This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2016).

STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1927

State of Minnesota,
Respondent,

vs.

Kevin Joseph Becker,
Appellant.

Filed September 5, 2017
Affirmed
Rodenberg, Judge

Stevens County District Court
File No. 75-CR-16-108

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Aaron Jordan, Stevens County Attorney, Morris, Minnesota (for respondent)

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

Considered and decided by Rodenberg, Presiding Judge; Kirk, Judge; and Florey, Judge.

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

RODENBERG, Judge

Appellant Kevin Joseph Becker appeals the district court's sentence and seeks a remand with instructions to the district court to order specific performance of a purported sentencing agreement. Because the record does not support an express and enforceable

agreement on sentencing, and because appellant expressly disclaims any desire to withdraw his guilty plea, we affirm.

FACTS

Appellant was charged with five felonies.[1] At the time of his omnibus hearing, appellant was serving a 54-month sentence on an unrelated driving-while-impaired (DUI)[2] conviction.

Appellant agreed to plead guilty under an arrangement identified in the plea petition as being that he would "[p]lead guilty to count three [second-degree assault] severity level 6—all other counts dismissed—concurrent with felony DUI sentence." A separate and attached "Appendix D" to the plea petition, signed by appellant, his attorney, and the prosecutor, has no boxes checked concerning any agreement to joint sentencing recommendations, but does contain this handwritten notation: "Concurrent with DUI sentence[,] severity level 6—sentence will be less than DUI sentence."

When appellant's plea was offered on the record, the district court indicated its understanding of the agreement by stating that appellant "would be pleading guilty to Count 3, Second Degree Assault; and the remaining counts would be dismissed." Both parties agreed with that statement. A presentence investigation (PSI) was discussed. Appellant's trial attorney stated an "understanding" that the PSI would recommend a

---

[1] The details of the events underlying the charges are unnecessary to deciding this appeal.

[2] Minn. Stat. § 169A.20 (2016) designates the offense as "driving while impaired," but we use the designation "DUI" to be consistent with the parties' submissions to the district court.

sentence on count three that would be no longer than the DUI sentence appellant was currently serving. The district court asked whether appellant and his attorney were "making some assumptions about the criminal history score," and appellant's trial counsel agreed that they were. After some not-entirely-clear colloquy, the district court summed up its understanding of the plea agreement by directly questioning appellant:

> THE COURT: So, Mr. Becker, you'd be pleading guilty to Second Degree Assault, a felony, which is a serious charge. That's Count 3 of the complaint. The other counts would be dismissed. You know that you'd be receiving an executed go-to-prison sentence on it. Correct?
> APPELLANT: Yes, sir.
> THE COURT: And that's what you want to do?
> APPELLANT: Yes, sir.

Appellant was sworn and pleaded guilty. He provided a factual basis for the plea, the adequacy of which is not challenged on appeal. The district court deferred acceptance of the plea and ordered a PSI.

At sentencing, the district court restated its earlier understanding of the plea agreement, that "[t]he agreement as set forth in that report was a concurrent sentence with what he's currently serving, and obviously it was Count 3 and dismiss the other counts." The prosecutor agreed with this understanding. Appellant's attorney advised the court that it was "our understanding" that a concurrent sentence would not exceed the sentence appellant was already serving on the DUI conviction. At this, the district court reiterated its earlier understanding that "[t]he parties didn't have an agreement within [the sentencing guidelines] box." The prosecutor agreed. Appellant's counsel argued for a sentence consistent with the claimed understanding, but also said "we aren't asking the court to

withdraw the plea or anything of that nature." There was no further evidence or argument concerning the plea agreement.

The district court accepted the earlier guilty plea, adjudicated appellant guilty of count three, and sentenced appellant to 68 months in prison—a top-of-the-box sentence that was longer than appellant's DUI sentence.

This appeal followed.

D E C I S I O N

I. Timeliness of appellant's brief

As a threshold issue, respondent argues that appellant's failure to timely file his brief deprives this court of jurisdiction to hear the appeal. In criminal cases, an appellant's brief must ordinarily be filed within 60 days of the court reporter's delivery of the transcript. Minn. R. Crim. P. 28.02, subd. 10. But in sentencing appeals, the rules require a criminal appellant to file and serve his sentencing-appeal brief "within 30 days after delivery of the transcript." Minn. R. Crim. P. 28.05, subd. 1(1).

A criminal defendant is permitted to raise sentencing issues on appeal from the judgment of conviction. In such cases, the procedures set forth in rule 28.02 govern. *See* Minn. R. Crim. P. 28.05, subd. 1 ("A defendant appealing the sentence and the judgment of conviction may combine the two into a single appeal; when this option is selected, the procedures in Rule 28.02 continue to apply."). This is so even when the briefs in an appeal from the judgment of conviction raise only sentencing issues. "[T]he fact that the brief filed in the Court of Appeals raises only a sentencing issue does not alter the fact that the

appeal is from the judgement of conviction." *State v. Thomas*, 371 N.W.2d 533, 535 (Minn. App. 1985).

Appellant's brief was *not* late-filed. Moreover, even if appellant's brief was untimely, the state has identified no prejudice occasioned by the complained-of late filing. And "[f]ailure to serve and file a brief timely is not a jurisdictional defect." *State v. Batzer Constr. Co.*, 445 N.W.2d 281, 282 (Minn. App. 1989).

Appellant's brief was not untimely filed, and respondent has not shown any prejudice. We decline to dismiss the appeal and resolve it on its merits.

II. Plea agreement

Appellant asks us to vacate his sentence and remand with instructions to the district court to order specific performance of a plea agreement for a sentence no longer than appellant's earlier DUI sentence. First, appellant argues that the sentence was unlawful because the district court imposed a sentence that violated the parties' plea agreement, rendering his plea unintelligent. Second, he argues that the prosecutor violated his right to due process of law by failing to fulfill the plea agreement and by recommending a sentence longer than that to which the parties had agreed. Both arguments are premised on the existence of a plea agreement that appellant's sentence would be less than his felony DUI sentence. The record as constituted does not support appellant's contention.

"What the parties agreed to involves an issue of fact to be resolved by the district court." *State v. Brown*, 606 N.W.2d 670, 674 (Minn. 2000). We review for clear error the district court's determination of the terms of the parties' agreement. *State v. Robledo-*

Kinney, 615 N.W.2d 25, 32 (Minn. 2000). But interpretation and enforcement of plea agreements involve issues of law that we review de novo. *Brown*, 606 N.W.2d at 674.

The district court twice identified on the record the parameters of the agreement as being a guilty plea to count three, with dismissal of the other counts and a sentence of unspecified length to be served concurrently with the earlier DUI sentence. It determined that the parties had not agreed on a particular sentence. The transcript of the omnibus hearing supports this determination. The district court described the sentencing portion of the plea agreement as being that appellant "would request execution of his sentence . . . and believes that the guidelines amount of time that he would receive in this would actually be less than" what he was serving on the DUI. The prosecutor, defense counsel, and appellant all agreed with this description of the plea agreement. The record supports the district court's finding concerning the parameters of the plea agreement.[3] The record supports the district court's determination that the plea agreement did not include a term regarding the length of appellant's sentence. The sentence the district court imposed is lawful and within the parameters of the Minnesota Sentencing Guidelines.

What we have here is an imprecise plea agreement with no unequivocal commitment by either the state or the district court concerning sentencing. Appellant and his trial counsel were making "some assumptions" which turned out not to be correct. The

---

[3] Counsel generated an imprecise plea petition and "Appendix D." The petition identifies the plea agreement exactly as the district court understood it. "Appendix D," in which no sentencing or other recommendation is indicated, contains this notation: "Concurrent with DUI sentence severity level 6—sentence will be less than DUI sentence." Despite the prosecutor having signed the appendix, the document does not indicate that this is a joint recommendation. That box on the form is not checked.

district court clarified its understanding of the agreement, and sentenced appellant within the parameters of that understanding. The record supports the district court having done so.

Because the record supports the district court's finding that the parties had no specific agreement concerning sentencing, the prosecutor's sentencing argument did not violate any such claimed agreement.

On the record as constituted, and based on appellant's explicit disclaimer of any interest in withdrawing his guilty plea, we decline to address whether appellant's guilty plea is valid. The record as constituted is also insufficient to address issues concerning the validity of the plea in this direct appeal.[4] *State v. Anyanwu*, 681 N.W.2d 411, 413 n.1 (Minn. App. 2004) (citing *Brown v. State*, 449 N.W.2d 180, 182-83 (Minn. 1989); *State v.*

---

[4] It is conceivable on this record that appellant did not understand the significance of the exchanges between counsel and the district court, despite his stated agreement with the district court's recitation of the agreement. We do not by this opinion discount that possibility. But the record as constituted contains no such assertion by appellant. Documents evidencing a plea agreement should be internally consistent and should reflect the agreement recited to the district court. Counsel have an obligation to ensure that the person pleading guilty clearly understands the terms of any agreement. Because appellant has not sought plea withdrawal, we do not address whether, on a complete record, he would be entitled to that relief. Perhaps he does not seek that relief because, were he to withdraw his guilty plea and then face the original charges, he would potentially face a much more serious criminal sanction were he to be convicted of a severity-level "A" offense on the sex-offender grid. *See* Minn. Sent. Guidelines 4.B (2015) (assigning a presumptive sentence of 360 months commitment for the first-degree criminal sexual conduct charges the prosecutor dismissed as part of appellant's plea agreement). That appellant apparently prefers the sentence he received from the district court over that much-more-serious potential sentence does not mean that counsel for both appellant and the state ought not have been clearer in their presentation of the plea agreement both to appellant and to the district court.

Schaefer, 374 N.W.2d 199, 201 (Minn. App. 1985)); s*ee State v. Green*, 719 N.W.2d 664, 674 (Minn. 2006) (declining to address inadequate-assistance issue on direct appeal, where the allegations are "more properly raised in a petition for postconviction relief"). In his brief, appellant's *only* request for relief on appeal is that we order specific performance of a 51-month sentence on count three. Neither the law nor the record support such a remedy where the district court twice identified its understanding of the plea agreement on the record, and sentenced appellant in conformity with that understanding. Sentencing is inherently a function of the district court. *Kaiser v. State*, 641 N.W.2d 900, 907 (Minn. 2002); *State v. Olson*, 325 N.W.2d 13, 18 (Minn. 1982); *State v. Pearson*, 479 N.W.2d 401, 405 (Minn. App. 1991), *review denied* (Minn. Feb. 10, 1992). The district court's sentence here conforms to both the Minnesota Sentencing Guidelines and the plea agreement presented to it.

Affirmed.