STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0760

State of Minnesota,
Respondent,

vs.

Joseph Mathias Osowski,
Appellant.

Filed April 22, 2008
Affirmed
Harten, Judge*

Hennepin County District Court
File No. 06062024

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

Jay M. Heffern, Minneapolis City Attorney, Paula J. Kruchowski, Assistant City Attorney, 333 South Seventh Street, Suite 300, Minneapolis, MN 55402 (for respondent)

Leonardo Castro, Hennepin County Public Defender, Stephen M. Simon, Assistant Public Defender, Peter Shaw (certified student attorney), University of Minnesota Law School, 229 19th Avenue South, Minneapolis, MN 55455 (for appellant)

Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Harten, 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

HARTEN, Judge

Appellant challenges his conviction of and sentence for a misdemeanor ordinance violation of being improperly clothed in a public park, arguing that the district court committed plain error in failing to advise appellant on the record of his right to remain silent and that the district court's condition of probation requiring appellant to be assessed for sex-offender treatment was unreasonable, inappropriate, and not justified by the facts of the offense. We affirm.

FACTS

On 27 July 2006, in Minneapolis, two police officers discovered appellant Joseph Mathias Osowski, naked and carrying a towel and swimming shorts, in a public park. Appellant was charged with indecent conduct, using prohibited language and conduct in a park, and failing to wear proper attire in a park, all misdemeanors under municipal ordinances.

At trial, appellant presented a defense by stating that he had gone to a secluded area of the park to change clothes before swimming. The jury found appellant guilty of the misdemeanor of failing to wear proper attire and not guilty of the other charges.

At the sentencing hearing, the district court gave appellant two options. He could either serve an executed 90-day sentence or receive a stay of execution for 86 of the 90 days, enter and complete the Alpha program for sex-offender assessment and treatment, and stay away from that area of the park. Appellant chose the stayed sentence.

Appellant now challenges his conviction, arguing that the district court: (1) breached its duty to obtain on the record appellant's waiver of his right to remain silent, and (2) abused its discretion by requiring appellant to enroll in a sex-offender program as a condition of the stay of sentence.

D E C I S I O N

1. Right to Remain Silent

Appellant argues that Minnesota courts have a duty to "conduct an on-the-record colloquy with a defendant regarding the defendant's right to remain silent at trial." But "the privilege [against self-incrimination] is waived for the matters to which the witness testifies . . . ." *Mitchell v. United States*, 526 U.S. 314, 321, 119 S. Ct. 1307, 1312 (1999). Appellant testified as to his conduct in the park on that day and, in doing so, waived his privilege against self-incrimination.

Prior to trial, the district court had been told that the state's witnesses included only the two officers who saw appellant in the park. In the opening statement, appellant's attorney told the district court and the jury that appellant "will get on the stand and tell you" why he was unclothed in the park. Appellant's waiver of his right not to testify was inferable from his plan to "get on the stand and tell" his version of what happened.

Appellant relies on *State v. Aanerud*, 374 N.W.2d 491 (Minn. App. 1985), and on *State v. Johnson*, 354 N.W.2d 541, 543 (Minn. App. 1984), claiming that "[t]aken together, [these cases] imply that Minnesota district courts have a duty to inform defendants on the record of the right to remain silent when they take the stand in their

own defense." But both cases are readily distinguishable because both involved pro se defendants. Appellant was represented by an attorney throughout the proceedings, and he does not claim that his attorney failed to advise him of his right to remain silent. It is well settled in Minnesota that "[a] court may presume that a defendant who has consulted with counsel is aware of his constitutional rights." *Berkow v. State*, 573 N.W.2d 91, 95 (Minn. App. 1997).

Moreover, neither case supports appellant's position. In *Aanerud*, the defendant was tried for a petty misdemeanor. The district court told him only, "if you wish to give your testimony—want to testify in this case you can do so at this time." *Aanerud*, 374 N.W.2d at 492. The defendant argued that the district court had erred in not advising him of his right not to testify. *Id.* This court held that no "warning [of the right to remain silent] is required for a defendant who has demanded trial on a petty misdemeanor for the precise purpose of presenting his defense." *Id*. This holding was limited to the facts of *Aanerud*. Appellant cites no authority supporting his argument that the holding implies a duty to warn of the right to remain silent in a misdemeanor or a felony trial.

In *Johnson*, the defendant had waived a jury trial and signed a defendant's rights form that "outlined, among other things, . . . that he had a right to remain silent at trial." 354 N.W.2d at 542. On appeal, he argued that the trial court had erred in permitting him to testify without adequately informing him of his right against self-incrimination. *Id*. at 543. The argument was rejected because the record supported the finding that appellant had been advised of his rights and had chosen to testify on his own behalf. *Id*.

Appellant chose to testify; he was not compelled to testify. We decline to impose on district courts the requirement to conduct an on-the-record colloquy concerning the right to remain silent in these circumstances. *See State v. Walen,* 563 N.W.2d 742, 751 (Minn. 1997) (declining to impose on district courts the duty to conduct a colloquy on the right to present defense with non-testifying defendants).

Appellant alternatively argues that, if a district court's "duty [to conduct an on-the-record colloquy concerning waiver of the right to remain silent] has yet to be recognized [in Minnesota], this court must now recognize that district courts are constitutionally required [to do so]." But it is not the function of this court to make changes in the interpretation of the Minnesota Constitution. *Minn. State Patrol Troopers Ass'n ex rel. Pince v. State, Dep't of Pub. Safety,* 437 N.W.2d 670, 676 (Minn. App. 1989), *review denied* (Minn. 24 May 1989). And "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. App. 1987), *review denied* (Minn. 18 Dec. 1987).

The district court had no duty to conduct an on-the-record colloquy with appellant as to his right not to testify.

2. Sentencing

This court reviews a district court's sentence for an abuse of discretion. *State v. Franklin*, 604 N.W.2d 79, 82 (Minn. 2000). Appellant argues that the district court abused its discretion when it imposed sex-offender assessment and treatment as a condition of his probation.

Probation conditions are imposed to further a defendant's rehabilitation or the public safety. *Id.* at 84. Appellant argues that, because he removed his clothes only to change into a swimsuit, he does not require rehabilitation, and that, because he checked to see that no one was around when he did so, the public safety was not endangered. But the district court noted two facts supporting its conclusion that appellant would benefit from sex-offender assessment and treatment. First, appellant has a prior conviction for indecent exposure because he was found swimming naked in the same park in the year 2000. He needs rehabilitation regarding his views on being in a public park without proper attire. Second, appellant testified that he plans to continue changing clothes in the woods, although he will change under a towel. The two police officers who saw appellant naked testified that he was in an area where he could be seen by other people. Thus, altering appellant's conduct regarding changing his clothes in a park would be in the interest of public safety. There is clearly a nexus between the sex-offender-treatment condition of probation and both appellant's rehabilitation and the public safety. *See id.*[1] We see no basis for overturning this condition of appellant's probation.

Affirmed.

[1] We note also that appellant chose probation with this condition rather than execution of his sentence and did not argue on appeal that he would prefer execution of the sentence.