STATE OF MINNESOTA
IN COURT OF APPEALS
A10-285
A10-286

State of Minnesota,
Respondent,

vs.

Wayne Lee Cummings, Jr.,
Appellant.

Filed January 25, 2011
Affirmed in part, reversed in part and remanded
Ross, Judge

Hennepin County District Court
File No. 27-CR-08-61683

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

Michael O. Freeman, Hennepin County Attorney, Lee W. Barry, III, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

David W. Merchant, Chief Appellate Public Defender, Theodora Gaïtas, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

ROSS, Judge

Appellant Wayne Cummings appeals from his first- and third-degree criminal sexual conduct convictions arising out of his sexual activity with children in 2000 and 2008. Cummings contends that the district court erred by allowing the state to amend its complaint on the day of the trial, holding a type of stipulated-facts trial not authorized by the rules, and requiring Cummings to represent himself in a posttrial motion. Because none of Cummings's rights were violated by these procedures, we affirm in part. But Cummings accurately asserts that the district court erred when sentencing him by ordering ten years' postincarceration conditional release when only five years are authorized by the statute. The state concedes the point. We reverse the sentence and remand the case to the district court to amend the sentence to impose only five years' conditional release time for the first-degree offense.

FACTS

In fall 2008, Rogers Police were tipped off that the owner of the local roller skating park, appellant Wayne Cummings, sexually touched young boys. Police investigated and the state charged Cummings with three counts of communication of sexually explicit materials to a child, one count of solicitation of a child to engage in sexual conduct, and counts of both third- and fourth-degree criminal sexual conduct, in violation of Minnesota Statutes sections 609.352, .344, and .345. By December, the skate-park case had attracted media attention and another male accused Cummings of having performed oral sex on him in 1999 or 2000. So the state added a second criminal

complaint charging Cummings with one count of first-degree criminal sexual conduct, Minn. Stat. § 609.342, subd. 1(a) (1998).

Cummings pleaded not guilty. The cases were consolidated. On the day of trial, Cummings moved to dismiss the charge arising from the 1999 and 2000 acts on statute-of-limitations grounds. The state amended the complaint, narrowing the dates on which those acts allegedly took place, and avoided dismissal. Cummings agreed to a stipulated-facts trial. The state agreed to seek only a 122-month prison sentence and to drop all but the first- and third-degree criminal sexual conduct charges. Cummings waived his jury trial rights, including his rights to cross-examine witnesses and to bring his own witnesses.

The parties then stipulated that testimony from J.M.L. and his sister would prove beyond a reasonable doubt that, in the spring of 2000, then 22-year-old Cummings performed oral sex on nine-year-old J.M.L., and that J.M.L. reported the abuse to his sister, who reported it to their mom, who reported it to the police. The parties also stipulated that testimony from N.C. would prove beyond a reasonable doubt that on two occasions in the summer of 2008, then 30-year-old Cummings invited 15-year-old N.C. to stay the night at the skate park, gave him pills, performed oral sex on him, and touched him in other sexual ways.

The district court found Cummings guilty of first- and third-degree criminal sexual conduct and sentenced him to 81 months in prison for the first-degree offense, to be followed by ten years' conditional release. It sentenced him to a consecutive 36-month prison sentence for the third-degree offense, followed by ten years' conditional release.

The 117-months sentence is five months shorter than the agreed-upon sentence because the parties had miscalculated the presumptive sentences. After sentencing, Cummings moved to withdraw his agreement to proceed on stipulated facts. The district court denied the motion. Cummings appeals.

D E C I S I O N

I

We first address whether the district court abused its discretion by permitting the state to amend its complaint on the first day of the trial to avoid dismissal on statute-of-limitations grounds. The initial criminal complaint charging first-degree criminal sexual conduct was filed on March 20, 2009, for acts alleged to have occurred "approximately the winter of 1999/spring of 2000." On the first day of the trial Cummings moved to dismiss the first-degree criminal sexual conduct charge because the complaint did not specifically allege that any acts occurred within the limitations period—that is, between March 20, 2000, and March 20, 2009. *See* Minn. Stat. § 628.26(e) (2008) (providing a nine-year statute of limitations). The state responded by moving to amend the complaint to allege that facts learned in recent interviews with the victim and the victim's sister indicated that the acts occurred "on or between March 18, 2000 and May 10, 2000." The district court allowed the amendment and denied Cummings's motion to dismiss.

We review the district court's decision to allow amendments to a criminal complaint for abuse of discretion. *Gerdes v. State*, 319 N.W.2d 710, 712 (Minn. 1982). Two Minnesota Rules of Criminal Procedure frame the district court's discretion. Rule 3.04 applies in pretrial proceedings and states that a criminal complaint may be freely

amended upon a motion by the prosecuting attorney. Minn. R. Crim. P. 3.04, subd. 2; *State v. Bluhm*, 460 N.W.2d 22, 24 (Minn. 1990). Rule 17.05 applies once the trial has commenced and states that the district court may allow an amendment only if "no additional or different offense is charged and if the defendant's substantial rights are not prejudiced." Minn. R. Crim. P. 17.05.

The parties disagree about which rule applied to the day-of-trial amendment. But because we see no indication that the amendment prejudiced Cummings, we need not decide which rule applied. Cummings's claim on appeal, which is that he needed to undertake a targeted investigation into the events in the amended timeframe in order for him to plan a defense, is belied by the fact that he never requested a continuance to conduct such an investigation once the state amended the complaint. It is true that the state's eleventh-hour amendment to the complaint prevented Cummings from succeeding on his statute-of-limitations defense. But this is not the sort of *unfair* prejudice that would concern us. And any substantive information Cummings might have gained from whatever investigation he already did undertake would have been just as useful to defend the claims under the narrower time frame in the amended complaint.

II

We next address whether the district court erred by holding a stipulated-facts trial under Minnesota Rules of Criminal Procedure 26.01, subdivision 3, when Cummings stipulated to the prosecution's case and agreed to the presumptive sentences. Cummings argues that the procedure the district court used was unauthorized by the rules and violated his rights to an adversarial proceeding. We review de novo the trial court's

compliance with Minnesota Rules of Criminal Procedure. *Ford v. State*, 690 N.W.2d 706, 712 (Minn. 2005).

Cummings claims that his stipulated-facts trial under rule 26 was improper because he essentially stipulated to his own guilt. The plain language of the rule states that "a determination of defendant's guilt . . . may be submitted to and tried by the court based on stipulated facts":

> By agreement of the defendant and the prosecuting attorney, *a determination of defendant's guilt*, or the existence of facts to support an aggravated sentence, or both, *may be submitted to* and tried by *the court based on stipulated facts*. . . . 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.

Rule 26.01, subd. 3 (2008) (emphasis added).

To prove criminal sexual conduct in the first degree, the state needed to prove that Cummings had sexual contact with J.M.L., that at the time of this contact J.M.L. was under age 13, and that Cummings was more than 36 months older than J.M.L. *See* Minn. Stat. § 609.342, subd. 1(a) (1998). The parties stipulated that J.M.L.'s testimony "would constitute proof beyond a reasonable doubt" that Cummings sexually penetrated J.M.L. and that, at the time, J.M.L. was nine years old and Cummings was 22. To prove criminal sexual conduct in the third degree, the state needed to prove that Cummings sexually penetrated N.C., that at the time N.C. was younger than 16, and that Cummings was more than 24 months older than N.C. *See* Minn. Stat. § 609.344, subd. 1 (2008). The parties stipulated that N.C.'s testimony "would constitute proof beyond a reasonable doubt" that Cummings committed multiple acts of sexual penetration against N.C. and

that, at the time, N.C. was 15 and Cummings was 30. It is clear that there was no substantive challenge to the sufficiency of the state's evidence at trial; Cummings stipulated to the prosecution's case. We agree, therefore, that the proceeding is not the type authorized by rule 26.01, subdivision 3, which contemplates a judicial determination of guilt.

Cummings's stipulations were akin to an *Alford* plea. In an *Alford* plea, a defendant comes short of a traditional guilty plea because he admits only that the state's evidence would constitute proof beyond a reasonable doubt. *See State v. Theis*, 742 N.W.2d 643, 647 (Minn. 2007) (applying *North Carolina v. Alford*, 400 U.S. 25, 38, 91 S. Ct. 160, 168 (1970)). *Alford* pleas are permitted "if the court, on the basis of its interrogatories of the accused and its analysis of the factual basis offered in support of the plea, concludes that the evidence would support a jury verdict of guilty, and that the plea is voluntary, knowingly, and understandingly entered." *State v. Goulette*, 258 N.W.2d 758, 761 (Minn. 1977). Technically, Cummings pleaded "not guilty." But we find authority to construe pleas based on their substance rather than their form. *See State v. Verschelde*, 595 N.W.2d 192, 195 (Minn. 1999) (construing an ambiguous *Lothenbach*-guilty plea as a not-guilty plea under *Lothenbach*); *State v. Ford*, 397 N.W.2d 875, 878 (Minn. 1986) (construing an unauthorized conditional guilty plea as though it had been a not-guilty plea followed by a stipulation to the state's case); *State v. Lothenbach*, 296 N.W.2d 854, 858 (Minn. 1980) (same).

We construe Cummings's plea materially similar to an *Alford* plea because, in substance, Cummings voluntarily, knowingly, and understandingly stipulated to the

essential facts of the prosecution's case without expressly pleading guilty, in exchange for an agreed-upon sentence. Only in Cummings's case, it was even better than an *Alford* plea because unlike a traditional *Alford* plea, Cummings preserved pretrial and trial issues for appeal without expressly declaring his guilt to the designated crime. This aspect makes it similar to the stipulated-facts trials permitted under rule 26.01, subd. 3 (preserving trial issues for appeal) and a *Lothenbach*-type arrangement permitted under rule 26.01, subd. 4 (preserving dispositive pretrial issues for appeal). *See Lothenbach*, 296 N.W.2d at 858.

Although Cummings got the benefit of both types of proceedings, he nevertheless argues that he was deprived of his right to an adversarial trial and his convictions should be reversed because his proceeding was not expressly authorized by the rules. He relies on *Brookhart v. Janis*, 384 U.S. 1, 8, 86 S. Ct. 1245, 1249 (1966) for the proposition that a defendant cannot be subjected to a so-called "prima facie trial," which the Supreme Court said was the functional equivalent of a guilty plea, without his consent. *Brookhart* does not help Cummings. The Supreme Court there decided whether the defendant consented by making the proper jury-trial waivers. The *Brookhart* defendant never waived his right to a jury trial, his right to confront and cross-examine witnesses, or other trial rights. *Id*. But here, Cummings consented to the proceeding and he expressly waived his adversarial rights.

Cummings made all of the required waivers he would have had to make to enter an *Alford* plea. *See* Minn. R. Crim. P. 15.01, subd. 1 (listing the required waivers for a

guilty plea). Cummings waived his right to a trial and all of the attendant rights of trial, including the right to be presumed innocent:

> Q. Okay. Now, by proceeding in this manner, we would not be having a trial, either the one we started already or a trial on the other file. Do you understand that?
>
> A. Yes
>
> Q. This would resolve all matters at this time and there would be no jury trial on either case. Do you understand that?
>
> A. Yes.
>
> Q. Okay. And you understand what a trial is. If you had a trial, you're presumed innocent. The prosecutor, the State, has to prove the case beyond a reasonable doubt. Do you understand that?
>
> A. Yes.
>
> Q. And that has to occur before you could be convicted of any offense. Do you understand that?
>
> A. Yes.
>
> Q. And by entering into this agreement, you are waiving the right to have that trial and make the State prove the case beyond a reasonable doubt by calling witnesses that come testify against you. Do you understand that?
>
> A. I do, yeah.
>
> Q. And you understand that in a jury trial a person also has a right to testify themselves, right?
>
> A. (No response)
>
> Q. You and I talked about that. Also, the right to cross-examine the State's witnesses, obviously, right?
>
> A. Correct, yeah.

Q. And also the right to call witnesses, if there are any, that are appropriate for your case. Do you understand that?

A. Yes.

Q. Okay. Now, by entering into this agreement, those things will not be happening. You'll be signing some written documents that resolve both of these matters. And the issue will be submitted to the Court on what are called stipulated facts. Do you understand that?

A. Yes.

Q. Okay. And you had a chance to review yesterday an earlier draft of the stipulation, is that correct?

A. Yes, it is.

Q. Okay. And we've made some changes to that today, but in essence it's essentially the same document but with a few changes that I pointed out to you, correct?

A. Correct.

Q. And by signing this and entering into this agreement, you're clear that you're waiving your right to a trial. Do you understand that?

A. Yes

Q. Okay. And then the manner will be submitted on these stipulated facts to the Court, and the Court will make a decision. Do you understand that?

A. Yup.

Q. And our agreement is that should the Court accept the stipulated facts and find you guilty, you would—you would receive a sentence of 122 months total on both cases. Do you understand that?

A. Yes.

> Q. Also, other counts would be dismissed in that event. Do you understand that?
>
> A. Uh-huh.

This waiver covered all his trial rights. *See* Minn. R. Crim. P. 15.01. While the waivers were not identified in the record as guilty-plea waivers under rule 15, strict compliance with rule 15 is not required to enter a plea of guilty. *State v. Christopherson*, 644 N.W.2d 507, 511 (Minn. App. 2002), *review denied* (Minn. Jul. 16, 2002). Because Cummings waived his rights, we need not reverse his conviction on this ground.

III

We next address whether the district court abused its discretion by not appointing new counsel for Cummings to make his posttrial motion to withdraw from the stipulated-facts agreement. Cummings argues that his posttrial request to withdraw his consent to the stipulated-facts trial occurred at a "critical stage" of the proceedings and therefore required effective counsel under the Sixth Amendment to the United States Constitution. And he emphasizes that unless a defendant waives his right to assistance of counsel, the breach of the Sixth Amendment is a jurisdictional bar to a valid conviction and sentence. *See Johnson v. Zerbst*, 304 U.S. 458, 468, 58 S. Ct. 1019, 1024 (1938). Cummings argues that his counsel was unable to continue representing him because of a conflict of interest: the attorney advised Cummings to consent to the stipulated-facts trial in the first place and could therefore not adequately represent him in attempting to withdraw his consent. We are not persuaded.

We review the district court's decision whether to appoint a substitute attorney for abuse of discretion. *State v. Gillam*, 629 N.W.2d 440, 449 (Minn. 2001). Generally, the district court need not appoint alternative counsel unless "exceptional circumstances" require it. *State v. Voorhees*, 596 N.W.2d 241, 255 (Minn. 1999) (quotation omitted). "Exceptional circumstances" are those that affect the "ability or competence" of the court-appointed attorney. *Id.*

Cummings would have us conclude that the district court abused its discretion by not providing him with a substitute attorney because once his court-appointed attorney urged the stipulated-facts trial, he could not later adequately argue that the arrangement was invalid. Cummings does not contend that his court-appointed attorney lacked ability or competence to advocate for him, only that a conflict of interest had developed. The argument ignores the fact that the supreme court specifically declined to adopt the notion that an exceptional circumstance broadly includes "a conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between the attorney and the defendant." *Gillam*, 629 N.W.2d at 449 (quoting but rejecting the standard of *United States v. Webster*, 84 F.3d 1056, 1062 (8th Cir. 1996)). Because Cummings's attorney was able and competent, his Sixth Amendment rights were not violated. We add that even if we applied the rejected Eighth Circuit standard, we see no conflict of interest in this case. Cummings's position taken to its logical extension would require reversal on Sixth Amendment grounds anytime a court-appointed lawyer represents a defendant pursuing a recommended course of action and the client changes his mind and favors a different course. Lawyers must be able to help the client both to pursue suggested

options and to withdraw from them as the case develops. The mere fact that a lawyer helped to negotiate Cummings's stipulated-facts trial with an agreement to sentencing did not render the lawyer incapable of assisting Cummings to withdraw from that agreement.

IV

We agree with the parties that the district court erred by imposing a ten-year conditional-release period for Cummings's conviction of first-degree criminal sexual conduct. The statute in effect at the time of the offense provided for a five-year conditional release, *see* Minn. Stat. § 609.109, subd. 7(a) (1998), and the statute increasing the conditional release period to ten years only applied to crimes committed on or after August 1, 2005, *see* 2005 Minn. Laws ch. 136, art. 2, § 21, at 932; Minn. Stat. § 609.3455, subd. 9 (2010). The state concedes the district court's error. We reverse and remand for the district court to issue a sentence in which the conditional-release period following the imprisonment for the 1998 crime is modified to five years.

V

We finally address whether any of Cummings's arguments in his separate pro se brief merit reversal. Cummings does not make specific arguments or identify errors in the record. He states generally that he is innocent, that he did not want to sign the stipulation, and that he received ineffective assistance of counsel.

Cummings's first two arguments do not affect his case. Regarding his claimed innocence, to be convicted of first- and third-degree criminal sexual conduct, the state needed to prove each element of each crime beyond any reasonable doubt. *See In re Winship*, 397 U.S. 358, 364, 90 S. Ct. 1068, 1073 (1970). The stipulated facts established

each element beyond all reasonable doubt and defeated any notion of Cummings's actual innocence. Whether Cummings preferred not to sign the stipulation is irrelevant because he did sign the stipulation, and he does not assert, or point to facts showing that he did so involuntarily or without knowledge of the consequences.

Cummings's ineffective counsel claim also fails. Cummings could prevail only if he could show that his attorney's performance was deficient and that the deficiency prejudiced his defense. *See Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). Cummings does not point to any facts that would support either of these conclusions. We observe also that his attorney's recommendation to stipulate to the elements of the charges was arguably a sound trial strategy since, as a result of the stipulation, the state agreed not to pursue numerous other charges against Cummings and Cummings's trial issues were preserved for appeal.

Affirmed in part, reversed in part and remanded.