STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1597

Tevin Marcel Bellaphant,
Appellant,

vs.

State of Minnesota,
Respondent.

Filed June 22, 2020
Affirmed
Bratvold, Judge

Ramsey County District Court
File No. 62-CR-16-7019

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

Keith Ellison, Attorney General, St. Paul, Minnesota; and

John J. Choi, Ramsey County Attorney, Peter R. Marker, Assistant County Attorney, St. Paul, Minnesota (for respondent)

Considered and decided by Reyes, Presiding Judge; Bratvold, Judge; and Slieter, Judge.

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

BRATVOLD, Judge

Appellant seeks review of an order denying his petition for postconviction relief, arguing that the postconviction court erred when it concluded that appellant validly waived

his right to a jury determination of aggravating factors the district court used to impose a sentence that was an upward durational departure under the Minnesota Sentencing Guidelines. Appellant seeks reversal of his sentence and a remand for resentencing within the guidelines. Because we conclude that appellant validly waived his rights, we affirm.

FACTS

The state charged appellant Tevin Marcel Bellaphant with attempted second-degree murder under Minn. Stat. § 609.19 subd. 1(1) (2016) with reference to Minn. Stat. § 609.17, subd. 1 (2016) (count one), and two counts of ineligible possession of ammunition or a firearm under Minn. Stat. § 624.713, subd. 1(2) (2016) (counts two and three). The state later amended the complaint and added second-degree assault with a dangerous weapon under Minn. Stat. § 609.222, subd. 1 (2016) (count four).

Bellaphant and the state reached a plea agreement, which provided that Bellaphant would plead guilty to count four, second-degree assault, and the state would dismiss the remaining three counts. Bellaphant and the state also agreed to ask the district court to impose the statutory maximum, an executed sentence of 84 months based on aggravating factors.

At a hearing on March 13, 2017, Bellaphant submitted a written plea petition. After orally waiving his trial rights, Bellaphant pleaded guilty to count four, second-degree assault. Bellaphant also submitted a second written petition waiving his right to have a jury determine whether aggravating factors were present for use at sentencing. We will call the second petition a "*Blakely* waiver," based on *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004).

Also at the March 13 plea hearing, Bellaphant's attorney asked him questions about his written *Blakely* waiver. Bellaphant agreed he had reviewed the *Blakely* waiver "[l]ine by line" with his attorney, understood it, and had signed it. Bellaphant also agreed he understood that he had the right to present a complete defense on any aggravating factors before sentencing, he understood his rights to a sentencing trial, and he wanted to give up those rights and be sentenced to an executed term of 84 months because aggravating factors were present. The district court asked Bellaphant if he understood that, without a waiver, "[y]ou'd have to make the state prove that there were in fact aggravating factors. And [the prosecutor] could do that or she would attempt to do that." Bellaphant responded, "Yeah, she would attempt to do it, yeah." Bellaphant agreed that he understood the state would not need to prove any aggravating factors if he waived his right to a sentencing trial.

Bellaphant testified that, on September 26, 2016, he was in a white sport utility vehicle (SUV) parked roughly "40 yards away" from the victim; he exited the SUV, armed with a loaded nine-millimeter handgun, and walked toward the victim. Bellaphant next testified that he "got to shooting," firing "probably ten, fifteen times." Bellaphant admitted that he reloaded the gun and continued to shoot. Bellaphant testified that he shot at the victim "to scare" him. Bellaphant agreed that the incident occurred outside his uncle's home in a residential neighborhood near a school. And Bellaphant agreed that his gunfire hit vehicles parked nearby. When asked whether the number of shots fired and the proximity of the incident to a school made this offense more serious than the typical assault offense and justified an upward departure in his sentence, Bellaphant responded, "Yeah, I guess, yeah."

The district court found that Bellaphant gave a "knowing, voluntary, and intelligent waiver of [his] trial rights," that he provided a "sufficient factual basis" to support his guilty plea, and found him guilty of second-degree assault. The district court also found that the state "laid a sufficient factual basis to support the upward durational departure" and determined that "the number of shots fired, the fact that this was in a school area and also . . . a residential area across from some family homes" supported a departure from the guidelines. The district court directed Bellaphant to return for sentencing after an abbreviated presentence investigation (PSI) as provided in the plea agreement.

The PSI report stated that Bellaphant had a criminal-history score of three, therefore, the guidelines sentence for his conviction of second-degree assault was a presumptive commit to the commissioner of corrections for 39 months, with a range of 36 to 46 months. The PSI also stated that the statutory maximum term of imprisonment was seven years, or 84 months, for second-degree assault. *See* Minn. Stat. § 609.222, subd. 1. The PSI did not recommend a sentence or discuss aggravating factors, but stated the parties had agreed to an executed 84-month sentence.

At a sentencing hearing on April 17, the district court asked Bellaphant and the state if they had "[a]ny additions or corrections" to the PSI. Both parties responded that they did not. The district court repeated its earlier finding of Bellaphant's guilt and adjudicated him guilty of second-degree assault, dismissed the remaining three counts, and imposed an executed 84-month sentence. The district court found that the shooting took place in "a residential area" and Bellaphant discharged "over 12 rounds," therefore, the assault was "more serious than the typical assault in the second degree."

Almost two years later, on April 16, 2019, Bellaphant petitioned for postconviction relief, arguing (1) he "did not validly waive his right to a jury determination of whether the circumstances justify the upward departure beyond a reasonable doubt" and (2) the record does not establish "legitimate reasons" for the upward departure. Bellaphant contended that, at the plea hearing, the district court did not inform him "that he had the right to a jury trial" or "that the state had the burden of proving the basis for departure beyond a reasonable doubt." Bellaphant also argued that the district court record did not include his signed *Blakely* waiver. He did not request an evidentiary hearing.

The postconviction court denied Bellaphant's petition in a written order. This appeal follows.

D E C I S I O N

Bellaphant raises one issue on appeal: whether his sentence should be reversed and a guidelines sentence imposed because he did not validly waive his right to a jury trial on aggravating factors. On appeal from a denial of postconviction relief, appellate courts "review issues of law de novo." *Carlton v. State*, 816 N.W.2d 590, 599 (Minn. 2012); *see also State v. Hagen*, 690 N.W.2d 155, 157 (Minn. App. 2004) ("[A] *Blakely* argument presents a constitutional issue, which this court reviews de novo.").

"[T]he presumptive sentence prescribed by the Minnesota Sentencing Guidelines is 'the maximum sentence a judge may impose solely on the basis of facts reflected in the jury verdict or admitted by the defendant.'" *State v. Shattuck*, 704 N.W.2d 131, 141 (Minn. 2005) (quoting *Blakely*, 542 U.S. at 303, 124 S. Ct. at 2537 (emphasis omitted)). A district court may impose an upward durational departure from the presumptive sentence when

one or more aggravating factors are present. *See* Minn. Stat. § 244.10, subds. 5, 5a (2016); *see also* Minn. Sent. Guidelines 2.D.1 (2016).[1]

Before sentencing, a defendant is entitled under the Sixth Amendment to have a jury determine any aggravating factors that a district court may rely on to impose a sentence that departs from the guidelines. *Blakely*, 542 U.S. at 303-05, 124 S. Ct. at 2537-38. A defendant may waive his right to a jury trial on aggravating factors, also known as *Blakely* rights. *State v. Jones*, 745 N.W.2d 845, 851 (Minn. 2008). A waiver of *Blakely* rights is valid if it is knowing, voluntary, and intelligent. *State v. Dettman*, 719 N.W.2d 644, 650-51 (Minn. 2006). A *Blakely* waiver is knowing, voluntary, and intelligent if the defendant personally waives his sentencing trial rights in writing or on the record in open court after he has been advised of his right to trial by jury and has had an opportunity to speak with counsel. *State v. Thompson*, 720 N.W.2d 820, 827-28 (Minn. 2006) (citing Minn. R. Crim. P. 26.01, subd. 1(2)(a)). The Minnesota Supreme Court amended Minn. R. Crim. P. 26.01, to include subdivision 1(2)(b), which provides that a defendant may waive *Blakely* rights if the "defendant does so personally, in writing or on the record in open court, after being advised by the court of the right to a trial by jury, and after having had an opportunity to consult with counsel."

[1] "[W]hen a court sentences an offender for a felony conviction, the court may order an aggravated sentence beyond the range specified in the sentencing guidelines grid based on any aggravating factor arising from the same course of conduct." Minn. Stat. § 244.10, subd. 5a(b) (2016); *see also State v. Fleming*, 883 N.W.2d 790, 797 (Minn. 2016) (holding an upward durational departure is appropriate when an offender's conduct is "significantly more serious than typically involved in the commission of the sentenced offense") (citing Minn. Stat. § 244.10, subd. 5a(b)).

Bellaphant argues that "the record here does not establish a valid *Blakely* waiver under Minn. R. Crim. P. 26.01, subd. 1(2)(b)." He makes two arguments, which we discuss in turn. Bellaphant first contends that he did not waive his jury-trial rights in writing because the record lacks a written *Blakely* waiver. The state agrees that Bellaphant's written *Blakely* waiver "did not make it in to the court record," but argues that Bellaphant's waiver is valid still because he testified that he read and signed a *Blakely* waiver. We note that neither Bellaphant nor the state contend that Bellaphant did *not* sign a written *Blakely* waiver.

We begin with the postconviction court's analysis, which stated that Bellaphant had a "valid concern" because his written *Blakely* waiver was not in the district court record. But the postconviction court found the absence of a written waiver was "not relevant" because Bellaphant did not dispute that he had signed the waiver, nor did Bellaphant contend that his written waiver was "deficient in content or misstated the law"; rather, Bellaphant's issue was that court administration "misplaced his [*Blakely*] petition."

Our review shows that Bellaphant's written *Blakely* waiver is in the appellate record, which consists of "[t]he documents filed in the trial court, the exhibits, and the transcript of the proceedings, if any." Minn. R. Civ. App. P. 110.01. Apparently, Bellaphant's written *Blakely* waiver was incorporated into the district court record at some point after the postconviction court filed its order because the parties' postconviction memoranda and the postconviction court's order each acknowledge the written waiver is missing. Our review of the appellate briefs suggests that counsel continued to assume the written waiver is not

in the appellate record because neither party refers to the appellate record in briefs filed with this court.[2]

Because Bellaphant's written *Blakely* waiver is in the appellate record, this court may rely on it reviewing Bellaphant's appeal. *See generally Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (holding appellate court must base its decision on evidence filed with the district court and found in the record on appeal); *State v. Morrow*, 492 N.W.2d 539, 549 (Minn. App. 1992) (denying a motion to strike a letter when it had been filed in district court and was a part of the appellate record). The postconviction court found that Bellaphant signed a written *Blakely* waiver and Bellaphant does not challenge that finding on appeal. Bellaphant's *Blakely* waiver is file-stamped with the date of the plea hearing, March 13, 2017, and Bellaphant signed and dated the document with the same date. Bellaphant testified at the plea hearing that he had read, understood, and signed the *Blakely* waiver. Bellaphant also agreed, in response to questioning, that he had read the petition "[l]ine by line."

Bellaphant's final argument is that his *on-the-record* waiver is not valid because, during the plea hearing, the district court failed to inform him that the state had the burden to prove any aggravating factors beyond a reasonable doubt. Bellaphant is correct that the plea-hearing transcript does not refer to the state's burden of proof. Rather, the transcript reflects that Bellaphant agreed, without a waiver, he would "have to make the state prove

[2] We note that the district court record was submitted to this court after the appellant's brief was filed and before the respondent and reply briefs were filed.

that there were in fact aggravating factors." Still, we reject Bellaphant's challenge to his on-the-record waiver for two reasons.

First, the postconviction court determined that Bellaphant's *Blakely* waiver was knowing, voluntary, and intelligent. The postconviction court found that Bellaphant "was advised of his rights to an aggravated sentencing hearing, waived that hearing, and its protections." The postconviction court also found that Bellaphant understood his bargained-for sentence was an upward durational departure from the presumptive guidelines sentence, and that he was "clear headed" at the plea hearing and "his actions were voluntary." Taken together, these findings, which are supported by the record, establish that Bellaphant's *Blakely* waiver was valid. *See Dettman*, 719 N.W.2d at 650-51; *Thompson*, 720 N.W.2d at 827-28.

Second, we need not rely solely on Bellaphant's on-the-record waiver because a valid *Blakely* waiver may be either "in writing or on the record in open court." Minn. R. Crim. P. 26.01, subd. 1(2)(b). Bellaphant's written *Blakely* waiver states, "The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge *beyond a reasonable doubt.*" (Emphasis added.) We determine that Bellaphant was informed of the state's burden of proof when he read and signed his written waiver with the advice of counsel, which occurred before he waived his *Blakely* rights on the record at the plea hearing. In his brief to this court, Bellaphant does not argue that his written *Blakely* waiver is deficient.

Because we conclude that Bellaphant's *Blakely* waiver was valid, we do not consider the parties' arguments about whether any error was harmless. *See State v.*

Chauvin, 723 N.W.2d 20, 30 (Minn. 2006) ("*Blakely* errors are not structural and thus are subject to a harmless error analysis," meaning a reviewing court determines whether the error is harmless beyond a reasonable doubt) (citing *Washington v. Recuenco*, 548 U.S. 212, 221-22, 126 S. Ct. 2546, 2553 (2006)).

Affirmed.