STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1177

State of Minnesota,
Respondent,

vs.

James Christian Peters,
Appellant.

Filed September 1, 2009
Affirmed in part and reversed in part
Halbrooks, Judge

Dakota County District Court
File No. 19-KX-07-001452

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

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

Marie L. Wolf, Interim Chief Appellate Public Defender, Roy G. Spurbeck, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for appellant)

Considered and decided by Halbrooks, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

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

HALBROOKS, Judge

On appeal from his convictions of felony driving while impaired (DWI), felony test refusal, giving false information to a peace officer, and driving after cancellation, appellant argues that (1) the district court erred by accepting a stipulation to an element of the felony offenses without also securing a valid waiver of his right to a jury trial on that element; (2) Minnesota's test-refusal statute is unconstitutional; (3) the district court erred when it sentenced him on the false-information conviction because that conviction was part of the same behavioral incident as the DWI conviction; (4) if appellant can be sentenced on the false-information conviction, his sentence must be reduced; and (5) the district court abused its discretion when it denied appellant's motion for a downward dispositional departure. Because appellant clearly waived his right to a jury trial on one of the felony elements, because we decline to reach appellant's constitutional argument raised for the first time on appeal, and because the district court did not abuse its discretion by denying appellant's motion for a downward dispositional departure, we affirm in part. But because appellant's false-information conviction was part of the same behavioral incident as the DWI conviction, we reverse in part.

FACTS

Appellant James Christian Peters was charged with first-degree DWI, first-degree test refusal, and giving false information to a peace officer. Appellant pleaded guilty to the DWI charge on September 11, 2007, and the district court ordered a presentence investigation (PSI) report. The remaining two counts were to be dismissed at sentencing.

On January 4, 2008, the district court allowed appellant to withdraw his guilty plea and to plead not guilty.

On the first day of trial, the state amended the complaint to include one count of driving after cancellation. The jury convicted appellant on all counts.

At sentencing, over the state's objection, appellant moved for a downward dispositional departure. The district court denied the motion and sentenced appellant to 46 months (the "low end of the box") for the DWI conviction, to be followed by a five-year period of conditional release. The district court vacated appellant's test-refusal conviction and imposed concurrent sentences of one year for the driving-after-cancellation and false-information convictions.

Appellant filed a notice of appeal and a motion for extension of time to file the notice of appeal. This court issued an order granting appellant's motion for an extension of time and accepted jurisdiction over his appeal.

D E C I S I O N

I.

Appellant was convicted of first-degree DWI and first-degree test refusal. An element of both of these crimes is that the perpetrator must commit the violation "within ten years of the first of three or more qualified prior impaired driving incidents." Minn. Stat. §§ 169A.20, subds. 1–2, .24, subd. 1(1) (2006). Appellant contends that he did not waive his right to a jury trial on this element.

A criminal defendant has a right to a jury trial on "each and every element of the charged offense." *State v. Wright*, 679 N.W.2d 186, 191 (Minn. App. 2004), *review*

denied (Minn. June 29, 2004); *see also* U.S. Const. amend. VI; Minn. Const. art. I, § 6. A defendant may waive this right, with the approval of the court, if he "does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel." Minn. R. Crim. P. 26.01, subd. 1(2)(a); *see also Wright*, 679 N.W.2d at 191. The waiver must be voluntary, knowing, and intelligent. *State v. Ross*, 472 N.W.2d 651, 653 (Minn. 1991). But a searching inquiry as to why a defendant is waiving his right is not required. *In re Welfare of M.E.M.*, 674 N.W.2d 208, 213 (Minn. App. 2004). We review a waiver of the right to a jury trial de novo. *State v. Tlapa*, 642 N.W.2d 72, 74 (Minn. App. 2002), *review denied* (Minn. June 18, 2002).

Appellant admits that a discussion took place at his trial regarding his stipulation to several prior impaired-driving incidents, but he argues that there was no explicit mention of his right to a jury trial on this element. While appellant is correct that the words "waiver" or "jury trial" were not used, it is clear from the following exchange that appellant personally consented to stipulate to the element in question and to prevent the jury from deciding that element:

Appellant's attorney:	Do you understand what we are talking about here, James?
Appellant:	Yes.
Appellant's attorney:	We talked about stipulating to some of your prior offenses so the jury won't hear evidence of that as part of the trial in this case . . . ?
Appellant:	Yes, sir.
Appellant's attorney:	And with that knowledge and understanding are you prepared to stipulate to those prior incidents and

	asking the court to allow those facts to be stipulated to and not presented to the jury?
Appellant:	That's right.
The District Court:	Okay. Then with respect to Count 1, when I read it to the jury I will just read all but the last portion, and the defendant has three or more prior impaired driving incidents within the past ten years.

Appellant cites no caselaw that supports his argument that specific language is required for waiver of the right to a jury trial on a particular element. Because we conclude that appellant validly waived his right to a jury trial on this element, we do not address his structural- or harmless-error arguments.

II.

Appellant contends that Minn. Stat. § 169A.20, subd. 2, violates the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution and the Due Process Clause of article I, section 7 of the Minnesota Constitution. Appellant concedes that he raises this issue for the first time on appeal. We therefore decline to address this constitutional issue. *See In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981).

III.

Appellant argues that the district court erroneously sentenced him on both the DWI and false-information convictions because the conduct underlying the convictions constituted a single behavioral incident. Whether offenses are part of a single behavioral incident is a fact determination that this court reviews for clear error. *State v. Carr*, 692 N.W.2d 98, 101 (Minn. App. 2005).

The conduct underlying appellant's convictions occurred on the night of April 25, 2007, during a traffic stop on a highway in Dakota County. Deputy Daniel Belcourt initiated the traffic stop after observing a vehicle cross the highway's center line three times and the fog line once and after seeing a "shiny silvery type can" fly out of the vehicle's window. Deputy Belcourt approached the vehicle; appellant was the driver and sole occupant. Appellant told the deputy, "Don't worry about this, the Department of Justice will be here shortly and this will all be taken care of." Deputy Belcourt asked appellant what he meant by that, and appellant repeated: "They will be here shortly." Appellant then handed the deputy a cell phone and said, "Here, talk to him." Deputy Belcourt returned the phone to appellant and asked him for identification. Appellant stated that he did not have any identification, and he orally identified himself as Daniel John Peters, born May 19, 1979.[1] Deputy Belcourt detected the odor of alcohol. The deputy was unable to find the name "Daniel John Peters" in the computer system.

At trial, Deputy Daniel Michener testified that he also attempted to identify appellant, who said his name was Danny. Deputy Michener then asked appellant if he had consumed alcohol; appellant said that he had not been drinking. When Deputy Michener asked appellant about medication, appellant handed him a pill bottle with a prescription label for a James Peters. Appellant said that James Peters is his brother.

Appellant was placed under arrest after failing three field sobriety tests. Upon a search of his vehicle, law enforcement found a Wisconsin driver's license for a James Christian Peters, born October 4, 1973. Appellant's appearance matched the photo on the

[1] This is apparently the name and birth date of appellant's brother.

driver's license. The record indicates that at the time of the offenses, appellant had at least one outstanding warrant for his arrest.

At sentencing, appellant's attorney requested that appellant be sentenced "on the behavioral incident for his conduct." The prosecutor argued that giving a false name to a peace officer and DWI are separate behavioral incidents that warrant separate sentences. Without explicitly addressing whether these two offenses constituted a single behavioral incident, the district court sentenced appellant for both convictions.

Minnesota law "allows multiple convictions for different incidents (counts) arising out of a single behavioral incident, but prohibits multiple sentences for conduct that is part of a single behavioral incident." *State v. Papadakis*, 643 N.W.2d 349, 357 (Minn. App. 2002) (quotation marks omitted); *see also* Minn. Stat. § 609.035, subd. 1 (2006). "When a single behavioral incident results in the violation of multiple criminal statutes, the offender may be punished only for the most severe offense." *State v. Suhon*, 742 N.W.2d 16, 24 (Minn. App. 2007), *review denied* (Minn. Feb. 19, 2008). This rule avoids exaggerating the criminality of the defendant's conduct and makes both punishment and prosecution commensurate with culpability. *Id.*; *State v. Johnson*, 653 N.W.2d 646, 651 (Minn. App. 2002).

"The determination of whether multiple offenses are part of a single behavioral act . . . involves an examination of all the facts and circumstances." *State v. Soto*, 562 N.W.2d 299, 304 (Minn. 1997). In making this determination, a court "must consider whether the offenses (1) arose from a continuous and uninterrupted course of conduct, (2) occurred at substantially the same time and place, and (3) manifested an indivisible

state of mind, or were motivated by a single criminal objective." *Suhon*, 742 N.W.2d at 24.

Appellate courts have applied different tests to cases, depending on whether the cases involved intentional crimes, nonintentional crimes, or a mixture of intentional and nonintentional crimes. DWI is a nonintentional crime. *See* Minn. Stat. § 169A.20, subd. 1. Giving a false name to a peace officer requires the intent to obstruct justice. Minn. Stat. § 609.506, subd. 1 (2006). Therefore, the proper approach here is "to analyze all the facts and determine whether the offense [arose] out of a continuing and uninterrupted course of conduct, manifesting an indivisible state of mind or coincident errors of judgment." *State v. Gibson*, 478 N.W.2d 496, 497 (Minn. 1991) (alteration in original) (quotation omitted). "In other words, a reviewing court must determine whether the offenses were based on a single behavioral incident, or rather, divisible conduct." *State v. Butcher*, 563 N.W.2d 776, 784 (Minn. App. 1997), *review denied* (Minn. Aug. 5, 1997). Divisibility of conduct "depends on the divisibility of the defendant's state of mind, not the separability of his actions." *Id.* When the motivations underlying one offense are "essentially different" from the motivations underlying another offense, a defendant's course of conduct does not manifest an indivisible state of mind. *State v. Sailor*, 257 N.W.2d 349, 353 (Minn. 1977). The state bears the burden of proof to show that the offenses were not part of a single course of conduct. *State v. Williams*, 608 N.W.2d 837, 841–42 (Minn. 2000).

"In a series of decisions—the avoidance-of-apprehension cases—[the Minnesota Supreme Court has] held that multiple sentences may not be used for two offenses if the

defendant, substantially contemporaneously committed the second offense in order to avoid apprehension for the first offense." *Gibson*, 478 N.W.2d at 497. Appellant here argues that he gave false information to law enforcement to avoid apprehension for DWI and that the state has not met its burden to prove otherwise. The state argues that appellant gave false information not to avoid apprehension for DWI, but to avoid being arrested on an outstanding warrant.

Our review of the record reveals that by giving a false name and date of birth, appellant was motivated by a desire to avoid arrest. But it is not clear whether appellant sought to avoid arrest based on DWI, an outstanding warrant, or both. The state's argument that appellant was motivated by the existence of an outstanding warrant is supported by the timing of the false-information offense—appellant gave the false information to Deputy Belcourt before Deputy Michener asked appellant if he had been drinking. But because the jury found that appellant had been operating the vehicle under the influence of alcohol, we cannot say that appellant was not also motivated by a desire to avoid being arrested for DWI.

There is ample—and contradictory—caselaw addressing the problem of ascertaining appellant's motivation. In *State v. Banks*, the defendant had been convicted of unlawful possession of a firearm and fleeing a peace officer. 331 N.W.2d 491, 492 (Minn. 1983). The defendant argued that his decision to flee was "motivated by the fact that he had a gun in his possession." *Id.* at 494. The supreme court stated that *Banks* presented a close case and concluded

> that the [district] court did not err in determining that the two offenses were not committed as part of a single behavioral incident. . . . While defendant indicated that he fled the officer because he had a gun in his possession, he also stated that he fled the officer because he did not have a driver's license. Defendant may also have concluded that the police wanted to arrest him for the forgery offenses committed [on a previous date]. Thus, the offense of fleeing the officer can be explained without necessary reference to the offense of possessing the gun. That is, defendant apparently would have fled the officer even if [he] had not possessed the gun.

Id. Under this reasoning, appellant's offense of giving a false name and date of birth to a peace officer can be explained without necessary reference to the offense of DWI—that is, appellant apparently would have given false information even if he were not intoxicated.

But in the more recent *Gibson* decision, the supreme court applied different reasoning. The *Gibson* defendant was convicted of criminal vehicular operation resulting in injury and leaving the scene of an accident. 478 N.W.2d at 497. The supreme court vacated the lesser of the two sentences, concluding that the defendant "committed the felonious act of leaving the scene of an accident *in part* to avoid being apprehended for any crime committed in connection with the accident." *Id.* (emphasis added). Here, appellant appears to have given a false name and date of birth at least "in part" to avoid being apprehended for DWI.

In *State v. Nordby*, the defendant was convicted of misdemeanor theft and giving a false name to a peace officer. 448 N.W.2d 878, 879 (Minn. App. 1989). After being detained for shoplifting, the defendant gave police his full name but a fictitious birth date. *Id.* The police had been prepared to issue a citation to the defendant to appear in court on

the shoplifting charge, but a computer check revealed that he had an outstanding felony warrant. *Id.* The defendant later submitted an affidavit to the district court stating "that he gave false information to the police to evade punishment for the theft charge." *Id.* at 880. This court followed *Banks* and concluded that

> the record supports finding these two crimes to be divisible. [The defendant] already had been apprehended for the shoplifting. Concealing his true date of birth only gave him the slim hope of not being found if he did not appear in court on the citation . . . . It did not lessen his obligation to appear in court on the theft charge. Avoiding incarceration on the outstanding felony warrant provided a much stronger motivation for giving false information to police.

Id.

Under *Nordby*, appellant's crimes appear to be divisible. Appellant had already been apprehended by police (though he may not have known on what grounds) when he gave law enforcement a false name and birth date. He had an even slimmer hope of escape than the *Nordby* defendant did; the latter had the hope of receiving a mere citation, but appellant was intoxicated and would not have been allowed to drive away no matter what identification he provided to law enforcement. But unlike *Nordby*, it does not appear that one of appellant's motivations—that is, avoiding arrest for the outstanding warrant as opposed to avoiding arrest for the DWI offense—was a "much stronger motivation" than the other.

In *State v. Barnes*, the defendant was convicted of two controlled-substance crimes and giving a false name to a peace officer. 618 N.W.2d 805, 808 (Minn. App. 2000), *review denied* (Minn. Jan. 16, 2001). The defendant gave his brother's name to

the police after he had been handcuffed in the room where cocaine was found. *Id.* at 813. This court vacated the defendant's sentence for giving a false name because the state failed to show that his criminal objective "*was only* to obtain some future advantage, as in *Nordby*." *Id.* at 814 (emphasis added). This court concluded:

> The testimony at trial . . . was too vague to carry the state's burden of proof on this issue. [The officer] testified that Barnes was in handcuffs when he gave the false name. Barnes, however, could have been handcuffed merely to ensure that he would not interfere with the search, without being placed under formal arrest. Moreover the search warrant authorized a search of [Barnes's person]. Barnes could have hoped to avoid a body search by means of the false identification.

Id.

Here, appellant's strategy was likely doomed to fail because his vehicle had already been stopped by law enforcement, and the officers were unlikely to allow him to drive away in his inebriated state. But at the time appellant gave Deputy Belcourt the false name and birth date, appellant did not know why the officers had stopped him. He may have hoped that the officers would not notice that he was intoxicated and that the provision of the false information would prevent the officers from discovering the warrant for his arrest.

This is a close case, but under the reasoning of *Gibson* and *Barnes*, we conclude that appellant's offenses constituted a single behavioral incident. Appellant's provision of a false name and date of birth to avoid being arrested for DWI may have been misguided and futile, but the state has not met its burden to show that this desire did not serve, in part, as a motivation for appellant. We therefore vacate appellant's sentence

imposed for giving false information to a peace officer. *See* Minn. Stat. § 244.11, subd. 2(b) (2006) (granting this court the power to vacate a sentence that is inconsistent with statutory requirements).

Because we vacate appellant's sentence for giving false information to a peace officer, we do not address appellant's argument that the district court exceeded the maximum authorized sentence for that count.

IV.

Appellant challenges the district court's determination that he is not amenable to probation and contends that the district court abused its discretion by denying his motion for a downward dispositional departure. Whether to depart from the sentencing guidelines rests within the discretion of the district court. *State v. Oberg*, 627 N.W.2d 721, 724 (Minn. App. 2001), *review denied* (Minn. Aug. 22, 2001). The district court must order the presumptive sentence provided in the sentencing guidelines unless the case involves "substantial and compelling circumstances" to warrant a departure. *State v. Kindem*, 313 N.W.2d 6, 7 (Minn. 1981). Only in a "rare" case will a reviewing court reverse a district court's imposition of the presumptive sentence. *Id.*

Here, the presumptive sentence range was 46 to 64 months; appellant received 46 months. The district court, citing certain incidents addressed in the PSI, found that appellant was not amenable to probation. The district court specifically mentioned that (1) appellant had been placed on probation for sexual activity with a minor in Florida in 1998; (2) appellant had been convicted of attempted third-degree arson in New York in 2004; (3) appellant had been convicted of possession of a short-barreled shotgun in

Wisconsin in 2005—appellant's vehicle was also found to contain two AK-47 assault rifles in the back seat, an assault rifle in the front passenger seat, a loaded rifle in a pouch attached to the driver's seat, ammunition, and two knives; (4) two additional DWI warrants had been issued for appellant's arrest; (5) appellant's then-wife had obtained an order for protection against him in Wisconsin; and (6) appellant had threatened the judge who issued the order for protection. The district court was also concerned that appellant contacted the PSI writer by telephone in February and March 2008. Appellant had accused the PSI writer of making mistakes in the PSI report and had threatened to file charges against her. Appellant had also contacted the PSI writer's supervisor.

Appellant contends that he is willing to address his chemical-dependency issues with the support of his family, that his criminal record "is of a recent vintage," that his offenses stemmed from marital stress, and that he is capable of gainful employment. Appellant acknowledges some "troubling" recent conduct but characterizes it as a "short-term aberration." He asserts a desire to rehabilitate himself.

Appellant's arguments are essentially a rehash of the arguments that his trial attorney made at sentencing and that the district court rejected. The district court acknowledged appellant's supportive family and his past gainful employment. But the district court also acknowledged appellant's anger issues, as evinced by his behavior toward the PSI writer in this matter, the threat he made to a Wisconsin judge, and an order for protection obtained by appellant's then-wife. There is sufficient evidence to support the district court's determination that appellant is not amenable to probation. We

therefore conclude that the district court did not abuse its discretion by declining to depart from the sentencing guidelines.

Affirmed in part and reversed in part.