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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1378

State of Minnesota,
Respondent,

vs.

Denise Ann Kline,
Appellant.

Filed August 21, 2017
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge

Becker County District Court
File No. 03-CR-15-806

Lori Swanson, Attorney General, Edwin W. Stockmeyer, Assistant Attorney General, St. Paul, Minnesota; and

Tammy L. Merkins, Becker County Attorney, Detroit Lakes, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Michael W. Kunkel, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Halbrooks, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

Appellant challenges her conviction of second-degree controlled-substance crime, arguing that the district court abused its discretion by declining to sanction the state following its discovery violation and that her conviction should be reduced from second

degree to third degree in accordance with the 2016 Drug Sentencing Reform Act (DSRA). In the alternative, appellant argues that she is entitled to be resentenced in accordance with the DSRA. We affirm appellant's conviction but reverse her sentence and remand to the district court for resentencing pursuant to *State v. Kirby*, __ N.W.2d __ (Minn. July 26, 2017), and *State v. Otto*, __ N.W.2d __ (Minn. July 26, 2017).

FACTS

In February and March 2015, appellant Denise Ann Kline sold a confidential informant approximately nine grams of methamphetamine over the course of three purchases. During these purchases, the confidential informant was working with Becker County Sheriff's Office Investigators Daniel Skoog and Mark Pinoniemi. After each purchase, the confidential informant gave the methamphetamine to one of the investigators, who would then bring the drugs back to the sheriff's office to be labeled, field-tested, and weighed. Following the final purchase, a third member of the Becker County Sheriff's Office, Investigator John Peterson, delivered all of the purchased methamphetamine to a Bureau of Criminal Apprehension (BCA) laboratory where a BCA analyst conducted forensic testing and confirmed that the substances contained methamphetamine.

In November 2015, respondent State of Minnesota charged Kline with one count of second-degree controlled-substance crime. At trial, the state's witnesses included the confidential informant, the BCA analyst, and Investigators Skoog and Pinoniemi. Neither Investigator Skoog nor Investigator Pinoniemi was able to identify who had transported the methamphetamine from the sheriff's office to the BCA laboratory. The BCA analyst later testified that her paperwork indicated that Investigator Peterson had delivered the

methamphetamine to the BCA laboratory. When the BCA analysist was then asked for her forensic-testing conclusions, Kline raised a foundation objection on the grounds that a sufficient chain of custody had not been established and the state had failed to produce updated evidence logs indicating Investigator Peterson's involvement.

In response to Kline's foundation objection, the state sought to add Investigator Peterson to its witness list and to call him to testify. The state characterized Kline's chain-of-custody objection and Investigator Peterson's involvement in the case as "a surprise." The state acknowledged that updated documentation indicating Investigator Peterson's involvement "probably exists," but that such records were not in the possession of the county attorney's office.

The district court permitted the state to amend its witness list and call Investigator Peterson to testify, providing the following explanation for its decision:

> I don't think the defense is, in any way, prejudiced by adding [Investigator Peterson] as a witness at this point in time, due to his insignificant role in this proceeding, and so I'm going to allow him to testify. And I will allow the defense time prior to his testimony to consult with him so you have an idea what he is going to testify to . . . .

Prior to Investigator Peterson's testimony, both parties were given an opportunity to speak with him, and defense counsel informed the district court, "I'm satisfied I have what I need." After Investigator Peterson testified that he delivered the methamphetamine to the BCA laboratory, the state recalled the BCA analyst to continue her testimony and sought to introduce the methamphetamine. The district court then overruled Kline's foundation objection and admitted the methamphetamine into evidence.

After the jury found Kline guilty of second-degree controlled-substance crime, the district court sentenced Kline to a presumptive guidelines sentence of 108 months in prison. Kline appeals.

D E C I S I O N

I. The district court did not abuse its discretion by declining to sanction the state for its discovery violation.

Kline argues, and the state concedes on appeal, that the state violated the discovery rules by failing to disclose Investigator Peterson as a potential witness before trial. In light of this violation, Kline asserts that she is entitled to a new trial because the district court abused its discretion by declining to sanction the state and, instead, permitting the state to call Investigator Peterson to testify.

Whether a discovery violation occurred is a question of law, which we review de novo. *State v. Palubicki*, 700 N.W.2d 476, 489 (Minn. 2005). Here, the state concedes that, "[a]lthough the prosecutor did not know anything about Investigator Peterson's involvement [prior to trial], the fact that the prosecutor did not disclose Investigator Peterson is still a technical violation." We agree. Therefore, we need only review the district court's decision to forgo sanctioning the state for this discovery violation.

We review a district court's decision to impose discovery-violation sanctions for an abuse of discretion. *Id.* When deciding whether to sanction a party for a discovery violation, a district court should consider: "(1) the reason why disclosure was not made; (2) the extent of prejudice to the opposing party; (3) the feasibility of rectifying that prejudice by a continuance; and (4) any other relevant factors." *State v. Lindsey*, 284

N.W.2d 368, 373 (Minn. 1979). "Preclusion of evidence is a severe sanction which should not be lightly invoked." *Id.* at 374.

Here, although the district court did not expressly cite to each of the *Lindsey* factors, the record establishes that the court's reasoning and decision sufficiently accounted for each factor. First, the district court characterized Investigator Peterson's role in the methamphetamine's chain of custody as "very minor" in comparison to the involvement of Investigators Skoog and Pinoniemi and the BCA analyst. While this minor role does not excuse the state's failure to identify and disclose Investigator Peterson's involvement in a timely manner, it does provide an explanation for why this disclosure was not made to the defense before trial. Second, the district court determined that Kline's defense would not be prejudiced by the state amending its witness list and calling Investigator Peterson to testify. Kline does not argue—and the record provides no indication—that her defense would have derived any benefit from a timely disclosure of Investigator Peterson's limited involvement. Third, the district court gave defense counsel the opportunity to interview Investigator Peterson before he testified. After this interview, defense counsel told the district court, "I'm satisfied I have what I need" and did not request a continuance.

Because we discern no abuse of discretion in the district court's decision not to sanction the state for its discovery violation, we conclude that Kline is not entitled to a new trial.

II. Kline's conviction is not affected by the DSRA, but she is entitled to resentencing in accordance with the DSRA-amended sentencing guidelines.

Kline argues that her conviction should be reduced from second degree to third degree under the DSRA and that she is entitled to be resentenced under the DSRA because her conviction was not yet final when the DSRA became effective.[1]

Kline relies on *State v. Coolidge*, in which the Minnesota Supreme Court stated that, under the common-law amelioration doctrine, "a statute mitigating punishment is applied to acts committed before its effective date, as long as no final judgment has been reached." 282 N.W.2d 511, 514 (Minn. 1979). But *Coolidge* does not apply if there is a contrary statement of intent from the legislature. *State v. Edstrom*, 326 N.W.2d 10, 10 (Minn. 1982). The rule from *Coolidge* and *Edstrom* is:

> An amended statute applies to crimes committed before its effective date if: (1) there is no statement by the Legislature that clearly establishes the Legislature's intent to abrogate the amelioration doctrine; (2) the amendment mitigates punishment; and (3) final judgment has not been entered as of the date the amendment takes effect.

Kirby, 2017 WL 3161079, at *4.

Kline argues that the DSRA section that increases the threshold amount of controlled substance necessary for a second-degree controlled-substance crime should apply to reduce her conviction from second degree to third degree. *See* 2016 Minn. Laws ch. 160, § 4, at 579-80. The DSRA states that this section is "effective August 1, 2016, and applies to crimes committed on or after that date." *Id.* at 581. This language abrogates

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[1] A conviction is final when direct appeals are exhausted or the time for filing a direct appeal has expired. *State v. Losh*, 721 N.W.2d 886, 893-94 (Minn. 2006).

the amelioration doctrine. *Otto*, 2017 WL 3161109, at *2. Thus, Kline's conviction of second-degree controlled-substance crime stands. *See id.*

However, the DSRA also changed the presumptive sentencing ranges under the Minnesota Sentencing Guidelines for various categories of crimes. 2016 Minn. Laws ch. 160, § 18(b), at 590-91. The Minnesota Supreme Court's recently issued opinions in *Kirby* and *Otto* hold that the "amelioration doctrine requires the resentencing of a person whose conviction was not yet final on the effective date of section 18(b) of the [DSRA]" in accordance with the amended provisions of the sentencing guidelines. *Kirby*, 2017 WL 3161079, at *1; *see Otto*, 2017 WL 3161109, at *3. We therefore reverse appellant's sentence and remand to the district court for resentencing in accordance with the 2016 amendments to the sentencing guidelines.

Affirmed in part, reversed in part, and remanded.