STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1398

State of Minnesota,
Respondent,

vs.

Joshua L. Beardemphl,
Appellant.

Filed October 28, 2008
Affirmed in part and reversed in part
Stoneburner, Judge

Olmsted County District Court
File No. CR064648

Lori Swanson, Attorney General, Kimberly R. Parker, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Mark A. Ostrem, Olmsted County Attorney, Olmsted County Courthouse, 151 Fourth Street Southeast, Rochester, MN 55904-3712 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, G. Tony Atwal, Assistant State Public Defender, Suite 300, 540 Fairview Avenue North, St. Paul, MN 55104 (for appellant)

Considered and decided by Stoneburner, Presiding Judge; Shumaker, Judge; and Stauber, Judge.

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

STONEBURNER, Judge

Appellant challenges his conviction of first- and second-degree controlled-substance crimes, arguing that his waiver of the right to a jury trial was invalid. Appellant also challenges his conviction of and sentence for second-degree controlled-substance crime, arguing that this offense was part of the same behavioral incident as the first-degree offense and is a lesser-included offense. In a supplemental pro-se brief, appellant raises additional issues which we find to be without merit. Because the record demonstrates that appellant's waiver of a jury trial was knowing and voluntary, we affirm his conviction of the first-degree controlled-substance crime. Because the state correctly concedes that the second-degree offense is a lesser-included offense of the first-degree crime, we vacate the conviction of and sentence for second-degree controlled-substance crime.

D E C I S I O N

I. Waiver of jury trial

Appellant seizes on one sentence of the district court's jury-waiver colloquy to argue that his waiver of a jury trial was based on an inference that he had the burden of proving his innocence. We find no merit in this argument.

The district court has discretion whether to accept a defendant's waiver of a jury trial. *State v. Pietraszewski*, 283 N.W.2d 887, 890 (Minn. 1979). The district court's decision will be affirmed if there is "sufficient evidence in the entire record from which the trial court could have determined that defendant's waiver was voluntarily and

intelligently made." *Id.* Minn. R. Crim. P. 26.01 sets out a "relatively painless and simple procedure to protect" defendant's constitutional right to a jury trial. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002) (quoting *State v. Neuman*, 392 N.W.2d 706, 709 (Minn. App. 1986)), *review denied* (Minn. June 18, 2002). The rule provides that a defendant may, with the approval of the court, waive a jury trial if that the waiver is "in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a).

In this case, appellant, who was represented by counsel, waived his right to a jury trial on the record in open court. Appellant confirmed on the record that he had "considerable and lengthy discussions [with counsel] about . . . [his] right to a jury trial versus [his] right to a court trial." The district court confirmed that appellant understood that, in a jury trial, "all 12 people would have to agree that [he was] guilty or not guilty before [he] could be found guilty or not guilty of one or more of the charges." The district court confirmed appellant's understanding that, in a court trial, the judge would make the decision "whether or not the state had met its burden of proof relative to one or more of the charges against [him.]" The district court informed appellant that "the same burden of proof exist[ed] whether [he tried] it to a jury or [he tried] it to the court," and that he would be "presumed innocent of the charge or charges against [him] until and unless [he was] proven guilty by proof beyond a reasonable doubt."

The district court specifically asked appellant whether he had had enough time to discuss all of his options with counsel so that he could make an informed and intelligent

decision. Appellant responded, "I just don't know, you know." The court then emphasized that only appellant could make the decision and that the decision had to be made so that a jury could be called for the trial, which was scheduled for the following day. The district court then stated, "So my question to you is whether or not you have had enough time now to consider your options and whether or not given those options you want to waive your right to a jury trial. Do you want to do that today?" Appellant answered, "Yeah . . . yes."

After appellant agreed to waive a jury trial, the court said: "All right. And I take it again the reasons behind your decision are yours, but there is some school of thought that it's more difficult to convince 12 people of something than it is to convince one person of something. . . . You probably agree with that. Right?" Appellant responded "yes" and went on to talk about failed plea-negotiations.

The district court noted that plea negotiations had failed and confirmed that appellant had calculated the number of months of incarceration that might accompany a guilty verdict. The district court then stated, "So back to my original question, you understand there is a school of thought that again it's more difficult to convince 12 people of something as opposed to one person. Right?" Appellant agreed. The district court then said, "And you understand that in this case the state will be presenting its evidence to me, and you will be presenting, if you wish, although you are not required to, any evidence bearing on your guilt or non-guilt that I should consider as well. You understand that?" Appellant agreed and went on to say that he understood that by choosing a court trial "the *Blakely* issue [was] no longer valid." The district court

informed appellant that unless he was prepared at that time to waive jury trials on both issues, the district court was only addressing the right to a jury trial "as it relate[d] to [appellant's] guilt or non-guilt." There was further discussion on the record about waiver of a sentencing jury. The district court clarified with appellant that the only waiver under consideration at that time involved the guilt phase of the trial and did not impact his right to a sentencing jury. Appellant indicated his understanding.

The district court then asked appellant if he had "any hesitation in [his] mind . . . about the decision [he had] made to waive [his] right to a jury trial on the issue of guilt or non-guilt[.]" Appellant responded, "Of course there is some hesitation, Your Honor, but I think I have made a decision." Appellant affirmed that he wanted the district court to accept his decision at that time, that he was thinking clearly, and that he was not under the influence of drugs or alcohol. The district court accepted appellant's waiver of his right to a jury trial, concluding that appellant was competent to make the decision, had made the decision with advice and consent of competent counsel, and after being fully advised of his rights.

On appeal, appellant argues that the district court's remarks about it being "more difficult to convince 12 people of something as opposed to one person" could have misled appellant into believing that he had the burden of proof and influenced his decision to waive a jury trial. But the record demonstrates that appellant, after having consulted with counsel and having been correctly informed of his rights and the state's burden of proof, waived his right to a jury trial before the district court made the challenged remarks. And there is no evidence in the record that the district court's

comments misled or influenced appellant's previously stated decision to waive a jury trial. We conclude that this record contains sufficient evidence to support the district court's determination that appellant's waiver was voluntary and intelligently made. We note, however, that the district court's comments were unnecessary and subject to misinterpretation.

II. The district court erred by convicting appellant of and sentencing him for a lesser-included offense.

"Upon prosecution for a crime, the actor may be convicted of either the crime charged or an included offense, but not both." Minn. Stat. § 609.04, subd. 1 (2006). In this case, it is not disputed that the charge of second-degree controlled-substance crime arose from the same behavioral incident as the charge of first-degree controlled-substance crime and was a lesser-included offense of the more serious crime. We therefore vacate the conviction of and sentence for second-degree controlled-substance crime.

III. Issues raised in appellant's pro-se supplemental brief have no merit.

In his pro-se brief, appellant first asserts that the district court erred by accepting his waiver of a pretrial omnibus hearing without a "waiver colloquy." Appellant has not cited any authority for his assertion that a separate omnibus hearing cannot be waived without a colloquy. Appellant expressly agreed on the record that omnibus issues would be handled at the court trial. We find no error or abuse of discretion in the district court's handling of this matter.

Appellant had moved to dismiss the charges for lack of probable cause, and defense counsel agreed that the issue could be dealt with as part of the trial if appellant

waived his right to a jury trial. Appellant now argues that it was improper for the same judge to determine probable cause and preside at his court trial and that he was, as a result, deprived of a fair trial. We disagree. Furthermore, because the district court found appellant guilty of the charges, his probable-cause argument is irrelevant. *See State v. Holmberg*, 527 N.W.2d 100, 103 (Minn. App. 1995) (stating that, after conviction, the defendant's probable-cause argument was irrelevant because "[t]he standard for the sufficiency of the evidence to support a conviction is much higher than probable cause"), *review denied* (Minn. Mar. 21, 1995).

Appellant next argues that he was prejudiced when the state was allowed to amend the complaint on the day before trial to add a charge of second-degree controlled-substance crime. A complaint may be amended at any time before the verdict if no additional or different offense is charged and if the defendant's substantial rights are not prejudiced. Minn. R. Crim. P. 17.05. Here, the amendment properly added a lesser-included offense. Furthermore, because we have vacated the conviction and sentence on this charge, this issue is moot.

Appellant challenges admission of a scale and baggies taken from his vehicle at the time of his arrest and text messages obtained from his cellular phone, which was on his person at the time of his arrest. But appellant's motion to suppress was expressly withdrawn by defense counsel, so the issue was not considered in the district court. A suppression issue not raised at an omnibus hearing is considered waived. *State v. Brunes*, 373 N.W.2d 381, 386 (Minn. App. 1985), *review denied* (Minn. Oct. 11, 1985).

And even if not waived, appellant's argument is without merit. Police followed appellant's vehicle into a gas station and lawfully arrested him on a warrant. The search of his person and his vehicle were lawful as incident to his arrest. *See State v. White*, 489 N.W.2d 792, 795–96 (Minn. 1992) (stating that the "bright line" rule established in *New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860 (1981), permits search of a vehicle contemporaneous with a lawful custodial arrest of the vehicle's occupant, "without the police having to make a particularized showing of need to conduct the search").

Affirmed in part and reversed in part.