STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2397

State of Minnesota,
Respondent,

vs.

Ryan David Benson,
Appellant.

Filed April 1, 2008
Affirmed
Hudson, Judge

Dakota County District Court
File No. K0-06-39

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, Minnesota 55101; and

James C. Backstrom, Dakota County Attorney, Cheri A. Townsend, Assistant County Attorney, Dakota County Judicial Center, 1560 Highway 55, Hastings, Minnesota 55033 (for respondent)

Peter J. Timmons, 700 Wells Fargo Plaza, 7900 Xerxes Avenue South, Minneapolis, Minnesota 55431 (for appellant)

Considered and decided by Hudson, Presiding Judge; Worke, Judge; and Poritsky, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

HUDSON, Judge

On appeal from his conviction on stipulated facts of felony theft over $2,500, appellant argues that (1) the district court erred in denying his motion to suppress because police failed to advise him of his *Miranda* rights, violating his Sixth Amendment right to counsel, and (2) the district court erred in conducting a *Lothenbach* proceeding by failing to obtain waivers from appellant of his constitutional rights before finding him guilty and by failing to make written findings. Because appellant had not yet been charged with the felony-theft offense when he gave his statement to police, his Sixth Amendment right to counsel for that offense had not yet attached. The district court did not commit reversible error in obtaining waivers of appellant's constitutional rights and was not required to issue written findings in a *Lothenbach* proceeding. Accordingly, we affirm.

FACTS

On June 20, 2005, a Lakeville police officer stopped a vehicle in which appellant Ryan Benson was a passenger for going through a stop sign at a high rate of speed. During the stop, another driver told police that he had seen the vehicle backed up to a construction-site garage. Police saw a bucket filled with copper tubing and fittings in the vehicle. The driver stated that he and appellant had taken copper from the site and intended to sell it for recycling. The next day, appellant was mailed a citation for misdemeanor theft and trespass.

On June 22, another police officer investigating the theft called appellant and asked him to come to the Lakeville Police Station to discuss the incident. Appellant went

voluntarily to the station. At the beginning of appellant's statement to police, the officer told him he was "not under arrest and free to leave at any time." Appellant admitted taking copper from the construction site. The officer then questioned appellant about another theft occurring around May 12 at a different construction site. Appellant stated that he was present during the May incident, that his friend took tools from the construction site, and that appellant later pawned the tools, the value of which was later estimated at $6,400.

In August, appellant pleaded guilty to the June misdemeanor theft. In January 2006, he was charged with aiding and abetting felony theft in connection with the May incident. After a contested omnibus hearing, the district court denied appellant's motions to dismiss for lack of probable cause and to suppress appellant's statement to police on grounds that he was not read his *Miranda* rights and was not accorded his Sixth Amendment right to counsel.

Appellant chose to proceed under a *Lothenbach* proceeding on a stipulated record. At the hearing, the district court asked appellant whether he wished to waive his jury-trial right and have the court determine his guilt or innocence; appellant stated that he did. The court continued that it "does find that the record . . . establishes beyond a reasonable doubt that the defendant is guilty . . . [and] is prepared at this point to proceed to sentencing." After a brief off-the-record discussion, the court stated to appellant's attorney, "Before the court proceeds to sentencing, I think it would be a good idea to make a record—I know you've discussed this at length with your client—but that he understands the constitutional rights he's giving up by going the *Lothenbach* route."

Appellant's attorney then obtained on-the-record, oral waivers of appellant's rights to a jury trial, to testify on his own behalf or remain silent, to subpoena witnesses, and to cross-examine opposing witnesses. The court then pronounced appellant guilty. This appeal follows.

D E C I S I O N

I

The United States and Minnesota Constitutions guarantee the right of legal representation to a person charged with a crime. U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant's Sixth Amendment right to counsel attaches when the state initiates adversary judicial proceedings "'by way of formal charge, preliminary hearing, indictment, information, or arraignment.'" *State v. Ture*, 353 N.W.2d 502, 509 (Minn. 1984) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689, 92 S. Ct. 1877, 1882 (1972)). Once the right has attached, it is improper to interrogate the accused without the presence of his attorney unless the defendant waives that right. *Id*. But "the right to counsel does not automatically attach when an accused is questioned in an investigatory stage." *State v. Everett*, 472 N.W.2d 864, 868 (Minn. 1991) (citing *Ture*, 353 N.W.2d at 511).

Appellant argues that the district court erred by denying his motion to suppress his statement to police given without the benefit of a *Miranda* warning or waiver of his Sixth Amendment right to counsel. Appellant acknowledges that because he was not in custody at the time of the statement, he had no Fifth Amendment right to a *Miranda* warning. *See State v. Miller*, 573 N.W.2d 661, 670 (Minn. 1998) (Fifth Amendment right to a *Miranda* warning attaches only during a custodial interrogation). But the Minnesota

Supreme Court has indicated that a *Miranda* warning advising a suspect of his right to counsel under the Fifth Amendment is also designed to protect the Sixth Amendment right to counsel. *State v. Williams*, 535 N.W.2d 277, 284 (Minn. 1995). And appellant claims that he had a Sixth Amendment right to counsel as to the May felony offense because the police questioned him at the same time about the June misdemeanor offense, with which he had been formally charged.

Appellant is correct that when he was interrogated, he had a right to counsel for the June misdemeanor offense because a complaint charging him with that offense had been issued. *See* Minn. R. Crim. P. 5.02, subd. 1 (stating that an accused has a right to counsel in misdemeanor, gross-misdemeanor, and felony prosecutions when a conviction may lead to incarceration). But the Sixth Amendment right to counsel "is offense specific." *State v. Willis*, 559 N.W.2d 693, 698 (Minn. 1997) (citing *McNeil v. Wisconsin*, 501 U.S. 171, 175, 111 S. Ct. 2204, 2207 (1991)). No exception exists for "crimes that are 'factually related' to a charged offense." *Texas v. Cobb*, 532 U.S. 162, 168, 121 S. Ct. 1335, 1340–41 (2001); *see also Tello v. State*, 362 N.W.2d 8, 9 (Minn. App. 1985) (stating that defendant's right to counsel for uncharged burglary had not attached when he was in jail awaiting sentencing on different burglary), *review denied* (Minn. Apr. 12, 1985). Therefore, because appellant had not been charged with the May felony offense at the time he was questioned, his Sixth Amendment right to counsel for that offense had not yet attached, and his uncounseled statement is admissible at trial on that offense. The fact that both crimes were construction-site thefts is irrelevant because

they were not part of the same act or transaction and were separately prosecuted. *See Cobb*, 532 U.S. at 173, 173 n.3, 121 S. Ct. at 1343, 1343 n.3.

We do not agree with the position put forth by appellant's counsel at oral argument that because the police conducted a "seamless interview," his Sixth Amendment right to counsel extended to questioning about the uncharged offense. As the Supreme Court has noted, it is often difficult for police to tailor their investigation to avoid addressing factually related offenses because of "the reality that police often are not yet aware of the exact sequence and scope of events they are investigating—indeed, that is why police must investigate in the first place. Deterred by the possibility of violating the Sixth Amendment, police likely would refrain from questioning certain defendants altogether." *Id*. at 173–74, 121 S. Ct. at 1343–44. Because appellant's Sixth Amendment right to counsel for the felony offense had not attached at the time he gave his statement to police, the district court did not err by denying his motion to suppress the statement.

II

Appellant argues that the district court erred by failing to procure a complete waiver of his rights before finding him guilty in the *Lothenbach* proceeding and by failing to issue written findings of guilt. Under the United States and Minnesota Constitutions, a criminal defendant has the right to a jury trial, to cross-examine witnesses, and to subpoena favorable witnesses. U.S. Const. amend. VI; Minn. Const. art. I, § 6. The Minnesota Rules of Criminal Procedure require an express waiver of those rights if the defendant waives a jury trial or agrees to a stipulated-facts trial. Minn.

R. Crim. P. 26.01, subd. 1, 3. This court has recently held that the mandatory-waiver provisions of rule 26.01, subd. 3, apply to *Lothenbach* proceedings. *State v. Knoll*, 739 N.W.2d 919, 921 (Minn. App. 2007).[1]

During the *Lothenbach* hearing, the district court obtained an express waiver of appellant's jury-trial right before stating that the record established appellant's guilt beyond a reasonable doubt. The court then held a brief, off-the-record discussion with counsel. The court returned to the record and obtained from appellant a complete waiver of his enumerated rights before pronouncing him guilty. Because the district court immediately corrected the record to confirm that appellant expressly waived his rights to a jury trial, to testify or to remain silent, and to subpoena or cross-examine witnesses, the district court's action did not constitute reversible error.

Appellant also maintains that the district court erred by failing to make written findings of guilt as required by Minn. R. Crim. P. 26.01, subd. 2, which states that in a trial without a jury, the court must find "essential facts in writing on the record." But this court has held that the rule 26 requirement for written findings does not apply to a *Lothenbach* proceeding. *State v. Mahr*, 701 N.W.2d 286, 292 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). Therefore, the district court did not err by failing to make written findings, and we affirm.

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[1] An amended version of the applicable rule, which became effective April 1, 2007, provides that the defendant in a *Lothenbach* proceeding "shall waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and shall also waive the rights specified in Rule 26.01, subdivision 3." Minn. R. Crim. P. 26.01, subd. 4. The same rule provides that if the *Lothenbach* court finds the defendant guilty, "the court shall [ ] make findings of fact, orally on the record or in writing, as to each element of the offense(s)." *Id.*

Affirmed.