.F.2. because it counted Campbell's criminal history score only one time in the calculation of the consecutive sentence duration.

Id. at 6.

Parker argues that the supreme court's holding in *Campbell* is inapplicable to his sentences because he was sentenced for different crimes than those at issue in *Campbell* and because *Campbell* did not disturb this court's holding in *State v. Johnson*, 770 N.W.2d 564 (Minn. App. 2009). He argues that *Johnson* controls here because his sentences were imposed pursuant to Minn. Stat. § 169A.28 (2006). We stated in our original opinion that "[w]e 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." *Parker*, 2011 WL 3654394, at *4. But Parker's assertion that "*Johnson* controls" ignores the fact that the rationale behind the supreme court's holding in *Campbell* applies equally to all gross misdemeanor/felony consecutive sentences regardless of which provision made the sentences permissive. *See Campbell*, 814 N.W.2d at 3. We therefore conclude that *Campbell* controls.

Accordingly, the district court was not required to reduce Parker's criminal-history score to zero before imposing the sentence for test refusal consecutive to the DAC sentence. Therefore, the overall length of Parker's sentences would have been 54 months plus 365 days—regardless of the order in which they were imposed. Because the error in the order of the sentences did not change the overall length of Parker's sentence, he cannot establish that the error affected his substantial rights. *See State v. Goelz*, 743 N.W.2d 249, 258 (Minn. 2007) (explaining that the invited-error doctrine does not include plain errors, but that it is the defendant's burden to establish that the plain error affected his substantial rights).

Affirmed.