STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0467

State of Minnesota,
Respondent,

vs.

Almetia Njuguna,
Appellant.

Filed April 8, 2013
Affirmed
Chutich, Judge

Hennepin County District Court
File No. 27-CR-09-17539

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

Michael O. Freeman, Hennepin County Attorney, Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Rochelle R. Winn, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Peterson, Judge; and Chutich, Judge.

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

CHUTICH, Judge

On appeal from her conviction of one count of theft by swindle and two counts of possession of stolen or counterfeit checks, appellant Almetia Njuguna argues that the

district court erred by admitting into evidence the affidavit she signed to enter a pretrial-diversion program. Because the district court properly admitted the affidavit, we affirm.

FACTS

On March 24, 2008, Njuguna opened a checking account at Stearns Bank in Edina in the name of her husband, Gitau Njuguna. A few days later, a check for $3,500 was deposited into the account through an automated teller machine (ATM). The check was drawn on an account in the name of Helen Parker from City-County Federal Credit Union. The word "car" was written on the check's memo line. The following day, Njuguna returned to the bank and withdrew $3,000 from her husband's account.

On April 4, 2008, a check for $1,000 was deposited into Gitau's account by ATM. Again, the check was drawn on the account of Helen Parker and had "car" written in the check's memo line. Parker had previously closed her City-County Federal account, so both checks were returned and Stearns Bank received no funds to credit Gitau's account.

After an internal investigation, Stearns Bank reported the matter to the police. Hennepin County charged Njuguna with one count of theft by swindle over $1,000 and two counts of possession or sale of stolen or counterfeit checks. On October 22, 2009, Njuguna was referred to Operation De Novo, Hennepin County's pretrial diversion program. As a prerequisite to entering the program, Njuguna signed an Affidavit of Agreement of Defendant. The affidavit contained language similar to the charging complaint, detailing the check deposits and withdrawal, and required Njuguna to acknowledge that the factual allegations were "true and accurate." By signing the

affidavit, Njuguna specifically acknowledged that if she failed to complete the program, "[the] affidavit would be admissible at trial and used against [her]."

In September 2010, Njuguna was discharged from the pretrial diversion program for failing to make restitution payments and to maintain contact with her counselor. The program referred her case back to the district court for prosecution.

Before trial, defense counsel moved to suppress the affidavit that Njuguna signed as a prerequisite to entering Operation De Novo, arguing that it violated her constitutional right against self-incrimination and Minnesota Rule of Evidence 410. The district court denied Njuguna's motion.

At trial, the state offered and the district court admitted Njuguna's Operation De Novo affidavit into evidence. Njuguna's daughter, Ebony Brown, testified in her defense. Brown testified that Helen Parker and Njuguna were good friends, and that in March 2008, they were in a car accident in Minneapolis. Brown claimed that Parker did not want to get the police involved so she wrote Njuguna two checks to take care of damage to her car. Helen Parker testified for the state and confirmed that she and Njuguna had been friends for many years, but denied that she hit Njuguna's car in Minneapolis or that she had given Njuguna two checks.

The jury convicted Njuguna of all three counts. Njuguna now appeals.

D E C I S I O N

When determining whether admission of evidence violates Minn. R. Evid. 410, appellate courts "review a district court's findings of fact for clear error and review the court's legal conclusions de novo." *State v. Brown*, 792 N.W.2d 815, 821 (Minn. 2011);

see also Commandeur LLC v. Howard Hartry, Inc., 724 N.W.2d 508, 510 (Minn. 2006) (stating that court rules are interpreted de novo). Here, the facts surrounding the affidavit are undisputed. Therefore, we only review the district court's legal conclusion that rule 410 does not prohibit Njuguna's affidavit from being admitted into evidence. *Brown*, 792 N.W.2d at 821.

"When interpreting the Minnesota Rules of Evidence, we first look to the plain language of the rule." *State v. Stone*, 784 N.W.2d 367, 370 (Minn. 2010). Rule 410 provides:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil, criminal, or administrative action, case, or proceeding, whether offered for or against the person who made the plea or offer.

Minn. R. Evid. 410. The purpose of the rule is to "encourage frank discussion in plea bargaining negotiations." *State v. Blom*, 682 N.W.2d 578, 616–17 (Minn. 2004) (quotation omitted).

"The language of Rule 410 and our case law make clear that Rule 410 applies to withdrawn guilty pleas, to express offers to plead guilty, and to statements made in connection with those offers in the context of formal plea negotiations with the State." *Brown*, 792 N.W.2d at 821. The supreme court has also applied rule 410 to a defendant's statements in open court when made in response to questions posed by the district court and to a defendant's statements made during a presentence investigation. *Id.*, *State v. Jackson*, 325 N.W.2d 819, 823–24 (Minn. 1982). None of these situations apply to the

present case. Here, Njuguna neither pleaded guilty nor made an offer to plead guilty. Thus, her affidavit does not fall under the plain language of the rule.

Nevertheless, Njuguna argues that because the diversion program is similar in many ways to a plea agreement, rule 410 should also prohibit admission of statements made in connection with such diversion programs. Specifically, a pretrial diversion program and a guilty plea both seek to reduce the burden on courts; solicit admissions of factual guilt; are subject to negation and reversal; and if terminated, the criminal prosecution is re-initiated.

We do not find Njuguna's argument persuasive. Although the pretrial diversion program and guilty pleas share some characteristics, they are separate and distinct ways to proceed with a criminal case. A prosecutor may "refer an offender to a diversion program on condition that the criminal charges against the offender will be dismissed . . . or the case will not be charged, if the offender successfully completes the program." Minn. Stat. § 401.065, subd.1(2) (2012). Thus, the diversion program is an opportunity for a defendant to avoid the court system entirely and completely remove evidence of a charge from his or her record. As the district court stated, "Njuguna's entry into Project De Novo was not a compromise that resulted in a plea of guilty . . . it was a means by which Ms. Njuguna was provided an alternative to confinement and criminal conviction."

In addition to providing "eligible offenders with an alternative to confinement and a criminal conviction," pretrial diversion programs are also designed to minimize recidivism and promote restitution to victims. Minn. Stat. § 401.065, subd. 2 (2012). Further, if the protections of rule 410 applied to pretrial diversion program affidavits, it

would likely lead to the end of such worthy programs. The state's incentive to provide participants a second chance would be lessened if failed participants suffered no consequences and, in fact, gained a potential advantage by delaying prosecution during the time that they participated in the program.

Moreover, "evidentiary safeguards provided for under Rule 410 for statements made in connection with a plea or plea offer . . . may be waived." *Blom*, 682 N.W.2d at 617. By signing the affidavit to enter the pretrial diversion program, Njuguna acknowledged that the "affidavit would be admissible at trial and used against [her]" if she failed to complete the program. Thus, even assuming that Minn. R. Evid. 410 applies to Njuguna's affidavit, Njuguna waived the rule's safeguards by signing the affidavit.

Njuguna's affidavit does not fall under the plain language of rule 410 and policy considerations do not support Njuguna's proposed expansion of the rule. Thus, the district court properly concluded that rule 410 did not apply to Njuguna's affidavit.

Affirmed.