STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0042

State of Minnesota,
Respondent,

vs.

David Anthony Tonce,
Appellant.

Filed December 24, 2018
Affirmed
Jesson, Judge

Beltrami County District Court
File No. 04-CR-16-3832

Lori Swanson, Attorney General, Peter Magnuson, Assistant Attorney General, St. Paul, Minnesota; and

David L. Hanson, Beltrami County Attorney, Bemidji, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Steven P. Russett, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Bratvold, Judge; and John P. Smith, Judge.*

*Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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

JESSON, Judge

After submitting his case to the district court for a trial on stipulated facts, appellant David Tonce was convicted of second-degree criminal sexual conduct for repeatedly rubbing the genital area of his nine-year-old daughter. On appeal, Tonce argues that his attorney completely failed to subject the prosecution's case to meaningful adversarial testing, and therefore committed structural error. Tonce also contends that the district court committed error when it failed to consider his request to withdraw from the stipulated-facts trial under a fair-and-just standard. We affirm.

FACTS

In November 2016, Tonce's wife reported to Beltrami County police that her nine-year-old daughter, Child A, had been sexually molested by Tonce. Child A told her mother that Tonce had rubbed the front of her genital area by reaching his hand into her overalls. Tonce's wife told police that she then confronted Tonce, who admitted that he had sexually touched Child A's genital area because he wanted her to experience the same gratification he received from masturbation. When interviewed by law enforcement, Tonce told investigators that Child A "doesn't tell stories," and whatever she said about him touching her sexually was "probably close to the truth." Tonce also told investigators that he had touched Child A's genital area on at least three prior occasions. The state charged

Tonce with second-degree criminal sexual conduct[1] based on Child A's claim and Tonce's confession.

In August 2017, Tonce agreed to submit his charge to the district court for a stipulated-facts trial pursuant to Minnesota Rules of Criminal Procedure 26.01, subdivision 3. Tonce waived his jury trial rights on the record and agreed to stipulated facts in writing, which were then submitted to the district court to consider and issue a verdict.[2] At the time of Tonce's waiver, all parties were aware that the state was considering amending its complaint to include a charge of first-degree criminal sexual conduct based on the allegation that Tonce digitally penetrated his daughter. Tonce does not claim that his waiver of jury trial rights was invalid or that the agreement was not in writing or otherwise on the record.

On the morning that the district court was to issue its verdict, Tonce requested to withdraw his consent to a stipulated-facts trial. The district court denied this request and issued a verdict of guilty. Tonce was sentenced to 90 months in prison, ten years of conditional release, and predatory offender status for life.

Tonce appeals.

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[1] In violation of Minn. Stat. § 609.343, subd. 1(h)(iii) (2016).

[2] Under Minn. R. Crim. P. 26.01, subd. 3, the defendant must waive his right to a jury trial and personally waive the right (1) to testify at trial; (2) to have the prosecution witnesses testify in open court in the defendant's presence; (3) to question those prosecution witnesses; and (4) to require any favorable witnesses to testify for the defense in court. Minn. R. Crim. P. 26.01, subd. 3(b). The parties' agreement and the waiver must be in writing or placed on the record. *Id.*, subd. 3(c).

D E C I S I O N

Tonce raises two issues on appeal: (I) whether Tonce's trial counsel committed structural error, depriving Tonce of his Sixth Amendment right to the effective assistance of counsel, and (II) whether the district court erred in failing to consider Tonce's request to withdraw from a stipulated-facts trial under a fair-and-just standard. We address each issue in turn.

I. Counsel's trial conduct did not constitute structural error.

Tonce has a Sixth Amendment right to reasonably effective assistance of counsel under the United States Constitution, which he claims was denied by counsel's conduct at trial. U.S. Const. amend. VI; *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Ineffective-assistance-of-counsel claims, such as those raised by Tonce here, are generally analyzed as trial errors, but some errors involve such a complete failure of counsel that the conduct must be analyzed as structural error, which does not require a showing of prejudice. *State v. Dalbec*, 800 N.W.2d 624, 627 (Minn. 2011). Structural error occurs when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, because there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. *Dereje v. State*, 837 N.W.2d 714, 722 (Minn. 2013) (quotation omitted). The party claiming that a counsel-related error amounted to structural error has the burden of showing that the facts of the case warrant inclusion in that narrow exception to *Strickland*. *Id.*

Here, the conduct of Tonce's counsel during the stipulated-facts trial was proper. Counsel submitted a written stipulation for the district court to consider that included,

among other things, Tonce's statements to police that his daughter "doesn't tell stories," and that whatever she said about Tonce touching her sexually was "probably close to the truth." Rule 26.01, subdivision 3, allows for a stipulated-facts trial. Tonce agreed to the process during a thorough waiver of his trial rights, which was made on the record and in writing.

One exchange between Tonce and the district court during Tonce's extensive waiver of trial rights demonstrates that the stipulated-facts trial was clearly explained to him before Tonce agreed to the process. The questioning occurred as follows:

> THE COURT: If we—let me just make sure that you do understand. If we go forward using this procedure, I will read—Mr. Tonce, I will read these four pages very carefully and consider what they say. And I will use everything that is written here in these four pages to determine whether you are guilty beyond a reasonable doubt of the charge of Criminal Sexual Conduct in the Second Degree, or whether these facts do not prove you guilty beyond a reasonable doubt. Do you understand that?
>
> THE DEFENDANT: Yes, sir.
>
> THE COURT: There will be nothing more that I will consider, other than what is written here. Do you understand that?
>
> THE DEFENDANT: Yes.
>
> THE COURT: And is it your desire that I determine your guilt or innocence using what is written on these four pages?
>
> THE DEFENDANT: Yes, sir.

Tonce's counsel clearly complied with the requirements of rule 26.01, subdivision 3. Equally clear was Tonce's understanding of the parameters of a stipulated-facts trial. Given counsel's compliance with the requirements of a stipulated-facts trial and the extensive waiver of Tonce's trial rights, we discern no structural error.

But Tonce relies on *Dereje* to support his claim that counsel committed structural error because the stipulated facts in his case did not include an alternative version of events, a claim of innocence, or any evidence from which the district court could have found him not guilty. In *Dereje*, the parties agreed to a stipulated-facts trial but submitted two versions of events to the district court. 837 N.W.2d at 719. The district court found the defendant guilty after accepting the victim's version of events. *Id.* The supreme court took issue with this process and held that "the submission of documentary evidence presenting contradictory versions of events cannot constitute a valid trial on stipulated facts." *Id*. at 721.

Tonce's reliance on *Dereje* is misplaced. First, unlike in *Dereje*, only one set of facts was presented here. And stipulated-facts trials are just that: a stipulation to facts. If there were two alternative sets of facts for the district court to choose between, that would be a bench trial under rule 26.01, subdivision 2, not a stipulated-facts trial. *See id.* at 721; Minn. R. Crim. P. 26.01, subd. 2. Further, Tonce's decision to proceed with a stipulated-facts trial appears to be an "informed strategic choice" made to avoid more serious charges. *See Dereje*, 837 N.W.2d at 723 n.2. And this decision was made after an extensive and voluntary waiver of trial rights. Finally, we note that Tonce has never identified alternative facts that he would have presented at a bench trial. We conclude that *Dereje* does not support Tonce's arguments.

Tonce further asserts that the lack of a closing argument is evidence of structural error. But the supreme court in *Dereje* specifically rejected an identical claim. *Id.* at 722-23. As the supreme court concluded, waiver of closing argument is insufficient to

establish structural error, especially when both sides waive the right, as was the case here. *Id.*

Tonce's trial counsel acted in a manner consistent with the requirements of a stipulated-facts trial and the wishes of his client. Tonce has failed to meet his heavy burden of proving a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. We therefore conclude that counsel's conduct did not constitute structural error.

II. The fair-and-just standard is not applicable to Tonce's request to withdraw from a stipulated-facts trial.

Tonce sought to withdraw his consent to the stipulated-facts trial shortly before the district court was to announce its verdict. The district court denied Tonce's request, pointing to his knowing, intelligent, and voluntary waiver of trial rights. But Tonce argues that his stipulation was essentially a guilty plea, and therefore the district court erred by failing to address whether it would be fair and just to let him withdraw his consent after submission of the evidence.[3]

The interpretation and application of a procedural rule presents a question of law that we review de novo. *Crowley v. Meyer*, 897 N.W.2d 288, 292 (Minn. 2017); *Clark v. Clark*, 642 N.W.2d 459, 464 (Minn. App. 2002). And our precedent clearly answers this question of law: a stipulated-facts trial under Minnesota Rules of Criminal Procedure 26.01

[3] A district court has discretion to allow a defendant to withdraw a plea before sentencing "if it is fair and just to do so." Minn. R. Crim. P. 15.05, subd. 2. But Minnesota Rules of Criminal Procedure 15.05, subdivision 2, governs the withdrawal of guilty pleas before sentencing, not stipulated-facts trials. *Id.*

does not involve a guilty plea, and it does not serve as the functional equivalent of a guilty plea. *State v. Johnson*, 689 N.W.2d 247, 252-53 (Minn. App. 2004), *review denied* (Minn. Jan. 20, 2005). While Tonce argues that the stipulated facts in his case were so one-sided that they were equivalent to providing a factual basis for a guilty plea, the strength of the state's evidence does not invalidate a stipulated-facts trial or convert the proceeding to a guilty plea.

Because Tonce concedes that his waiver of trial rights was knowing, intelligent, and voluntary, and because Tonce did not move to withdraw from the stipulated-facts trial process prior to the submission of evidence, there is no legal basis to remand his case to the district court for the purpose of making the determination Tonce requests. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569, 97 S. Ct. 1349, 1353 (1977) (holding that jeopardy attaches when the judge begins to receive evidence).

Affirmed.