STATE OF MINNESOTA
IN COURT OF APPEALS
A07-2177

Izell Wright Robinson, petitioner,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed September 16, 2008
Reversed
Toussaint, Chief Judge

Stevens County District Court
File No. 75-K0-01-200

Lawrence Hammerling, Chief Appellate Public Defender, Renee J. Bergeron, Special Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

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

Charles C. Glasrud, Stevens County Attorney, 601-1/2 California Avenue, P.O. Box 593, Morris, MN 56267 (for respondent)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Worke, Judge.

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

TOUSSAINT, Chief Judge

Appellant Izell Wright Robinson challenges the district court's denial of his petition for postconviction relief, arguing that the conviction on which the revocation of his probation rested was reversed on appeal and that the district court failed to make findings on the *Austin* factors. We reverse.

D E C I S I O N

In 2002, appellant pleaded guilty in Stevens County District Court to fourth-degree criminal sexual conduct and was sentenced to ten years' probation. In 2003, appellant was found guilty by a jury in Otter Tail County of two felony counts of violating a harassment restraining order, count I alleging knowing violation of an order within five years of two or more previous convictions in violation of Minn. Stat. § 609.748, subd. 6(d)(1) (2002) and count II alleging knowing violation of an order against an underage victim in violation of Minn. Stat. § 609.748, subd. 6(d)(6) (2002). A review of the judgment in the harassment-restraining-order case makes it clear that the district court intended to formally adjudicate appellant on both count I and count II and to have convictions entered on both. The district court acknowledged, however, that it could not enter a sentence on count II because count II arose from the same course of conduct as count I and sentenced appellant to 21 months' imprisonment on count I.

Following appellant's conviction in Otter Tail County, the Stevens County District Court held a probation-revocation hearing. On the basis of appellant's admission that he had been convicted of violating a harassment restraining order in Otter Tail County, the

district court in this case revoked his probation and sentenced him to 21 months' imprisonment and five years' conditional release. Appellant did not directly appeal his probation revocation.

Appellant subsequently appealed the judgment entered against him in the harassment-restraining-order case.[1] This court affirmed in part, reversed in part and remanded "for a new trial on appellant's conviction of violating a harassment restraining order under Minn. Stat. § 609.748, subd. 6(d)(1) (Supp. 2001) [count I]." *State v. Robinson*, No. A04-1758, 2005 WL 2352939, at *6 (Minn. App. Sept. 27, 2005). On remand, the prosecutor dismissed both harassment-restraining-order charges because appellant had served his entire sentence, circumstances had changed for the victim, and the ends of justice would not be served by re-prosecution.

Appellant then sought postconviction relief in this case, arguing that the conviction on which the revocation was based, court I, had been vacated. The postconviction court denied his petition, concluding that the revocation could be sustained on the basis of petitioner's conviction on count II. Appellant now asserts that the district court erred in sustaining his probation revocation.

[1] The state characterizes the district court's disposition of the harassment-restraining-order case as consisting of two judgments – one adjudicating and sentencing appellant on count I and the other adjudicating appellant on count II – and asserts that appellant only appealed the first judgment. The state offers no authority or argument in support of this position. "The clerk's record of a judgment of conviction shall contain the plea, the verdict of findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly." Minn. R. Crim. P. 27.03, subd. 7. Here, the two documents, read together, constitute the judgment.

State law defines a conviction to include a "verdict of guilty by a jury," accepted and recorded by the court. Minn. Stat. § 609.02, subd. 5(2) (2002). "A guilty verdict alone is not a conviction." *Spann v. State*, 740 N.W.2d 570, 573 (Minn. 2007). The official judgment of conviction in the district court file is conclusive evidence of whether an offense has been formally adjudicated. *Id.*

A defendant convicted of a crime may not also be convicted of an included offense. Minn. Stat. § 609.04 (2002). This statute "bars multiple convictions under different sections of a criminal statute for acts committed during a single behavioral incident." *State v. Jackson*, 363 N.W.2d 758, 760 (Minn. 1985.) When a defendant is convicted on more than one charge for the same act, the proper procedure to be followed by the district court is

> to adjudicate formally and impose sentence on one count only. The remaining conviction(s) should not be formally adjudicated at this time. If the adjudicated conviction is later vacated for a reason not relevant to the remaining unadjudicated conviction(s), one of the remaining unadjudicated convictions can then be formally adjudicated and sentence imposed, with credit, of course, given for time already served on the vacated sentence.

State v. LaTourelle, 343 N.W.2d 277, 284 (Minn. 1984). When a defendant has been found guilty of multiple included offenses as defined in section 609.04, the district court lacks authority to formally adjudicate or sentence him or her for more than one of those offenses. *State v. Pflepsen*, 590 N.W.2d 759, 766 (Minn. 1999).

Harassment-restraining-order-violation counts I and II both allege violation of a harassment restraining order as a result of the same behavior, but they allege two different felony enhancements. As a result, the district court only had the authority to

adjudicate and sentence appellant on one of the verdicts. Because appellant was sentenced on count I, he was lawfully adjudicated convicted on count I but not on count II. Thus, to the extent the judgment in the harassment-restraining-order case purports to enter conviction on count II, the district court exceeded its authority.

The state responds that appellant's direct appeal of his harassment-restraining-order conviction and subsequent reversal affects only count I and not count II and that his revocation may still be upheld on the basis of the jury's verdict of guilty on count II.

Minn. R. Crim. P. 28.02, subd. 12, provides:

> On appeal from a judgment, if the court affirms the judgment, it shall direct the sentence as pronounced by the trial court or as modified by the appellate court pursuant to Rule 28.05, subd. 2, be executed. If it reverses the judgment, it shall either direct a new trial, or that the defendant be discharged or that the conviction be reduced to a lesser included offense or to an offense of lesser degree, as the case may require. If the conviction is reduced, the case shall be returned to the court which imposed the sentence for resentencing.

On appeal in appellant's harassment-restraining-order case, we held that "the verdict form for count I was not prejudicial," but "the district court abused its discretion by denying appellant's request to stipulate to prior convictions." *Robinson*, 2005 WL 2352939 at *1. We reversed and remanded for a new trial on the basis of the district court's failure to allow appellant to stipulate to his prior convictions and, as a result, did not address appellant's argument regarding newly-discovered evidence. *Id.*

Although the facts section indicates that appellant had been charged with and found guilty of two counts of violating the harassment restraining order, count II is never specifically addressed in this court's decision. *Id.*, at *1-*6. Nevertheless, for several

reasons, we conclude that our intent was to reverse and remand both guilty verdicts.

First, although aware appellant had been found guilty of count II, we did not remand for sentencing on count II. *See, e.g.*, *State v. Clark*, 739 N.W.2d 412, 424 (Minn. 2007) ("Because we vacate Clark's conviction for domestic abuse murder, we remand for conviction and sentencing on the first-degree premeditated murder verdict."); *State v. Vance*, 734 N.W.2d 650, 662-63 (Minn. 2007) ("[W]e remand to the district court for adjudication and sentencing on the terroristic threat conviction or, if the state so chooses, a new trial on the third-degree assault charge.").

Second, the reasoning invoked in reversing and ordering a new trial is equally applicable to both counts. We concluded that the district court's error was not harmless because it prejudiced appellant on the element of his knowing violation of the harassment restraining order. *Robinson*, 2005 WL 2352939, at *5. Appellant's knowing violation of the harassment restraining order was an element of both count I and count II. *See* Minn. Stat. § 609.748, subd. 6(d) (2002) (providing person is guilty of felony violation of harassment restraining order "if the person knowingly violates the order" and one of statutorily-enumerated enhancements applies). It would be illogical and inconsistent to reverse the jury's verdict on count I on the basis of prejudice on this element while leaving count II, which included the same element, intact.

Finally, having concluded that a new trial was necessary on this basis, we did not address appellant's claim that newly-discovered evidence significantly undermined the credibility of the testimony of the alleged victim, entitling him to a new trial. *Robinson*, 2005 WL 2352939, at *6. Her testimony was equally necessary to both counts in proving

appellant's guilt. Refusal to consider this argument only makes sense if the remand for a new trial is read to nullify both guilty verdicts. Thus, although the opinion does not explicitly address the guilty verdict on count II, it must be read to reverse and remand both counts.

Furthermore, *LaTourelle* provides that an unadjudicated guilty verdict can be adjudicated and sentence imposed only if the adjudicated conviction is reversed "for a reason not relevant to the remaining unadjudicated conviction(s)." 343 N.W.2d at 284. Because the district court's error in the harassment-restraining-order case prejudiced the verdict on an element required for a conviction of count II, the reason for reversal is relevant to that conviction. Because the reason for reversal on count I is relevant to count II, on remand the district court could not have simply adjudicated and sentenced appellant on count II. Thus, the decision had the practical effect of reversing count II.

The state also argues that the prosecutor's dismissal of count II was ineffective because the district court had entered a conviction, divesting the prosecutor of authority to dismiss. But the conviction entered on count II was not lawful, and the rules the state cites do not specifically prohibit a prosecutor from dismissing an unadjudicated guilty verdict. Even if this dismissal was not effective as to count II, it demonstrates an intent to discontinue prosecution. This failure to prosecute would justify dismissal of count II by the district court. *See* Minn. R. Crim. P. 30.02 (providing that court may dismiss complaint on basis of unnecessary delay on part of prosecution).

The appellate opinion in the harassment-restraining-order case can only be logically read to reverse both counts. But even if it did not have this effect, there is no

evidence in the record that appellant has been lawfully adjudicated convicted on count II. The sole basis for revoking appellant's probation was his admission that he had been convicted of violating a harassment restraining order. Because he was only lawfully adjudicated convicted on count I, and that charge was clearly and explicitly reversed by this court and dismissed by the prosecutor, his conviction has been vacated and can no longer support the revocation.[2] We conclude that under the facts of this case, a conviction entered in excess of the district court's authority is not a sufficient basis to sustain the revocation of appellant's probation, particularly because the conditions have not been met under which the district court could lawfully adjudicate appellant on count II.

Reversed.

[2] Because we reverse the denial of appellant's petition for postconviction relief on this basis, we decline to reach his argument that the district court erred in failing to explicitly address the *Austin* factors when it revoked his probation.