STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1982

State of Minnesota,
Respondent,

vs.

Mark A. Niznik,
Appellant.

Filed December 23, 2008
Affirmed; motion denied
Huspeni, Judge[*]

Anoka County District Court
File No. K3-06-5772

Lori Swanson, Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Robert M.A. Johnson, Anoka County Attorney, Marcy S. Crain, Assistant County Attorney, 2100 Third Avenue, Suite 720, Anoka, MN 55303-5025 (for respondent)

Lawrence Hammerling, Chief Appellate Public Defender, Lydia Villalva Lijó, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Ross, Presiding Judge; Bjorkman, Judge; and Huspeni, 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

HUSPENI, Judge

Appellant challenges his convictions for sexual assault following a stipulated-facts trial, arguing that (1) he failed to waive his right to compel the testimony of favorable witnesses; (2) the trial amounted to the equivalent of a guilty plea with no agreement as to sentencing; and (3) he was denied his right to an impartial judge. Because appellant did not fail to waive a fundamental right prior to his stipulated-facts trial waiver, had a valid stipulated-facts trial, and was not denied the right to an impartial judge, we affirm. Respondent's motion to strike appellant's pro se brief is denied.

FACTS

Appellant Mark A. Niznik was charged with first-degree criminal sexual conduct in violation of Minn. Stat. § 609.342, subd. 1(g) (2004), and second-degree criminal sexual conduct in violation of Minn. Stat. § 609.343, subd. 1(g) (2004). The charges stem from appellant's sexual abuse of his 14-year-old niece, A.E.M.T., in September 2005.

On the day of trial, appellant informed the district court that he would waive his right to a jury trial and opt to have a court trial on stipulated facts.[1] Prior to the stipulated-facts trial, appellant's attorney, the prosecutor, and the district court had the following exchange:

> APPELLANT'S ATTORNEY: I did discuss the matter with my client about waiving his right to a jury trial, and submitting the matter to the Court on stipulated facts. I

[1] The stipulated facts included police reports, the criminal complaint, the school's report of suspected child abuse, and a document captioned "Facts to Establish Probable Cause."

> indicated to him that if we can get him hooked up into a program, a human sexuality program between now and sentencing, and my client agrees to participate, the prosecution, if my client is convicted, will recommend a dispositional departure to probationary sentence.
> THE COURT: [Prosecutor?]
> PROSECUTOR: That's true, Your Honor. Although there is no guarantee with the trial going forward, if the defendant is convicted, the State does feel if the defendant can get himself amenable and into a treatment program, the State would suggest to this court that a departure be granted and he be given an opportunity short of prison.
> DISTRICT COURT: [Appellant,] do you understand there is no guarantee about that, but in talking with the attorneys and reviewing the information that has been given so far, if you cooperate and do everything you're supposed to the court would probably go along with that.

Following this exchange, the parties went forward with the stipulated-facts trial. After trial, appellant's motion for acquittal was denied, and the district court found appellant guilty of both counts.

Prior to sentencing, the district court ordered that a pre-sentence investigation (PSI) and a psychosexual evaluation be conducted. After hearing appellant's allocution and reviewing the PSI and psychosexual evaluation, the district court found that appellant was not amenable to probation. He was sentenced on the first-degree criminal sexual conduct conviction to a presumptive sentence of 144-months imprisonment, followed by a ten-year conditional-release term. This appeal followed, during the pendency of which respondent moved to strike appellant's pro se supplemental brief, arguing that it contains material not in the record before this court on appeal. The motion was deferred by special term order of this court for consideration together with other issues on appeal.

D E C I S I O N

1. Appellant's failure to waive his right to compel the testimony of favorable witnesses does not invalidate his convictions.

Appellant argues that his convictions should be reversed because he did not waive his right to compel favorable witnesses to testify prior to submitting to his stipulated-facts trial. Minn. R. Crim. P. 26.01, subd. 3, governs trials on stipulated facts:

> By agreement of the defendant and the prosecuting attorney, [a case] may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record. . . . Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

"The interpretation of the rules of criminal procedure is a question of law subject to de novo review." *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005). This court has held that rule 26.01 is to be strictly construed. *State v. Halseth*, 653 N.W.2d 782, 784 (Minn. App. 2002).

It is undisputed that defendants must personally make an informed waiver of fundamental rights. *New York v. Hill*, 528 U.S. 110, 114, 120 S. Ct. 659, 664 (2000). Fundamental rights include the right to decide to plead guilty, waive a jury trial, testify on your own behalf, and appeal an issue. *Jones v. Barnes*, 463 U.S. 745, 751, 103 S. Ct. 3308, 3312 (1983) (citation omitted). The right to subpoena witnesses to testify on your

own behalf has yet to be declared a fundamental right, and it is not this court's place to declare it one. *See Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987) ("[T]he task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court."), *review denied* (Minn. Dec. 18, 1987).

In the past, this court has overturned convictions for failure to comply with the requirements of rule 26.01. *See State v. Knoll*, 739 N.W.2d 919, 921-22 (Minn. App. 2007). In *Knoll*, the appellant agreed to a *Lothenbach* trial, but did not expressly waive his rights to testify at trial, to confront the witnesses against him, and to subpoena favorable witnesses. *Id.* The court in *Knoll* reversed. *Id.* ("Therefore, we conclude that under Minn. R. Crim. P. 26.01, subd. 3, a defendant who agrees to a *Lothenbach* trial must expressly waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question these prosecution witnesses, and to require any favorable witnesses to testify for the defense in court.").

Knoll is distinguishable from the present case. Here, appellant only failed to personally waive a single trial right, the non-fundamental right to compel the testimony of favorable witnesses. The appellant in *Knoll* failed to waive multiple rights, including rights which are clearly fundamental. Thus, we believe *Knoll* requires strict compliance with the waiver requirements of rule 26.01 only to the extent that the waiver is dealing with a fundamental right. *See Halseth*, 653 N.W.2d at 786 (reversing for failure to obtain an explicit waiver of the right to testify under rule 26.01, subdivision 3, but noting that certain rights are non-fundamental and may be waived by counsel).

Additionally, in this case, appellant had numerous opportunities to consult with his privately retained attorney and the attorneys provided to him by the public defender's office. Furthermore, the record indicates that appellant had the opportunity to consult with his trial attorney about his trial rights prior to the waiver proceeding, and he waived all of his other trial rights in the course of that proceeding. Thus, we presume that appellant was aware of his right to compel the testimony of favorable witnesses, and we conclude that this non-fundamental right was effectively waived by appellant's trial counsel's participation in the stipulated-facts trial waiver. *See State v. Propotnik*, 299 Minn. 56, 58, 216 N.W.2d 637, 638 (1974) (holding that, although a defendant might not be questioned about a specific constitutional right, if the record demonstrates that the defendant had an opportunity to consult with counsel, the court may safely presume the defendant was aware of his rights).

2. Appellant had a valid stipulated-facts trial.

Appellant contends that the hearing was "the equivalent of a guilty plea with no agreement as to sentencing." This argument is without merit. An agreement to a stipulated-facts trial is not the equivalent of a guilty plea. *State v. Mahr*, 701 N.W.2d 286, 291 (Minn. App. 2005), *review denied* (Minn. Oct. 26, 2005). Appellant did not plead guilty at his hearing. This fact alone is sufficient to distinguish appellant's stipulated-facts trial from a guilty-plea hearing. *See State v. Johnson*, 689 N.W.2d 247, 253 (Minn. App. 2004) (holding that appellant could not withdraw his agreement to a stipulated-facts trial when the district court refused to abide by the parties' sentencing agreement because consent to a stipulated-facts trial is not the same as a guilty plea),

review denied (Minn. Jan. 20, 2005). And the record establishes that there was no assumption that the court would find appellant guilty.

Additionally, contrary to appellant's argument, this proceeding was not the type of "prima facie trial" struck down in *Brookhart v. Janis*, 384 U.S. 1, 86 S. Ct. 1245 (1966). At a minimum, this case is distinguishable from *Brookhart* because guilt needed to be proven beyond a reasonable doubt whereas in *Brookhart* the state was only required to make a "prima facie" showing of guilt.

3. Appellant was not denied the right to an impartial judge.

As a defendant in a criminal trial, appellant has a constitutional right to a fair trial. *See* U.S. Const. amends. V, XIV; Minn. Const. art. I, § 7. The right to a fair trial includes the right to an impartial judge. *Cuypers v. State*, 711 N.W.2d 100, 104 (Minn. 2006) (citing *Bracy v. Gramley*, 520 U.S. 899, 904-05, 117 S. Ct. 1793, 1797 (1997)). "There is the presumption that a judge has discharged his or her judicial duties properly," *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006), so a defendant must assert allegations of impropriety sufficient to overcome this presumption, *see McKenzie v. State*, 583 N.W.2d 744, 747 (Minn. 1998). Once a defendant submits to trial before a judge without objecting to the judge on the basis of bias, reversal of a defendant's conviction is warranted only if the defendant can show actual bias in the proceedings. *State v. Moss*, 269 N.W.2d 732, 734-35 (Minn. 1978); *State v. Plantin*, 682 N.W.2d 653, 663 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004).

Appellant argues that his right to an impartial judge was violated because the judge was predisposed to find him guilty. This contention is unavailing. At no point

prior to or during the stipulated-facts trial did the judge state that she would find appellant guilty. She merely indicated that, if convicted, she was inclined to follow the parties' tentative agreement regarding appellant's sentence. And the judge explicitly informed appellant that there was "no guarantee" concerning his sentence. Appellant cites to no authority that calls into question this behavior.

Appellant also objects that the district court "immediately" found him guilty after receiving the stipulated facts. Our review of the record discloses no "immediate" finding of guilt. Before announcing its decision, the district court gave each party an opportunity to offer anything further or make any additional arguments. Additionally, the district court had ample time to review the stipulated facts before announcing its decision. The hearing was scheduled to begin at 10:00 a.m. and the waiver occurred at 11:40 a.m. While it is not entirely clear when the district court received the stipulated facts, it did state that "I did receive by agreement of counsel a little earlier today a packet of documents. I counted them, they total 36 pages." Before announcing its decision, the district court stated: "Then given the fact that I've had the opportunity to review all of this information contained in [the stipulated record], I would be prepared to make my ruling." These statements indicate that the district court did in fact review the record prior to making its decision and that the decision was not rendered immediately upon receiving the stipulated facts.

Finally, appellant points to statements made by the district court during sentencing that he claims indicate the district court had prejudged him prior to his trial. Specifically,

appellant emphasizes the following exchange between himself and the district court during the sentencing hearing:

> APPELLANT: I truly believe I didn't do a thing. I can't tell you that I did it. Because if I did I don't remember doing it. And I can tell you several circumstances in which if I could anyway possibly prove it I would certainly prove that I did not do that.
>
> DISTRICT COURT: Well you didn't. In fact when you went to trial on a court trial you didn't offer one fragment of evidence to support your claim. Including not calling your girlfriend as a witness.

We believe appellant reads too much into this exchange. As respondent points out, these statements occurred during a sentencing hearing in which the district court displayed its frustration with a defendant who had been less than truthful to the court on numerous occasions.[2] Appellant's contention that these statements, which occurred months after appellant's trial and conviction, were in some way an indication of the district court's bias against appellant at the time of his stipulated-facts trial is unconvincing.

4. Appellant's pro se issues.

We address initially respondent's motion to strike appellant's pro se supplemental brief and recognize that the "record on appeal shall consist of the papers filed in the trial court, the offered exhibits, and the transcript of the proceedings, if any." Minn. R. Crim. P. 28.02, subd. 8. Appellant's pro se supplemental brief contains no papers, exhibits, or transcripts that are not part of the appropriate record on appeal. His brief does contain

[2] At sentencing, the district court stated: "In going through all this information I saw a number of lies throughout." It then outlined some of the misrepresentations that appellant had made throughout the course of his case.

several statements regarding issues already addressed in this opinion and several additional statements regarding alleged problems existing between himself and his attorney. It does not appear to us that any of these statements violate the limitations set forth in rule 28.02, subdivision 8. In any event, to the extent that statements regarding the attorney/client relationship may be considered not properly raised on direct appeal, we address that issue below. Respondent's motion to strike is denied.

Appellant's pro se supplemental brief raises an ineffective assistance of counsel claim. When raising a claim of this nature, an appellant "must affirmatively prove that his counsel's representation 'fell below an objective standard of reasonableness' and 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Gates v. State*, 398 N.W.2d 558, 561 (Minn. 1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 688, 694, 104 S. Ct. 2052, 2064, 2068 (1984)).

Because additional fact finding may be necessary to develop an ineffective assistance of counsel claim that cannot be based upon the trial court record, we note that a direct appeal is not the preferred procedure for raising such a claim. *Carney v. State*, 692 N.W.2d 888, 891 n.1 (Minn. 2005). On our review of the record before us here, we conclude that appellant's claim of inadequacy of counsel is not capable of review on direct appeal.

Affirmed; motion denied.