STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1629

State of Minnesota,
Respondent,

vs.

Kevin Allen Quinn,
Appellant.

Filed September 9, 2008
Affirmed
Halbrooks, Judge

Anoka County District Court
File No. K8-04-5956

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101; and

Robert M.A. Johnson, Anoka County Attorney, Robert D. Goodell, Assistant County Attorney, Anoka County Government Center, 2100 Third Avenue, Suite 720, Anoka, MN 55303 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Johnson, Presiding Judge; Toussaint, Chief Judge; and

Halbrooks, Judge.

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

HALBROOKS, Judge

As part of a negotiated agreement with the state, appellant pleaded guilty to first-degree driving while impaired. Part of the plea agreement included an understanding that appellant would receive a sentence at the bottom of the range of the sentencing guidelines. At the sentencing hearing, the district court sentenced appellant to a top-of-the-range sentence without objection from either side. Appellant later violated probation, and the district court executed his sentence. Appellant now challenges the duration of his sentence as a violation of the terms of the plea agreement. Because we conclude that appellant waived his ability to challenge his sentence by failing to object to its duration, we affirm.

FACTS

On the evening of June 19, 2004, a Blaine police officer stopped appellant's vehicle for a traffic violation. Upon conversing with appellant, the officer noticed that he smelled strongly of alcohol, was unsteady on his feet, and that his eyes were bloodshot and watery. When asked, appellant admitted consuming alcohol earlier in the day.

When the officer ran a license check, he learned that appellant's driving privileges were cancelled as inimical to public safety and that he had six prior driving-while-impaired (DWI) convictions, three of which were within ten years of June 19, 2004. Appellant also had an outstanding arrest warrant in Anoka County for forgery.

Appellant was placed under arrest based on the outstanding warrant. Because the officer also suspected that appellant was intoxicated, he was asked to take a preliminary

breath test. But appellant became belligerent and refused to submit to the test. Appellant was read the Minnesota Motor Vehicle Implied Consent Advisory and asked to consent to a chemical test to measure his alcohol concentration. He again refused to submit to testing.

Based on his prior DWI offenses, appellant was charged with felony first-degree DWI, felony first-degree test refusal, and gross-misdemeanor driving with a license canceled inimical to public safety. Appellant reached a plea agreement with the state in which he agreed to plead guilty to the first-degree DWI charge in return for dismissal of the other two charges. In addition, the agreement called for sentencing pursuant to the Minnesota Sentencing Guidelines with appellant's sentence to be at the "low end of the box" (i.e., the lower of the range of months in the sentencing guidelines). Appellant's plea petition expressly stated that he would be given a "low end of [the] box" sentence.

At appellant's guilty-plea hearing there was some confusion as to his criminal-history score, although the parties believed the score to be five. The prosecutor informed the district court that the "low end of the box on that [score] is a 63-month sentence." *See* Minn. Sent. Guidelines IV (2004) (establishing the sentencing guidelines grid effective from August 8, 2003 to August 1, 2004).[1] The presumptive sentence called for

[1] The guidelines were revised effective August 1, 2005, in a manner that altered appellant's presumptive sentence. But it is the sentencing guidelines in effect at the time of appellant's offense under which he must be sentenced. Minn. Sent. Guidelines III.F. (stating that any modifications to the sentencing guidelines "will be applied to offenders whose date of offense is on or after the specified modification effective date"); *see also Miller v. Florida*, 482 U.S. 423, 426-27, 435-36, 107 S. Ct. 2446, 2449, 2454 (1987) (holding that the application of revised sentencing guidelines that increased the sentence

a commitment to prison, *id.*, but appellant's attorney requested a downward dispositional departure, asking the judge to stay any imposed sentence.

At the October 21, 2005 sentencing hearing, the district court convicted appellant and sentenced him to 69 months. The district court stated at least three times during the hearing that the length of the imposed sentence was 69 months. The fact that this 69-month sentence was a top-of-the-box sentence under the guidelines was not raised by either party during the hearing. In addition, the district court granted appellant's motion for a downward dispositional departure, staying the execution of this sentence and placing him on probation for seven years. Appellant's probation contained a condition that he abstain from the use of mood-altering substances, including alcohol.

Appellant had a probation-revocation hearing less than a year later on September 19, 2006. At the hearing, appellant admitted that he had consumed alcohol in violation of his probation. The district court revoked appellant's probation and executed the earlier-imposed 69-month sentence. The 69-month duration of the sentence being executed was discussed numerous times at the probation-revocation hearing without objection from appellant.

In April 2007, appellant's attorney moved to modify his sentence, contending that his actual criminal-history score was four and not five and that his sentence should be adjusted to reflect the correct score. The motion also asserted that the imposed sentence

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of a defendant whose crime occurred before the revision's effective date violated the Ex Post Facto Clause).

contravened the parties' plea agreement, which had called for a low-end-of-the-box sentence.

The district court granted appellant's motion in part. It agreed that the incorrect criminal-history score of five was used to sentence appellant and, therefore, reduced his sentence to a term of 63 months.[2] The district court did not address appellant's second argument that his sentence should be reduced to comply with the terms of his plea agreement, effectively denying it. This appeal follows.

D E C I S I O N

I.

Appellant argues that he is entitled to withdraw his plea because his sentence was a top-of-the-box sentence under the sentencing guidelines instead of a low-end-of-the-box sentence called for by the plea agreement. The state argues that appellant has waived his ability to challenge the duration of his sentence because he did not object at the sentencing hearing when the sentence was imposed or at the probation-revocation hearing when the sentence was executed.

Minn. R. Crim. P. 27.03, subd. 9, allows a district court to "at any time . . . correct a sentence not authorized by law." The supreme court has interpreted this rule as preventing a defendant from waiving or forfeiting appellate review of an "illegal sentence" in the context of the "illegal sentence" being one unauthorized by the sentencing guidelines because it was based on an incorrect criminal-history score. *State*

[2] But this sentence is still a top-of-the-box sentence for a person convicted of first-degree DWI with a criminal-history score of four. Minn. Sent. Guidelines IV. The low end of the box under the guidelines at the time was 57 months. *Id*.

v. Maurstad, 733 N.W.2d 141, 147-48 (Minn. 2007). Appellant argues that *Maurstad* controls here and that he could not waive his right to bring the present challenge because his sentence was "illegal" as a violation of the plea agreement.

But appellant fails to differentiate between a challenge to the substance of the sentence imposed—such as the duration of the sentence—and a challenge to the process by which the sentence was imposed, which this court has held can be waived. Unlike *Maurstad*, appellant's sentence *was* authorized by the sentencing guidelines based on his circumstances and criminal-history score. While appellant was initially sentenced using an incorrect criminal-history score, the district court subsequently adjusted his sentence downward to again fall within the presumptive sentence under the guidelines. Accordingly, the sentence imposed on appellant was not "illegal" as this term was used by the *Maurstad* court; in fact, it was expressly authorized by the guidelines.

Furthermore, this court has stated in other contexts that an appellant can waive his or her ability to challenge a violation of a plea agreement by not objecting at sentencing. In *State v. Ferraro*, 403 N.W.2d 845 (Minn. App. 1987), the state had agreed to remain silent on all sentencing issues other than restitution. *Id.* at 846. The state violated the agreement by opposing the defendant's departure motion and by moving for an upward departure or a vacation of the plea. *Id.* at 847. But defense counsel did not object or move to vacate the plea because of that violation. *Id.* at 848. This court held that the defendant had waived any objection to the violation. *Id.* Similarly, in *State v. Anderson*, 507 N.W.2d 245, 247 (Minn. App. 1993), *review denied* (Minn. Dec. 22, 1993), this court held that the "failure to object to restitution either during [the] plea hearing or during

sentencing constitutes a waiver of the challenge" to the restitution obligation even though its imposition violated the plea agreement.

Lastly, the supreme court has suggested in dicta that violation of a plea bargain can be waived by failure to object at sentencing. In *State v. Witte*, 308 Minn. 214, 245 N.W.2d 438 (1976), the defendant argued that the prosecutor breached the plea agreement by making sentencing recommendations in contravention of the agreement. *Id*. at 214-15, 245 N.W.2d at 438. The supreme court first noted that the defendant did not object to the prosecutor's actions. *Id.* at 215, 245 N.W.2d at 438. It went on to state that while the plea agreement had apparently been breached, "it also appears that there may have been a waiver, as defendant did not object. In the absence of any explanation, it seems unjust for defendant and his counsel to sit idly by without objection and, after finding out what the sentence is, to then cry foul." *Id*. at 215, 245 N.W.2d at 438-39. The supreme court ultimately concluded, however, that the best solution was to remand to allow a proper development of the record in a postconviction proceeding. *Id*. at 215, 245 N.W.2d at 439.

In sum, these cases indicate that an objection to a violation of a plea agreement can be waived if an objection to the condition or conduct violating the agreement is not lodged at the appropriate time.[3] Here, the prosecutor stated at the guilty-plea hearing that

[3] We note that if appellant had objected to his sentence when it was executed at his probation-revocation hearing, this would likely have preserved his ability to challenge the length of the sentence despite failing to object at his sentencing hearing. *See State v. Fields*, 416 N.W.2d 734 (Minn. 1987) (holding that objection to sentence duration at a probation-revocation hearing was enough to preserve the issue of the sentence's propriety when execution of the sentence had previously been stayed and there was no objection at

the low-end-of-the-box sentence called for by appellant's plea deal was 63 months. But the district court stated multiple times at both the sentencing and probation-revocation hearing that the sentence to which appellant was subject was 69 months. At no point did appellant question or object to this sentence. Furthermore, after imposing the 69-month sentence at the sentencing hearing, the district court asked appellant's attorney whether any other sentencing matters needed to be addressed. In response, appellant's attorney stated that there was "[n]othing else, Your Honor." We conclude that this express acquiescence to the 69-month sentence, coupled with appellant's failure to object to the duration of the sentence when it was stated at both the guilty-plea and the probation-revocation hearings, amounts to waiver of consideration of this issue on appeal.

II.

Appellant also claims in his pro se supplemental brief that the DWI conviction that he received in Steele County on September 2, 1998, should not have been used to enhance this offense. While the precise justification for this claim is not entirely clear, appellant appears to contend that the Steele County DWI was eventually dismissed. Our record contains no evidence of this. *See State v. Ouellette*, 740 N.W.2d 355, 361 (Minn. App. 2007) (stating that, in the context of an appellant's pro se supplemental brief, an assignment of error that is "based on mere assertion and not supported by argument or authority is waived unless prejudicial error is obvious on mere inspection" (quotation omitted)), *review denied* (Minn. Dec. 19, 2007). Furthermore, appellant admitted under

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sentencing). But appellant did not object to the duration of the sentence at his probation-revocation hearing.

oath while establishing a factual basis for his plea to the first-degree DWI charge that he was convicted of DWI in Steele County on September 2, 1998. Therefore, this argument warrants appellant no relief.

III.

Appellant's final claim, also made in his pro se supplemental brief, is that the holdings of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), apply to his probation-revocation hearing and were violated when the district court found, when executing his stayed sentence, that he was not amenable to continued probation.

As the United States Supreme Court has succinctly summarized, the *Apprendi* and *Blakely* cases stand for the proposition that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." *United States v. Booker*, 543 U.S. 220, 244, 125 S. Ct. 738, 756 (2005). Here, the sentence imposed upon appellant by the district court was not beyond the statutory maximum sentence as described within the Minnesota Sentencing Guidelines. Although appellant's initial sentence was based on a mistaken belief as to his criminal-history score, once it was discovered that an incorrect score was used, the district court reduced the duration of appellant's sentence so that it again fell within the maximum sentence allowed based on the facts that he admitted during his guilty plea. As such, the holdings of *Apprendi* and *Blakely* are not implicated here.

Appellant's reliance on *State v. Allen*, 706 N.W.2d 40 (Minn. 2005), is also misplaced. The *Allen* court held that a district court cannot dispositionally depart upward from the sentencing guidelines without complying with *Blakely*. *Allen*, 706 N.W.2d at 47. Appellant contends that *Allen* supports his argument because the fact found by the district court in *Allen*, when it dispositionally departed in executing the defendant's presumptively-stayed sentence, was that the defendant was not amenable to probation. *Id*. at 43, 47. The district court made the same finding here, but in the context of a probation-revocation hearing and *not* in the initial sentencing decision. The district court actually made a downward dispositional departure in this case, not an upward one as addressed in *Allen*. Therefore, we find no merit in appellant's second pro se argument.

Affirmed.