STATE OF MINNESOTA
IN COURT OF APPEALS
A07-412

State of Minnesota,
Appellant,

vs.

Lance Christopher Suing,
Respondent.

Filed January 15, 2008
Reversed and remanded
Willis, Judge

Hennepin County District Court
File Nos. 06074889, 05071960

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

Mike Freeman, Hennepin County Attorney, Linda M. Freyer, Assistant County Attorney, C-2000 Government Center, Minneapolis, MN 55487 (for appellant)

John M. Stuart, State Public Defender, Richard Schmitz, Assistant Public Defender, 540 Fairview Avenue North, Suite 300, St. Paul, MN 55104 (for respondent)

Considered and decided by Peterson, Presiding Judge; Willis, Judge; and Wright, Judge.

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

WILLIS, Judge

The state appeals from respondent's sentence, arguing that the district-court judge impermissibly injected himself into plea negotiations and erred by imposing a sentence that was a downward durational departure from a mandatory minimum sentence. We reverse and remand.

FACTS

In October 2006, respondent Lance Christopher Suing was charged with one count of ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). At the plea hearing, Suing rejected appellant state's offer to recommend the 60-month mandatory minimum sentence in exchange for a guilty plea. Suing's counsel explained that Suing would instead enter a "straight [guilty] plea to the Court" with the understanding that the district court, in exchange for the guilty plea and Suing's acceptance of responsibility, "would sentence [Suing] to 40 months." After hearing the factual basis for the plea and Suing's acceptance of responsibility, and considering Suing's performance on probation, the district court stated that it would impose a sentence that was a downward durational departure. The district court rejected the state's objection to the departure and the state's contention that the judge had impermissibly injected himself into plea negotiations. Accordingly, the district court sentenced Suing to 40 months. The state appeals.

D E C I S I O N

I. The state's challenge to the validity of Suing's guilty plea is properly before this court.

As an initial matter, Suing contends that the state's argument that the guilty plea is invalid because the district-court judge injected himself into the plea negotiations is not properly before this court. He suggests that a challenge to the validity of a guilty plea "is not one of the listed areas of review" in Minn. R. Crim. P. 28.05, subd. 2, and, thus, such a challenge must be governed by Minn. R. Crim. P. 28.04, subd. 2, which relates to appeals from pretrial orders and requires that such an appeal be filed within five days after the order. He concludes that because the state did not appeal within five days, this court should either dismiss the state's appeal as untimely or limit the scope of the appeal and not consider the state's argument that Suing's guilty plea is invalid. We disagree.

Rule 28.04 provides that the state "may appeal as of right . . . in felony cases from any sentence imposed." Minn. R. Crim. P. 28.04, subd. 1(2). And under rule 28.05, "the court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact." Minn. R. Crim. P. 28.05, subd. 2. Because the sentence here was based on a guilty plea entered with the expectation of a particular sentence, the sentence would be "inappropriate" if the guilty plea were not valid. Therefore, the state's challenge to the validity of Suing's guilty plea is an issue that we may consider in a sentencing appeal under rule 28.05.

II. The district-court judge impermissibly injected himself into plea negotiations.

A district-court judge should neither usurp the responsibility of counsel nor participate in plea negotiations himself. *State v. Johnson*, 279 Minn. 209, 216, 156 N.W.2d 218, 223 (1968). But this is not to say that any involvement by the judge is impermissible. *State v. Anyanwu*, 681 N.W.2d 411, 415 (Minn. App. 2004). Rather, "the district court judge has a delicate role in a plea negotiation and necessarily plays a part in any negotiated guilty plea." *Id*. The role of the district-court judge in the plea process is limited to determining the propriety of the proffered plea bargain. *Johnson*, 279 Minn. at 216, 156 N.W.2d at 223.

The Minnesota Supreme Court has expressed its concern regarding district-court judges participating in plea negotiations. *See State v. Nelson*, 257 N.W.2d 356, 359 n.1 (Minn. 1977) (stating that "judges should be very cautious not to impermissibly participate in plea negotiations"); *Johnson*, 279 Minn. at 216, 156 N.W.2d at 223 (declaring that a judge's role is one of discrete inquiry into the propriety of the plea arrangement, not that of a party to the negotiation). When a judge injects himself into plea negotiations, he removes himself from the role of an "independent examiner" and becomes "one of the parties to the negotiation" and is "excessively involved in the negotiations themselves." *Johnson*, 279 Minn. at 216 n.11, 156 N.W.2d at 223 n.11 (quotations omitted). Therefore, a guilty plea is per se invalid if the judge has impermissibly injected himself into the plea negotiations. *State v. Moe*, 479 N.W.2d 427, 429-30 (Minn. App. 1992), *review denied* (Minn. Feb. 10, 1992). *See also Anyanwu*, 681

N.W.2d at 415 (holding that when the judge promised a defendant a sentence in advance and over the objection of the prosecutor, the judge stepped into the position of a party to the negotiation and "abandoned [his] role as an independent examiner").

At the plea hearing here, the following exchange occurred between Suing and his counsel after Suing stated that he was rejecting the state's offered plea agreement and entering a straight guilty plea:

> [COUNSEL:] What we are doing today is we would be entering a straight plea to the Court. There is no offer from the prosecution—or the offer would be the 60-month mandatory minimum. The Judge has indicated that in exchange for your plea and your acceptance [of] responsibility for this—for the acts that constitute the offense, [the judge] would sentence you to 40 months which is about a third off of [the state's offer]. Do you understand that and we went over that downstairs?
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> [SUING:] Yes, I understand.
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> [COUNSEL:] Okay. And in exchange for that, it is your wish today to go ahead and waive your trial rights and enter a guilty plea?
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> [SUING:] It is.

The district court accepted Suing's guilty plea and, over the state's objection, sentenced him to 40 months.

Suing contends that the district-court judge merely "tipped [his] hand" as to what he was going to do if Suing entered a straight guilty plea and that there was "no unequivocal promise" of a particular sentence. Although there may not have been an express promise by the judge to impose a 40-month sentence if Suing pleaded guilty, the exchange between Suing and his counsel shows that Suing and the district court had

reached an understanding regarding Suing's sentence if he pleaded guilty. And it is clear that Suing relied on this agreement when he decided to plead guilty. In addition, the state objected to the sentence announced by the district court. Because the record shows that the plea agreement was between Suing and the district court, and not between Suing and the state, we conclude that the district-court judge impermissibly injected himself into plea negotiations, and, thus, the resulting guilty plea was per se invalid. *See Anyanwu*, 681 N.W.2d at 415.

In reaching this conclusion, we are not insensitive to the frustrations felt by district-court judges as the result of heavy caseloads, the shortage of resources, and the pressure to resolve cases.[1] These practical concerns may militate in favor of affording judges more latitude in becoming involved in plea negotiations. But we cannot ignore precedent. Therefore, we vacate the guilty plea, reverse the conviction, and remand for further proceedings before a different judge.

III. The district court abused its discretion by granting a downward durational departure on Suing's sentence.

The state also argues that because Suing was convicted in 2005 of second-degree assault, the district court had no discretion to grant a downward durational departure in sentencing Suing. Although we reverse on another ground, we nevertheless will address this issue because it may arise again on remand.

[1] When the state informed the district-court judge of its position that the judge had impermissibly injected himself into the plea negotiations, the judge responded: "I think that the realities of the world are that if the courts are fully prohibited from any kind of involvement in plea negotiations, at least in this county, there definitely are not enough resources in this state to handle all the cases that we have."

The district court departed from the mandatory minimum sentence of 60 months and sentenced Suing to 40 months, explaining that "as I understand it, while this is a departure, it is a permissible departure. . . . I think it is appropriate that he go to prison. I won't depart dispositionally. I will depart durationally. It is permitted under the Rules, and I am going to depart durationally." We review a district court's sentencing decision for a clear abuse of discretion. *State v. Lundberg*, 575 N.W.2d 589, 591 (Minn. App. 1998), *review denied* (Minn. May 20, 1998).

Suing pleaded guilty to one count of ineligible person in possession of a firearm, in violation of Minn. Stat. § 624.713, subd. 1(b) (2006). Section 609.11, subdivision 5(b) (2006), provides that "[a]ny defendant convicted of violating section . . . 624.713, subdivision 1, clause (b), shall be committed to the commissioner of corrections for not less than five years." And Minn. Stat. § 609.11, subd. 8(b) (2006), provides that "[t]he court may not, on its own motion or the prosecutor's motion, sentence a defendant without regard to the mandatory minimum sentences . . . if the defendant previously has been convicted of an offense listed in subdivision 9 in which the defendant used or possessed a firearm or other dangerous weapon."

Here, Suing has a prior conviction of second-degree assault, one of the offenses listed in Minn. Stat. § 609.11, subd. 9 (2006). And it is clear that this prior conviction is one "in which the defendant used or possessed a . . . dangerous weapon." Second-degree assault is, by definition, an offense in which the accused used a dangerous weapon. *See* Minn. Stat. § 609.222, subd. 1 (2006). In *State v. Sheppard*, this court explained the

effect that section 609.11, subdivision 8(b), has on the district court's authority to depart from a mandatory minimum sentence:

> We conclude that section 609.11, subd. 8(b), is a clear statement of the intention of the legislature. . . . [T]he legislature has mandated that courts have no discretion to depart from minimum sentences under those circumstances described in section 609.11, subd. 8(b).
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> . . . Minn. Stat. § 609.11, subd. 8(b), removes the authority of the courts to disregard the mandatory-minimum sentence, both as to the imposition and execution of a sentence.

587 N.W.2d 53, 56-57 (Minn. App. 1998), *review denied* (Minn. Jan. 27, 1999). District courts have no authority to grant downward sentencing departures in cases involving the circumstances described in section 609.11, subdivision 8(b). Therefore, the district court abused its discretion by granting a downward durational departure here.

Reversed and remanded.